

# Confirmation Decision issued under section 139A of the Communications Act 2003 to CityFibre Infrastructure Holdings Limited relating to contravention of information requirements

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**Non-confidential version – redactions are indicated with [X]**

## Subject of this Confirmation Decision

- 1.1 This Confirmation Decision is addressed to CityFibre Infrastructure Holdings Limited (“CityFibre”), whose registered company number is 08772997. CityFibre’s registered office is 15 Bedford Street, London, WC2E 9HE.

## Summary

- 1.2 Ofcom has statutory powers, contained in section 135 of the Communications Act 2003 (the “Act”) to require the provision of information which it considers necessary for the purpose of carrying out its functions. A person required to provide information under that provision has a statutory duty to provide it to Ofcom in the manner and within such reasonable period as Ofcom may specify.<sup>1</sup>
- 1.3 These statutory powers are fundamental to Ofcom’s ability to carry out its statutory functions in relation to communications matters, such as conducting market reviews, imposing regulatory obligations, resolving disputes and taking enforcement action, in line with its principal duty of furthering the interests of citizens and consumers. They enable Ofcom to gather the information which it considers necessary to carry out its functions in a timely and effective manner and therefore are key to the integrity of the regulation of the communications sector.
- 1.4 Ofcom has found that CityFibre has breached the requirements imposed under section 135 of the Act, by failing to provide information by the deadline set by Ofcom. Ofcom required the provision of the information for the purposes of its Business Connectivity Market Review (“BCMR 2019”).

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<sup>1</sup> Section 135(4) of the Act.

- 1.5 Given the importance and reliance we place on the information requested under our statutory powers, a late response is likely to be a serious matter. A late response (without explaining to Ofcom why a deadline cannot be met and seeking an extension in advance) indicates a degree of carelessness and the absence of effective systems in place to respond to information requests in a timely manner in accordance with the requirements in section 135 of the Act.
- 1.6 However, in the specific circumstances of this case, we have decided not to impose a penalty on CityFibre in respect of the contravention we have identified. We are satisfied the late response was the result of an administrative oversight (it was mistakenly saved to draft rather than being sent to Ofcom) and the information requested was promptly provided to Ofcom once CityFibre became aware of its mistake. The delay in providing the information did not adversely affect Ofcom's ability to carry out its market review functions and CityFibre has proactively taken practical steps in order to respond promptly to statutory information requests that it may receive in the future. We have also taken into account the fact we have not previously made any finding of breach of regulatory requirements against CityFibre.

## Relevant legislation

- 1.7 Section 135(1) of the Act states that:
- "Ofcom may require a person falling within subsection (2) to provide them with all such information as they consider necessary for the purpose of carrying out their functions under this Chapter"*.
- 1.8 Section 135(2) of the Act states that communications providers ("CPs") fall within the scope of this provision. CityFibre is a "communications provider" within the meaning set out in section 405(1) of the Act, namely, *"a person who provides .... an electronic communications network or an electronic communications service."*
- 1.9 Section 135(3) of the Act confirms that the information that may be required by Ofcom under section 135 of the Act includes information required for, amongst other things:
- "(g) identifying markets and carrying out market analyses in accordance with, or for the purposes of, any provision of this Chapter"*
- 1.10 Section 135(4) of the Act requires CPs to provide information to Ofcom in the manner and within such reasonable period as Ofcom may specify.
- 1.11 Section 137(3) of the Act provides that Ofcom cannot require the provision of information under section 135 except:
- a) by a demand for the information that describes the required information and sets out Ofcom's reasons for requiring it; and
  - b) where the making of a demand for the information is proportionate to the use to which the information is to be put in the carrying out of Ofcom's functions.

- 1.12 Sections 138 to 144 of the Act specify the enforcement powers that Ofcom has in relation to a contravention of section 135 of the Act.
- 1.13 Section 138 of the Act provides that Ofcom can issue a CP a notification “[w]here Ofcom determine that there are reasonable grounds for believing that a person is contravening, or has contravened, a requirement imposed under section 135”. Section 138(2) of the Act provides that the notification can specify a penalty Ofcom is minded to impose and requires Ofcom to allow a CP the opportunity to provide representations in response.
- 1.14 Following the expiry of the period allowed for making representations, section 139A of the Act provides that Ofcom can issue a “confirmation decision” if it is satisfied that the CP has, in one or more of the respects notified, been in contravention of a requirement notified under section 138, and may require the person to pay the penalty specified in the notification issued under section 138 or such lesser penalty that Ofcom considers to be appropriate in light of representations made or steps taken by the CP.
- 1.15 Section 139(5) of the Act provides that the amount of any penalty Ofcom may impose has to be appropriate and proportionate and cannot exceed £2,000,000.

## Background to Business Connectivity Market Review 2019

- 1.16 Pursuant to section 84 of the Act, Ofcom is required to periodically review the markets it has identified for the purpose of reviewing market power determinations made on the basis of earlier analysis. The process of reviewing these markets includes identifying the relevant products and services and the appropriate geographic areas to define the relevant markets and review whether any undertakings hold significant market power in the market identified. In addition, where SMP is found, the review will assess the appropriateness of any regulatory remedies to address our competition concerns.
- 1.17 Due to the asymmetry of information that exists (for example, in relation to the size of a market), Ofcom will issue information requests to CPs under section 135 of the Act in order to inform its thinking on a particular market and determine the regulatory interventions that would be appropriate to promote competition, in the interests of the CPs in the market, their customers and ultimately consumers.
- 1.18 In order for Ofcom to complete its market review within the statutory timeframe, it is important that CPs provide complete and accurate responses to statutory information requests by the deadline set by Ofcom, in accordance with the requirements of section 135 of the Act.
- 1.19 In March 2016, Ofcom published the conclusions of its review of competition in the provision of leased lines<sup>2</sup> in the UK – the Business Connectivity Market Review 2016.<sup>3</sup>

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<sup>2</sup> Leased lines are components of some important services that business customers buy, including managed ICT services, connections between customer sites and connections for the provision of internet access.

<sup>3</sup> See: <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/>

Ofcom is now carrying out its next review of competition in the provision of leased lines in the UK, the BCMR 2019, in accordance with the statutory timeframe for this review.

## **Contravention of section 135 of the Act**

### **Information Request – the Notice**

- 1.20 As part of the BCMR 2019, CityFibre received four information requests under section 135 of the Act. The fourth of these requests was sent to CityFibre on 13 April 2018 and required the provision of specified information by noon on 27 April 2018 (the “Notice”).
- 1.21 The Notice required CityFibre to provide information relating to end user business customer sites and mobile base station sites for which CityFibre has a fibre connection.
- 1.22 CityFibre did not respond by the 27 April 2018 deadline. Ofcom telephoned CityFibre on Friday 1 June 2018 to confirm that the request had been received. CityFibre confirmed it would follow this up on the following Monday (due to a lack of access to computer systems). CityFibre subsequently submitted its response to Ofcom on Monday 4 June 2018, 24 working days after the deadline had expired. In its response to the Notice, CityFibre stated that the delay was due to an administrative oversight but provided no further detail.
- 1.23 CityFibre subsequently informed Ofcom that a response to the Notice had been prepared for dispatch but was mistakenly saved to draft rather than being sent to Ofcom.

### **Conclusions on contravention**

- 1.24 We confirm that we have found that CityFibre contravened requirements imposed under section 135 of the Act by failing to respond to the Notice by the deadline set by Ofcom. While the failure to respond by the deadline appears to be the result of an administrative oversight, it remains the case that Ofcom did not receive CityFibre’s response to the Notice until 24 working days after the deadline.

## **Consideration of financial penalty**

- 1.25 Ofcom’s power to require the provision of information for the purpose of carrying out market reviews such as the BCMR 2019 is fundamental to its ability to determine the regulatory interventions which would be appropriate to safeguard competition and protect the interests of customers in this market. A failure to comply with the requirements in section 135 of the Act may hinder the ability of Ofcom to exercise its functions in the interests of citizens and consumers.
- 1.26 Ofcom relies on information from CPs when completing its market reviews because of the asymmetry of information that exists: much of the information which it requires is held by the CPs that it regulates.
- 1.27 Section 84A of the Act requires Ofcom to review the business connectivity market every three years and the BCMR 2019 aims to have new regulatory conditions in place from May 2019. In order for Ofcom to complete its market review within this timeframe, it is

important that CPs provide accurate and complete responses to statutory information requests by the deadline set by Ofcom, in accordance with the requirements of section 135 of the Act.

- 1.28 Accordingly, Ofcom considers that a contravention of a requirement to provide information in accordance with the requirements of section 135 of the Act is a serious matter.
- 1.29 Under section 138(2)(e) of the Act, Ofcom may impose a financial penalty on a CP that has, in one or more of the respects notified by Ofcom, been in contravention of the requirements in section 135 of the Act.
- 1.30 Section 139(5) of the Act provides that the amount of any penalty Ofcom may impose for a contravention of the information requirements has to be appropriate and proportionate and (other than in respect of a continuing contravention) cannot exceed £2,000,000.
- 1.31 Ofcom's Penalty Guidelines state that the central objective of imposing a penalty is deterrence.<sup>4</sup> Specifically, Ofcom considers that a penalty "*should incentivise the management (which is ultimately responsible for the conduct and culture of the regulated body) to change the conduct of the regulated body as a whole and bring it into compliance, achieving this, where necessary, by changing the conduct at different levels within the organisation*".<sup>5</sup>
- 1.32 Notwithstanding the seriousness with which Ofcom generally regards a failure to secure compliance with the requirements in section 135 of the Act, in the specific circumstances of this case, and for reasons set out below, we have decided not to impose a penalty in respect of the contravention we have identified.

### **Seriousness of the contravention**

- 1.33 As set out above, Ofcom will generally regard a breach of section 135 of the Act as serious. A late response (without explaining to Ofcom why a deadline cannot be met and seeking an extension in advance) indicates a degree of carelessness and the absence of effective systems in place to respond to information requests in a timely manner in accordance with a CP's obligations under section 135 of the Act.
- 1.34 CityFibre's turnover for the year ending 31 December 2017 was £34.8m<sup>6</sup> and its website states that it is "*the UK's largest alternative provider of wholesale fibre network*".<sup>7</sup> Although CityFibre is a relatively new entrant to the market, it also has a number of years' experience in responding to statutory information requests. In principle, therefore, CityFibre should have the capability and resources to respond to statutory information

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<sup>4</sup> Para. 1.11 of Ofcom Penalty Guidelines, 14 September 2017 ("Penalty Guidelines")

[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0022/106267/Penalty-Guidelines-September-2017.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf)

<sup>5</sup> Penalty Guidelines, para. 1.5.

<sup>6</sup> See CityFibre's "*Report and Consolidated Financial Statements for the Year Ended 31 December 2017*" filed at Companies House on 2 May 2018.

<sup>7</sup> See: <https://www.cityfibre.com/>

requests in a timely manner in accordance with its statutory obligations. Moreover, we would expect a CP of CityFibre's size to implement systems to ensure that checks are carried out to ensure statutory information requests are logged, monitored and responded to on time.

1.35 However, CityFibre has said that its response to the Notice<sup>8</sup> had been prepared but was mistakenly saved to draft rather than being sent to Ofcom by the deadline. Consistent with this explanation, CityFibre provided a complete response to Ofcom on the next working day after Ofcom queried the whereabouts of the response. CityFibre has acknowledged its error and apologised for the late response.

1.36 We have also taken into account the fact that CityFibre has proactively taken steps to better manage statutory information requests going forward and address the concerns we have identified above. CityFibre has informed us that it has recently recruited two additional staff to the CityFibre regulatory team to help log, manage and monitor progress of responses to statutory information requests. We understand one of the additional staff had already started their new role before Ofcom initiated enforcement action for the contravention we have identified.

1.37 We have also taken into account the following factors:

- we do not have any evidence that the contravention we have found occurred deliberately;
- the contravention did not ultimately hinder the progress of the BCMR 2019 and therefore the risk that this particular contravention could have resulted in harm to citizens and consumers is low; and
- we have not previously made any finding of breach of regulatory requirements against CityFibre.

## Precedents

1.38 We have had regard to the following decisions which Ofcom has taken under section 139A of the Act since revising its Penalty Guidelines in 2015. Each of these confirmed Ofcom's decision to impose a penalty in respect of the contraventions of information requirements identified.

1.39 Two of the decisions under section 139A of the Act were taken against GW Telecom Limited (CW/01201/07/17), as a result of a persistent failure to respond to statutory information requests issued under section 135 of the Act. The information we had indicated that GW Telecom was a very small CP, with the most recent financial information available showing that its accounts were in the red.<sup>9</sup> In these cases, we imposed penalties of £10,200 and £4,950 respectively. In both cases, these amounts included ongoing daily penalties (due to involving continuing contraventions).

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<sup>8</sup> Letter from CityFibre's [redacted] to Ofcom's [redacted] dated 16 July 2018.

<sup>9</sup> See paragraph 48 of case CW/01201/07/17.

- 1.40 While these two cases also concern failures to respond by given deadlines, the contraventions by GW Telecom were more serious because of its complete failure to respond to the information requests. In contrast, CityFibre responded promptly once they realised their error.
- 1.41 Two decisions were taken against BT, a CP which is substantially larger than CityFibre. In the first decision, CW/01192/03/17, Ofcom imposed a penalty of £300,000. In the second, CW/01208/09/17, we imposed a penalty of £100,000 (reduced by 30% to £70,000 due to a voluntary settlement by BT). We consider there to be substantive differences in the contraventions found against BT compared to this case, both in the facts and in the seriousness of the breaches and we do not consider these decisions as a relevant guide to the appropriate penalty in this case.
- 1.42 On 29 November 2018, Ofcom imposed a penalty of £5,000, with daily penalties up to a maximum of £3,000, on Cloud M for contravening requirements imposed within three separate information requests, by (i) not providing information that fell within the scope of the request; and (ii) not providing the information by the deadline set by Ofcom(CW/01211/01/18). On 16 November 2018, Ofcom imposed a penalty of £25,000 on Virgin Media for its failure to provide complete information in response to a statutory information request (CW/01198/06/17).
- 1.43 We consider there to be substantive differences in the contraventions found against Cloud M and Virgin Media compared to this case, both in the facts and in the seriousness of the breaches.

### **Deterrence**

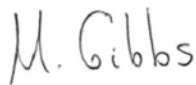
- 1.44 Ofcom's Penalty Guidelines explain that the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient to deter the business from contravening regulatory requirements, and to deter the wider industry from doing so, having regard to the seriousness of the infringement.
- 1.45 As a general matter, we are of the view that, in the context of a contravention of information requirements, the need for deterrence by means of a penalty is important as information requests are fundamental to Ofcom's ability to regulate electronic communications networks and services under the Act effectively and in a timely manner.
- 1.46 In this case, however, taking all the facts into consideration, we consider that making a finding that CityFibre has contravened the requirements in section 135 of the Act is sufficient. Noting the proactive steps CityFibre has taken to better manage future information requests, we consider that CityFibre has the ability and the necessary incentives to ensure that it complies with its obligations in relation to Ofcom's statutory information requests.

## Conclusion on penalty

- 1.47 Considering all of the above factors in the round, and in the specific circumstances of this case, we have decided not to impose a penalty on CityFibre in respect of the contravention of section 135 of the Act we have identified.
- 1.48 We are satisfied that our decision not to impose a penalty is appropriate and proportionate because the late response was the result of an administrative oversight; the information requested was promptly provided to Ofcom once CityFibre became aware of its mistake; the delay in providing the information did not adversely affect Ofcom's ability to carry out its market review functions; CityFibre has proactively taken practical steps in order to respond promptly to statutory information requests that it may receive in the future; and we have not previously made any finding of breach of regulatory requirements against CityFibre.

## Interpretation

- 1.49 Words or expressions used in this Decision have the same meaning as in the Act except as otherwise stated in this Decision.



**Marina Gibbs**

**Competition Director**

**18 February 2019**