

Confirmation Decision to Telefónica UK Limited of contravention of information requirements under Article 5(2) of the EU Open Internet Access Regulation (EU) 2015/2120 and Regulation 17 of the Open Internet Access (EU Regulation) Regulations 2016

Non-confidential version

Subject of this Confirmation Decision

- 1.1 This Confirmation Decision (the “Confirmation Decision”), issued in accordance with regulation 22 of the Open Internet Access (EU Regulation) Regulations 2016, is addressed to Telefónica UK Limited, trading as O2 (“O2”) whose registered company number is 01743099. O2’s registered office is 260 Bath Road, Slough, Berkshire, SL1 4DX.

Summary

- 1.2 The EU Open Internet Access Regulation (EU) 2015/2120 (the “EU Regulation”)¹ establishes rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users’ rights.
- 1.3 Article 3 of the EU Regulation comprises the basic principles of ensuring open access to the internet by end-users without restriction except for under certain limited conditions.
- 1.4 Ofcom, as the national regulatory authority in the UK, is responsible under the EU Regulation and the Open Internet Access (EU Regulation) Regulations 2016 (the “UK Regulations”)² for ensuring compliance by the providers of internet access services with the requirements of the EU Regulation.³ In particular, Ofcom has duties to closely monitor and ensure compliance with certain requirements of the EU Regulation.

¹ Regulation (EU) 2015/2120 of the European Parliament and of the Council laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, 25 November 2015. See: <https://eur-lex.europa.eu/eli/reg/2015/2120/oj>

² SI 2016/607: <http://www.legislation.gov.uk/ukxi/2016/607/contents/made>

³ Under Article 5 of the EU Regulation and regulation 4 of the Open Internet Access (EU Regulation) Regulations 2016.

- 1.5 In order to undertake its regulatory functions, Ofcom has powers to require from any person information which it considers is necessary for the purpose of carrying out its functions under the EU Regulation.⁴ A person who receives a request for information from Ofcom is under a statutory duty to provide it in the manner, and within such reasonable period, as Ofcom may specify.⁵ Failure to comply with a request for information may result in the imposition of a penalty up to, but not exceeding, two million pounds.⁶
- 1.6 Ofcom's powers to require information are fundamental to its ability to carry out its functions in relation to ensuring compliance with the EU Regulation. They enable Ofcom to gather the information which it considers necessary to carry out its functions in a timely and effective manner and are key to safeguarding end-users' rights with respect to the equal and non-discriminatory treatment of data traffic and guaranteeing the continued functioning of the internet ecosystem as an engine of innovation.⁷
- 1.7 On 6 December 2017, Ofcom opened an enforcement programme, examining whether Internet Service Providers' ("ISPs") traffic management practices complied with the requirements of the EU Regulation.⁸ Among others, O2, as a provider of mobile internet access services, was one of these ISPs and was a person who, in Ofcom's view, was likely to have information for the purposes of carrying out its enforcement programme.
- 1.8 On 16 January 2018, Ofcom issued a formal information request to O2, requiring it to provide certain information to help Ofcom assess O2's compliance with the EU Regulation. The information requested was proportionate to the purposes for which it was being requested and was integral to Ofcom's ability to meet its obligations to closely monitor and ensure compliance with the requirements of the EU Regulation.
- 1.9 O2 responded to the formal information request. However, in doing so, it failed to supply accurate and complete information in response to one of the questions in the information request. O2 initially told Ofcom that it had previously employed a traffic management policy, but that this had been discontinued in 2016. O2 subsequently informed Ofcom that this traffic management policy had in fact continued to be applied until March 2018 and provided details of how the policy operated. It was only once O2 provided the correct information that Ofcom was able to assess its traffic management practices against the EU Regulation.
- 1.10 On the basis that O2 failed to supply accurate and complete information, Ofcom had reasonable grounds to believe that O2 had contravened its statutory obligations to provide information in such a manner and within such reasonable period as may be specified by Ofcom. Accordingly, Ofcom issued O2 with a notification under regulation 19 of the UK Regulations. O2 had one month to make representations on the matters notified and did

⁴ Article 5(2) of the EU Regulation and regulation 17 of the Open Internet Access (EU Regulation) Regulations 2016.

⁵ Regulation 17(3) of the Open Internet Access (EU Regulation) Regulations 2016.

⁶ Regulation 21 of the Open Internet Access (EU Regulation) Regulations 2016.

⁷ Where, under Recital 1 of the EU Regulation, safeguarding end-users' rights with respect to the equal and non-discriminatory treatment of data traffic and guaranteeing the continued functioning of the internet ecosystem as an engine of innovation is the stated purpose of the Regulation.

⁸ https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01210.

so in a letter dated 28 February 2019. Having considered these representations, Ofcom is now satisfied that O2 contravened its statutory obligations to provide information in such a manner and within such reasonable period as may be specified by Ofcom.

- 1.11 Given the importance and reliance Ofcom places on the information requested under our statutory powers, an incomplete and inaccurate response is, in our view, a serious matter. In this particular case it delayed Ofcom’s discovery of the need to assess O2’s compliance with the EU Regulation for over two months. An incomplete and inaccurate response may also indicate a degree of carelessness and the absence of effective systems in place to respond to information requests in accordance with O2’s statutory obligations.
- 1.12 Therefore, in accordance with its Penalty Guidelines,⁹ Ofcom has decided to impose on O2 a penalty of £75,000 in respect of the contravention it has identified. Ofcom considers this is appropriate and proportionate given the seriousness of the contravention identified and Ofcom’s central objective of deterring future contraventions.

Relevant legislation

The EU Open Internet Access Regulation

- 1.13 The aim of the EU Regulation is to “*establish common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users’ rights.*” It further “*aims to protect end-users and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation.*”¹⁰
- 1.14 Under Articles 3(1) and 3(2) of the EU Regulation, end-users have the right to “*access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user’s or provider’s location or the location, origin or destination of the information, content, application or service, via their internet access service.*” This right is not to be limited by agreements entered into by the providers of internet access services and end-users, or by the commercial practices of those providers.
- 1.15 Further, under Article 3(3), providers “*of internet access services shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.*”¹¹
- 1.16 Article 3(3) also makes provision for the providers of internet access services to implement reasonable traffic management measures in certain circumstances.¹² However, such measures must be transparent, non-discriminatory and proportionate. Such measures

⁹ Ofcom, [Penalty guidelines – Section 392 Communications Act 2003](#), 14 September 2017

¹⁰ Recital 1.

¹¹ EU Regulation, Article 3(3), first sub-paragraph.

¹² EU Regulation, Article 3(3), second sub-paragraph.

must not be based on commercial considerations, but on objectively different technical quality of service requirements of specific categories of traffic. Such measures must also not monitor the specific content, nor be maintained for longer than necessary. Providers may only engage in traffic management practices which go beyond these principles in very limited circumstances.¹³

- 1.17 Under Article 5(1), national regulatory authorities in each Member State must “*closely monitor and ensure compliance*” with (amongst other things) Article 3. To this end, Article 5(2) of the EU Regulation states that:

*“At the request of the national regulatory authority, providers of electronic communications to the public, including providers of internet access services, **shall make available to that national regulatory authority information relevant to the obligations set out in Articles 3 and 4, in particular information concerning the management of their network capacity and traffic, as well as justifications for any traffic management measures applied. Those providers shall provide the requested information in accordance with the time-limits and the level of detail required by the national regulatory authority**”* (emphasis added).

- 1.18 Article 6 provides that Member States shall lay down rules on penalties applicable to infringements of (amongst other things) Articles 3 and 5, and shall take all measures necessary to ensure that they are implemented.

The UK Open Internet Access Regulations

- 1.19 Further effect is given to the EU Regulation through the UK Regulations.¹⁴
- 1.20 Under Regulation 4 of the UK Regulations, Ofcom is the national regulatory authority for the UK.
- 1.21 Parts 4 and 5 of the UK Regulations make provision for “information requirements”, relating to requests made by Ofcom for information under Regulation 5(2) of the EU Regulation. In particular, Regulation 17 states that:

“(1) OFCOM may require a person falling within paragraph (2) to provide them with such information as they consider necessary for the purpose of carrying out their functions under the EU Regulation and these Regulations.”

(2) Any person who appears to OFCOM to have information required by them for the purpose of carrying out their functions under the EU Regulation and these Regulations is a person falling within this paragraph.

(3) A person required to provide information under this regulation must provide it in such manner and within such reasonable period as may be specified by OFCOM.

¹³ EU Regulation, Article 3(3), third sub-paragraph.

¹⁴ SI 2016/607: <http://www.legislation.gov.uk/uksi/2016/607/contents/made>

(4) OFCOM are not to require the provision of information under this regulation 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 carrying out OFCOM's functions.

(5) A demand for information required under this regulation must be contained in a notice served on the person from whom the information is required."

1.22 Regulations 19 to 23 of the UK Regulations specify the enforcement powers that Ofcom has in relation to contravention of information requirements. Regulation 19 states that:

"(1) Where OFCOM determine that there are reasonable grounds for believing that a person is breaching, or has breached an obligation under Articles 3, 4 or 5 of the EU Regulation or under these Regulations they may give that person a notification under this regulation.

(2) A notification under this regulation is one which –

(a) sets out the determination made by Ofcom;

(b) specifies the obligation and the breach in respect of which that determination has been made;

(c) specifies the period during which the person notified has an opportunity of making representations;

(d) to the extent that the notification relates to a breach of an information requirement, specifies the information to be provided by the person to Ofcom in order to comply with the requirement;

...

and

(f) specifies any penalty which Ofcom are minded to impose in accordance with regulation 20."

1.23 Under Regulation 21, a penalty for a contravention of the information requirements (other than in respect of a continuing contravention) is to be an amount not exceeding £2,000,000 as Ofcom determine to be both appropriate and proportionate to the contravention in respect of which it is imposed.

1.24 In setting any penalty, Ofcom takes into account the principles set out in its Penalty Guidelines.

1.25 The relevant provisions of Regulation 22 state that:

"(1) This regulation applies where—

(a) a person has been given a notification under regulation 19;

(b) OFCOM have allowed the notified person an opportunity to make representations about the matters notified; and

(c) the period allowed for the making of representations has expired.

(2) OFCOM may—

(a) give the notified person a decision (a “confirmation decision”) confirming the matters referred to in regulation 19(2); or

(b) inform the notified person that they are satisfied with the person’s representations and that no further action will be taken.

(3) OFCOM may not give a confirmation decision to a notified person unless, after considering any representations, they are satisfied that the person has, in one or more of the respects notified, been in breach of an obligation specified in the notification under regulation 19.

(4) A confirmation decision—

(a) must be given to the notified person without delay;

(b) must include reasons for the decision;

(c) may require immediate action by the notified person to comply with the obligations specified in the notification under regulation 19, or may specify a period within which the person must comply with those obligations;

(d) may require the notified person to pay—

(i) the penalty specified in the notification under regulation 19; or

(ii) such lesser penalty as OFCOM consider appropriate in the light of the notified person’s representations or steps taken by the notified person to comply with the obligation or remedy the consequences of the breach; and

(e) may specify the period within which the penalty is to be paid.

(5) It is the duty of the notified person to comply with a confirmation decision.”

Background

The enforcement programme into fixed and mobile ISP traffic management practices

1.26 Under Article 5(1) of the EU Regulation, national regulatory authorities such as Ofcom are required to closely monitor and ensure compliance with (amongst other things) Article 3 of the EU Regulation.

1.27 On 6 December 2017, Ofcom opened an ‘own-initiative’ enforcement programme (the “Enforcement Programme”) to examine ISP traffic management practices, including those

relating to mobile roaming services, and other ISP practices covered by the EU Regulation.¹⁵

- 1.28 In accordance with Article 5(2) of the EU Regulation and Regulation 17 of the UK Regulation, it appeared to Ofcom that the providers of internet access services were likely to have information that was relevant and necessary to it carrying out its Enforcement Programme. On that basis, Ofcom determined that it was appropriate to gather information from a range of ISPs in order to assess whether any traffic management practices raised compliance issues with the EU Regulation and to decide whether any further action, including enforcement, was required.
- 1.29 In order for Ofcom to fulfil its obligations under the EU Regulation, it was important that ISPs provided complete and accurate responses to statutory information requests by the deadline set by Ofcom, in accordance with the requirements of Regulation 17(3) of the UK Regulations.

The information request

- 1.30 On 16 January 2018, Ofcom issued O2 with a formal demand for information under Article 5 of the EU Regulation and Regulation 17 of the UK Regulations (the “Notice”). The Notice required the provision of specified information by noon on 13 February 2018. A copy of the Notice issued to O2 on 16 January 2018 is attached at Annex 1.
- 1.31 Question 2 of the Notice requested information relating to statements about O2’s traffic management measures contained in its Key Fact Indicators (“KFIs”) and Fair Use Policy (“FUP”) published on its website regarding customers who were “heavy users” of mobile data. With respect to these statements Ofcom asked O2 to explain:
- a) the particular level of use that means that some O2 customers are deemed to be “detrimentally affected” under the KFI by other customers who are heavy users of data and the threshold for “a lot of data” under the FUP, so as to cause O2 to activate its traffic management measures;
 - b) the particular traffic management measure(s) which O2 employed (e.g. blocking, shaping, throttling);
 - c) how those particular traffic management measures were deployed, in particular whether they treated particular types of traffic differently;
 - d) the decision-making and/or governance procedures that O2 had in place when activating and carrying out traffic management in these circumstances; and
 - e) how often O2 had deployed each of the relevant traffic management measures during 2017, how long each was in place and how many users were affected.

¹⁵ See: https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01210

- 1.32 The Notice was first sent to O2 in draft format on 19 December 2017. On 4 January 2018, O2 responded, saying that, with the exception of question 12, in general it was *“comfortable with the questions and should be able to provide the information requested”*.
- 1.33 The deadline for responding to the Notice was midday on 13 February 2018, which gave O2 twenty working days to respond.

Exchange of letters concerning O2’s responses to information requests

- 1.34 On 26 January 2018, prior to the deadline for responding to the Notice, Ofcom sent a separate letter to O2,¹⁶ setting out its general concerns with *“O2’s poor performance with responding to requests for information, both formal and informal”*. That letter noted that, having undertaken various projects during the course of 2017, Ofcom had *“often struggled to obtain the required information by the deadline set”*, and that *“O2 has also submitted responses which contained insufficient or incorrect information, requiring Ofcom to follow up, leading to delay.”* We emphasised in that letter that *“the receipt of full, accurate and timely information is critical to Ofcom’s ability to carry out its duties and functions efficiently.”* A copy of Ofcom’s letter to O2 dated 26 January 2018 is attached at Annex 2.
- 1.35 On 2 February 2018, O2 responded¹⁷ to Ofcom’s letter of 26 January 2018, stating that it would review its previous engagements with Ofcom and giving assurances that it takes its obligations in relation to responding to information requests seriously. A copy of O2’s letter to Ofcom dated 2 February 2018 is attached at Annex 3.

O2’s 13 February 2018 response

- 1.36 O2 provided its response to the information request at 7:05pm on 13 February 2018 (the “Response”). In answer to Question 2 of the Notice it stated that:
- “We do not currently apply any policies that relate to this. We have previously operated a ‘hotspot based’ traffic management policy, but this was discontinued in late 2016.*
- We constantly monitor and manage the demand across our network to deliver the best possible experience for our customers. We do reserve the right that, in exceptional circumstances, where a customer’s use is so excessive that other customers are detrimentally affected, we may notify the customer and ask them to adjust their usage or we may stop their data service. This is to ensure fair use and to preserve the quality of service for other customers. However, this is not something that we are currently doing, it is more a reserved right.”*
- 1.37 A copy of the Response is attached at Annex 4.

¹⁶ Letter from Lindsey Fussell of Ofcom to [redacted] of O2, dated 26 January 2018.

¹⁷ Letter from [redacted] of O2 to Lindsey Fussell of Ofcom, dated 2 February 2018.

O2's 10 April 2018 response

- 1.38 On 16 March 2018, O2 requested a meeting with Ofcom to discuss several matters related to the EU Regulation. Ofcom responded on 22 March 2018, confirming that we would be happy to meet and that we would also like to discuss the Response. A meeting was subsequently arranged for 27 March 2018 and, on 26 March 2018, Ofcom sent O2 a list of supplementary questions to help clarify the information provided in the Response. A copy of Ofcom's email of 26 March 2018 is attached at Annex 5.
- 1.39 At the meeting on 27 March 2018, O2 provided some information verbally to Ofcom in relation to the Response. In particular, O2 explained how their platforms worked and confirmed that their 'hotspot based' traffic management policy had ceased. O2 said that it would revert to Ofcom to provide written confirmation of the points discussed.
- 1.40 On 29 March 2018, O2 contacted Ofcom by telephone to explain that it had discovered that its 'hotspot based' traffic management policy did not in fact cease in 2016 as stated the Response. O2 agreed to provide Ofcom with updated information about its traffic management and how often it was deployed. A file note of the 29 March 2018 telephone conversation is attached at Annex 6.
- 1.41 On 4 April 2018, O2 sent Ofcom an email which confirmed the content of the telephone call it had made to Ofcom on 29 March 2018. O2 noted in this email that it had "*discovered that we had provided some incorrect information, namely that our Hotspot Based (busy cells) Traffic Management did not in fact cease in 2016, but had continued throughout 2017*" and confirmed that it would provide updated information to Ofcom that week. O2 also noted that it wanted to "*ensure that this information goes through our new Governance process that we have now implemented (as a result of us establishing that the correct information was not provided). This is to ensure that the information is approved and validated by a member of our Senior Leadership Team, before it is sent to Ofcom. In this case it will be our Chief Operating Officer.*" A copy of O2's email dated 4 April 2018 is attached at Annex 7.
- 1.42 O2 subsequently sent further emails, dated 5 and 9 April 2018, to provide updates as to when it would be able to provide its revised response to the Notice. A copy of those emails are attached at Annex 8.
- 1.43 On 10 April 2018, O2 emailed Ofcom a revised response to Questions 2(b)–(e) of the Notice (the "Revised Response"). O2 now stated that it employed a "*hotspot-based traffic management (throttling of a limited number of specific, congested (hence 'hotspot') 3G sites¹⁸*" where "*[f]or all users being served by the specific 3G congested sites, between the hours of 08:00 – 01:00, all Peer-to-Peer protocols, email and Operating System updates would be limited to 50kbps downlink per subscriber session, regardless of their usage*" and that, in addition, "*each user being served by one of the specific 3G congested sites had their usage counted*" so that if "*any of these users used 30 Mb (aggregate) of data within the first 15 minutes of their session, they would be throttled to a maximum of 100kbps*

¹⁸ Response to Question 2(b) of the Notice.

(downlink only)”. O2 further stated that “[d]uring 2017 its [‘hotspot’ traffic management] was applied on a daily basis between the hours of 08:00-01:00.” O2 stated that “193 sites had the traffic management applied to them as of 1st January 2017, this number reduces to 164 sites by 31st December 2017.”¹⁹

- 1.44 O2 went on to explain that its *“Hot Spot Throttling Policy was first implemented in January 2014”* and that its *“Radio Team requested that the Hot Spot Policy was removed in June 2016, however this request was bundled up into a larger piece of work which was subsequently delayed and the removal did not take place - this is where the confusion arose as the Radio Technical Architect provided the responses to the questions in the original Ofcom information request, hence they thought that the removal had been completed, whereas in fact it had not, this was confirmed by operational colleagues.”*
- 1.45 O2 also confirmed that *“this Hot Spot Based Throttling no longer takes place on our network as it was removed from implementation on 28th March 2018 (confirmed by operational colleagues) as part of preparations to withdraw the Sandvine platform from service, which the policy operates on.”*
- 1.46 Ofcom has no grounds to believe that the Revised Response is incomplete or inaccurate. A copy of the Revised Response is provided at Annex 9.

Determination

O2’s compliance with the Notice

- 1.47 As set out above, it appeared to Ofcom that O2 supplied to it inaccurate and incomplete information in response to the Notice. In relation to Question 2 of the Notice, which requested information about specific traffic management practices being employed by O2, O2 stated that *“it does not currently apply any policies that relate to this”* and that it *“previously operated a ‘hotspot based’ traffic management policy, but this was discontinued in late 2016”*. However, following subsequent discussions with O2 (as set out in paragraphs 1.39 – 1.40 above), it transpired that this information was actually incorrect. In its email of 10 April 2018, O2 stated that, during 2017, it had in fact applied a ‘hotspot’ traffic management policy for congested 3G cell sites on a daily basis between the hours of 08:00-01:00. Further, as of 1 January 2017, it had identified 193 sites where traffic management had been applied, reducing to 164 sites by 31 December 2017. The ‘hotspot’ management did not appear to be completely decommissioned until 28 March 2018.
- 1.48 O2 acknowledged that it provided incorrect information to Ofcom in response to the Notice. In its email of 4 April 2018, O2 stated that it *“had provided some incorrect information, namely that [its] Hotspot Based (busy cells) Traffic Management did not in fact cease in 2016, but had continued throughout 2017.”* O2 further explained in its email of 10 April 2018 that the reason for the error was due to its Radio Technical Architect being under the belief that its Radio Team’s request to remove the policy in June 2016 had been

¹⁹ Response to Question 2(e) of the Notice.

implemented, when in fact it had been bundled into a larger piece of work that did not take place until later.

- 1.49 On the basis that it appeared that O2 had provided inaccurate and incomplete information, Ofcom issued it with a notification under regulation 19 of the UK Regulations. O2 had one month to make representations on the matters notified
- 1.50 In a letter dated 28 February 2019. O2 stated that *“We have now had the opportunity to consider our position in full. Taking everything in to consideration, we wish to confirm that we will accept Ofcom’s finding in the [notification issued under regulation 19 of the UK Regulations] and do not intend to make representations as regards the provisional finding of breach or the level of fine.”*

Breach finding

- 1.51 Given the above, we are satisfied that O2 failed to provide accurate and complete information as required by the Notice by the given deadline, in breach of its obligations imposed under Article 5(2) of the EU Regulation and regulation 17 of the UK Regulations.

Penalty

Grounds for imposing a penalty

- 1.52 This Confirmation Decision concerns a contravention of a statutory information request under Article 5(2) of the EU Regulation and Regulation 17 of the UK Regulations which was sent as part of the Enforcement Programme.
- 1.53 The information was requested for Ofcom to undertake its functions in monitoring and ensuring compliance with the EU Regulation, namely by assessing whether any ISPs traffic management practices raised compliance issues and deciding whether any further action, including enforcement, was required.
- 1.54 Ofcom’s powers to require information are fundamental to its ability to carry out its functions in relation to ensuring compliance with the EU Regulation. They enable Ofcom to gather the information which it considers necessary to carry out its functions in a timely and effective manner and are key to safeguarding end-users’ rights with respect to the equal and non-discriminatory treatment of data traffic and guaranteeing the continued functioning of the internet ecosystem as an engine of innovation.
- 1.55 Given the importance and reliance Ofcom places on the information requested under our statutory powers, an incomplete and inaccurate response is, in our view, a serious matter. In this particular case it delayed Ofcom’s discovery of the need to assess O2’s compliance with the EU Regulation for over two months. An incomplete and inaccurate response indicates a degree of carelessness and the absence of effective systems in place to respond to information requests in accordance with O2’s statutory obligations, as we set out in more detail below.

1.56 For these reason, we consider it appropriate and proportionate to impose a penalty on O2 in this case. For the reasons set out at paragraphs 1.57 – 1.86 below, Ofcom has decided to impose a penalty of £75,000 in respect of the contravention of Article 5(2) of the EU Regulation and regulation 17 of the UK Regulations which it has identified. In reaching this decision, we have had regard to Ofcom’s Penalty Guidelines.

Factors relevant to determining penalty amount

1.57 Ofcom has considered all of the circumstances of the case in the round in order to determine the appropriate and proportionate amount of the penalty. We have also taken into account the central objective of imposing a penalty under our Penalty Guidelines, which is to deter O2 from contravening its regulatory requirements, and to deter the wider industry from doing so. In particular, the penalty should be sufficiently high to have the appropriate impact on the regulated body at an organisational level and should incentivise O2’s management (which is ultimately responsible for O2’s conduct and culture) to change O2’s conduct as a whole and bring it into compliance.²⁰

1.58 In the following paragraphs, we set out our assessment of the factors that appear to us most relevant to determining the penalty that is proportionate to the contraventions we have found.

Seriousness of the contravention

1.59 A contravention of a requirement to provide complete and accurate information is inherently serious. As noted above, Ofcom’s powers under Article 5(2) of the EU Regulation and regulation 17 of the UK Regulations are fundamental to its ability to carry out its statutory functions.

1.60 Where the providers of internet access services fail to comply with their obligations to provide complete and accurate information, Ofcom is at risk of being prevented from exercising its functions in the safeguarding the rights of end-users in relation to open internet access because of the asymmetry of information that exists; much of the information which it requires is held by the providers of internet access services which it regulates.

1.61 We consider that the asymmetry of information was particularly pronounced in this case. The information was requested as part of the Enforcement Programme and the responses were integral to Ofcom’s decision on whether to take any further action, including enforcement, but the information was held entirely by the ISPs. In this case, we were asking questions of O2 about information contained within its own KFI. O2 was therefore the only source that Ofcom had in order to obtain this information.

1.62 Additionally, there are specific features of the contravention that Ofcom has identified in this Confirmation Decision which contribute to its seriousness.

²⁰ Penalty guidelines, paragraphs 1.4-1.5.

- 1.63 In particular, we consider that O2 did not appear to have effective systems in place to respond accurately and comprehensively to information requests in accordance with its statutory obligations imposed under Article 5(2) of the EU Regulation and regulation 17 of the UK Regulations.
- 1.64 We would expect a prudent ISP in an equivalent position to implement systems to carry out all necessary due diligence checks to ensure responses to a statutory information requests are complete and accurate. These checks should ensure responses are discussed with and reviewed by individuals with knowledge of the relevant information and are reviewed and approved by the appropriate director/head of department. These checks appear to be absent in this case.
- 1.65 Given the apparent system failures identified above, it is unclear whether Ofcom would have received accurate information from O2 about its traffic management practices if Ofcom had not asked further follow-up questions in its meeting with O2 on 27 March 2018. This further aggravates this contravention.
- 1.66 O2 is one of the largest mobile ISPs in the UK, with revenues of over £5bn in 2017.²¹ In our view, O2 has many years' experience in responding to statutory information requests and should have the capability and resources to respond to statutory information requests accurately and comprehensively in accordance with its statutory obligations.
- 1.67 We also note that O2 was specifically reminded of its obligations to respond to Ofcom's requests for information in a timely, accurate and complete manner in our letter of 26 January 2018. O2 should have understood from this letter that Ofcom treats these matters seriously. Given that O2 had until 13 February 2018 to comply with the Notice, it is Ofcom's view that it had ample opportunity (12 working days) to re-evaluate its response in light of this letter to ensure that its response to the Notice was accurate and complete.
- 1.68 In addition, O2's failure to respond accurately to Question 2 in the Response led to a significant delay (almost two months) in Ofcom's discovery of the need to assess whether O2 was complying with the EU Regulation. As noted on Ofcom's Competition and Consumer Enforcement Bulletin, we also gathered information from a number of other fixed and mobile ISPs under the Enforcement Programme and opened investigations in March 2018 into Three and Vodafone's traffic management practices. The delay in receiving complete and accurate information from O2 meant that, while other operators were undergoing regulatory scrutiny, Ofcom was unaware of its need to assess O2's traffic management practices. We consider that this delay adds to the seriousness of the contravention.

Degree of harm, whether actual or potential, caused by the contravention

- 1.69 Ofcom has no evidence to indicate that actual harm occurred to the end-users of internet access services as a result of O2 failing to comply with its obligations imposed under Article 5(2) of the EU Regulation and regulation 17 of the UK Regulations.

²¹ See: https://www.telefonica.com/en/web/shareholders-investors/financial_reports.

- 1.70 However, O2's failure to comply with any of its statutory information request requirements has the potential to undermine the effectiveness of the EU Regulation and could have a harmful impact on a significant number of end-users of internet access services.

Whether in all the circumstances appropriate steps were taken to prevent the contravention

- 1.71 For the reasons set out in paragraphs 1.63 – 1.64 above, it does not appear that O2 took appropriate steps to prevent the contravention, despite being specifically reminded of its obligations in Ofcom's letter of 26 January 2018 and O2's assurances in its letter of 2 February 2018.

The extent to which the contravention occurred deliberately or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur

- 1.72 We do not have any evidence to suggest that the contravention we have found occurred deliberately.
- 1.73 However, in our view, O2's conduct does appear to be indicative of a careless attitude towards its regulatory responsibilities under Article 5(2) of the EU Regulation and regulation 17 of the UK Regulations. This is particularly because Ofcom wrote to O2 on 26 January 2018 setting out concerns with O2's poor performance in responding to information requests, both formal and informal. These concerns related to both the timeliness and quality of the responses received from O2. The letter explained that if in future O2 failed to respond fully or properly to information requests then we would consider formal enforcement action, including with the possibility of imposing fines.
- 1.74 O2 responded to this letter on 2 February 2018, prior to the deadline for responding to the Notice, stating that it would review its previous engagements with Ofcom and giving assurances that it takes seriously its obligations in relation to responding to information requests. Despite this review and assurances, however, the contravention still occurred.
- 1.75 Given that Ofcom's letter of 26 January 2018 was addressed to a member of O2's Senior Leadership Team, and that its response of 2 February 2018 was from a member of O2's Senior Leadership Team, Ofcom has reasonable grounds to believe that O2's senior management knew, or ought to have known, that there had been problems with the provision of information in the past and that there was a risk that O2 might contravene its regulatory obligations in future.

History of contraventions and steps taken to prevent future contraventions

- 1.76 Ofcom has not previously found O2 in breach of its information request requirements, either under Article 5(2) of the EU Regulation and regulation 17 of the UK Regulations, or under section 135 of the Communications Act 2003.²²

²² Similar to the requirements of Article 5(2) of the EU Regulation and regulation 17 of the UK Regulations, section 135 of the Communications Act 2003 gives Ofcom the power to require the provision of information which it considers necessary for the purpose of carrying out its functions.

Mitigating factors

- 1.77 O2 has taken steps to improve its processes. In O2's email of 4 April 2018 it noted that it had implemented a new governance process to ensure that the information is approved and validated by a member of its Senior Leadership Team before it is sent to Ofcom. Ofcom saw this in action when O2 provided the Revised Response with confirmation that it had been approved by its Chief Operating Officer.
- 1.78 Moreover, O2 took timely and effective steps to end the contravention once O2 became aware of it. After the meeting between O2 and Ofcom on 27 March 2018, during which questions by Ofcom called into question the accuracy of the Response, O2 quickly admitted the contravention (on 29 March 2018) and remedied it (on 10 April 2018).

Precedents

- 1.79 This is the first time that Ofcom has taken enforcement action under the EU Regulation or the UK Regulations in relation to an information requirement breach. However, Ofcom has found communications providers to have contravened requirements imposed under the information gathering provisions of the Communications Act 2003 (specifically, section 135) since revising its Penalty Guidelines in 2015. Amongst these cases²³ of particular relevance is the case concerning BT's failure to respond to an information request with accurate and complete information. We consider that this is a relevant precedent to take into account in reaching a decision on the appropriate level of penalty given that it found a breach of statutory information request requirements, albeit determined under a slightly different statutory scheme.
- 1.80 Ofcom issued a decision against BT in March 2018 (the "BT case") where BT failed to provide Ofcom with accurate and complete information in relation to two separate information requests.²⁴ In that case, Ofcom imposed a penalty of £100,000 (reduced by 30% to £70,000 due to a voluntary settlement by BT). BT is a communications provider which is an established national operator. As the second largest mobile operator in the UK²⁵ O2 is also an established national operator.
- 1.81 We consider that there are broad similarities between the BT case and the present case which may have a bearing on the level of penalty imposed. In both cases:
- a) incorrect information was provided to Ofcom;
 - b) the errors were only subsequently discovered by Ofcom following further questioning;
- and

²³ Past cases involving contraventions of requirements imposed under section 135 of the Act include cases involving [Gateway, BT](#) (deemed consent investigation), [Cloud M](#) and [Virgin Media](#).

²⁴ Case CW/01208/09/17 – see: https://www.ofcom.org.uk/data/assets/pdf_file/0016/112192/cw01208-confirmation-decision.PDF

²⁵ See: <https://www.statista.com/statistics/375986/market-share-held-by-mobile-phone-operators-united-kingdom-uk/>

c) Ofcom was relying on the information to make timely decisions in carrying out its duties.

1.82 We also note that both BT and O2 are established operators and therefore should have had appropriate processes in place to deal with such requests. Although in the case of BT there had previously been penalties imposed for regulatory breaches, in the case of O2, it was warned in January 2018 by Ofcom that regulatory action would be considered if in future it failed to provide full and timely responses to information requests. We note, however, that the BT case related to two separate requests for information where BT failed to provide accurate and complete information, whereas the present case only relates to one request.

Deterrence

1.83 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.

1.84 As a general matter, we are of the view that the need for deterrence by means of penalty is important as statutory information requests are fundamental to Ofcom's ability to fulfil its obligations to monitor and ensure compliance with the EU Regulation and safeguard open internet access. Ofcom therefore needs to be able to rely on responses to these information requests.

1.85 Further, we consider that deterrence is particularly important in this case given that O2 is a large communications provider with a substantial customer base. As stated above, O2's failure to comply with any of its statutory information request requirements has the potential to undermine the effectiveness of the EU Regulation and could have a harmful impact on a significant number of end-users of internet access services. 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 O2 with all of Ofcom's information requests.

1.86 We consider that the penalty which we have decided to impose is sufficiently large to ensure that it is a deterrent, having regard to O2's size and turnover and to the seriousness of the proposed contravention in this case, and is at such a level which can change any potential non-compliant behaviour by O2, and by other providers.

Ofcom's conclusions on penalty amount

1.87 The contraventions we have identified in this Confirmation Decision give rise to a breach of Article 5(2) of the EU Regulation and regulation 17 of the UK Regulations.

1.88 Under regulation 21 of the UK Regulations, there is a statutory maximum penalty of £2,000,000 which Ofcom may impose on O2 in relation to each contravention of the requirements of Article 5(2) of the EU Regulation and regulation 17 of the UK Regulations,

although the level of the penalty imposed must be appropriate and proportionate to the contravention(s) in respect of which it is imposed.

- 1.89 Taking all the factors set out at paragraphs 1.57 – 1.86 above in the round, the penalty we have decided to impose on O2 is £75,000. Taking into account O2's size and turnover, we consider that this is appropriate and proportionate, in particular given O2's apparent failure to appreciate the importance of complying with its statutory information obligations, even after receiving a formal written warning and Ofcom's central objective of deterring further contraventions.

Interpretation

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



Ali-Abbas Ali

Competition Policy Director

20 March 2019

List of Annexes

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Annex 2	Ofcom's 26 January 2018 letter
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Annex 7	O2's 4 April 2018 email
Annex 8a	O2's 5 April update email
Annex 8b	O2's 9 April update email
Annex 9	The Revised Response

Annex 1

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Annex 2

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Annex 3

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Annex 4

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Annex 5

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