

Confirmation Decision issued under section 139A of the Communications Act 2003 to British telecommunications plc relating to contravention of information requirements

Subject of this Confirmation Decision

- 1.1 This Confirmation Decision (the “Confirmation Decision”) is addressed to British Telecommunications plc (“BT”), whose registered company number is 1800000. BT’s registered office is 81 Newgate Street, London, EC1A 7AJ.

Summary

- 1.2 Ofcom has statutory powers 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.
- 1.3 These statutory powers are fundamental to Ofcom’s ability to carry out its statutory functions in relation to communications matters in accordance with its principal duty of furthering the interests of citizens and consumers.
- 1.4 Ofcom’s functions include its duty under section 134A of the Act to prepare a report at least every three years on matters related to electronic communications networks and services specified in section 134B of the Act. The report, which Ofcom publishes annually in performance of this duty, is titled “*Connected Nations*”. It includes information about the availability of broadband services in the UK.
- 1.5 In 2018, the Government introduced legislation for a broadband ‘universal service obligation’ to ensure that homes and businesses are able to require provision of a decent and affordable broadband connection, where such a broadband connection and service would otherwise not be available (the “broadband USO”).¹ Ofcom is responsible for implementing delivery of the broadband USO by designating providers to provide broadband connections and services at prices that are affordable and uniform throughout the UK.²
- 1.6 Certain information which Ofcom gathers for the purposes of the *Connected Nations* report is also used to check eligibility for a broadband connection from a designated provider in fulfilment of the broadband USO.³
- 1.7 On 19 September 2019, Ofcom issued to BT’s wholly-owned subsidiary, EE Limited (EE), a notice under section 135 of the Act requiring the provision of information for the purpose of preparing the *Connected Nations 2019* report (the “Information Request”). The

¹ The Electronic Communications (Universal Service)(Broadband) Order 2018.

² See: section 66 of the Act, The Electronic Communications (Universal Service) (Broadband) Regulations 2018 and paragraphs 1 and 2, Schedule 2 to The Electronic Communications (Universal Service)(Broadband) Order 2018.

³ Ofcom, *Delivering the Broadband Universal Service*, 6 June 2019 (the “Broadband USO Statement”), paragraphs 8.7-8.12. https://www.ofcom.org.uk/data/assets/pdf_file/0019/151354/statement-delivering-the-broadband-universal-service.pdf

Information Request included a requirement to produce data about premises able to receive EE's fixed wireless access broadband service.

- 1.8 BT provided information in response to the Information Request on 29 October 2019, on behalf of EE and this was subsequently incorporated into Ofcom's *Connected Nations 2019* report published on 20 December 2019.
- 1.9 The data about EE's fixed wireless broadband service was also incorporated into a dataset provided to the designated providers to check the eligibility of those requesting a broadband service under the broadband USO. The dataset was sent to BT on 17 January 2020.
- 1.10 On 5 February 2020, having noticed discrepancies between the dataset and its internal information, BT informed Ofcom that the information they had provided in response to the Information Request about the number of premises able to receive EE's fixed wireless access broadband service was incorrect. BT provided corrected data on 7 February 2020.
- 1.11 On 18 March 2020 we decided to open an investigation into BT's compliance with section 135 of the Act.
- 1.12 On 27 April 2021 BT made written representations to Ofcom about its responses to the Information Request and whether there was any potential for consumer harm.⁴
- 1.13 On 23 June 2021, Ofcom sent BT a notification under section 138 of the Act (the "s138 Notification") setting out its finding that there are reasonable grounds for believing that BT contravened the requirement to provide information under section 135 of the Act.
- 1.14 On 19 July 2021, BT confirmed to Ofcom that it would not make any written or oral representations about the matters set out in the s138 Notification and agreed to enter into a voluntary settlement with Ofcom in relation to the matters set out in this Confirmation Decision.
- 1.15 This Confirmation Decision is issued under section 139A of the Act confirming that BT contravened requirements imposed in the Information Request issued under section 135 of the Act. The Confirmation Decision also sets out Ofcom's decision to impose a penalty of £42,500 which we have determined to be appropriate and proportionate to the contravention we have found. The calculation of this figure includes a 15% discount applied to the provisional penalty figure of £50,000 proposed in the s138 Notification, as a result of BT accepting liability and entering into a voluntary settlement with Ofcom.

Legal framework

- 1.16 In this section, we first set out Ofcom's functions which were relevant to the Information Request to which this Confirmation Decision relates, and then describe Ofcom's powers to require the provision of information and to take enforcement action in relation to such information requirements.

⁴ Letter dated 27 April 2021 from Clive Carter, BT, to Samuel Hinkley, Principal, Ofcom.

Relevant functions

- 1.17 Under sections 134A and 134B of the Act, Ofcom is required to publish at least every three years a report which deals with the different types of electronic communications networks and services in the UK and matters such as their geographic coverage and capacity and the steps that have been taken to improve the availability of such networks and services.⁵
- 1.18 The Electronic Communications (Universal Service) (Broadband) Order 2018 requires that an affordable broadband connection and service meeting specified characteristics, must be provided where certain eligibility criteria are met,⁶ including:
- a) a prospective end user requests such a connection is provided to a residential or business address; and
 - b) a broadband connection and service meeting the technical specification is not available at that location and will not be available within a year as a result of a publicly funded intervention.
- 1.19 Under section 66 of the Act and the Electronic Communications (Universal Service) Regulations 2018, Ofcom has power to designate providers to fulfil the broadband USO under the 2018 Order.
- 1.20 On 6 June 2019, Ofcom designated KCOM Group plc (KCOM) to fulfil the broadband USO in Hull and designated BT to do so in the rest of the UK. In addition, Ofcom set universal services conditions, directions and approvals under sections 45 to 47, 48A, 48C, 49, 49A, 49C, 67 and 68(3) and (4) of the Act to regulate how KCOM and BT fulfil the broadband USO.⁷ Under these conditions BT and KCOM are required to make use of information provided by Ofcom in addition to their own relevant data in order to assess whether the eligibility criteria for provision of an affordable broadband connection and service are met.⁸
- 1.21 BT's obligations as a designated provider in relation to the broadband USO came into force on 20 March 2020.⁹

Ofcom's information-gathering powers

- 1.22 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.”*
- 1.23 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:

⁵ Ofcom has power under section 134AA of the Act to publish such reports more regularly in order to bring it to the attention of persons likely to have an interest.

⁶ Paragraph 1, Schedule 1 to the Electronic Communications (Universal Service)(Broadband) Order 2018.

⁷ Ofcom, the Broadband USO Statement, 6 June 2019, Annex 1.

⁸ See conditions B2, B6 and B9 in Schedules 1 and 3 to the Notification at Annex 1, Broadband USO Statement, 6 June 2019.

⁹ Ofcom, the Broadband USO statement, 6 June 2019, Overview.

“a person who provides....an electronic communications network or an electronic communications service.”

- 1.24 Section 135(3) of the Act particularises the information that may be required by Ofcom under Section 135(1) and includes information required for the following purposes:
- a) preparing a report under section 134A or section 134AA of the Act;¹⁰
 - b) assessing the availability of a public electronic communications network.¹¹
- 1.25 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.
- 1.26 Section 135(5) of the Act provides that the powers in section 135 are subject to the limitations in section 137. Section 137(3) provides that Ofcom are not to 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.
- 1.27 Sections 138 to 144 of the Act specify the enforcement powers that Ofcom has in relation to the contravention of information requirements imposed under section 135 of the Act. Section 138 of the Act states, *inter alia*:

“(1) Where Ofcom determine that there are reasonable grounds for believing that a person is contravening, or has contravened, a requirement imposed under section 135 or 136, they may give that person a notification under this section.

(2) A notification under this section is one which—

(a) sets out the determination made by OFCOM;

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

(c) specifies the period during which the person notified has an opportunity to make representations;

(d) specifies the information to be provided by the person to OFCOM in order to comply with a requirement under section 135 or 136;

(e) specifies any penalty that OFCOM are minded to impose in accordance with section 139; and

(f) where the contravention is serious, specifies any direction which OFCOM are minded to give under section 140. [...].”

¹⁰ Section 135(3) (ic) and (id) of the Act.

¹¹ Section 135(3) (if) of the Act.

- 1.28 Section 139 of the Act specifies the penalties that may apply for contravention of the information requirements where a person is given a notification under section 138.
- 1.29 Section 139A of the Act applies where a person has been given a notification under section 138, Ofcom has allowed the opportunity for representations about the matter to be made, and the period allowed for the making of representations has expired.
- 1.30 Section 139A(2) allows Ofcom to:
- “(a) give the person a decision (a “confirmation decision”) confirming the imposition of requirements on the person, or the giving of a direction to the person, or both, in accordance with the notification under section 138; or*
- (b) inform the person that they are satisfied with the person’s representations and that no further action will be taken.”*
- 1.31 Under section 139A(3), Ofcom may not give a confirmation decision to a person unless, after considering any representations, they are satisfied that the person has, in one or more of the respects notified, been in contravention of a requirement notified under section 138.
- 1.32 Section 139A(4) states that a confirmation decision must be given without delay, include the reasons for the decision, may require immediate action by the relevant person, 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. The confirmation decision may also specify the period within which the penalty is to be paid.

Relevant facts

The Information Request

- 1.33 On 19 September 2019, Ofcom issued the Information Request to BT’s wholly-owned subsidiary, EE.
- 1.34 The Information Request specified that the information EE was required to produce was for the purpose of Ofcom’s functions under sections 134A, 134AA and 134B of the Act and that it was part of a suite of requests, collecting data for the *Connected Nations* report. The Information Request stated: *“our current intention is that collecting this information from operators will allow us to continue to compare the coverage, capacity and take up of networks and services in different parts of the country and over time.”*¹²
- 1.35 The Information Request included the following questions about EE’s fixed wireless access (FWA) broadband service:¹³

¹² The Information Request, 19 September 2019.

¹³ Fixed wireless access (FWA) is a means of making fixed connections between users’ premises and telecommunication networks, using a wireless link for the final connection to the end user’s premises, where the end user cannot connect to the network via wires. FWA services, which include telephony, high speed data, television and multimedia services, can be delivered by the mobile network operators and wireless internet service providers.

- a) Question 6: “Please provide, at postcode level, or site/sector level, any geographical areas currently excluded from receiving an FWA [Fixed Wireless Access] broadband service due to capacity constraints;” and
- b) Question 7: “Based on the assumptions provided in response to question 6 for each property that could be served by your FWA broadband service without the installation of new access points, please provide: the Unique Property Reference Number (“UPRN”); or, if UPRN is not available, the address of the property, which must include at a minimum the property number and postcode; or if the address of the property is not available, please provide the billing address for your customers.”¹⁴

1.36 EE was required to provide the information specified in questions 6 and 7 by 29th October 2019.

BT’s initial response

1.37 BT responded to the Information Request on the 29th October 2019.

1.38 In response to Q7, BT provided data identifying c.27 million premises by postcode as being able to be served by EE’s FWA broadband service without the installation of new access points.

1.39 The data provided by BT was used to:

- a) calculate coverage figures for FWA broadband services;¹⁵ and
- b) provide an estimate of the number of premises unable to get decent fixed broadband connection.

1.40 This data was then included in Ofcom’s *Connected Nations 2019* report published on the 20th December 2019:

“We estimate that EE has FWA coverage over 401,000 premises that do not currently have access to a decent broadband service from a fixed line or a WISP. Our research has shown that the 4G EE service is capable of delivering USO level broadband. Taking this and the WISP coverage into consideration means that we estimate that there are currently only around 155,000 premises that could be eligible for the Broadband USO.”¹⁶

Use of the information for the purposes of the broadband USO

1.41 As the designated providers of the broadband USO, KCOM and BT are required, on request, to provide broadband connections and services meeting the technical specification, where the eligibility criteria are met. One of the eligibility criteria is that at the relevant premises, there is no alternative broadband service available, which meets the technical specification.

¹⁴ The Information Request, 19 September 2019.

¹⁵ Ofcom, *Connected Nations 2019* (first release), 20 December 2019; since withdrawn.

¹⁶ Ofcom, *Connected Nations 2019* (first release), 20 December 2019; since withdrawn, p.16.

- 1.42 Under their universal service conditions, on receipt of a request for a broadband connection or service, KCOM and BT are required to assess whether the eligibility criteria are met by using any relevant information which they hold themselves and information provided to them by Ofcom under the conditions. The Ofcom information includes a bulk data file which is a list of locations where alternative broadband services are not available and are not expected to be available as a result of a publicly funded intervention within the next year. This bulk data file is compiled by Ofcom from information it gathers for the *Connected Nations* report.
- 1.43 Accordingly, Ofcom used BT's response to Question 7 of the Information Request as part of its estimate of the number of premises unable to receive a decent broadband service. In particular, this data was used to cross check against premises which had been identified as being unable to receive such services via a fixed wired connection. Premises identified in response to Question 7 as being capable of receiving broadband via EE's FWA service were removed from the list of USO-eligible premises in the bulk data file.
- 1.44 On 17 January 2020, Ofcom sent the bulk data file to BT. On receipt, BT compared the number of eligible premises listed to their own internal data and identified a discrepancy.¹⁷

Provision of revised data by BT

- 1.45 On 6 February 2020, BT sent a letter to Ofcom notifying it that the data from BT in the *Connected Nations 2019* was incorrect. The letter contained an explanation of the error made by BT, how they came to realise the mistakes they had made and the potential impacts they saw from submitting the incorrect data. The discrepancy for Question 7 was described as follows:

“Question 7 asked for FWA data at premise level. Specifically, Unique Property Reference Number (“UPRN”) – or, if unavailable, property or billing addresses - for premises that could be served by FWA based on the assumptions provided in response to Question 6...

The data provided in our response of 29th October 2019, did not include the assumptions provided in response to question 6. As a result, BT's response showed FWA as available in more areas than could be served by FWA.”¹⁸

- 1.46 BT said that “the number of USO-eligible premises could increase by c.37k from the 155k quoted by Ofcom in the *Connected Nations* report”.¹⁹ BT said that the impact appeared minimal, as Openreach had always had the correct data from BT about FWA.²⁰

¹⁷ BT described this to Ofcom in the letter dated 6 February 2020 from Cathryn Ross, BT to Lindsey Fussell, Group Director, Ofcom.

¹⁸ Letter from Cathryn Ross, BT to Lindsey Fussell, Ofcom, 6 February 2020. In a presentation by BT to Ofcom on 27 February 2020, and in a follow-up email from Neena Rupani, BT, to Tim Gilfedder, Ofcom, BT explained that in calculating the number of premises that could be served by EE's FWA service, it had only taken account of satellite backhaul constraints and had failed to account for other network capacity constraints. As a result, BT's response to Question 7 of the Information Request gave a higher number of premises which could be served by EE's FWA than was actually the case.

¹⁹ Letter from Cathryn Ross, BT, to Lindsey Fussell, Ofcom, 6 February 2020

²⁰ Letter from Cathryn Ross, BT, to Lindsey Fussell, Ofcom, 6 February 2020

- 1.47 On 7 February 2020, BT provided updated data in respect of Q7. These omitted 153,000 properties that had been identified as being able to be served by EE's FWA broadband service in BT's response to the Information Request.²¹
- 1.48 On 27 and 28 of February 2020, BT provided additional information to Ofcom to assist our understanding of the error and the revised data submitted on 7 February.
- 1.49 As a result, Ofcom withdrew the *Connected Nations 2019* report which it had published on 20 December 2019.²² It was reissued with the correct data on 18 March 2020. In the reissued report, the estimate of the number of premises unable to access a decent broadband service was reported as 189,000, rather than the 155,000 stated in the original November 2019 report.²³

BT's representations in response to Ofcom's investigation

- 1.50 On 27 April 2021 BT submitted representations to Ofcom about the matters under investigation in relation to its responses to the Information Request.²⁴ BT said that finding a breach and imposing a penalty would be inappropriate and disproportionate²⁵ because:
- a) BT considers that its response to Question 7 of the Information Request was based on a reasonable interpretation of the question, since Ofcom did not specify in either Question 6c or Question 7 which capacity constraints should be considered. BT submitted that this led to different interpretations by the team responding to Question 6c and the team responding to Question 7, both of which BT considers were reasonable. In addition, BT said that the use of the phrase "could be served" in Question 7, led the data provider to reflect BT's future plans when responding to the question. BT said that this was a reasonable interpretation of Question 7.²⁶
 - b) BT self-reported the issue to Ofcom in writing on 6 February 2020 and re-submitted a revised response to Question 7 on 7 February 2020 (for the UK excluding Hull; data on the Hull area was resubmitted on 12 February 2020).²⁷
 - c) BT considers that there was no actual or potential harm to USO customers because:
 - i) the issue was identified and fully rectified five weeks ahead of the launch of the Broadband USO scheme on 20 March 2020: Ofcom re-ran its bulk data analysis, and provided BT with revised bulk data on 14 February 2020, five weeks before the scheme launched;
 - ii) Openreach had the correct set of data at the relevant period, and the planning work Openreach had carried out in preparation of the launch of the Broadband USO was unaffected by the issue;

²¹ Letter from Cathryn Ross, BT, to Lindsey Fussell, Ofcom, 6 February 2020

²² Ofcom, *Connected Nations 2019*, 18 March 2020, Figure 4.

https://www.ofcom.org.uk/data/assets/pdf_file/0023/186413/Connected-Nations-2019-UK-final.pdf

²³ Ofcom, *Connected Nations 2019*, 18 March 2020, p 3.

²⁴ Letter from Clive Carter, BT, to Samuel Hinkley, Ofcom, 27 April 2021.

²⁵ Letter from Clive Carter, BT, to Samuel Hinkley, Ofcom, 27 April 2021, p.5.

²⁶ Letter from Clive Carter, BT, to Samuel Hinkley, Ofcom, 27 April 2021, p.2-3.

²⁷ Letter from Clive Carter, BT, to Samuel Hinkley, Ofcom, 27 April 2021, p.3.

- iii) BT had agreed a safeguard mechanism with Ofcom to ensure that any customer unable to achieve the required speeds over a suitable fixed or FWA service would be eligible for the USO; and
 - iv) by the Broadband USO launch date, BT had addressed the FWA network capacity constraints, such that coverage was available. As a result, any potentially eligible USO customer who contacted BT was provided with the correct information about FWA availability and USO eligibility.²⁸
- d) BT has put measures in place to minimise the risk of a similar issue arising in future. These include:
- i) increased engagement with Ofcom on FWA information requests and the wider *Connected Nations* information requests to ensure it understands the information Ofcom requires; and
 - ii) increased internal discussions around FWA information requests, ensuring several check-in meetings while the response is collated, to avoid a similar mistake being made in the future.²⁹

Determination of contravention

- 1.51 We have determined that BT failed to provide the information required by Question 7 of the Information Request. In particular, because it did not apply the same assumptions about network capacity constraints as those it applied in its response to Question 6c, it overestimated the number of premises that could be served by EE's FWA service.
- 1.52 We do not agree with BT's view that its interpretation of Question 7 was reasonable. The relevant question was clear that the same assumptions should be used when answering Question 6c and Question 7. BT did not apply the same assumptions in its responses to these questions, and as a result provided incorrect information in response to Question 7 of the Information Request.
- 1.53 BT explained that different teams compiled the information it provided in response to Question 6c and Question 7 respectively and each applied different assumptions. However, as the recipient of the Information Request, BT had a duty under section 135(4) of the Act to provide the information as specified in these questions. It therefore should have had processes in place to ensure co-ordination between the relevant teams and/or appropriate oversight so that the information provided in its response was consistent in the terms of the assumptions applied. BT's submissions indicated to Ofcom that the processes and oversight it had in place were not in this case sufficient to ensure the coordination necessary for it to fulfil its statutory duty in preparation of its response.
- 1.54 In light of these considerations and the facts set out at paragraphs 1.33 to 1.50, we have determined that BT contravened its obligations under section 135 by failing to provide the information specified in Q7 of the Information Request.

²⁸ Letter from Clive Carter, BT, to Samuel Hinkley, Ofcom, 27 April 2021, p.4.

²⁹ Letter from Clive Carter, BT, to Samuel Hinkley, Ofcom, 27 April 2021, p.4.

Penalty

- 1.55 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 requirements imposed under 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 information requirements has to be appropriate and proportionate and cannot exceed £2,000,000.

Decision to impose a penalty

- 1.56 For the reasons set out below, we are satisfied that it is appropriate and proportionate to impose a penalty on BT.
- 1.57 Parliament has recognised in the enactment of the Act that information-gathering powers are a foundation stone for a regulatory regime for telecommunications which operates effectively and in the interests of citizens and consumers. In addition to the powers conferred on Ofcom to require the provision of information in section 135, it has given Ofcom the power to impose financial penalties in the event of a contravention of a statutory requirement to provide information. A person who fails to provide information in accordance with a requirement imposed by Ofcom under section 135 is guilty of a criminal offence.
- 1.58 Parliament has also enacted duties for Ofcom to publish reports periodically on certain matters related to the electronic communications networks and services in the UK. One of the purposes of these reports is to inform UK businesses and consumers about the availability of such networks and services in their local area. The importance of this function is underlined by the fact that Ofcom is specifically empowered to require the provision of information under section 135(3)(ic) for the purpose of preparing its report, to ensure the accuracy and reliability of the information that it publishes.
- 1.59 The applicable statutory framework therefore establishes that the provision of accurate and complete information in response to the request made under section 135 is fundamental to Ofcom's ability to carry out its statutory functions in line with its principal duty of furthering the interests of citizens and consumers. The grounds that BT put forward in support of its contention that a penalty would not be appropriate and proportionate in this case, do not alter that finding; instead, they explain the circumstances in which the breach occurred and so are relevant to our assessment of the level of the appropriate penalty in this case.
- 1.60 Accordingly, we have determined that BT's contravention of the information requirements specified in the Information Request is a serious matter and it is appropriate and proportionate to impose a penalty.

Penalty amount

- 1.61 As set out in our Penalty Guidelines,³⁰ the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient, having regard to the relevant turnover, to have a material impact on the regulated body so that it is incentivised to bring itself into compliance and avoid recurrences of the contraventions in future. It is also important that the penalty imposed serves to deter the wider industry from contravening regulatory requirements.
- 1.62 Any penalty we set should therefore be sufficiently high to discourage bad conduct and incentivise BT's management to change the conduct of the company, ensure that its processes are effective in identifying errors when they occur, encouraging good practices and a culture of compliance across the organisation. In that regard, our Penalty Guidelines set out a range of further factors which may be relevant in any particular case and Ofcom has assessed those factors carefully in relation to the circumstances of this case to the extent they are relevant. Ofcom has also considered whether there are any relevant precedents and, if so, the extent to which they should be followed in this case.
- 1.63 We have taken these factors into account in the round in order to determine the appropriate and proportionate penalty amount. In the following paragraphs, we set out our assessment of the factors which are the most relevant to determining an appropriate penalty that is proportionate to the contravention we have found.

Seriousness, culpability and harm

- 1.64 As noted above, a contravention of a requirement to provide information is inherently serious since Ofcom's powers under section 135 of the Act are fundamental to its ability to carry out its statutory functions.
- 1.65 Where companies contravene these requirements, Ofcom is at risk of being prevented from exercising its functions in the interests of citizens and consumers because of the asymmetry of information that exists. That is because much of the information which it requires is held by CPs that it regulates. This is the case in respect of the information that Ofcom requires to fulfil its reporting duty under section 134A of the Act. Further, in order to enable citizens and consumers to track progress in the availability of broadband services in their area, it is important that they have confidence in the reliability of the information that we publish. Accordingly, we exercise our powers under section 135 to obtain the information we require for the *Connected Nations* report.
- 1.66 As set out at paragraph 1.25, BT had a duty under section 135(4) of the Act to provide the information specified in Question 7. There was no evidence that the breach occurred deliberately or recklessly. However, BT's representations suggested to Ofcom that the processes it had in place were not in this case sufficient to ensure co-ordination between the teams collating the data for Question 7 and Question 6c and/or to ensure the information provided in its response was consistent in terms of the assumptions applied.

³⁰ Ofcom, Penalty guidelines, September 2017. https://www.ofcom.org.uk/data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf

- 1.67 In relation to the harm that followed from the contravention, it resulted in Ofcom publishing inaccurate information in its *Connected Nations 2019* report so that we had to withdraw and re-issue it. As a consequence, there was the potential for confidence in the reliability and accuracy of the report to be adversely affected.
- 1.68 We are satisfied that the contravention did not have any impact, actual or potential, on the fulfilment of BT's obligations as a designated provider for the broadband USO, for the reasons set out in BT's representations notably, it provided corrected information before its obligations took effect on 20 March 2020, Openreach had the correct information at the relevant time, and its planning work in preparation for the broadband USO was unaffected.

Co-operation and remedial action

- 1.69 We have given significant weight to BT's co-operation with Ofcom in terms of identifying the breach and correcting the data it provided in response to the Information Request. Specifically, BT self-reported the issue to Ofcom in a letter to Ofcom dated 6 February 2020, following a phone call between BT and Ofcom on 5 February 2020. Further, BT voluntarily provided additional information to Ofcom on 27 and 28 February 2020 to assist our understanding of the error and the revised data which BT submitted on 7 February.
- 1.70 BT acted swiftly to provide accurate data in response to the Information Request on 7 February 2020 (and on 12 February for the Hull area).³¹
- 1.71 BT's prompt, co-operative action ensured that the period during which the *Connected Nations 2019* report contained inaccuracies was relatively short and enabled Ofcom to reissue a corrected version within a matter of weeks of being alerted to the error. It also ensured that the error was corrected before BT's obligations as a designated provider for the purposes of the broadband USO took effect, so that there was no scope for consumers to be adversely affected.
- 1.72 We have also accounted for the steps that BT has said it is taking to minimise the risk of a similar issue arising in future in respect of information requests for the purposes of preparing the *Connected Nations* report and the data sets for determining eligibility for the broadband USO. These include increasing internal engagement and "check-ins", which should mitigate the risk of inconsistency between teams tasked with gathering the data for a response.³²

³¹ Letter from Clive Carter, BT, to Samuel Hinkley, Ofcom, 27 April 2021, p.3.

³² Letter from Clive Carter, BT, to Samuel Hinkley, Ofcom, 27 April 2021, p.4-5.

History of contraventions

- 1.73 Ofcom has made determinations under section 139A of the Act against BT for contravening information requirements imposed under section 135 and section 191 of the Act on the following occasions:
- a) On 5 April 2017, Ofcom issued BT with a penalty of £300,000 for providing incomplete information in response to two information requests and misleading information in response to another during Ofcom’s investigation into BT’s use of deemed consent in Ethernet provisioning.³³
 - b) On 25 January 2018, Ofcom issued BT with a penalty of £100,000 (reduced to £70,000 as a result of Ofcom applying a 30% settlement discount) for providing inaccurate and incomplete information about its pricing as part of the Wholesale Local Access market review.³⁴
 - c) On 9 August 2019, Ofcom found that BT had provided inaccurate information in response to the 2011 General Demand for Information by incorrectly stating its turnover information for the years 2011, 2012, 2013, 2014, and 2015. As such, BT was found in breach of section 135 of the Act.

Precedents

- 1.74 Ofcom has issued a number of decisions under section 139A of the Act since revising its Penalty Guidelines in 2017 in addition to those listed above, some examples of which are detailed below.
- 1.75 On 22 March 2019, Ofcom imposed a penalty of £75,000 on O2 for contravening the requirements of a statutory information request issued under the Open Internet Access Regulations 2016.³⁵ We found that O2 failed to provide accurate and complete answers to our questions about its traffic management practices which delayed Ofcom’s assessment.
- 1.76 On 16 November 2018, Ofcom imposed a penalty of £25,000 on Virgin Media for providing an incomplete response to an information request issued under section 135 of the Act in the context of Ofcom’s investigation into Virgin Media’s early termination charges.³⁶ In this case, we found that the risk to citizens and consumers was low as the information did not have a substantive impact on Ofcom’s investigation.

Deterrence

- 1.77 As noted above, 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

³³ CW/01192/03/17: https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01192

³⁴ CW/01208/09/17: https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01208

³⁵ CW/01236/02/19: https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01236

³⁶ CW/01198/06/17: https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01198

from contravening regulatory requirements, and to deter the wider industry from doing so, having regard to the seriousness of the infringement.

- 1.78 As a general matter, we are of the view that the need for deterrence in any penalty set 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.
- 1.79 We have determined that the penalty which we have imposed is sufficient to ensure that: it is a deterrent, having regard to BT's size and turnover;³⁷ it takes account of the seriousness of the contraventions we have identified in this case and BT's history of contraventions, in particular in relation to information requirements; and it will incentivise BT and other providers to ensure that they comply with statutory information requests that they receive from Ofcom.

Conclusion on appropriate penalty

- 1.80 Under section 139(5) of the Act, there is a statutory maximum penalty which Ofcom may impose on BT in relation to contraventions of information requirements. This statutory maximum is £2,000,000, although the level of the penalty imposed must be appropriate and proportionate to the contravention(s) in respect of which it is imposed.
- 1.81 This is a serious breach which resulted in Ofcom having to withdraw and reissue its *Connected Nations 2019* report. However, importantly, it had no adverse impact for consumers and businesses which may benefit from the broadband USO because of the action that BT took in identifying and rectifying the error and the mitigations that it put in place prior to its broadband USO obligations coming into force, as outlined at paragraph 1.49c. Although BT has a history of compliance breaches in relation to information requests under section 135 as set out at paragraph 1.73, we were cognisant that it was incentivised to bring the matter to Ofcom's attention promptly and to rectify the error.
- 1.82 Taking all the factors set out at paragraphs 1.56 to 1.79 in the round, Ofcom has decided to impose a financial penalty on BT of £42,500. The calculation of this figure includes a 15% discount applied to the provisional penalty figure of £50,000 proposed in the s138 Notification, as a result of BT's accepting liability and entering into a voluntary settlement with Ofcom.
- 1.83 BT has until 27 August 2021 to pay the penalty.

³⁷ BT's Annual Report 2021 states BT's revenue for the 2020/21 financial year was £21.3bn. BT Group plc, Annual Report 2021, p.11. <https://www.bt.com/bt-plc/assets/documents/investors/financial-reporting-and-news/annual-reports/2021/bt-annual-report.pdf>

Interpretation

1.84 Words or expressions used in this Notification have the same meaning as in the Act except as otherwise stated in this Notification.

Signed by

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Samuel Hinkley

Principal, Enforcement

A person duly authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

30 July 2021