

Confirmation Decision issued under section 139A of the Communications Act 2003 to MS3 Networks Limited relating to contravention of information requirements

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

Subject of this Confirmation Decision

- 1.1 This Confirmation Decision is addressed to MS3 Networks Limited (“MS3”), whose registered company number is 08190151. MS3’s registered address is Owen House, Owen Avenue, Priory Park, Hessle, North Humberside, HU13 9PD.

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.¹
- 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 are therefore key to the integrity of the regulation of the communications sector.
- 1.4 Ofcom has found that MS3 has breached the requirements imposed under section 135 of the Act on two occasions, by failing to provide information by the deadlines set by Ofcom. Ofcom required the provision of the information for the purposes of its Business Connectivity Market Review (“BCMR 2019”).
- 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

¹ See section 135(4) of the Act.

respond to information requests in a timely manner in accordance with the requirements in section 135 of the Act.

- 1.6 This Confirmation Decision sets out Ofcom's decision to impose a penalty of £2,000 on MS3 in respect of the contraventions we have identified. We consider that this is appropriate and proportionate, taking into account the length of the delays, MS3's size and Ofcom's central objective of deterring future contraventions.

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. The expression "communications provider" is defined at section 405(1) of the Act. It means *"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 that they require 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 states that a person required to provide information under section 135 must provide it in such manner and within such reasonable period as may be specified by Ofcom.

- 1.11 Section 135(5) of the Act provides that the powers in section 135 are subject to the limitations in section 137.

- 1.12 Section 137(3) provides that Ofcom are not to require the provision of information under section 135 except:

- i) by a demand for the information that describes the required information and sets out Ofcom's reasons for requiring it; and
- ii) 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.

- 1.13 Sections 138 to 144 of the Act specify the enforcement powers that Ofcom has in relation to contravention of information requirements.

- 1.14 Section 138 of the Act provides that Ofcom can issue a CP a notification *"where 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.

- 1.15 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 section 138 notification or such lesser penalty that Ofcom considers to be appropriate in light of representations made or steps taken by the CP.
- 1.16 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

- 1.17 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 significant market power is found, the review will assess the appropriateness of any regulatory remedies to address our competition concerns.
- 1.18 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.
- 1.19 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.
- 1.20 In March 2016, Ofcom published the conclusions of its review of competition in the provision of leased lines² in the UK – the Business Connectivity Market Review 2016.³ 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.

² 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.

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

Contraventions of section 135 of the Act

- 1.21 For the reasons set out below, we have found that MS3 contravened section 135 of the Act on two occasions by failing to respond to two statutory information requests by the deadlines set by Ofcom.

Information request – January Notice

- 1.22 As part of the BCMR 2019, MS3 received two information requests under section 135 of the Act. The first of these requests was sent to MS3 on 17 January 2018 and required the provision of specified information by noon on 14 February 2018 (the “January Notice”).
- 1.23 The January Notice required MS3 to provide information relating to MS3’s network and the services it sells and purchases. The requested information was set out in 13 questions divided into 5 parts (A-E) with the same deadline applying to all of them. Part F requested details of the name and position of the person within MS3 who would be signing off the response. MS3 acknowledged receipt of the January Notice on 22 January 2018.
- 1.24 On 8 February 2018, Ofcom reminded MS3 about the forthcoming deadline and asked MS3 if it wanted to submit its response to the January Notice via Ofcom’s file transfer system. On 12 February 2018, MS3 replied that it would submit its response by email.
- 1.25 MS3 did not respond with the requested information by the 14 February 2018 deadline or notify Ofcom in advance that it could not meet that deadline and seek an extension. On 14 February 2018, Ofcom emailed MS3 to check whether it had submitted a response to the January Notice (as it had not appeared in the BCMR 2019 dedicated inbox).
- 1.26 MS3 subsequently submitted its response in three separate tranches on 19 February 2018 (Part D), 28 February 2018 (Parts A, B and C) and 2 March 2018 (Parts E and F).
- 1.27 When MS3 sent its response to Part D on 19 February 2018, it offered no reason for the delay, nor did it explain why it had only responded to Part D or ask Ofcom for an extension for its responses to the remaining questions.
- 1.28 Ofcom emailed MS3 on 21 February 2018, asking MS3 to provide its responses to the remaining questions “*as a matter of urgency*”. On 28 February 2018, MS3 sent its response to the questions in Parts A, B and C saying the reason for the delay in responding was due to the Managing Director of MS3 being on annual leave.
- 1.29 Ofcom subsequently emailed MS3 on 2 March 2018 querying whether it had sent its response to Parts E and F. MS3 replied on the same day with its response to Parts E and F, saying it had mistakenly missed these out from its earlier response. By 2 March 2018, we had received MS3’s response to Parts A–F of the January Notice, 12 working days after the deadline.
- 1.30 Upon review of MS3’s response to Part C, we noted that some of the requested information was missing from Part C and, on 12 March 2018, we asked MS3 to provide this by 15 March 2018. MS3 submitted this missing information on 15 March 2018.

- 1.31 MS3's complete response to Parts A–F of the January Notice was therefore not provided to Ofcom until 15 March 2018, 21 working days after the deadline.

Information request – April Notice

- 1.32 Ofcom issued MS3 with a second information request on 13 April 2018 under section 135 of the Act, which required the provision of specified information by noon on 27 April 2018 (the "April Notice").
- 1.33 The April Notice required MS3 to provide information relating to end user business customer sites and mobile base station sites for which MS3 has a fibre connection.
- 1.34 MS3 did not respond with the requested information by the 27 April 2018 deadline or seek an extension. Ofcom telephoned MS3 on 1 June 2018 to confirm whether the April Notice had been received. MS3 agreed to check and confirm what had happened in relation to its response.
- 1.35 MS3's response was not submitted until 14 June 2018, 32 working days after the deadline set out in the April Notice.
- 1.36 MS3 offered no explanation for the delay. In its representations provided in response to the section 138 notification, MS3 contended that the January and April Notices "*seemed to be duplicative*".
- 1.37 We have reviewed the relevant requests in the January and April Notices in the light of MS3's representations, which related to MS3's active (i.e. in use) and inactive (i.e. not in use) fibre connections. While there was a degree of overlap in relation to the information requested in respect of its active connections, we note that overlap was acknowledged in the April Notice itself.⁴ In relation to inactive connections, the April Notice requested additional information to that provided by MS3 in response to the January Notice (and MS3 provided this additional information when it responded on 14 June 2018).
- 1.38 We are therefore satisfied that the April Notice required MS3 to provide different information to that required in the January Notice and that to the extent there was a degree of overlap, this does not excuse MS3's failure to respond by the deadline set by Ofcom.

Conclusions on contraventions

- 1.39 Accordingly, we are satisfied that MS3 contravened section 135 of the Act on two occasions by failing to respond to the January and April Notices by the deadlines set by Ofcom. MS3's complete response to the January Notice was not received until 21 working days after the deadline and MS3's response to the April 2018 was not received until 32 working days after the deadline.

⁴ The April Notice explained that: "*For the avoidance of doubt, we would that expect the list of active fibre connections will match the equivalent data in your response for on-net circuits in Question A1 of the 1st Notice, but with the addition of the full postal addresses. To the extent that your response does not match, please explain why.*"

Penalty

- 1.40 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. 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 cannot exceed £2,000,000.

Grounds for imposing a penalty

- 1.41 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.
- 1.42 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. In the case of a market review like the BCMR 2019, this asymmetry is likely to be pronounced because much of the detailed information about the size of the market (and related information) will be held by CPs within the market.
- 1.43 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.
- 1.44 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.
- 1.45 The contraventions we have found reflect poorly on MS3 and the way in which it discharges its regulatory obligations. However, we do not consider that the findings alone are as sufficient deterrent. MS3 breached section 135 of the Act on two occasions and the contraventions we have identified are indicative of a careless attitude towards its regulatory responsibilities under section 135 of the Act. MS3 has a legal obligation to provide accurate and complete responses to statutory information requests by the deadline set by Ofcom. It is important that MS3 recognises this and is incentivised to ensure that these failings are not repeated. We are therefore satisfied that a penalty is appropriate to reflect the seriousness of the contraventions and act as an effective deterrent to prevent further wrong-doing by MS3 and the wider industry.

Penalty amount

- 1.46 In setting the penalty, we have considered all the circumstances of the case and have had regard to the Penalty Guidelines.⁵

Seriousness of the contravention

- 1.47 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.
- 1.48 We have taken into account that MS3 contravened the requirements of two statutory information requests and the delays were substantial; a complete response to the January Notice was not received until 21 working days after the deadline and the response to the April Notice was not received until 32 working days after the deadline.
- 1.49 Further, in relation to the January Notice, Ofcom reminded MS3 of the deadline four working days before the response was due (when Ofcom asked MS3 if it wished to submit its response via Ofcom's file transfer system). At no point did MS3 seek an extension; in fact, two working days before the deadline, MS3 confirmed it would respond by email. From the date MS3's response to the January Notice was due, Ofcom also sent MS3 three emails asking MS3 to provide a complete response to all of the questions (on 14 and 21 February and 2 March 2018). The 21 February 2018 email asked MS3 to provide its response to the remaining questions "*as a matter of urgency*" but it was not until 15 March 2018 that MS3 provided a complete response to all the questions.
- 1.50 In relation to the delay in respect of the January Notice, MS3 said that the Managing Director had been on annual leave. It is unclear whether he was on leave for a period before the Ofcom deadline or only after MS3 had failed to meet the Ofcom deadline. We do not consider this explanation - which was provided 10 working days after the deadline for MS3's response had expired and only when MS3 provided the second tranche of its response - is a reasonable justification for the breach, and we therefore regard it as serious.
- 1.51 MS3 offered no explanation at the time in relation to the delay in respect of the April Notice. In its representations provided in response to the section 138 notification, MS3 said that Ofcom "*put it under a great deal of pressure*" as it didn't have an automated way of providing the requested information and had to provide it manually. MS3 further stated that "*it had a lot of work on at that point*". We consider that we allowed MS3 a reasonable amount of time to respond to the January and April Notices. Consistent with the timeframe given to other CPs of a similar size to MS3, MS3 was allowed 20 working days to respond to the January Notice and 10 working days to respond to the April

⁵ Ofcom Penalty Guidelines, 14 September 2017 ("Penalty Guidelines")
https://www.ofcom.org.uk/_data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf

Notice. MS3 did not raise concerns with Ofcom about the period specified for responding during that time. MS3 was provided with an Ofcom contact name, email and telephone number, which it could have contacted to explain the challenges it was facing at the time and request an extension to the deadline set by Ofcom. This did not happen and so Ofcom was unable to take any extenuating circumstances into account.

1.52 We note that MS3 is a relatively small CP in the market – it only operates in Hull and East Yorkshire⁶ and qualifies as a small company, in accordance with section 382 of the Companies Act 2006 (the “2006 Act”).⁷ We therefore consider it likely that MS3 only has limited resources for managing statutory information requests.

1.53 However, prior to responding to Ofcom’s section 138 notification, MS3 had not suggested that a shortage of resource was a reason why it failed to respond to Ofcom’s information requests on time. Even if this were the case, this does not excuse MS3’s failure to contact Ofcom in advance to explain why the deadlines set for its responses could not be met and seek an extension. All our information requests provide the email address and telephone number of the relevant Ofcom contact so that it is straightforward for a CP to request an extension.

1.54 We consider that MS3’s conduct in relation to these information requests is indicative of a careless attitude towards its regulatory responsibilities under section 135 of the Act. It has a legal obligation to provide complete and accurate responses to statutory information requests by the deadline set by Ofcom and it is important that MS3 takes such requests seriously and responds to them properly in the manner and form specified.

Other factors

1.55 In addition to the above, we have taken into account the following factors:

- i) information in MS3’s most recent management accounts, including its turnover figure for the year to date, for the purposes of assessing the proportionality of the penalty;
- ii) 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
- iii) we have not previously made any finding of breach of regulatory requirements against MS3.

⁶ See: <http://www.ms-3.co.uk/pages/about-us.html>.

⁷ MS3’s Unaudited Financial Statements for the year ended 31 October 2017 state that MS3 is entitled to exemption from audit under section 477 of the 2006 Act for the year ended 31 October 2017. Section 477 of the 2006 Act provides that small companies, as defined in Section 382 of the 2006 Act, are exempt from audit. Under section 382(3) of the 2006 Act, a company qualifies as a small company if it satisfies two or more of the following requirements: (1) its turnover is no more than £10.2 million; (2) its balance sheet total is not more than 5.1 million; (3) it does not have more than 50 employees.

Precedents

- 1.56 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.
- 1.57 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. 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.⁸ 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).
- 1.58 While these two cases also concern failures to respond by given deadlines, we consider the contraventions by GW Telecom were more serious because of its complete failure to respond to the information requests. In contrast, MS3 did eventually provide complete responses to the January and April Notices.
- 1.59 Two decisions were taken against BT, an established national CP which is substantially larger than MS3. 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).
- 1.60 BT has significantly more resource and capability to manage information requests. Both decisions concerned a failure by BT to provide complete and accurate information and, in relation to one of the contraventions, we found that BT had provided misleading information. Accordingly, we consider the facts to be materially different to this case.
- 1.61 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). Cloud M is also a small CP and one of its contraventions was failing to provide information by the deadline set by Ofcom. However, we also note that Cloud M contravened section 135 of the Act on three occasions, and there was an on-going failure to respond.
- 1.62 On 16 November 2018, Ofcom imposed a penalty of £25,000 on Virgin Media (CW/01198/06/17). There are some similarities between that case and this case. For example, in setting the penalty in that case, we took into account Virgin Media's lack of attention to its regulatory responsibilities; the potential impact on Ofcom's substantive investigation; and our finding that these did not materialise so that the risk to citizens and consumers as a result of Virgin Media's breach was low. We also took into account

⁸ See paragraph 48 of case CW/01201/07/17.

the fact that Virgin Media is one of the UK's largest CPs with substantial turnover from its communications business.

Deterrence

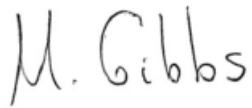
- 1.63 Ofcom's Penalty Guidelines explain that the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient to deter the business from contravening regulatory requirements, and to deter the wider industry from doing so, having regard to the seriousness of the infringement.
- 1.64 As a general matter, we are of the view that the need for deterrence in any penalty imposed for a contravention of information requirements 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, and Ofcom needs to be able to rely on responses to them.
- 1.65 In view of our findings in relation to MS3's attitude towards information requests, we consider deterrence to be important in this case. MS3's failure to comply with regulatory obligations imposed under section 135 of the Act has the potential to undermine the effectiveness of those obligations to which it is subject and can have a harmful impact on a significant number of customers. More generally, it can cause harm to citizens, consumers and competition. We therefore consider that it is important to ensure that any penalty we set in relation to the breach we have identified is large enough to incentivise compliance by MS3 with all of Ofcom's information requests.

Conclusion on penalty amount

- 1.66 Considering all of the above factors in the round, we have decided to impose a penalty on MS3 of £2,000 in respect of both contraventions of section 135 of the Act.
- 1.67 Ofcom's judgment is that this is an appropriate and proportionate penalty. It reflects the importance of providing complete and accurate responses to statutory information requests by the deadline set by Ofcom and the seriousness of the contraventions, in particular the length of the delays and MS3's apparent failure to appreciate the importance of complying with its statutory obligations under section 135 of the Act. The level of the penalty takes into account MS3's size and turnover and in our judgment, is at such a level which can change any potential non-compliant behavior by MS3, and by other providers.
- 1.68 Accordingly, Ofcom now requires MS3 to pay a penalty of £2,000 in respect of its contraventions of the requirements imposed under section 135 of the Act within one calendar month of the date of this Confirmation Decision.

Interpretation

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

A handwritten signature in black ink that reads "M. Gibbs". The letters are cursive and slightly slanted to the right.

Marina Gibbs

Competition Policy Director

18 February 2019