
Confirmation Decision under section 96C of the Communications Act 2003

Notice served on Virgin Media Limited by the Office of
Communications (Ofcom) for contraventions of
General Conditions 9.3 and 9.2(j)

Non-confidential version - redactions are indicated
with [✂]

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1. Overview

Ofcom's Confirmation Decision against Virgin Media explains how the company broke two of its regulatory obligations by charging its customers too much when they decided to switch to another provider and by not publishing information about these charges that was up-to-date and which its customers could understand. These charges are known as early termination charges ('ETCs') and are payable by customers who decide to leave their fixed term contracts early and switch to another communication provider.

The Confirmation Decision also explains why Ofcom has decided to impose a penalty of £7m on Virgin Media for breaking these rules.

What we have decided – in brief

We have found that from 22 September 2016 to 22 August 2017 Virgin Media set ETCs for its customers which were higher than the amounts that they agreed to pay. We found that 36% of Virgin Media's communication packages had ETCs which were higher than the monthly subscription prices for those packages and more than half had ETCs higher than the monthly subscription price less VAT, leaving Virgin Media better off if the customer left the contract.

We have found that Virgin Media overcharged more than 80,000 customers a total of just under £3m. The average overcharge was £34 but over 23,500 customers were overcharged by more than £50 and about 6,500 customers were overcharged by more than £100.

We have found that Virgin Media's ETCs made switching more expensive for its customers. As a result, Virgin Media broke its regulatory obligation to ensure that its conditions and procedures do not act as a disincentive to switch.

We have found that from 1 September 2016 to 20 March 2017, the information that Virgin Media published on its website about its ETCs did not meet its regulatory obligations. Virgin Media used T-shirt sizes (S, M, L) to describe different ETCs, instead of the VIVID branding which it used to describe its broadband contracts to which the ETCs applied. On 1 November 2016, Virgin Media also changed some of its ETCs but it did not publish these on its website until 20 March 2017. As a result, it was difficult for its customers to know how much they would be charged if they wanted to switch to another provider.

We have decided that Virgin Media's breaches of its regulatory obligations are serious and warrant a penalty. The rules it broke are important consumer protection rules with the purpose of enabling consumers to obtain maximum benefits from competitive communications markets. Virgin Media caused significant financial harm to a large number of its customers for almost a year.

We have decided to impose a penalty of £7m. Virgin Media is one of the UK's largest communications providers with millions of customers and it is important that the penalty is set at a level sufficient to deter further breaches by Virgin Media and communications providers more generally.

This overview is a simplified high-level summary only. The decisions we have taken and our reasoning are set out in the full document.

2. Introduction & Summary findings

- 2.1 This decision concerns the failure of Virgin Media Limited (VM) to comply with GC 9.3 and GC 9.2(j). These are two of the regulatory obligations, known as the General Conditions of Entitlement (GCs),¹ which are generally applicable to communications providers retailing services such as broadband, phone services and access to TV packages.
- 2.2 The General Conditions are measures put in place by Ofcom to secure the specific objectives of the European Regulatory Framework for the communications sector.² Two of these objectives are: furthering the interests of EU citizens, including by ensuring a high level of protection for consumers in their dealings with communications providers;³ and promoting competition in the provision of communications services, including by ensuring that users obtain maximum benefit in terms of choice, price and quality.⁴
- 2.3 GC 9.3 and GC 9.2(j) are important rules which give protection for consumers buying communications services.⁵ GC 9.3 ensures that switching from one provider to another is as smooth as possible so that consumers do not face obstacles if they want to change provider to get a better deal. GC 9.2 makes sure consumers have access to information about their contracts which is up-to-date and which they can understand so that they can make the right purchase and are clear about their rights and obligations. These measures ensure that consumers are empowered to take full advantage of a competitive market.
- 2.4 The contraventions that we have found relate to VM's early termination charges (ETCs). These are charges that consumers must pay to their communications provider when they decide to terminate their fixed term contracts early. Customers may decide to do this because they want to switch to another provider.

Finding under GC 9.3

- 2.5 We carried out an investigation into the ETCs that VM set and charged between 1 September 2016 and 22 August 2017 (the Relevant Period).⁶ We have found that VM's ETCs increased their customers' switching costs and as a result acted as a disincentive for them against switching to another provider, in breach of GC 9.3.

¹ GCs are set and modified from time to time by Ofcom under sections 45 to 64 of the Act. This decision enforces the General Conditions which were in force in the Relevant Period (see https://www.ofcom.org.uk/_data/assets/pdf_file/0026/86273/CONSOLIDATED_VERSION_OF_GENERAL_CONDITIONS_AS_AT_28_MAY_2015-1.pdf). These were replaced by the current set of General Conditions, which came into effect on 1 October 2018 (https://www.ofcom.org.uk/_data/assets/pdf_file/0021/112692/Consolidated-General-Conditions.pdf).

² The European Regulatory Framework comprises the harmonised set of European directives for the regulation of electronic communications networks and services.

³ Directive 2002/21/EC (Framework Directive), Article 8(4)(b).

⁴ Directive 2002/21/EC (Framework Directive), Article 8(2)(a).

⁵ As per footnote 1 above, Ofcom amended the GCs with effect from 1 October 2018. GCs 9.2(j) and 9.3 applied at the times considered in this document and until that date. As from that date, those GCs are contained in conditions C1.2(k) and C1.3.

⁶ The scope of our investigation and the information gathering that we conducted is set out at Annex 3 to this decision.

- 2.6 Under VM’s terms and conditions, the ETC payable by a customer when terminating a fixed term contract early should have been no higher than the customer’s remaining monthly payments, less the cost savings accruing to VM as a result of the contract ending.⁷ The maximum amount of an ETC was also subject to a cap under VM’s terms and conditions of £240.
- 2.7 VM has admitted that between 22 September 2016 to 22 August 2017 the ETCs that it published on its website and that it charged its customers were too high because of an error in how it calculated its ETCs. This error came about because VM failed to make consequential adjustments to its ETC rate card to reflect changes it had made to the pricing structure of its fixed term contracts. As a result, throughout the Relevant Period it continued to *“levy ETCs with reference to a higher headline charge that still reflected the previous, longer minimum contract term.”*⁸ Under VM’s terms and conditions, it agreed one retail price with its fixed term customers but treated them as if they were paying another higher price if they wanted to leave.
- 2.8 We have found that VM had opportunities during the Relevant Period to rectify the error that it had made in the calculation of its ETCs but that it failed to take concerted action to do so and to compensate customers it had overcharged until Ofcom opened its investigation on 27 June 2017.
- 2.9 VM has accepted that it overcharged more than 80,000 customers a total of £2,790,613.⁹ The average overcharge for these customers was £34. Over 23,500 customers were overcharged by more than £50 and of these, 6,508 were overcharged by more than £100. Because VM’s ETCs were too high, VM’s customers who terminated their fixed term contracts during the period under investigation had to pay extra charges, which made switching to another provider more expensive than it should have been.
- 2.10 Furthermore, faced with these unduly high ETCs, VM’s customers may have been deterred from terminating their fixed term contracts in order to switch to another provider or may have delayed their decision to do so, in order to reduce the amounts they would have to pay. Analysis commissioned by VM suggests that just under [X] customers were disincentivised from switching in this way during the Relevant Period. This number represents a reduction of about one-tenth in switching rates that might otherwise have been expected for VM’s consumers in fixed term contracts (see paragraphs 3.67 and 5.33).

Finding under GC 9.2(j)

- 2.11 We have also found that VM failed to publish information about its ETCs that was up-to-date and that its customers were likely to understand, in breach of GC 9.2(j). This meant that VM’s customers would have found it difficult to work out how much they would have

⁷ Condition M13, VM’s terms and conditions for fixed term contracts applicable during the Relevant Period.

⁸ VM March 2018 Letter, p.2(d).

⁹ VM’s Written Representations, paragraphs 4.2 – 4.3.

to pay if they wanted to leave VM and switch to another provider or, noting our finding that VM's ETCs were too high, if they wanted to query the ETC that VM charged them.

Penalty

- 2.12 We have decided to impose a penalty of £7m on VM in respect of its contraventions of GC 9.3 and GC 9.2(j).
- 2.13 These were serious contraventions which undermined the protection that should have been afforded to VM's customers. The contravention of GC 9.3 carried on for almost a year and caused significant financial harm to a large number of VM's customers. We are satisfied that the contraventions warrant a penalty and, taking account of the fact that VM is one of the UK's largest CPs with 5.5m cable customers, one that is sufficient to have a deterrent effect to prevent further wrong-doing.
- 2.14 Taking account of all the evidence set out in Sections 3, 4 and 5, including the action that VM has taken to remedy the contraventions, and having regard to our published Penalty Guidelines, we are satisfied that a penalty of £7m is appropriate and proportionate.

Ofcom's confirmation decision

- 2.15 Accordingly, we confirm that VM has contravened GC 9.3. We set out our detailed reasons for these findings in Section 3 of this decision.
- 2.16 We are also satisfied that VM has contravened GC 9.2(j) by virtue of its failure to publish clear and up-to-date information about its ETCs. We set out our detailed reasons for this finding in Section 4 of this decision.
- 2.17 Our decision for imposing a penalty of £7m in respect of these contraventions and our assessment of the factors relevant to the appropriate level are set out in detail in Section 5 of this decision.

3. Contravention of GC 9.3

Introduction

- 3.1 In this section, we set out our reasons for finding that the ETCs which VM set and charged its customers from 22 September 2016 to 22 August 2017 acted as a disincentive for its customers against switching provider in breach of GC 9.3.
- 3.2 We have structured our reasons as follows. We first set out the factual findings that we have made, which VM has accepted, and our finding that these amount to a contravention of GC 9.3. We then set out VM's Representations about the interpretation of GC 9.3 and explain why we have not accepted its arguments as to why Ofcom cannot apply the condition to its ETCs during the Relevant Period.
- 3.3 In the light of our assessment of VM's Representations and the factual findings we have made, we confirm that VM has contravened GC 9.3.

GC 9.3

- 3.4 GC 9.3 provides, amongst other things:

“Without prejudice to any initial commitment period, Communications Providers shall ensure that conditions or procedures for contract termination do not act as disincentives for End-Users against changing their Communications Provider.”

- 3.5 The term “End-User” in GC 9.3 is defined by reference to sections 151 and 405 of the Act and includes consumers who purchase publicly available communications services, such as broadband, fixed phone services and access to TV packages.

- 3.6 GC 9.3 derives from Article 30 of the Universal Service Directive,¹⁰ which provides at paragraph 6:

“Without prejudice to any minimum contractual period, Member States shall ensure that conditions and procedures for contract termination do not act as a disincentive against changing service provider.”

- 3.7 Ofcom implemented Article 30(6) by modifying GC 9 in a notification of modifications to the General Conditions, dated 23 May 2011.¹¹ In our accompanying statement, we said that “disincentives can be both contractual (early termination charges, automatically renewable contracts) or can be industry processes”,¹² noting:

¹⁰ Directive 2002/22/EC.

¹¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0023/33449/annex_2.pdf

¹² Ofcom, *Changes to the General Conditions and Universal Service Conditions*, Statement dated 25 May 2011, paragraph 7.76. https://www.ofcom.org.uk/_data/assets/pdf_file/0027/37746/statement.pdf

“in order to benefit from competition, consumers must have confidence to be able to exercise choice. This means that consumers should be able to switch between services and providers without undue effort, disruption and anxiety. Therefore, procedures and processes that increase switching costs and create barriers to consumers changing providers are likely to act as disincentives against switching providers.”¹³

Relevant Facts

VM’s terms and conditions for fixed term contracts

- 3.8 During the Relevant Period, VM offered consumers its communications services – phone, broadband and pay TV services – on fixed term contracts (with an initial commitment period of usually either 12 or 18 months) or on rolling 30-day contracts.¹⁴
- 3.9 Section M of the terms and conditions of VM’s fixed term contracts during the Relevant Period made the following provision for the customer to pay an ETC (referred to as ‘an early disconnection fee’ or ‘EDF’ in VM’s terms and conditions and its internal correspondence), in the event that the customer terminated the contract before the end of the initial commitment period:¹⁵

“9. In addition to your rights to cancel during the cooling off period, either you or we may end this agreement at any time (including during or at the end of any minimum period) by giving the other 30 days’ notice.

10. If you end this agreement, you must pay any charges (including usage charges and line rental) up to the end of that 30-day notice period.

11. If you ask us to end supply of services during the relevant minimum period (except when you cancel during the cooling off period as described above or under paragraph m14 below) you will have to pay an early disconnection fee as set out in paragraph M13.

12. If you break this agreement and we and/or Virgin Media Payments may end this agreement under section O (including for non-payment of charges) within the minimum period, you must immediately pay to Virgin Media Payments an early disconnection fee in respect of the cancelled service by way of compensation to us for ending the service early.

¹³ Ofcom, *Changes to the General Conditions and Universal Service Conditions*, Statement dated 25 May 2011, footnote 41.

¹⁴ Second Response, Annex 1 – response to Q1-3_Updated 301117_Highlighted. The data in this Annex indicates that VM started offering rolling 30 day contracts in February 2017 to new customers i.e. customers who had not previously been on a fixed term contract with VM.

¹⁵ VM provided two versions of its terms and conditions, one which was current as at 11 September 2016 (First Response, Annex 8 – response to Q8) and another one which was current as at 14 November 2016 (First Response, Annex 9 – response to Q8). There was no material difference in section M from the September version to the November version.

13. You can find details of the early disconnection fee on the Virgin Media Website (<http://www.virginmedia.com/shop/the-legal-stuff/terms-and-conditions-for-fibre-optic-services/early-disconnection-fees.html>). The early disconnection fee will not be more than the charges you would have paid for the services for the remainder of the minimum period less any costs we save, including the costs of no longer providing you with the services.”

- 3.10 The webpage referenced in what was Condition M13 of VM’s terms and conditions in the Relevant Period included a table which set out ETC rates the customer would be charged for each month remaining in their initial commitment period. This information is referred to by VM as its ETC rate card.
- 3.11 During the Relevant Period, VM published three different ETC rate cards – on 1 September 2016, 20 March 2017 and 22 August 2017 – which we set out in Annex 4 to this decision. The contravention of GC 9.3 that we have found relates to the ETCs set in accordance with the first and second of these rate cards (see Tables A4.1 and A4.2 of Annex 4). The third rate card published on 22 August 2017 reduced the ETC rate for VM’s phone service to zero and made substantial reductions to the majority of VM’s ETC rates for its broadband and pay TV services (see Table A4.3 of Annex 4).

Changes to VM’s prices and ETCs during the Relevant Period

Broadband service price changes in September 2016

- 3.12 Prior to 22 September 2016, the initial commitment period for VM’s fixed term contracts was typically 18 months and the customer was charged a cheaper price for the first 12 months. VM referred to the cheaper price as the ‘discount price’ and the higher price that it charged for the remainder of the initial commitment period as the ‘list price’.¹⁶
- 3.13 In anticipation of changes to the Advertising Standards Authority (ASA) guidance on the advertising of broadband pricing (which required providers to combine the price of line rental and broadband in advertisements), on 22 September 2016, VM made changes to its broadband pricing.¹⁷ Under VM’s new pricing structure, the duration of the initial commitment period was reduced (typically from 18 to 12 months) and a single monthly price was charged. At the end of the initial commitment period, a VM customer who did not enter into a new fixed term contract, would be subject to a rolling thirty-day contract (which could be terminated on 30 days’ notice) and would pay a higher price for the same services.¹⁸

¹⁶ VM’s slides for a meeting with Ofcom on 12 December 2017 (‘December 2017 Meeting Slides’), slide 5.

¹⁷ December 2017 Meeting Slides, slide 5. See also VM’s March 2018 Letter, paragraph 2d.

¹⁸ VM refers to the monthly subscription price paid by customers on a fixed term contract as the ‘discount’ price, and the price per month of a 30 day rolling contract as the ‘list’ price. See slide 5 of the December 2017 Meeting Slides and VM’s March 2018 Letter, paragraphs 2d. and e., pp. 2-3.

3.14 To illustrate these broadband pricing changes, we set out in Table 3.1 below, pricing information in respect of VM's headline triple-play packages (broadband, phone, pay TV services).

Table 3.1: Examples of September 2016 pricing changes

	Before 22 September 2016			After 22 September 2016		
	Fixed term	'Discount' Price per month for first 12 months of fixed term	'List' price for last 6 months of fixed term	Fixed term	Price per month in fixed term	Price per month of a rolling 30 day contract
Player (50mb)	18 months	£31	£45	12 months	£31	£45
Mix (100mb)	18 months	£42	£55	12 months	£42	£55
Full House (200mb)	18 months	£54	£76	12 months	£54	£76

Source: VM's Second Response, Annex 1- response to Q1-3_Updated 301117_Highlighted.

Price and ETC changes in November 2016

3.15 In November 2016, VM implemented price changes across its packages.¹⁹ The changes included increases to its ETC rates for its phone and broadband services. These increases were set out in the ETC rate card published on VM's website on 20 March 2017 (see Table A4.2 in Annex 4).

3.16 The table below sets out, by way of example, the changes to the monthly prices and ETC rates based on the same triple play packages used in Table 3.1 above.

Table 3.2: November 2016 price and ETC changes

	22 September to 31 October 2016		After 1 November 2016	
	Monthly price of 12 month fixed term contract	ETC rate	Monthly price of 12 month fixed term contract	ETC rate
Player (50mb)	£31	£30	£29	£32.30
Mix (100mb)	£42	£38	£47	£40.30
Full House (200mb)	£54	£54.50	£60	£56.80

Source: VM's Second Response, Annex 1- response to Q1-3_Updated 301117_Highlighted

¹⁹ First Response, question 8, Annex 12 Nov 2016 Price Changes – Detailed Rate Changes V1 1 and Annex 13 – DD17-007373 1st Nov Price Change_DSD_v5.

- 3.17 As shown in the examples in Table 3.2, in November 2016 VM increased the monthly price of some of its packages (for example the Mix and Full House packages) but decreased the price of others (the Player package). We identified 46 packages out of a total of 112 (41%) of the headline packages provided in VM's Second Response where the monthly price of a fixed term contract was lower in November 2016 compared to September 2016.²⁰
- 3.18 As shown in Table A4.2 of Annex 4, VM either increased its ETC rates or made no change to them as part of this pricing review. VM's customers terminating their fixed term contracts after 1 November 2016 were charged in accordance with these revised ETC rates, but they were not published on VM's website until 20 March 2017.²¹

Assessment of VM's ETCs under GC 9.3

- 3.19 For the purposes of assessing VM's ETCs in the Relevant Period, we have considered them against three thresholds: the monthly subscription price for the package in question; the monthly subscription price for the package in question less VAT; and the monthly subscription price for the package in question, less cost savings (including VAT) accruing to VM because of early termination.
- 3.20 An ETC above the monthly subscription price would mean that the customer was paying more to leave the contract than if they had continued to receive communications services from VM under their contract. An ETC above the second threshold – the monthly subscription price less VAT – would be lower than the amount the customer would have paid if they remained in contract. However, VM would be better off than if it had continued to provide the services under the contract because it does not pay VAT on ETCs that it receives. It would also benefit from other cost savings that accrue to it as a result of termination. In both cases, the ETC would be more than the customer would have expected to pay under VM's terms and conditions.
- 3.21 An ETC above the last (and lowest) threshold would still be higher than the customer would have expected to pay when terminating a fixed term contract, given that Condition M13 of VM's terms and conditions applicable during the Relevant Period provided that the ETC *"will not be more than the charges you would have paid for the services for the remainder of the minimum period less any costs we save, including the costs of no longer providing you with the services"*.

²⁰ Second Response, Annex 1 – response to Q1-3 Updated 301117_ Highlighted. If there was more than one charge available in a given month we have taken an average. The data provided by VM did not include subscription prices in November 2016 for three packages (Full House Movies 200, Full House Movies 200 Gamer and Full House Movies 300 & Homeworks). The data provided by VM shows that the subscription charges for each of these packages were the same in October 2016 and December 2016. Therefore, we assume the same subscription charges applied in November 2016.

²¹ First Response, question 13, email from [VM employee] to [Senior Commercial Manager] and others dated 20 March 2017, VM20001.

Assessing whether VM’s ETCs were higher than monthly subscription prices, including and excluding VAT

- 3.22 We requested a range of data from VM in our First Notice relating to its ETCs during the period 1 September 2016 to 30 June 2017. This included data on VM’s fixed term contracts, the monthly subscription prices, ETC rates and the value of ETCs raised and the number of subscribers terminating their fixed term contracts. We also requested the total number of VM subscribers on fixed term contracts across the specified period, as well as the number of customers on fixed term contracts during the month of June 2017.²²
- 3.23 VM’s First Response provided data for 112 headline packages²³ (specifically 14 solus packages, 38 dual play packages and 60 triple play packages). This data captured [50-60]% of VM’s subscribers subject to an initial commitment period as of June 2017.²⁴
- 3.24 For each of VM’s headline packages we compared the ETC rates it had set for those packages with their monthly subscription prices. We assessed whether the ETC rates were (for any given month during the period September 2016 to June 2017):
- i) higher than the monthly subscription prices (including VAT); and
 - ii) higher than the monthly subscription prices less VAT.
- 3.25 In particular, for each headline package, in each month, we calculated the ETC rate as a proportion of the monthly subscription price. ETC rates are higher than the monthly subscription prices if the proportion is more than 100%. They are higher than the monthly subscription prices less VAT if the proportion is above 83%. This reflects a VAT rate of 20%.
- 3.26 The results are summarised in Table 3.3 below:

Table 3.3: Analysis of VM’s headline packages 1 September 2016 to 30 June 2017

	# of Headline packages	(i) ETCs higher than monthly subscription price		(ii) ETCs higher than monthly subscription price less VAT ²⁵	
		No. of packages	% of headline packages	No. of packages	% of headline packages
Solus	14	6	43%	9	64%
Dual-play	38	17	45%	17	45%

²² First Notice, Questions 1-7.

²³ In the interests of proportionality, VM provided data for ‘headline packages’, namely its fixed term contracts available across all sales channels, but excluding any promotional elements that do not impact the price a customer pays (e.g. free content for X months, free hardware).

²⁴ This calculation is based on the following data submitted by VM in response to the First Notice. For headline packages, we calculate that the total number of subscribers on a fixed term commitment period as of June 2017 was [3<]. VM Second Response, Question 4, “Annex 2 - response to Q4, Q7 (FC)_Updated 301117_Highlighted”. VM’s First Response, Question 6, indicated that for all packages, the total number of subscribers on a fixed term commitment period as of June 2017 was 2,684,583, “Annex 4 - response to Q4_6_agg_Updated 301117_Highlighted”.

²⁵ Note that these figures also include the numbers in column (i).

Triple-play	60	17	28%	36	60%
Total	112	40	36%	62	55%

Source: Ofcom analysis based on the Second Response.²⁶

Data from VM’s review of its ETCs during the Relevant Period

- 3.27 In October 2017, VM told Ofcom that it had “commenced a programme to identify and reimburse those customers who have been charged an ETC in excess of permissible levels”.²⁷ In December 2017, VM explained to Ofcom that it was comparing all ETCs for the period September 2016 to August 2017 with ETCs based on its new calculation methodology (captured in the ETC rate card published on 22 August 2017). Where the ETC actually charged was greater than the ETC calculated in accordance with the new methodology, VM refunded the customer the difference plus an annual interest rate of 1.75%.²⁸
- 3.28 Data from VM’s review reveals that 146,706 customers were charged an ETC during the Relevant Period.²⁹ Of these, 56% were charged an amount higher than the amount calculated under VM’s new methodology.
- 3.29 Table 3.4 below summarises the number and proportion of customers who were overcharged.

Table 3.4: VM analysis of number of customers overcharged over the Relevant Period³⁰

	Number of customers	Proportion of all ETCs charged over the Relevant Period
ETCs higher than monthly subscription	52,055	[30-40]%
ETCs higher than monthly subscription less VAT	68,103	[40-50]%
ETCs higher than monthly subscription less VAT and all cost savings	81,994	[50-60]%

Source: Ofcom’s calculations based on VM’s Fourth Response, and Follow-up Fourth Response, 6 April 2018

Number of customers who paid too much and amount of the overcharge

- 3.30 Our analysis of VM’s headline packages indicates that 40 (36%) of those packages had ETCs which were set at a level which was higher than the customer’s monthly subscription price

²⁶ Second Response, “Annex 1 - response to Q1-3_Updated 301117_Highlighted”. We consolidated and cleaned the data submitted by VM. Then we calculated the numbers in columns (i) and (ii).

²⁷ First Response, question 13 cover letter.

²⁸ December 2017 Meeting Slides, slide 9.

²⁹ Follow-up Fourth Response, 6 April 2018. This figure provided by VM represents the period 1 September 2016 to 31 August 2017 inclusive.

³⁰ We understand that the data provided in the Fourth Response on which this table is based covers the period 1 September 2016 to 31 August 2017. This relates to the number of customers who were charged an ETC higher than their monthly subscription and higher than their monthly subscription less VAT. However, we do not consider this to have had a material impact on the results because VM mentioned that ETCs were over-recovered for a small number of customer accounts during the period 23 August 2017 to 31 October 2017. See Third Response, question 5.

(see Table 3.3) and VM's review found that just over 52,000 customers were charged an ETC which was above their monthly subscription price during the Relevant Period (see Table 3.4). This represents around [30-40]% of all the ETCs VM charged to customers during that period.

- 3.31 We also found that more than half of VM's headline packages (55%) had ETCs which were set at a level which was higher than the customer's monthly subscription price less VAT during the Relevant Period (see Table 3.3). This proportion includes the packages which we found had an ETC above the monthly subscription price.
- 3.32 VM's review found that 68,103 customers were charged an ETC which was above their monthly subscription price less VAT during the Relevant Period (see Table 3.4). This represents [40-50]% of VM's customers who were charged an ETC during the Relevant Period. These figures include the customers who were found to have been charged an ETC higher than their subscription price.
- 3.33 VM's ETC rates set on 22 August 2017 are calculated using a methodology which takes account of the following cost savings accruing to VM as a result of no longer having to provide a service to the customer due to early termination of a fixed term contract:
- a) variable costs of sale, e.g. TV Content costs, interconnection charges;
 - b) network capacity savings;
 - c) savings from early return of equipment (e.g. wireless router, TV set-top box);
 - d) savings from early payment; and
 - e) for customers paying an ETC because they are moving home, savings from VM's ability to gain a customer at the vacated premise (the home move replacement acquisition).³¹
- 3.34 Data from VM's review reveals that during the Relevant Period, 81,994 customers were charged an ETC which was above their monthly subscription price (excluding VAT) less these additional cost mitigations (see Table 3.4). This represents [50-60]% of all VM customers who were charged an ETC during the Relevant Period. These figures include the customers charged an ETC above their subscription price or above their subscription price less VAT.
- 3.35 As noted at paragraph 3.11 above and Annex 4, VM charged these ETCs under the rate cards published on 1 September 2016 and 20 March 2017. These ETC rate cards applied to VM's customers on fixed term contracts during the Relevant Period.³² Accordingly, the number of customers who were overcharged by VM in this way is substantially lower than the number of VM's customers during the Relevant Period who were subject to published ETC rates under VM's terms and conditions which had been set by reference to prices higher than their monthly subscriptions. Analysis commissioned by VM has estimated it averaged [3<]m customers who were within a fixed term contract during the Relevant

³¹ December 2017 Meeting Slides, slide 8 and Third Response, Q7 and 8.

³² See Conditions M12 and M13 of VM's terms and conditions applicable during the Relevant Period.

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Period and that in each month of the Relevant Period, an average of about [30% of these] customers would have been required to pay an unduly high ETC under their terms and conditions if they had wanted to switch provider.³³

3.36 We discuss the impact of VM's ETCs on consumer switching rates in Section 5 of this document.³⁴

3.37 In terms of the amount of the overcharge, VM has told us that the total was £2,790,613.³⁵ This breaks down as follows:³⁶

- a) £985,465 is the total overcharge paid by consumers who were charged an ETC higher than the subscription payments due for the remainder of the fixed term;
- b) £413,349 is the total overcharge paid by consumers who were charged an ETC higher than the subscription payments due for the remainder of the fixed term less VAT;³⁷ and
- c) £1,391,799 is the total overcharge paid by consumers who were charged an ETC higher than the subscription payments due for the remainder of the fixed term less VAT and the cost savings accruing to VM saved as a result of the early termination.³⁸

3.38 These consumers were overcharged £34 on average. Over 23,500 customers were overcharged by more than £50; of these, 6,508 were overcharged by more than £100.³⁹ In terms of the scale of these overcharges relative to VM's retail prices for its services, the average overcharge is more than the monthly price of VM's cheapest triple play package during the Relevant Period;⁴⁰ an overcharge of £50 or more is more than the monthly price of VM's Mix triple play package during the Relevant Period;⁴¹ and an overcharge of more than £100 would have paid for almost two months of VM's most expensive triple play package.⁴²

Ofcom's decision

3.39 The evidence set out above establishes that during the period between 22 September 2016 to 22 August 2017, VM set and charged ETCs which were higher than the amounts that its

³³ Charles Rivers Associates: Impact of Virgin Media "ETC Over-Recovery" on Customer Switching, (4 October 2018 version), p.24 ('CRA Report').

³⁴ In particular see also paragraph 5.33 below.

³⁵ Follow-up Fourth Response, 6 April 2018. At paragraph 4.51 and 9.10 of VM's Written Representations, it stated it had refunded or made payments to charity in respect of 98.2% of those customers overcharged and it continues to trace the remaining affected customers.

³⁶ The breakdown is Ofcom's estimates based on the data provided by VM in the Fourth Response, question 1 and the Fifth Response, question 1.

³⁷ Figure excludes customers paying an ETC higher than the remaining subscription payments.

³⁸ Figure excludes customers paying an ETC higher than the remaining subscription payments and those paying an ETC higher than the remaining subscription payments less VAT.

³⁹ Third Response, Question 15. In the Fourth Response, VM revealed that the information it had provided in the Third Response about the number of customers it had refunded included customers who had been on a rolling 30 day contract. However, we expect the vast majority of customers who were refunded amounts in excess of £50 to have been on fixed term contracts because of the more limited liabilities associated with the termination of rolling contracts.

⁴⁰ VM's Player package which cost £29 per month from 1 November 2016 (Table 3.2)

⁴¹ £47 per month from 1 November 2016 (Table 3.2)

⁴² VM's Full House package which cost £60 per month from 1 November 2016 (Table 3.2).

customers had agreed to pay under their fixed term contracts. VM agreed one retail price with its fixed term customers but treated them as if they were paying another higher price, if they wanted to leave. This led to its ETCs being higher than they would have been if it had calculated them by reference to the correct price and in accordance with its terms and conditions.

- 3.40 As shown by the data at paragraphs 3.27 – 3.29 above, the scale of the overcharging by VM was material, in terms of the number of customers affected, the amounts overcharged and the period over which it occurred. VM imposed an undue cost on more than 80,000 customers that they should not have incurred as a result of switching.

VM's Representations

- 3.41 VM has admitted the factual findings that Ofcom had made about the extent to which it had overcharged its customers as a result of the ETCs that it set and charged during the period between 22 September 2016 and 22 August 2017. However, in its Representations, it contended that the additional costs it imposed on its customers did not act as disincentive to switch in breach of GC 9.3.
- 3.42 It contended that the underlying purpose of Article 30(6) of the Universal Service Directive (which GC 9.3 implements) is to enable consumers to benefit from competition.⁴³ Accordingly, VM said:

“When considering whether conduct contravenes GC9.3, it is therefore necessary to consider whether or not that conduct results in consumers being unable to take full advantage of the competitive environment (at a time outside the initial commitment period) by making informed choices and changing provider if they wish to do so.”⁴⁴

- 3.43 Based on its purposive interpretation, VM made a number of challenges to Ofcom's interpretation of GC 9.3, which fall into three main limbs:
- i) The obligation in GC 9.3 is stated to be *“Without prejudice to the initial commitment period”*. Because of this carve out, the obligation under GC 9.3 is not engaged in respect of conditions and procedures for contract termination which apply during that period.⁴⁵
 - ii) Where a CP overcharges a consumer in respect of ETCs during the initial commitment period, that is a matter for generally applicable consumer law, contract law and/or the law of restitution. By seeking to apply GC 9.3, Ofcom has taken a novel, convoluted and unduly expansive interpretation, which is contrary to the principle of legal certainty and unlawfully duplicates national law, in breach of Article 6(3) of the Authorisation Directive.⁴⁶

⁴³ VM's Written Representations, paragraph 3.21.

⁴⁴ VM's Written Representations, paragraph 3.22.

⁴⁵ VM's Written Representations, paragraphs 3.60 – 3.70.

⁴⁶ Directive 2002/20/EC. See VM's Written Representations, paragraphs 3.27 – 3.59.

iii) Even if VM is wrong about the scope of GC 9.3, Ofcom has failed to show, on the basis of strong and convincing evidence, that the ETCs which VM set and charged during the Relevant Period had a material effect in terms of preventing or deterring its customers from changing provider. The econometric analysis commissioned on behalf of VM shows that the impact of its ETCs on its customers during the Relevant Period was *de minimis*.⁴⁷

3.44 VM has also said that it had no “*procedural obligation*” under GC 9.3 to ensure that its conditions and procedures for contract termination did not act as a disincentive to switch. Its obligation is confined to the substantive requirement not to have conditions and procedures which disincentivise switching. It was therefore wrong for Ofcom to identify a separate contravention arising from VM’s failure to identify the error in relation its ETCs during the Relevant Period.⁴⁸

Ofcom’s response

3.45 We are satisfied that ETCs which a CP charges when a consumer terminates a fixed term contract may be subject to the substantive obligation under GC 9.3. We deal first with the purpose of this obligation before addressing each limb of VM’s challenge.

Purpose of GC 9.3

3.46 GC 9.3 implements Article 30(6) of the Universal Service Directive.⁴⁹ This provision was introduced as a result of amendments made to the Universal Service Directive by the Citizens Rights Directive 2009/136/EC. The policy objective behind the provision is set out in the recitals as follows:

“In order to take full advantage of the competitive environment, consumers should be able to make informed choices and to change providers when it is in their interests. It is essential to ensure that they can make informed choices without being hindered by legal, technical or practical obstacles, including contractual conditions, procedures, charges and so on. This does not preclude the imposition of reasonable, minimum contractual periods in consumer contracts.”⁵⁰

3.47 In light of that recital, we regard consumer protection to be the primary purpose of Article 30(6).⁵¹ The protection it provides is ensuring that consumers are able to switch easily between communications providers and do not face obstacles from their existing provider

⁴⁷ VM’s Written Representations, paragraphs 3.71 – 3.81 and 4.54 – 4.73.

⁴⁸ VM’s Oral Representations, pp. 26–27.

⁴⁹ Directive 2002/22/EC.

⁵⁰ Directive 2009/136/EC, recital 47.

⁵¹ This is confirmed by section 51(1)(a) and (2)(h) of the Act, which specify that Ofcom’s power to set general conditions for protecting end-users of communications services incorporates its power to set conditions to ensure that conditions and procedures for contract termination do not act as a disincentive against changing provider.

that would make that process more difficult.⁵² This purpose must be construed in accordance with the overarching regulatory objectives of the European Regulatory Framework, specifically the objective of “ensuring a high level of protection for consumers in their dealings with suppliers...” under Article 8(4)(b) of the Framework Directive.⁵³

- 3.48 By facilitating switching in this way, consumers are better able to reap the benefits of competition between providers and so the obligation also complements the competition objectives of European Regulatory Framework.⁵⁴ Nonetheless, because of its consumer protection purpose, when considering the application of GC 9.3, the primary focus should be whether a CP’s conditions and procedures for contract termination hinder switching for a consumer, making it more expensive, time-consuming or difficult than the consumer is entitled to expect, not whether the conditions or procedures in question have an adverse effect on the process of competition, as VM has contended.⁵⁵
- 3.49 VM has contended that the purpose of GC 9.3 is “to take full advantage of the competitive environment (at a time outside the initial commitment period).”⁵⁶ However, we do not consider that the objective of ensuring that consumers do not face obstacles to switching is only engaged after the initial commitment period has ended. Consumers may consider switching at any time and will typically do so as they approach the end of their initial commitment period. It cannot be the case, as VM contends, that consumers should be deprived of the benefits of GC 9.3 until after their initial commitment period has come to an end. We discuss in the next subsection how the obligations in GC 9.3 fit with the provision of a carve out in relation to the initial commitment period.

Application of GC 9.3 to conditions and procedures for contract termination during an initial commitment period

- 3.50 The opening words to GC 9.3 (“Without prejudice to the initial commitment period...”) expressly permit CPs to enter into fixed term contracts with their customers, provided the term of these contracts is no longer than two years.⁵⁷ We agree with VM that where a customer decides to terminate their contract before the end of the initial commitment period in order to switch to another provider, the CP is entitled to charge the customer an ETC under its conditions for termination which apply during the initial commitment period. This is not what happened in this case.
- 3.51 In this case, the ETCs which VM’s customers agreed to pay under what was clause M13 of its terms and conditions in the Relevant Period were no higher than a charge calculated from their subscription charge less cost savings accruing to VM as a result of termination. However, VM set and charged its customers ETCs that were higher than this.

⁵² This view coincides with observations about the switching provisions in the Universal Service Directive in the Commission Staff Working Document: Evaluation of the regulatory framework for electronic communications 14.9.16 (‘Commission Staff Working Document’) – see pp 15, 79, 107, 131.

⁵³ Directive 2002/21/EC.

⁵⁴ Commission Staff Working Document, p.79.

⁵⁵ VM’s Written Representations, paragraphs 3.22 - 3.24.

⁵⁶ VM’s Written Representations, paragraph 3.22.

⁵⁷ The maximum length of the initial commitment period is specified in GC C1.4 (previously GC 9.4).

- 3.52 Accordingly, the ETCs do not fall within the carve out, as VM has contended, since they exceeded the sums which should have been payable if they had been set in accordance with VM's terms for contract termination applicable during the initial commitment period. The ETCs made switching more expensive for its customers than they were entitled to expect and are therefore subject to, and in this case in breach of, GC 9.3.

Duplication with general consumer law, contract law and the law of restitution

- 3.53 Article 6(3) of the Authorisation Directive does not prevent the application of GC 9.3 to conditions and procedures for contract termination that may also be subject to consumer law. GC 9.3 is a sector-specific provision which copies out the minimum harmonised requirements of Article 30(6) of the Universal Service Directive. These apply to contract terms and charges *in addition* to the separate, substantively different and less stringent requirements of unfair contract terms law (which themselves provide that Member States may adopt stricter rules).⁵⁸
- 3.54 The methodology we adopted in the Section 96A Notification for assessing VM's ETCs is similar to the principles set out in Ofcom's guidance on unfair terms in contracts for communications services.⁵⁹ However, we used the methodology to identify ETCs which act as a disincentive to switch, not to consider whether they are fair (which is a different legal test). Article 6(3) of the Authorisation Directive prohibits duplication between the *conditions* with which a CP must comply under the general authorisation and the requirements of generally applicable national law. It does not regulate the methodology that Ofcom uses to identify whether there is a breach of a sector specific condition which is distinct from the requirements of general national law.
- 3.55 In any event, regardless of the methodology used by Ofcom for the purposes of the Section 96A Notification, VM has accepted that it set its ETCs by reference to amounts higher than the customer's monthly subscription price: it agreed one retail price with its fixed term customers but treated them as if they were paying another higher price, if they wanted to leave. This led to its ETCs being higher than they would have been if it had calculated them by reference to the correct price and in accordance with its terms and conditions. Consequently, VM's customers faced charges higher than they were entitled to expect if they wanted to switch to another provider.
- 3.56 VM said that the overcharging was a mistake and not covered by consumer law but by general contract law and/or the law of restitution.⁶⁰ If that is correct, there can be no duplication between GC 9.3 and general consumer law on unfair terms in any event. Nor is there an unlawful duplication with the law of contract and/or restitution. The latter requires individual consumers to take action to secure a remedy in response to VM's unjust enrichment. GC 9.3 applies a different, sector-specific rule prohibiting disincentives to

⁵⁸ Article 8 of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts states: "*Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.*"

⁵⁹ https://www.ofcom.org.uk/data/assets/pdf_file/0019/74701/guidance_from_1_october_2015.pdf

⁶⁰ VM's Written Representations, paragraphs 3.56 – 3.59.

switch, which is imposed pursuant to the European Regulatory Framework, in pursuit of its regulatory objectives and in respect of which Ofcom has enforcement powers on behalf of consumers collectively.

- 3.57 Where a CP imposes an additional charge for termination in breach of its contract with its customers which makes switching CP more expensive than they were entitled to expect, it is not the case, as VM has argued, that the customer's only option is to pursue a remedy individually under the law of contract or restitution. In addition to the higher charges that the customer had to pay to switch to another provider, the customer would then be obliged to engage in a procedure including, potentially, going to court for damages for breach of contract and/or for restitution for unjust enrichment, if VM had failed to remedy the harm it caused. This would not be in the best interests of VM's customers. Legal action is invariably time-consuming and often complex and expensive. For most consumers, it would be a daunting prospect and would itself be likely to cause "*undue effort, disruption and anxiety.*" VM's narrow reading of its obligations under the European Regulatory Framework would defeat the purpose of GC 9.3, which is to ensure that switching operates smoothly in the interests of consumers.
- 3.58 VM contended that GC 9.3 and Article 30(6) are "*principles-based rules*", which in the absence of specific guidance, can give rise to uncertainty. It said that Ofcom's application of GC 9.3 was novel and contrary to the principal of legal certainty.⁶¹ However, the provisions are not so ambiguous that it is impossible for CPs to know how they might be applied.
- 3.59 First, it is clear that ETCs set by CPs are part of their conditions and procedures for contract termination and therefore, subject to the application of the carve out, plainly within scope.⁶² VM has submitted that GC 9.3 can only be applied to contractual conditions and established procedures for termination so that an unintended failure to apply such conditions or procedures is not subject to the rule.⁶³ We consider that this fails to give sufficient weight to the purpose of the provision. Further, the ETCs plainly represented an "*established way of doing something*",⁶⁴ given that VM published the ETCs on its website and charged them to more than 80,000 fixed term customers over a period of 11 months.
- 3.60 Second, where the established procedure of a CP in relation to contract termination is to have ETCs which are higher than the amounts its fixed term customers have agreed to pay, it is self-evident that those ETCs may act to disincentivise switching in breach of GC 9.3, by imposing an undue cost when a customer seeks to change provider. It is not necessary for Ofcom to issue guidance to make this clear.

⁶¹ VM's Written Representations, paragraphs 3.27 – 3.40.

⁶² Recital 47 of the Citizens Rights Directive states expressly that Article 30(6) may apply to charges. See also Ofcom, *Changes to the General Conditions and Universal Service Conditions*, 25 May 2011, paragraph 7.76 where Ofcom identified ETCs as contractual conditions that can act as a disincentive.

⁶³ VM's Written Representations, paragraph 3.26.

⁶⁴ VM's Written Representations, paragraph 3.26(a)(ii).

- 3.61 Furthermore, it is not practicable for the regulator to identify an exhaustive list of all the circumstances in which GC 9.3 will apply and issue guidance on its application to each set of facts before taking enforcement action on the basis of those facts. It is sufficient that the assessment is carried out by reference to transparent and objective factors.⁶⁵
- 3.62 VM argued that Ofcom took a different approach in relation to automatically renewable contracts (ARCs), where it issued a policy statement and set a specific general condition (previously GC 9.6). VM said that Ofcom’s failure to take a similar approach in relation to the application of GC 9.3 to its ETCs is inconsistent and discriminatory, in breach of Ofcom’s regulatory principles. However, the work that led to the ARC statement began in 2008, three years before implementation of GC 9.3.).⁶⁶ At the time, they were a widespread industry practice that required a different intervention.
- 3.63 In conclusion, we do not agree with the legal arguments that VM has made about why we are unable to take enforcement action against it under GC 9.3 in relation to its unduly high ETCs. The payment of an ETC by a customer terminating its fixed term contract is typically the result of a switching decision by that customer. By setting and charging ETCs in the that were materially higher than the amounts that its customers on fixed term contracts had agreed to pay, VM increased their switching costs and we are satisfied that this contravened GC 9.3.

Effect of VM’s ETCs on customer switching

- 3.64 In its Representations, VM submitted that there is European jurisprudence which establishes that the national regulatory authority (NRA) must demonstrate the disincentive effect that results from the condition or procedure in question, by means of “*evidence of a material effect on switching*”.⁶⁷
- 3.65 As regards the application of GC 9.3, the European case law to which VM has referred is authority only for the proposition that the NRA must assess by reference to clear and objective factors whether conditions or procedures for contract termination act as a disincentive to switch.⁶⁸ Our analysis at paragraphs 3.19 – 3.38 above satisfies this test since it assesses VM’s ETCs by reference to VM’s own terms and conditions, the subscription charges for VM’s headline packages, VAT and VM’s revised ETC methodology which takes account of the cost savings detailed at paragraph 3.33 above.
- 3.66 A disincentive need not necessarily delay or prevent a course of action – it may just make it more difficult or costly to complete.⁶⁹ As recital 47 of the Citizens Rights Directive⁷⁰ explains, the requirements are imposed because it is important that consumers are able to

⁶⁵ Case C-99/09 *Polska Telefonia* (Opinion of Advocate General (AG) Bot, 15 April 2010), paragraphs 52 and 55.

⁶⁶ VM’s Written Representations, paragraphs 3.35 – 3.38.

⁶⁷ VM’s Oral Representations, page 29. See also VM’s Written Representations, paragraphs 3.76 – 3.81.

⁶⁸ Case C-99/09 *Polska Telefonia* (Judgment of 1 July 2010; AG Opinion, 15 April 2010).

⁶⁹ According to the Shorter Oxford English Dictionary, a disincentive is, “*a source of discouragement, esp. in an economic or commercial matter.*”

⁷⁰ Directive 2009/136/EC.

make and give effect to informed choices without hindrance. Accordingly, where the source of discouragement is established by reference to clear and objective factors, that is sufficient to demonstrate a breach even if the discouragement does not prevent or delay switching in most cases.

- 3.67 In any event, analysis commissioned by VM⁷¹ shows that its ETCs delayed just under [8<] customers from switching for a period of time during the Relevant Period.⁷² This equates to a reduction of a tenth in the switching rates of those customers in fixed term contracts whose ETC had been set too high, compared to the switching rates that would have occurred if ETCs had been set correctly during the Relevant Period.⁷³ We consider the scale of this impact is material in terms of the number of customers affected.⁷⁴ Moreover, the analysis uses a particular econometric specification and model, and alternative specifications or models not included in the analysis might yield a larger impact (although we do not dispute the broad order of magnitude of the results).⁷⁵
- 3.68 We also disagree that it is necessary to show that the conditions and/or procedures for contract termination under investigation have an effect on competition. As we have explained, the primary purpose of GC 9.3 is consumer protection, ensuring that consumers can change providers when it is in their interests without being hindered by legal, technical or practical obstacles. Where the CP's conditions or procedures create such obstacles, that is sufficient to establish a breach.

VM's on-going obligations under GC 9.3

- 3.69 The CP's obligations under GC 9.3 include an ongoing responsibility to ensure that its conditions and procedures for contract termination do not act as a disincentive to switch.⁷⁶ In view of our findings that the ETCs set by VM during the period 22 September 2016 to 22 August 2017 acted as a disincentive to switch, it has not been necessary to consider whether the evidence about VM's actions during this period amount to a separate contravention. We consider this evidence instead as part of our assessment of penalty in Section 5.

⁷¹ See for example, CRA Report, paragraph 19.

⁷² For the purpose of calculating the number of customers who were deterred from switching, the analysis commissioned by VM employed an estimate of the average overcharge of £35.80. This is slightly higher than our calculation of the average overcharge (£34) paid by customers who switched during the Relevant Period. For the reasons noted in this paragraph, we do not consider this alters the broad order of magnitude of the results.

⁷³ Based on calculations from the analysis commissioned by VM. See paragraph 5.33 below.

⁷⁴ See paragraph 5.33 below.

⁷⁵ We also note the unduly high ETCs may have generated wider or longer-term impacts on switching due loss of trust or the development of other negative perceptions about the switching process. This analysis would not capture such effects.

⁷⁶ In Case C-99/09 *Polska Telefonia*, paragraph 41, AG Bot characterised the obligation of the NRA under identical wording in Article 30(2) as "*their supervisory duty to monitor*".

Confirmation Decision

- 3.70 Having considered VM's Representations and in view of the findings of fact we have made and which are accepted by VM, we are satisfied VM's ETCs in the Relevant Period are subject to the substantive requirements of GC 9.3.
- 3.71 We therefore confirm that by setting and charging ETCs that were above the sums that should have been charged if VM had calculated its ETCs correctly and in accordance with its terms and conditions during the Relevant Period, VM's conditions and procedures for contract termination acted as a disincentive for its customers against changing provider, in contravention of GC 9.3.

4. Contravention of GC 9.2(j)

- 4.1 We have found that VM contravened GC 9.2(j) between 1 September 2016 and 20 March 2017 by:
- i) publishing an ETC rate card on its website that was not clear and comprehensive; and
 - ii) failing to publish up-to date information about its ETC rates.

General Condition 9.2(j)

- 4.2 GC 9.2(j) says:

“Any contract concluded after 25 May 2011 between the Communications Provider and a Consumer, and other End-Users on request, shall specify at least the following minimum requirements in a clear, comprehensive and easily accessible form: ...

(j) the duration of the contract, and the conditions for renewal and termination of the services and of the contract, including: ...

(iii) any charges due on termination of the contract, including any cost recovery with respect to terminal equipment”

- 4.3 This General Condition implements Article 21.1 of the Universal Service Directive.⁷⁷ Recital 32 of Directive 2009/136/EC explains the objective of the requirement as follows:

“The availability of transparent, up-to-date and comparable information on offers and services is a key element for consumers in competitive markets where several providers offer services. End-users and consumers of electronic communications services should be able to easily compare the prices of various services offered on the market based on information published in an easily accessible form.”

- 4.4 GC 9.2 sets out certain minimum requirements that CPs must specify in a “clear, comprehensive and easily accessible form” in their consumer contracts. These minimum requirements include, at paragraph (j)(iii) of GC 9.2, any charges due on termination. Accordingly, VM is required to set out the ETC which is payable in the event of the early termination of a fixed term contract in a clear, comprehensive and easily accessible form.

Relevant facts

- 4.5 The ETC rate card that was published on VM’s website from 1 September 2016 until 20 March 2017 is set out in Table A4.1 of Annex 4. The rate card lists different service tiers for each element of its packages. For its phone and broadband services, VM used ‘T-shirt sizes’

⁷⁷ Directive 2002/22/EC, as amended by Directive 2009/136/EC.

– S/M/L etc. – to distinguish between different tiers. VM has admitted that this nomenclature did not match the names VM gave to its phone and broadband contracts, where it made use of its VIVID branding.⁷⁸

- 4.6 As a result of the investigation, we obtained internal correspondence from VM that revealed that this mismatch had led to complaints from VM’s customers about the clarity of its published ETC rate card. The basis of the complaints was that the T-shirt sizes used for ETCs did not match the VIVID names of the packages purchased by the customers and therefore they were unable to determine which ‘T-shirt size’ ETC applied to their particular package.⁷⁹ In an internal email dated 2 February 2017, VM acknowledged that this complaint had some force:

“Yes it was advice on how best to display the EDFs to customers, I’ve included the current table below. You’ll see what I mean when I say ‘t-shirt size’, when we talk to customers about their BB we’d usually describe it by the speed eg VIVID Optical Fibre 200. If a customer was to look at this table there would be no way of knowing where their VIVID 200 fell. Simple answer would be to replace all the ‘t-shirt sizing’ with however it appears on the customer bill/contract...”⁸⁰

- 4.7 Subsequent internal correspondence indicates that VM changed the information on its ETC rate card to address this issue and this resulted in the ETC rate card that was published on 20 March 2017 (see Table A4.2 of the Annex 4).⁸¹ Specifically, VM replaced the T-Shirt sizing for its ETCs with the specific ‘VIVID’ broadband product names of the packages to which the ETCs applied, e.g. “VIVID 50” or “VIVID 300”.
- 4.8 We also obtained from VM evidence that it changed its prices for some of its fixed term contracts in November 2016. At the same time, it also changed the ETCs that it charged for its phone and broadband services.⁸² However, these changes were not published on its website until 20 March 2017, more than four months later. As a result, some of the ETCs that VM set and charged for its fixed term contracts were not easily accessible because the ETC rate card that VM published on its website between 1 November 2016 and 20 March 2017 contained out-of-date-information.
- 4.9 The table below sets out examples of how the VM’s rate cards were amended in the changes made on 20 March 2017.

⁷⁸ VM’s Written Representations, paragraph 7.11.

⁷⁹ First Response, question 8, VM0002 and VM0004 (email from [VM employee] to [Senior Commercial Manager], dated 2 February 2017, 16:24).

⁸⁰ First Response, question 8, VM0004 (email from [VM employee] to [Senior Commercial Manager], dated 2 February 2017, 16:24).

⁸¹ See First Response, question 8, VM0002, VM00004, VM0005, VM0008, VM00010, VM00012, VM00013, VM00016 and VM00017 (email from [Senior Commercial Manager] to [VM employee], dated 16 March 2017)

⁸² See paragraphs 3.17 – 3.18 and the evidence cited at footnote 20.

Table: 4.1: VM ETC rate card examples⁸³

1 November 2016 – 20 March 2017			20 March 2017 to 21 August 2017	
Webpage description	Published ETC rate card	Actual rate card	Webpage description	Published & actual ETC rate card
XL	£20	£21.50	VIVID 100/150	£21.50
XXXL	£35	£36.50	VIVID 300	£36.50

Ofcom's decision

4.10 In the light of this evidence, we found that VM had failed to publish clear and comprehensive information about its ETCs and had failed to provide in an easily accessible form up-to-date information about the ETCs that it charged from 1 November 2016 until 20 March 2017.

VM's Representations

- 4.11 In its Written Representations, VM accepted the factual findings made by Ofcom in that it admitted that the use of T-shirt sizing was no longer “*as obvious and intuitive to all customers as it had been*” following the introduction of its VIVID brand and that it did not publish the November 2016 changes to its ETCs until March 2017.⁸⁴ However, it said the finding of a contravention of GC 9.2(j)(iii) was unfounded and disproportionate.⁸⁵
- 4.12 VM contended that T-shirt sizing is a widely adopted method of communicating VM's package sizes. It said that the “*vast majority – appear to have had no problem navigating the ETC rate card*”.⁸⁶
- 4.13 VM said that Ofcom's provisional finding of breach was disproportionate. After receiving one customer complaint about the T-shirt sizing used to categorise ETC rates, VM had acted swiftly to rectify the situation.⁸⁷ There is no evidence of any impact on customers before the complaint was received in January 2017 and VM should be allowed a reasonable interval to implement changes once it becomes aware of customer confusion. Further, the ETCs which VM failed to publish were wrong and VM should not be punished for failing to publish incorrect information.⁸⁸

⁸³ Taken from Tables A4.1 and A3.2 in Annex 4.

⁸⁴ VM's Written Representations, paragraphs 7.11 - 7.13.

⁸⁵ VM's Written Representations, paragraph 7.45.

⁸⁶ VM's Written Representations, paragraph 7.20.

⁸⁷ In its Oral Representations, VM suggested that only 1 customer complaint had been made about the issue. However, as it acknowledged in its Written Representations, paragraph 7.25, the correspondence revealed that a number of complaints were made about the issue before it was resolved. See First Response, question 8, VM0002.

⁸⁸ VM's Written Representations, paragraphs 7.23 -7.31.

Ofcom's response

- 4.14 The purpose of the transparency obligations in GC 9.2 is to give consumers clarity about the nature of the communications services they are buying and the terms on which they are buying them, including the price they are paying and the charges they have to pay on termination (including ETCs). This gives consumers legal certainty and enables them to optimise their choices.⁸⁹
- 4.15 The use of T-shirt sizing may be an appropriate means for denoting different product types or service levels. In this case, VM used T-shirt sizing to denote different ETC rates that were payable in the event of contract termination and this could have been appropriate in different circumstances. However, in this case the names of the VM broadband contracts to which the ETCs related were different (VIVID 200, VIVID 300 etc). As a result, a customer looking for their applicable ETC would have no way of identifying which 'T-shirt sized' ETC related to their particular VIVID broadband contract (as VM correctly observed in the contemporaneous internal correspondence referred to at paragraph 4.6 above).
- 4.16 As noted at paragraph 4.4 above, GC 9.2(j) specifies minimum requirements that a CP must meet in respect of the information it publishes about its contractual terms. If the information that the CP publishes does not meet these requirements, there is a contravention of the General Condition. It is not necessary to show what impact the failure may have had on VM's customers.
- 4.17 The impact of the contravention and the other matters raised in VM's Representations set out at paragraph 4.13 above are relevant to the assessment of penalty and we consider them in that context in Section 5.

Confirmation of contravention

- 4.18 Having considered VM's Representations and in light of the factual findings set out in paragraphs 4.5 – 4.9, we confirm that VM contravened GC9.2(j)(iii) from 1 September 2016 until 20 March 2017 because:
- i) it did not publish clear and comprehensive information about its ETCs; and
 - ii) it did not provide in an easily accessible form up-to-date information about its ETCs from 1 November 2016 to 20 March 2017.

⁸⁹ See recital 30, Universal Service Directive.

5. Penalty and remedial steps

Summary

- 5.1 Ofcom has decided to impose a penalty of **£7m** on VM for its contraventions of GC 9.3 and GC 9.2(j).
- 5.2 The seriousness of these contraventions merits a penalty. GC 9.3 and GC 9.2 are important provisions which give consumers buying communications services a high level of protection. VM's failure to comply with them has compromised the protection that should have been afforded to their customers and had the potential to undermine the objective of the measures, namely to empower consumers to obtain maximum benefits from a competitive market.
- 5.3 The number of customers overcharged, the total amount of the overcharge and the period over which the contravention of GC 9.3 occurred contribute to the seriousness of this breach. VM's breach of GC 9.2(j) is also serious in that it compromised the legal certainty that its customers should have about the terms and conditions of their contracts and hindered their ability to properly assess and compare VM's offerings with those of its competitors.
- 5.4 While we recognise that the contraventions we have found reflect poorly on VM and the way it has treated its customers, we do not accept that the findings alone are a sufficient deterrent. These were serious breaches that were harmful to VM's customers. VM is one of the largest communications providers in the UK, with millions of customers and relevant turnover in its last financial year of over £[~~8~~]bn. We are therefore satisfied that a substantial penalty is appropriate to act as an effective deterrent to prevent further wrongdoing by VM and the wider industry.
- 5.5 In setting the penalty, we have taken account of the action that VM has taken to remedy the consequences of its breaches. In relation to the contravention of GC 9.2(j), VM acted in response to customer complaints to clarify and rectify the information it provided on its website about its ETCs. In relation to the contravention of GC 9.3, VM has refunded those it overcharged with interest and has amended its methodology for calculating ETCs so that the amounts it charges are consistent with its contractual terms.
- 5.6 However, in relation to the contravention of GC 9.3, we consider that VM failed to take appropriate action to prevent the breach. Although the overcharging arose as a result of a mistake, VM's governance process, which involved the most senior members of the organisation, failed to spot the error and correct it both at the outset and on two further occasions when it exercised oversight of pricing and ETC changes.
- 5.7 We also regard as a serious matter the evidence that members of [the relevant commercial pricing team] were aware of the ETC overcharging in February 2017 but decided to address this by means of price rises in November that year.

- 5.8 VM has said that senior managers became aware of the issue on 11 May 2017 and took immediate action to resolve this issue.⁹⁰ This is not supported by the contemporaneous correspondence we have seen. In our view, VM did not engage in sustained and co-ordinated efforts to remedy the breach until Ofcom opened its investigation on 27 June 2017.
- 5.9 We have concluded that the failures of VM’s governance process to identify the ETC overcharging and [VM’s relevant commercial pricing team] to investigate and remedy the error when it came to light contributed to the duration of the contravention and the extent of harm to consumers.
- 5.10 We have therefore decided that these contraventions warrant a penalty:
- to reflect their seriousness and duration;
 - to reflect the degree of actual and potential harm to VM’s customers;
 - which takes into account VM’s size as a large and established communications provider, with an annual relevant turnover of over £[>]billion and millions of customers; and
 - which deters similar breaches of these regulatory obligations by other communications providers.
- 5.11 Accordingly, as set out more fully below, we have imposed on VM a penalty of **£7m**. We regard this as appropriate and proportionate to the contraventions we have found and consider it will incentivise VM and the wider industry to ensure that they are complying with GC 9.3 and GC 9.2(j) on an ongoing basis.

Decision to impose a penalty

- 5.12 Ofcom’s central objective of imposing a penalty for a contravention is deterrence, both in respect of the business required to pay the penalty and the wider industry.⁹¹
- 5.13 VM has argued that a penalty is not required in this case because the findings of contravention and the negative publicity they will attract, will have a significant cost for the company because of the reputational impact. VM says that as a result, the negative findings against them are a sufficient deterrent.⁹²
- 5.14 In its Oral Representations, VM explained that its philosophy is to be a consumer champion and so it is important to them “*at all times to do the right things by their customers*”.⁹³ Given this stated mission, we recognise that this Confirmation Decision, which reflects poorly on VM and its dealings with its customers, will have an adverse impact for the reputation of the company. We also acknowledge that there is already evidence of the

⁹⁰ VM’s Written Representations, paragraphs 6.12 - 6.13.

⁹¹ *Penalty Guidelines*, 14 September 2017, paragraph 1.4.

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

⁹² VM’s Written Representations, paragraphs 8.16 – 8.17.

⁹³ VM’s Oral Representations, page 33.

deterrent effect of Ofcom’s enforcement process, to the extent that VM has taken action in response to Ofcom’s investigation to remedy the breaches and improve its compliance processes (see paragraphs 5.75 – 5.78 below).

- 5.15 However, as we explain at paragraphs 5.24 – 5.27 and 5.81 – 5.90 below, these were serious breaches that compromised the protection that should have been afforded to VM’s customers. It is important that VM and the wider industry are deterred on an on-going basis from contraventions that have the potential to cause significant consumer harm. We are therefore satisfied that it is appropriate to impose a penalty in this case. This imposes a measurable financial cost on the company to remind it and others that it is not more profitable to break the law and pay the consequences, than it is to comply with the law in the first instance.⁹⁴

Penalty amount

- 5.16 In considering the level of penalty which should be applied, Ofcom has had regard to its published Penalty Guidelines.⁹⁵
- 5.17 We first consider deterrence and then assess the other factors set out in the Penalty Guidelines in the context of the contravention of GC 9.3. We then consider these factors to the extent they are relevant to specific aspects of the contravention of GC 9.2(j).
- 5.18 Finally, we set out more general considerations set out in the Penalty Guidelines (VM’s history of compliance and precedents).

Deterrence

- 5.19 As set out in the Penalty Guidelines, the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient 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 the regulatory requirements.
- 5.20 Any penalty that we set should therefore be sufficiently high to discourage bad conduct and incentivise VM’s management to encourage good practice and compliance across VM. The level of the penalty should be set at a level that highlights to VM’s senior management the adverse financial consequences of non-compliance. It should not be more profitable for the business to break the law and pay the consequence, than to comply with the law in the first instance.

⁹⁴ Penalty Guidelines, 14 September 2017, paragraph 1.5. This is not to suggest that the contraventions in this case were intentional.

⁹⁵ Section 392 of the Act requires Ofcom to prepare and publish guidelines for determining penalties under sections 96A to 96C of the Act. Section 392(6) of the Act requires us to have regard to those guidelines when determining such penalties. The current version of the Penalty Guidelines was published on 14 September 2017: <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines/penalty-guidelines>

Confirmation Decision

- 5.21 VM is one of the largest communications providers in the UK. As at 31 March 2018, it reported that it delivered services to 14.4m revenue generating units, consisting of 5.5m broadband customers, 4.8m fixed-line telephony services and 4.1m video customers.⁹⁶
- 5.22 Under section 97 of the Act, the maximum penalty Ofcom may impose on VM is 10 per cent of its turnover for its relevant business for the year ending 31 March 2018.⁹⁷ Taking account of VM's relevant turnover for the year ending 31 March 2017 (£[3<]bn)⁹⁸ and its published accounts for the year ending 31 December 2017, we have estimated the maximum penalty we could impose on VM for the contraventions identified in this Confirmation Decision at £[3<]m.
- 5.23 For the purpose of assessing the amount of the penalty that might serve as an effective deterrent to prevent further wrong-doing by VM, we have also considered the size of the gain it may have obtained from its wrongdoing. In this regard we have taken into account:
- a) the refund VM calculated it had to repay as a result of overcharging customers during the Relevant Period in respect of their ETCs;⁹⁹ and
 - b) the number of customers who may have been disincentivised from switching as a result of VM's ETCs during the Relevant Period.¹⁰⁰

Contravention of GC 9.3

Seriousness and consumer harm

- 5.24 GC 9.3 seeks to protect consumers by ensuring that a CP's conditions and procedures for contract termination do not increase switching costs or create barriers to switching, so that consumers are able to take full advantage of the competitive environment. Breaches of GC 9.3 cause consumer harm by increasing switching costs or raising barriers so it is harder for customers to switch, or by delaying or preventing switching decisions by consumers when it may be in their interests to do so. Contraventions of GC 9.3 also have the potential to harm competition by creating obstacles that make it harder for competitors to persuade consumers to switch to their competing services. Because of the impact on consumers and the potential impact on competition, a contravention of GC 9.3 is likely to be serious.
- 5.25 In this case, the contravention we have found increased the switching costs of VM's customers. The contravention is serious because of the number of customers whose switching costs were increased by VM's overcharging, the proportion of ETCs which

⁹⁶ Virgin Media Consolidated Financial Statements, March 31 2018, page 40 <https://www.libertyglobal.com/wp-content/uploads/2018/06/VirginMedia-Q1-2018-Report.pdf>

⁹⁷ This is the relevant period for the purposes of calculating the maximum penalty, as defined in section 97(5) of the Act. Since the penalty we have set is substantially below this indicative threshold, it has not been necessary to obtain turnover figures from VM for this period.

⁹⁸ First Response, question 15, Annex 32 – Relevant Turnover

⁹⁹ The aggregate amount of the refund is £2.7m – see paragraph 5.25a) below.

¹⁰⁰ We have calculated as a rough estimate that in the region [3<]m of VM's customers may have been disincentivised from switching – see paragraph 5.26 below.

included an overcharge, the total amount of the overcharge and the duration of the wrongdoing:

- a) during the Relevant Period, VM overcharged 81,994 customers that terminated their fixed term contracts. This represents [50-60]% of all the ETCs it charged to customers during the Relevant Period and amounted to a total of £2,790,613 of overcharging;
- b) based on the period of the investigation, the majority of the contraventions of GC 9.3 continued for a period of at least 11 months (22 September 2016 to 22 August 2017).

5.26 As set out at Table 3.3 above, we estimate 36% of headline packages had ETCs higher than monthly subscription prices and 55% had ETCs higher than monthly subscription prices minus VAT. Analysis commissioned by VM has estimated that in each month of the Relevant Period an average of about [30%] of its customers [in fixed term contracts] would have been required to pay an unduly high ETC under their terms and conditions if they had wanted to switch provider.¹⁰¹ We also estimate in the region of [3<]m customers were on a fixed term contract were subject to an unduly high ETC for at least one month in the Relevant Period.¹⁰²

5.27 VM has argued that for the purposes of assessing the seriousness of the contravention, Ofcom should disregard the overcharging since the customers who were affected managed to switch notwithstanding and have now been compensated.¹⁰³ VM's position reflects its unduly narrow view of the purpose of GC 9.3. As we have explained, the objective of the obligation is to facilitate switching for consumers from one provider to another by removing obstacles that make the process more expensive, time-consuming or difficult.¹⁰⁴ VM's contravention made switching more expensive for its customers than they were entitled to expect, in breach of GC 9.3. The overcharging was a sustained practice by VM, affecting tens of thousands of its customers and resulting in overcharging of almost £3m in total. The fact that these customers were able to switch is relevant to the degree of harm that they suffered but it does not reduce the overall seriousness of the contravention we have found. We consider the action that VM has taken to compensate its customers in paragraph 5.76 below.

5.28 In terms of the degree of harm caused to VM's customers by the contravention of GC 9.3, we have looked at the extent of the financial harm to VM's customers and the evidence submitted by VM about the impact on switching.

¹⁰¹ CRA Report.

¹⁰² Based on CRA's estimate that there were an average of [3<]m in-contract customers during the Relevant Period and our estimate (using data from the econometric analysis commissioned by VM) that [40-50]% of customers who were in-contract at some point during the Relevant Period were subject to unduly high ETCs.

¹⁰³ VM's Written Representations, paragraphs 8.21 and 8.34.

¹⁰⁴ See paragraph 3.47 – 3.48 above.

Financial harm

- 5.29 There was material financial harm to a substantial number of its customers on fixed term contracts during the Relevant Period. The overcharging breaks down as follows:¹⁰⁵
- a) £985,465 is the total overcharge paid by consumers who were charged an ETC higher than the subscription payments due for the remainder of the fixed term;
 - b) £413,349 is the total overcharge paid by consumers who were charged an ETC higher than the subscription payments due for the remainder of the fixed term less VAT;¹⁰⁶ and
 - c) £1,391,799 is the total overcharge paid by consumers who were charged an ETC higher than the subscription payments due for the remainder of the fixed term less VAT and the cost savings accruing to VM saved as a result of the early termination.¹⁰⁷
- 5.30 These consumers were overcharged £34 on average. Over 23,500 customers were overcharged by more than £50; of these, 6,508 were overcharged by more than £100.¹⁰⁸ In terms of the scale of these overcharges relative to VM's retail prices for its services, the average overcharge is more than the monthly price of VM's cheapest triple play package during the Relevant Period;¹⁰⁹ an overcharge of £50 or more is more than the monthly price of VM's Mix triple play package during the Relevant Period;¹¹⁰ and an overcharge of more than £100 would have paid for nearly two months of VM's most expensive triple play package.¹¹¹

Impact on switching

- 5.31 As set out at paragraph 3.31 above, more than half of VM's fixed term contracts had an ETC that was set at a level which breached GC 9.3. We also estimate in the region of [X]m customers on a fixed term contract during the Relevant Period were subject to an unduly high ETC for at least one month.¹¹²
- 5.32 Of those VM customers who were on fixed term contracts during the Relevant Period, the econometric analysis commissioned by VM calculates that about [X] customers delayed switching for a period of time during the Relevant Period as a result of the unduly high ETCs.

¹⁰⁵ The breakdown is Ofcom's estimates based on the data provided by VM in the Fourth Response, question 1 and the Fifth Response, question 1.

¹⁰⁶ Figure excludes customers paying an ETC higher than the remaining subscription payments.

¹⁰⁷ Figure excludes customers paying an ETC higher than the remaining subscription payments and those paying an ETC higher than the remaining subscription payments less VAT.

¹⁰⁸ Third Response, Question 15. In the Fourth Response, VM revealed that the information it had provided in the Third Response about the number of customers it had refunded included customers who had been on a rolling 30 day contract. However, we expect the vast majority of customers who were refunded amounts in excess of £50 to have been on fixed term contracts because of the more limited liabilities associated with the termination of rolling contracts.

¹⁰⁹ VM's Player package which cost £29 per month from 1 November 2016 (see Table 3.2 above)

¹¹⁰ £47 per month from 1 November 2016 (see Table 3.2 above)

¹¹¹ VM's Full House package which cost £60 per month from 1 November 2016 (see Table 3.2 above).

¹¹² See paragraph 5.26 and footnote 102 above.

- 5.33 VM has contended this number is small relative to the [X]m in-contract customers and the average of [30%] of [these] customers subject to unduly high ETCs each month during the Relevant Period (based on the results of the econometric analysis it commissioned).¹¹³ However, we consider that the more appropriate comparison, when looking at the impact that VM's ETCs had on consumer switching rates, is with the percentage of customers in fixed term contracts subject to unduly high ETCs who would have been expected to switch if VM had set ETCs correctly in accordance with its terms and conditions. The econometric analysis commissioned by VM reveals that only a small minority of these customers ([X]%) would have been expected to switch in any given month during the Relevant Period in any event. This compares with the average predicted monthly switching rate of [X]% for customers in months during the Relevant Period in which they faced over-recovery. Therefore, the reduction in switching rates for the affected customers which may be attributed to VM's unduly high ETCs is about one-tenth.¹¹⁴ We consider this is a material impact for the affected customers.
- 5.34 Further, the analysis uses a particular econometric specification and model, and alternative specifications and models not used in the analysis might yield a larger impact (although we do not dispute the broad order of magnitude of the results).
- 5.35 We also note the unduly high ETCs may have generated wider or longer-term impacts on consumer switching due loss of trust or the development of other negative perceptions about the switching process. These effects are not captured by the results of the econometric analysis commissioned by VM.
- 5.36 For the reasons set out above, we consider the degree of harm resulting from VM's contravention of GC 9.3 during the Relevant Period to be substantial.

Whether appropriate steps were taken to prevent the contraventions and whether senior management should have been aware

- 5.37 The contravention of GC 9.3 that we have found resulted from an error on the part of VM. As set out at paragraphs 3.12 – 3.14 above, in September 2016 VM reduced the typical term of its fixed term contracts from 18 months to 12 months and changed its approach to pricing so that a single monthly price was charged for the duration of the initial commitment period. However, it did not make consequential changes to its ETC rate card and so continued *“to levy ETCs with reference to a higher headline charge that still reflected the previous, longer minimum contract term”*.¹¹⁵
- 5.38 Although the overcharging occurred because of an error, VM had mechanisms in place that could - and provided they were set up effectively, should - have identified and rectified the error. VM told us that it had a detailed governance process for pricing changes, including changes to ETCs. This involved some of the most senior members of VM's organisation, including [Members of VM's Executive Committee]. It involved multiple layers of review

¹¹³ VM's Written Representations, paragraph 8.43.

¹¹⁴ The difference between the two switching rates is [X]%, which is one-tenth of [X]%

¹¹⁵ VM March 2018 Letter, p.2.

and approval. Price change proposals were prepared by the [relevant commercial pricing team], with senior oversight from [Senior member of the X Team] and were then presented to the leadership group of the [X] Team for review and approval, followed by [Member of VM's Executive Committee] and finally [Members of VM's Executive Committee].

- 5.39 We would expect a governance process of this nature to operate as an effective check and balance to prevent or at a minimum reduce the risk of contravention, provided the respective layers of governance are mindful of the business's regulatory responsibilities as well as the commercial imperatives informing the proposed changes. However, no one within VM involved in the preparation of the September 2016 pricing change or its governance spotted the need to make consequential changes to VM's ETC rate card.
- 5.40 Although VM has described the pricing changes it made as "*novel*",¹¹⁶ this is not a case where the error might be explained by the complexity of the analysis required to identify that ETCs had been set incorrectly. A straightforward comparison of monthly subscription prices with the applicable ETC would have flagged concerns sufficient to merit further investigation.¹¹⁷ Nor can the failure be explained by the fact that only a few fixed term contracts were affected so that it was difficult to spot the incorrect ETCs. Our analysis revealed that out of 112 headline packages, 40 had an ETC higher than the monthly subscription price and 62 had an ETC higher than the monthly subscription price less VAT.¹¹⁸
- 5.41 VM has acknowledged that its governance process failed but has said that different stages of its governance perform distinct functions and that the most senior individuals (such as [Members of VM's Executive Committee]) are accountable for "*over-arching decisions*" about price changes and cannot be expected to scrutinise the detail of how changes are calculated. VM said that ETCs "*played just once [sic] small part in the overall pricing decision matrix.*"¹¹⁹
- 5.42 We make no findings about any individual errors within VM's internal governance process for the September 2016 price change. The process overall failed (as VM has acknowledged). ETCs are important to VM's customers as the price that they have to pay to leave their fixed term contracts and switch to another provider. VM should have ensured, in accordance with its regulatory obligation under GC 9.3, that they were adjusted in line with the pricing changes made in September 2016. As part of this, VM should have had effective governance systems in place so that senior management were in a position in

¹¹⁶ VM's Written Representations, paragraph 4.25.

¹¹⁷ Internal email correspondence on the day after Ofcom opened its investigation shows that a member of the leadership group of VM's Commercial Team swiftly identified that monthly subscription prices were lower than the prices used to set VM's ETCs, although [they] appeared to have had no prior involvement in the governance of pricing changes. (First Response, question 8, email dated 28 June 2017 from [Senior member of the commercial team] to [Senior Commercial Manager], [Senior member of the relevant commercial pricing team] and another, 07:58, VM00045.)

¹¹⁸ See Table 3.3 in Section 3 above.

¹¹⁹ VM's Written Representations, paragraph 8.51 – 8.52.

September 2016 to identify the ETC error and ensure it was rectified in accordance with the new subscription prices charged to its customers.

Whether VM took timely and effective steps to end and remedy the contraventions

- 5.43 VM has taken steps to end and remedy the contravention of GC 9.3 (as we set out at paragraphs 5.75 – 5.78 below). However, we consider that it did not take timely action, for the reasons we explain in the following paragraphs.
- 5.44 The initial failing by VM to adjust ETCs in line with the changes to its prices in September 2016, was compounded by further failures by VM during the Relevant Period to ensure that its ETCs did not act as disincentives to switching. There were at least three other opportunities during the Relevant Period before Ofcom opened its investigation when VM could have taken action to look into and remedy the errors in its ETC rate card but failed to do so.
- 5.45 These opportunities arose as a result of: price changes made by VM on 1 November 2016; members of VM’s [relevant commercial pricing team] realising that ETCs were incorrectly set in February 2017; and a price rise project, known as ‘Matterhorn’, carried out in May and June 2017. We discuss each of these in paragraphs 5.47 – 5.68 below.
- 5.46 In its Representations VM said that members of its Senior Commercial team and its Legal and Regulatory Teams became aware on 11 May 2017 that some of its ETCs had been set too high and that it took immediate action to find ways to rectify this situation.¹²⁰ As we discuss at paragraphs 5.69 – 5.73 below, our assessment of the contemporaneous documentary evidence that VM has provided to us is that VM did not take substantive and concerted action to correct its ETCs until after Ofcom opened its investigation.

November 2016 price changes

- 5.47 On 1 November 2016, VM made further changes to its prices for fixed term contracts and on this occasion it also made changes to its ETC rate card.¹²¹ Based on the information that VM has provided us,¹²² these changes to prices and ETCs were subject to the multi-stage governance process described in paragraph 5.38 above.
- 5.48 As we set out in paragraphs 3.17-3.18 and Table 3.2 above, VM reduced the prices of 41% of its headline packages but it either increased ETC rates or kept them at the existing level. Given the extent of the price reductions, we would have expected VM’s multi-stage governance process to have identified that its prices and ETC rates diverged. We would also have expected VM’s governance process to have identified that this was potentially problematic and to have taken action to ensure that it had correctly set ETC rates relative to the prices on which they were based.

¹²⁰ VM’s Written Representations, paragraphs 4.41, 6.12 and 8.60.

¹²¹ Third Response, Question 3.

¹²² First Response, Question 8(d).

- 5.49 In the First Notice,¹²³ we asked VM to provide documents or analysis produced during the period from 1 September 2016 to 30 June 2017 which reviewed or proposed changes to VM's ETC procedures and policies and/or the way in which it calculates ETCs (including the maximum amount of the ETC it charges). We also asked for documents that VM's governance structures considered during this period for the purpose of reviewing VM's ETC policy and/or the level of ETCs.¹²⁴ VM did not produce any documents in response to this request which related to any review by VM's governance structures of the changes to pricing and ETCs that it implemented in November 2016.
- 5.50 In line with our finding at paragraph 5.42 above, the governance process overall failed. VM should have taken steps to ensure that its ETCs were adjusted in line with the pricing changes made in November 2016, including by having a governance process to exercise effective oversight. It failed to do so.

Identification of ETC error in February 2017

- 5.51 In February 2017, members of the [relevant commercial pricing team] realised that the ETCs of some of VM's packages were set at levels above the subscription price. The following correspondence took place in a chain of emails on 10 February 2017 between [Senior Commercial Manager] and one of [their] colleagues in the team [Commercial Manager]:

[Senior Commercial Manager]: *"Can you do me a favour and pull together a version of our pricing grid that shows the EDF alongside the bundle price ex VAT (Corona 4)?...I'm concerned that we might be charging more than the bundle price which a) breaks Ofcom regulation and b) doesn't make much sense. This is especially the case when you consider that most people in contract will have a discount overlaid."*¹²⁵

[Commercial Manager] in response, attaching the document requested: *"We are not charging more if a customer is paying the full fat price, but discounts would change the picture."*¹²⁶

[Senior Commercial Manager]: *"Relieved we're not over on any of them but do need to keep an eye on this as we go through [X] and Matterhorn."*¹²⁷

¹²³ Details of Ofcom's investigation (including the First Notice) are set out in Annex 3 of this Confirmation Decision.

¹²⁴ First Notice, Question 8(d).

¹²⁵ First Response, question 8, email from [Senior Commercial Manager] to [Commercial Manager], dated 10 February 2017, 08:58, VM00009.

¹²⁶ First Response, question 8, email from [Commercial Manager] to [Senior Commercial Manager], dated 10 February 2017, 11.10, VM00009.

¹²⁷ First Response, question 8, email from [Senior Commercial Manager] to [Commercial Manager], dated 10 February 2017, 12.33, VM00009.

[Commercial Manager]: *“Do you mean we are not over any of the ones including VAT (full fat price)? If you consider the ones excluding VAT then we are over the BB/Telco duals.”*¹²⁸

[Senior Commercial Manager]: *“Oh bugger, didn’t spot that. I think it’s unlikely to create an immediate issue (a customer is unlikely to complain as they would be looking at the inc. VAT price) but we should resolve this through the price rise project. FYI – the reason I’m looking at ex VAT prices is that we don’t pay VAT on EDFs. It should represent the profit foregone due to a customer leaving.”*¹²⁹

5.52 The document attached to the correspondence listed prices (including VAT and excluding VAT) for some of VM’s bundle packages against the ETCs for those bundles.¹³⁰ It showed that in some instances, the ETC was higher than the ex-VAT price listed for the bundle (for example 100Mbps broadband with phone had a ‘core’ price of £33 and an ETC of £35).

5.53 We make the following findings in relation to this correspondence:

- i) It is recognised that ETCs might be higher than the ‘discount’ price paid by customers in a fixed term contract.¹³¹
- ii) It is recognised that some of VM’s ETC rates are higher than the subscription price less VAT and that this *“breaks Ofcom regulation”*.
- iii) The *“price rise project”* is identified as the means of addressing the ETC issue that has been identified.
- iv) It is decided that no immediate action is required because customers are unlikely to complain.

5.54 Consistent with the correspondence, VM did not take action at this point in time to investigate whether ETCs were set above subscription prices or to amend its ETC rates, in response to the issues flagged in this correspondence.

5.55 We regard with particular seriousness the evidence that the team within VM responsible for proposing pricing and ETC changes to senior managers was aware in February 2017 that some ETCs were too high, that this *“breaks Ofcom regulation”* and that no immediate action was required because customers were unlikely to complain. We also regard as a serious matter the evidence of a strategy to address the issue through price rises to be implemented eight months later.

5.56 VM has acknowledged in its Representations that its governance process failed to identify and take the right course of action once the ETC over-charging became visible at a working

¹²⁸ First Response, question 8, email from [Commercial Manager] to [Senior Commercial Manager], dated 10 February 2017, 12:42, VM00009.

¹²⁹ First Response, question 8, email from [Senior Commercial Manager] to [Commercial Manager], dated 10 February 2017, 12:46, VM00009.

¹³⁰ First Response, question 8, VM00007.

¹³¹ See paragraph 3.12 above. As noted, VM refers to the monthly subscription price paid by customers on a fixed term contract as the ‘discount’ price.

level.¹³² It has accepted that the issue should have been escalated but that “*a poor judgment was made by a single individual that the ETC miscalculations could be dealt with in the next price change.*”¹³³

Project Matterhorn (May/June 2017)

5.57 In May 2017, VM started an internal review of its retail prices, with the revised prices due to become effective on 1 November 2017 (after the end of the Relevant Period).¹³⁴ VM referred to this review in its internal correspondence as ‘Matterhorn’. The Matterhorn project was overseen by [Senior member of the relevant commercial pricing team] and [Member of VM’s Executive Committee], with [Member of VM’s Executive Committee] responsible for the project sign off.¹³⁵ In response to Ofcom’s request for information about “*any changes proposed to the calculation of ETCs as a result of the project*”¹³⁶, VM said that:

*“ETCs were not review [sic] in this project as this came after the introduction of the new ETC calculation process implemented on 22 August 2017.”*¹³⁷

5.58 Internal email correspondence that we have obtained from VM reveals that VM colleagues working on the Matterhorn project did draw up proposals in May and June 2017 to change ETCs, in addition to pricing revisions. For example, in an email dated 15 May 2017, with the subject “*RE: Matterhorn Requirements*”,¹³⁸ [Senior Commercial Manager from VM’s relevant commercial pricing team]¹³⁹ circulated a document showing pricing changes, which included a separate tab called “*EDF Charge Changes*”. This showed the then current ETCs, new ETC rates scheduled for 1 November 2017 and the amount of the difference between the two. The spreadsheet showed the new ETCs proposed for implementation on 1 November 2017 as either unchanged or increased compared to the prevailing ETC rates.

5.59 On 9 June 2017, [Senior Commercial Manager] sent an email with the subject “*EDF Page*”, which set out some changes required to the webpage on VM’s website setting out ETCs.¹⁴⁰ The text of the ETC changes listed in the email included: “*1st Nov – There will be some rate changes to our EDF charges in support of the price rises.*”

5.60 On 16 June 2017, [Senior Commercial Manager] circulated an email with a table setting out the ETC rate cards applicable on 1 June 2017 and 1 November 2017, which said with reference to the table: “*I’m pretty sure we will go with the below so can use this*”.¹⁴¹ With

¹³² VM’s Written Representations, paragraph 8.51.

¹³³ VM’s Written Representations, paragraphs 8.55, 8.57 – 8.58.

¹³⁴ Third Response, question 19 i).

¹³⁵ Third Response, question 19 i); Follow-up Third Response, Annex 1_Consumer Division. [3<]

¹³⁶ Third Notice, question 19 i).

¹³⁷ Third Response, question 19 i).

¹³⁸ First Response, question 8, email from [Senior Commercial Manager] to various people dated 15 May 2017, VM00023.

¹³⁹ Follow-up Third Response, Table_Consumer Division Pricing Team.

¹⁴⁰ First Response, question 8, spreadsheet VM00033.

¹⁴¹ First Response, question 8, email from [Senior Commercial Manager] to [VM employee] dated 16 June 2017 14:53, VM00035. The information in this email is consistent with a spreadsheet prepared by [Senior Commercial Manager] dated 20 June 2017 showing current ETC rates and revised ETC rates for 1 November 2017 (First Response, question 8, VM00040).

the exception of the ETC rate for phone services, the ETC rates proposed for 1 November 2017 either remained the same or were increased from the levels given for 1 June 2017. The ETC rate for phone services was shown as decreasing from £10.80 to £10.50.

- 5.61 There is also a document prepared by [Senior Commercial Manager] in relation to the 1 November 2017 prices that is consistent with the proposal in the February correspondence to address the ETC issue by means of price rises.¹⁴² In the tab “*EDF calculation*”, a table shows bundle prices, deductions for fixed and variable cost of sales and the “*Maximum EDF*” that resulted from that calculation. A separate column for “*Current EDF*” shows that seven bundles have a “*Current EDF*” higher than the “*Maximum EDF*”. In the tab “*Post Price Rise EDFs*”, the price of six of these seven bundles has increased. Of these six, the ETC shown in the “*Current EDF*” column for four of the packages is unchanged from the “*EDF calculation*”. We note that two of the packages still have a “*Current EDF*” higher than the “*Maximum EDF*” notwithstanding the proposed price rise.
- 5.62 Our assessment of this evidence is that the Matterhorn project carried out by VM in May and June 2017 included a review of its ETCs. However, although individuals from VM’s [relevant commercial pricing team] involved in the review were aware that some ETCs had been set too high, action was not taken to rectify this by adjustments to the calculation of ETCs. There is no evidence that any regard was paid to the on-going impact of the incorrect ETCs on VM’s customers. Instead, proposals were drawn up to implement price rises in November 2017.¹⁴³
- 5.63 For similar reasons to those set out at paragraph 5.55, we regard as a serious matter the evidence that VM’s [relevant commercial pricing team] pursued its strategy of addressing unduly high ETCs with price rises to be implemented several months later.

VM’s Representations about when senior managers became aware of the contravention and the action they took

- 5.64 In its Representations VM said that members of its Senior Commercial Team and its Legal and Regulatory Teams became aware on 11 May 2017 that some of its ETCs had been set too high.¹⁴⁴ VM said “*From this point, VM’s action was immediate and clear: to resolve the over-recovery of ETCs issue. VM took immediate steps to understand the root cause of the issue, assess how many customers were affected, and to find ways to rectify the issue going forward.*”¹⁴⁵
- 5.65 VM provided an email dated 12 May 2017 from a member of its Regulatory Team to [Senior member of the relevant commercial pricing team] and others to substantiate this statement.¹⁴⁶ The email contained a list of questions “*which need answering from both a*

¹⁴² First Response, Annex 11. Annex 10 to the First Response explains the document was “*being used to calculate EDF rates relative to the price rise effective 1 November 2017.*” See also paragraphs 5.57 – 5.62 above.

¹⁴³ These proposed changes to VM’s ETC rates did not ultimately take place as they were superseded by the changes VM made to its ETC rates on 22 August 2017 (see paragraph 5.57 above).

¹⁴⁴ VM’s Written Representations, paragraphs 4.41, 6.12 and 8.60.

¹⁴⁵ VM’s Written Representations, paragraph 6.13.

¹⁴⁶ VM’s Written Representations, Annex 5, row 5.

legal and finance perspective to decide on our approach". The list of questions includes the following:

“2. *What's the extent of EDFs being charged that exceed the current monthly payments of a discounted customer (customer numbers & value)*

3. *Can we introduce a check to ensure that (1) does not happen going forward:*

a. For example; if the calculated EDF > monthly payments outstanding, ensure that the EDF charged is Monthly Payments Outstanding - £X (where £X is set to reflect adjustments for saved costs etc as per guidance)”

5.66 We agree that this email sets out the initial steps that needed to be taken to identify the extent to which ETCs were being overcharged and how this might be corrected. However, we have seen no further emails responding directly to the questions it set out.

5.67 We have reviewed other contemporaneous documents, including VM's internal email correspondence which we obtained during the investigation and a letter that VM sent to Ofcom on 26 May 2017 about ETCs that it charged customers moving home to a location not served by VM's network before the expiry of their fixed term contract (home movers). We have made the following observations in relation to this documentation:

- i) None of the internal emails we have seen which are dated between 12 May 2017 and 27 June 2017, when Ofcom opened its investigation, expressly acknowledge that VM was charging ETCs in excess of monthly subscription prices;
- ii) Nor do they suggest that reductions to ETC rates may be required or set out options for addressing concerns of this nature;
- iii) There is evidence of action to look at the mitigation of ETCs charged to home movers in response to a letter that Ofcom wrote to VM about this issue on 28 April 2017;¹⁴⁷
- iv) We have seen three internal emails dated 20 and 22 June 2017 respectively which suggest that there is scope for VM to generate more revenues from ETCs;¹⁴⁸
- v) An internal document dated 26 June 2017 and headed “*Ofcom ETC Summary*” sets out aggregated data on ETCs charged for the period January 2017 to May 2017 and includes the following comment: “*In all instances ETC revenue is lower than the remaining contract cost to customers and the calculated rate for agents, demonstrating that VM is currently compliant with Ofcom regulation.*”¹⁴⁹

¹⁴⁷ First Response, question 8, VM00018, VM00029. Following consumer complaints, Ofcom wrote to VM on 28 April 2017 about its policy of charging ETCs to customers who moved to a location not served by VM's network. The letter noted that VM did not reduce ETCs for these customers even though VM had the opportunity of winning a new customer in the vacated property. In its response on 26 May 2017, VM said that “*ETCs are applied to legitimately recover costs incurred to service a customer*” and that it had commenced a review “*to ensure that the level of mitigation is appropriate*”.

¹⁴⁸ First Response, question 8, VM00039 (email to [Senior member of VM's Finance Team]), VM00041, VM00042.

¹⁴⁹ First Response, question 8, VM00044. This document was produced by a VM analyst. Earlier correspondence shows that this individual was liaising with individuals from VM's [relevant commercial pricing] and Regulatory Affairs Teams

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- 5.68 We also note that the internal Matterhorn correspondence from 15 May 2017 to 16 June 2017 from [Senior Commercial Manager] (who reported directly to [Senior member of the relevant commercial pricing team]),¹⁵⁰ gives no indication that was an on-going investigation looking at immediate corrections to ETC rates, as VM has suggested. To the contrary, the proposals were to leave the current ETC rates either unchanged or increase them in November.
- 5.69 Our assessment of VM's contemporaneous documents dated between 12 May 2017 and 27 June 2017 that we obtained in the course of the investigation is that they do not support VM's contention that during this period it "*took immediate steps to understand the root cause of the issue, assess how many customers were affected, and to find ways to rectify the issue going forward.*"¹⁵¹ Although there is evidence of action to look at the mitigation of ETCs for home movers in response to Ofcom's enquiry letter, there is no other evidence that VM explicitly acknowledged that its ETCs were higher than they should have been and that it was actively investigating ways to reduce them.
- 5.70 There is a marked difference with VM's internal email correspondence which followed Ofcom's opening of the investigation on 27 June 2017, which immediately identifies that ETCs are too high and that action is required to address this. For example, [Senior Commercial Manager] emailed members of the Commercial Team's Leadership group on the same day to set out actions that needed to be taken "*straight away*".¹⁵² These included ensuring that "*our discounted prices don't fall below the levels of our EDFs*".¹⁵³ Within a matter of hours, one of the recipients had correctly identified one of the key reasons why VM's ETCs were too high: "*It won't help that we've essentially established the front book prices at the offer price points now*";¹⁵⁴ and [Senior Commercial Manager] had produced a table of package prices showing where ETCs were set above the ex VAT or inc. VAT price.¹⁵⁵
- 5.71 Although the recipients of [Senior Commercial Manager's] email of 27 June 2017 were to members of the group¹⁵⁶ that VM has said instigated the "*immediate and clear*" steps on 11 May 2017 to resolve the issue of ETC over-charging, there is no reference to any action that had already been taken. In fact, the content of the email, which requests that VM "*kick off an IA to look at both a tactical and longer term solution to cap EDFs at the*

producing documents about ETCs in connection with an Ofcom update, who knew that VM's ETCs were too high – see First Response, question 8, VM00037, VM00038.

¹⁵⁰ See paragraphs 5.58 – 5.61 above.

¹⁵¹ VM's Written Representations, paragraph 6.13.

¹⁵² First Response, question 8, email dated 27 June 2017 from [Senior Commercial Manager] to [Senior Members of the Commercial Team] and another, 19:03 VM00045.

¹⁵³ First Response, question 8, email dated 27 June 2017 from [Senior Commercial Manager] to [Senior Members of the Commercial Team] and another, 19:03 VM00045.

¹⁵⁴ First Response, question 8, email dated 28 June 2017 from [Senior member of the commercial team] to [Senior Commercial Manager], [Senior member of the relevant commercial pricing team] and another, 07:58, VM00045.

¹⁵⁵ First Response, question 8, email dated 28 June 2017 from [Senior Commercial Manager] to [Senior Members of the Commercial Team] and another, 09:06, VM00046.

¹⁵⁶ The email was addressed to [Senior member of the relevant commercial pricing team] and another member of VM's Commercial leadership group.

individual customers monthly price” strongly suggests no meaningful action had been taken prior to 27 June 2017 to find a solution to the issue.

- 5.72 Subsequent email chains during July and August 2017 reveal a coordinated and concerted effort to review ETC rates and calculate any retrospective action required to address issues identified in the review. The correspondence includes a timetable for action and scheduled updates with the Chief Operating Officer.¹⁵⁷
- 5.73 Accordingly, having considered all the contemporaneous documentary evidence, we have concluded that while senior managers may have been alerted to the ETC issue in early May 2017, VM did not take concerted steps to address the issue until Ofcom opened its investigation on 27 June 2017.
- 5.74 For the reasons set out at paragraphs 5.44 – 5.73 above, on the evidence before us we have found that VM failed to take timely and effective action after 22 September 2016 until Ofcom opened its investigation on 27 June 2017 to bring the contravention of GC 9.3 to an end. VM’s repeated failures to act are serious because they directly contributed to the duration of the contravention and the extent of harm to consumers.

Action by VM after Ofcom opened its investigation

- 5.75 Once Ofcom opened the investigation in June 2017, there is evidence that VM worked swiftly to remedy the contraventions of GC 9.3 we have identified. VM implemented a revised ETC rate card and a new calculation process on 22 August 2017. We welcome VM taking these steps to rectify its ETC calculations to ensure customers were being quoted and charged ETCs which were calculated by reference to the correct subscription price and accounted for the appropriate cost mitigations.
- 5.76 We also welcome and give weight to the fact that VM has acted to reimburse all affected customers. We note that VM confirmed that it had paid out £2,630,014 of refunds to 72,077 customers, £2,415 had been donated to charity and VM was continuing to attempt to trace the remaining c.3,500 former customers who have not yet received their refunds.¹⁵⁸ We also note that VM’s compensation scheme has gone beyond the scope of our investigation, in that it extended to customers who were overcharged when they terminated 30 day rolling contracts. VM has paid or is in the process of paying £733,523 in refunds to these customers.
- 5.77 VM has stated it is introducing a new automated ETC calculator in Q4 2018 to avoid the need for the daily reports and additional manual adjustments involved under its current ETC calculation process.¹⁵⁹ We expect this would help prevent the recurrence of similar incidents. We note that the cost of this tool is relatively insignificant for a business of VM’s

¹⁵⁷ For example, First Response question 8, emails VM20015, VM20017, VM20030, VM20037, VM20054.

¹⁵⁸ Follow-up Fourth Response, 6 April 2018. At paragraph 4.51 and 9.10 of VM’s Written Representations, 24 July 2018, it stated it had refunded or made payments to charity in respect of 98.2% of those customers overcharged and it continues to trace the remaining affected customers.

¹⁵⁹ VM March 2018 Letter, paragraph 2(j); VM’s Written Representations, paragraph 9.2.

size and resources.¹⁶⁰ We therefore consider that this is a step that VM could have taken much earlier.

5.78 In addition to these actions, VM has told us that it has:

- commenced a programme of training about the GCs targeted at key members of its Consumer Team. The training is to continue on a rolling basis;
- amended its governance processes for all pricing proposals and set in place specific review and approval processes in respect of ETCs (including quarterly and annual checkpoints and reviews). These revised processes have been reflected in VM's internal governance documentation;
- made an approach to a certified metering and billing auditor to carry out an independent audit of its ETC calculation methodology.¹⁶¹

5.79 We welcome, and give weight to, the steps VM has taken to end and remedy its contraventions with respect to the calculations of its ETCs and the action it has taken to secure VM's ongoing compliance with GC 9.3.

Whether VM made a gain from its contravention

5.80 We have set out at paragraph 5.25 above the amount by which VM overcharged its customers during the Relevant Period. As noted at paragraph 3.27, VM has acted to reimburse all affected customers, with interest. As at 11 July 2018, it had repaid 98.2% of the customers it overcharged.¹⁶²

Contravention of GC 9.2(j)

Seriousness and consumer harm

5.81 GC 9.2(j) is intended to ensure that consumers have a minimum set of information about their contracts for communications services to give them legal certainty about their rights and obligations under the contract and enhance their ability to optimise their choices. By failing to publish clear and up-to-date information about its ETCs over a period of seven months, VM undermined their customers' legal certainty and their ability to calculate their liabilities when considering switching providers and to choose services in their best interests.

5.82 In its Representations, VM has argued that the contravention is *de minimis and immaterial* because:

- i) the evidence that there was any impact on consumers is limited to a small number of complaints; and

¹⁶⁰ VM has told us that the total cost of the automated ETC process is £[><]m in capital expenditure with an additional £[><]m operating expenditure.

¹⁶¹ VM's Written Representations, paragraphs 9.3 – 9.5, paragraph 9.7, Annex 5.

¹⁶² VM Written Representations, paragraph 4.51.

- ii) the duration of the contravention should be determined by reference to the date of the earliest evidence of an effect on its customers. This was 9 January 2017, on which basis the contravention lasted for less than 3 months.¹⁶³

- 5.83 As set out in Section 4, if the information that the CP provides does not meet the minimum requirements of GC 9.2, there is a contravention. We therefore confirm our finding that the duration of the contravention we have found is 7 months, from 1 September 2016 to 20 March 2017.
- 5.84 We accept that the direct evidence of the impact on consumers is the complaints referred to in VM's internal correspondence.¹⁶⁴ However, it does not follow that the contravention we have identified is neither material nor serious. The contravention hindered consumers' ability to understand VM's fixed term contracts and compare them with those of other providers in order to optimise their choices. Further, the contravention took place in the context of VM charging its customers too much in ETCs. By failing to publish clear, comprehensive and up-to-date information about its ETCs, customers subject to such charges would have found it difficult to understand the amounts they had to pay, how VM had calculated them and to assess whether switching was in their interests. By undermining their customers' legal certainty and their ability to calculate their liabilities when switching providers in this way, VM aggravated the impact of its overcharging. We therefore regard the contravention as serious.
- 5.85 In relation to the scope for consumer harm, VM has provided evidence about the website traffic numbers to its ETC page from September 2017 and observes that this is substantially less than the 147 million visits made to its website during the same period.¹⁶⁵ VM also referred to experimental research by London Economics which found that ETC warnings do not help consumers due to the complexity of the information provided in a switching process and limited attention problems.¹⁶⁶
- 5.86 In relation to VM's failure to publish its up-to-date ETC rates from 1 November 2016 to 20 March 2017, VM has noted that these rates were incorrectly calculated and said it is unreasonable for Ofcom to punish it for failing to publish incorrect information.¹⁶⁷
- 5.87 These observations do not alter our assessment of the scope for consumer harm arising from this contravention. The number of visitors to VM's ETC page during the period of the contravention is not out of line with the 81,994 customers who it overcharged in breach of GC 9.3. VM's contravention of GC 9.2(j) denied its customers information about ETCs that should have provided them with legal certainty about their rights and obligations under the contract and enhanced their ability to optimise their choices. In the context of VM

¹⁶³ VM's Written Representations, paragraph 7.24 – 7.28.

¹⁶⁴ First Response, question 8, VM0002 and VM0004.

¹⁶⁵ VM's Written Representations, paragraph 8.38.

¹⁶⁶ VM's Written Representations, paragraph 7.36. The research was commissioned by Ofcom and looked at the performance of different consumer switching processes – see https://www.ofcom.org.uk/data/assets/pdf_file/0021/68043/economics-research.pdf.

¹⁶⁷ VM's Written Representations, paragraph 7.30 – 7.31.

overcharging its customers for ETCs, VM's failure had the potential to aggravate the harm resulting from its overcharging.

- 5.88 We note the findings of London Economics to which VM has referred. VM has a regulatory obligation to meet the minimum requirements specified in GC 9.2 and this includes the provision of easily accessible, clear and up-to-date information about its ETCs. It does not follow that because some consumers may struggle to understand ETC information that meets these standards, the absence of such information in breach of VM's regulatory obligation does not adversely affect consumers.
- 5.89 Further, the research by London Economics also found that *"ETCs warnings which are precise help consumers to make better choices as compared to simple ETC warnings, and this is because the warning is tailored to the individual consumer and can therefore be useful to them."*¹⁶⁸ This supports the importance of clear and up-to-date information about ETCs which consumers are able to apply to their individual packages.
- 5.90 VM has said that it should not be punished for failing to publish incorrect ETC rates. However, the fact that VM's ETC rates were wrong does not justify or mitigate VM's failure to publish them. Its customers should have had easy access to this information so that they could calculate how much they would be charged if they wanted to switch and understand how much VM was asking them to pay in the event they did switch. The information might even have enabled them to identify that they were being over-charged. By failing to publish up-to-date information, VM acted to the detriment of its customers and other consumers, by compromising their legal certainty and their ability to optimise their choices.
- 5.91 Accordingly, for the reasons set out in paragraphs 5.84 – 5.90 above, we are satisfied that VM's contravention is serious and harmful to consumers.

Whether appropriate steps were taken to prevent the contraventions and whether VM took timely and effective steps to end and remedy the contravention

- 5.92 In its Written Representations, VM explained that it has used T-shirt sizing across all of its cable products but at some point, launched a new brand, VIVID, for its broadband services, so that the intuitive link with its ETCs was lost.¹⁶⁹ We have no evidence as to what action, if any, was taken by VM when it launched the VIVID brand to review whether it should make any consequential changes to the information it provided to consumers on its website and in other communications.
- 5.93 The documentary evidence we have relied on demonstrates that VM acted upon the complaints it received about the issue to rectify and clarify the information that it published and that it did so within a reasonable time frame.

¹⁶⁸ London Economics, *Consumer Switching*, June 2010, p2.

¹⁶⁹ VM's Written Representations, paragraphs 7.9 – 7.11 and 7.19 – 7.20.

History of contraventions

5.94 VM has no history of contraventions of the GCs.

Precedents

5.95 We revised our Penalty Guidelines in December 2015 on the basis that the penalties we had set prior to that date had not operated as effective deterrents. We said that it might be necessary in appropriate cases to set higher penalties to secure a stronger effect. For example in recent enforcement cases, we have imposed fines of £3.7m on Vodafone¹⁷⁰ and £42m on BT.¹⁷¹

5.96 We have not previously issued a penalty in respect of a contravention of GC 9.2(j) or GC 9.3 so there are no directly relevant precedents in this case. However, the following enforcement decisions in which Ofcom imposed a penalty for failures to ensure customers were charged correctly have some relevance:

- The penalty of £3.7m imposed on Vodafone in 2016¹⁷² for contravention of GC 11.1 (which deals with billing accuracy). Vodafone charged approximately 10,500 customers around £150,000 for pay as you go credits to their accounts which they did not receive as a result of problems with its processes for closing dormant pay as you go accounts. In the Vodafone case there was also evidence that its staff were aware of the problems in its billing system but did not take prompt and effective steps to rectify the problem until Ofcom and a national newspaper contacted Vodafone about the matter.
- The penalty of £2.7m on EE in January 2017¹⁷³ for contravention of GC 11.1. EE overcharged at least 39,000 customers approximately £245,000 as a result of failings in its billing system for calls to its customer services number. The penalty Ofcom imposed was lower than it otherwise would have been on account of steps EE proactively took to end and to remedy the contraventions prior to Ofcom opening its investigation.
- The penalty of £880,000 on Plusnet in March 2017¹⁷⁴ for a contravention of GC 11.1. Plusnet continued to bill 1,025 customers who had cancelled either their landline or broadband services and overcharged them over £500,000 in total. On discovering the error, and prior to Ofcom opening its investigation, Plusnet took a number of proactive positive steps to address the mistake, which were taken into account when determining the amount of the penalty.

5.97 However, all of these decisions can be distinguished from the contraventions that we believe VM has committed because the scale of the contraventions and number of affected customers were substantially lower than in this investigation. As we have set out,

¹⁷⁰ Including a discount that took into account Vodafone's co-operation in settling the relevant case:

https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01160

¹⁷¹ Including a discount that took into account BT's co-operation in settling the relevant case:

https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01170

¹⁷² https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01160

¹⁷³ https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01174

¹⁷⁴ Including a discount that took into account Plusnet's co-operation in settling the relevant case:

https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01178

the number of VM's customers actually harmed and the level of the financial harm is much greater.

Co-operation with Ofcom's investigation

- 5.98 VM has generally provided Ofcom with information in a timely manner in response to information requests under section 135 of the Act. However, there were errors in VM's responses to our First, Third and Fourth and Fifth Notices which required us to issue further information requests to VM to clarify or rectify the information that it provided. This repeated provision of inaccurate information used up additional time and resource in the investigation, even if it is not deliberately misleading, and we consider that the provision of inaccurate information should be deterred.
- 5.99 We have taken separate enforcement action under section 139A of the Act in relation to certain aspects of VM's response to the Third Notice, and we have therefore not taken these matters into account in our consideration of penalty in this Confirmation Decision.

Ofcom's conclusion on the penalty amount

- 5.100 Considering all of the above factors in the round, we have decided to impose on VM a penalty of **£7m** in respect principally of its contravention of GC 9.3, but also incorporating its contravention of GC 9.2(j).
- 5.101 Ofcom's judgement is that this penalty is appropriate and proportionate to the contraventions in respect of which they are imposed. Our objectives in setting the penalty are:
- a) to impose an appropriate and proportionate sanction that reflects the seriousness and significance of VM's contraventions of GC 9.3 and GC 9.2(j) respectively and its culpability in those contraventions; and
 - b) to deter VM, and other CPs, from contravening the GCs, and GC 9.3 and GC 9.2(j) in particular.
- 5.102 Having regard to VM's turnover, our judgment is that a penalty of **£7m** secures these objectives in a proportionate way. It would reflect each of the factors described in more detail above. It does not exceed the maximum penalty Ofcom may impose.
- 5.103 On the basis of the evidence and reasoning contained in this document, we have issued the Confirmation Decision set out in Annex 1.

Actions required of VM

- 5.104 The steps which we consider should be taken by VM, to the extent it has not already taken them, to comply with the requirements of GC 9.3 are set out below.
- a) VM must obtain an independent audit of its ETC calculation methodology (including its approach to calculating the replacement acquisition mitigation for home-movers) within 3 months of the Confirmation Decision to ensure that the methodology makes a

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reasonable assessment of the amounts due under the relevant clauses of VM's fixed term contracts;

The person should be appointed within 1 month of a Confirmation Decision.

- b) VM must make available to Ofcom the findings of the audit of its ETC calculation methodology which it obtains in accordance with paragraph a) above and such other information as Ofcom may require to monitor that its ETC calculation methodology is appropriate; and
- c) VM must comply with any direction given by Ofcom for the purpose of securing VM's compliance with the steps it is required to take to remedy the consequences of its contraventions.

A1. Confirmation Decision to Virgin Media Ltd of contraventions of General Conditions 9.3 and 9.2(j) under section 96C of the Communications Act 2003

Section 96C of the Communications Act 2003

- A1.1 Section 96C of the Communications Act 2003 (the 'Act') allows the Office of Communications ('Ofcom') to issue a decision (a 'Confirmation Decision') confirming the imposition of requirements on a person where that person has been given a notification under section 96A of the Act, Ofcom has allowed that person an opportunity to make representations about the matters notified, and the period allowed for the making of representations has expired. Ofcom may not give a Confirmation Decision to a person unless, having considered any representations, it is satisfied that the person has, in one or more of the respects notified, been in contravention of a condition specified in the notification under section 96A.
- A1.2 A Confirmation Decision:
- a) must be given to the person without delay;
 - b) must include the reasons for the decisions;
 - c) may require immediate action by the person to comply with the requirements of a kind mentioned in section 96A(2)(d) of the Act,¹⁷⁵ or may specify a period within which the person must comply with those requirements; and
 - d) may require the person to pay:
 - i) the penalty specified in the notification issued under section 96A of the Act, or
 - ii) such lesser penalty as Ofcom consider appropriate in light of the person's representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention, and may specify the period within which the penalty is to be paid.

General Conditions

- A1.3 Section 45(1) of the Act gives Ofcom the power to set conditions, including General Conditions, binding on the person to whom they are applied.

¹⁷⁵ Such requirements include those steps that Ofcom thinks should be taken by the person in order to remedy the consequences of a contravention of a condition.

A1.4 The Schedule to a Notification issued by the Director General of Telecommunications on 22 July 2003 under section 48(1) of the Act, which took effect from 25 July 2003, sets out the General Conditions of Entitlement (the General Conditions or GCs) which apply to all Communications Providers (CPs) defined in each GC. The GCs have been amended from time to time between 2003 and 2018 and, on 1 October 2018, a new set of GCs came into effect.

General Conditions 9.2(j) and 9.3

A1.5 GC 9.2 applied at all material times for the purposes of this Confirmation Decision (with effect from 1 October 2018, its requirements are in GC C1.2). GC 9.2 (now C1.2) contains a number of requirements, including the following at paragraph (j) (now in C1.2(k)):

“Any contract concluded after 25 May 2011 between the Communications Provider and a Consumer, and other End-Users on request, shall specify at least the following minimum requirements in a clear, comprehensive and easily accessible form: ...

(j) the duration of the contract, and the conditions for renewal and termination of the services and of the contract, including: ...

(iii) any charges due on termination of the contract, including any cost recovery with respect to terminal equipment”

A1.6 GC 9.3 also applied at all material times for the purposes of this Confirmation Decision (with effect from 1 October 2018, its requirements are in GC C1.3). GC 9.3 (now C1.3) requires that:

“Without prejudice to any initial commitment period, Communications Providers shall ensure that conditions or procedure for contract termination do not act as disincentives for End-Users against changing their Communications Provider.”

Enforcement of General Conditions

A1.7 Sections 96A to 96C of the Act give Ofcom the power to take action, including the imposition of penalties, against persons who contravene, or have contravened, a condition set under section 45 of the Act.

Subject of this Confirmation Decision

A1.8 This Confirmation Decision is addressed to Virgin Media Limited (VM), whose registered company number is 02591237. VM's registered office is Media House, Bartley Wood Business Park, Hook, Hampshire, RG27 9UP.

Notification given by Ofcom under section 96A of the Act

- A1.9 On 21 May 2018, Ofcom gave a notification under section 96A of the Act (the Section 96A Notification) to VM as Ofcom had reasonable grounds for believing that between 1 September 2016 and 22 August 2017 (the Relevant Period) VM contravened GC 9.2(j) and GC 9.3.
- A1.10 The Section 96A Notification also specified the penalty that Ofcom was minded to impose on VM in respect of the contraventions of GC 9.2(j) and GC 9.3.
- A1.11 The Section 96A Notification allowed VM the opportunity to make representations to Ofcom about the matters set out.

Confirmation Decision under section 96C of the Act

- A1.12 VM provided its written representations (Written Representations) on 24 July 2018 and made its oral representations (Oral Representations) on 14 September 2018. Together, these representations are referred to as the Representations.
- A1.13 Ofcom has carefully considered VM's Representations and all the relevant evidence and, having done so, is satisfied that VM contravened:
- a) GC 9.3 by setting and charging ETCs during the period between 22 September 2016 and 22 August 2017 that were higher than the amounts that its customers on fixed term contracts had agreed to pay, and therefore failing to ensure that its conditions and procedures for contract termination did not act as disincentives for its customers against changing provider; and
 - b) GC 9.2(j) by failing to publish clear and up-to-date information about its ETCs from 1 September 2016 to 20 March 2017.
- A1.14 Accordingly, Ofcom has decided to give VM a Confirmation Decision confirming its contraventions of GC 9.3 and GC 9.2(j) and our decision to impose a financial penalty on VM in respect of these contraventions of £7m.
- A1.15 The reasons are set out in the document to which this Confirmation Decision is annexed.

Actions required by VM

- A1.16 The steps which we consider should be taken by VM, to the extent it has not already taken them, to comply with the requirements of GC 9.3 are set out below.
- a) VM must obtain an independent audit of its ETC calculation methodology (including its approach to calculating the replacement acquisition mitigation for home-movers) within 3 months of the Confirmation Decision to ensure that the methodology makes a reasonable assessment of the amounts due under the relevant clauses of of VM's fixed term contracts;
- The person should be appointed within 1 month of a Confirmation Decision.

- b) VM must make available to Ofcom the findings of the audit of its ETC calculation methodology which it obtains in accordance with paragraph a) above and such other information as Ofcom may require to monitor that its ETC calculation methodology is appropriate;
- c) VM must comply with any direction given by Ofcom for the purpose of securing VM's compliance with the steps it is required to take to remedy the consequences of its contraventions.

A1.17 The duty to comply with any requirement imposed by a Confirmation Decision is enforceable in civil proceedings by Ofcom for an injunction, for specific performance or any other appropriate remedy or relief.¹⁷⁶

Penalty

A1.18 Ofcom has determined that VM must pay a penalty of **£7m** in respect of its contraventions of GC 9.2(j) and GC 9.3 during the Relevant Period.

A1.19 VM has until 5.00pm on **Friday 14 December 2018** to pay Ofcom the penalty. If not paid within the period specified it can be recovered by Ofcom accordingly.¹⁷⁷

Interpretation

A1.20 Words or expressions used in this Confirmation Decision have the same meaning as in the GCs or the Act except as otherwise stated in this Confirmation Decision.



Simon Leathley
Legal Director,
as final decision maker for Ofcom

16 November 2018

¹⁷⁶ Section 96C(6) Communications Act 2003.

¹⁷⁷ Section 96C(7) Communications Act 2003.

A2. Glossary

'Act' - the Communications Act 2003.

'April 2017 Letter' - the letter dated 28 April 2017 from Lynn Parker, Ofcom to [member of VM's Regulatory Team].

'Consumer' - any natural person who uses or requests a Public Electronic Communications Service for purposes which are outside his or her trade, business or profession.

'CP' means communications provider.

'CRA Report' – *"Impact of ETC Over-Recovery on Customer Switching: an economic analysis"*, Charles Rivers Associates report for VM, originally dated 23 July 2018 and submitted as Annex 6 to VM's Written Representations. Subsequently updated on 4 October 2018 and submitted in VM's Seventh Response.

'dual play' - the provision of two communications services, such as broadband, phone and/or pay TV, under one contract.

'EDFs' or **'Early Disconnection Fees'** - a term used by VM in its internal correspondence and in its terms and conditions to refer to ETCs.

'ETC' - the total charge payable by the subscriber when they terminate a fixed term contract before the expiry of the initial commitment period.

'ETC rate' - the amount the customer is charged for each month remaining in their initial commitment period following early termination of a fixed term contract.

'ETC rate card' - the ETC rates for each of VM's communications services and, within each service type, the level/tier of that service, published on VM's ETC webpage.

'European Regulatory Framework' - the European Regulatory Framework comprises the harmonised set of European directives for the regulation of electronic communications networks and services.

'Fifth Notice' - the fifth information notice issued to VM on 18 April 2018 under section 135 of the Act.

'Fifth Response' - VM's response to the Fifth Notice, dated 25 April 2018.

'First Notice' - the first information notice issued to VM on 21 August 2017 under section 135 of the Act.

'First Response' - VM's response to the First Notice, dated 2, 9 and 13 October 2017.

'fixed term contract' - a retail contract under which the consumer agrees to receive and pay for communications services provided by VM for an initial commitment period.

'Follow-up Fourth Response' – VM's response to clarification questions in respect of the Fourth Response, dated 6 April 2018.

'Follow-up Third Response' – VM's response to clarification questions in respect of the Third Response, dated 18 March 2018.

'Fourth Notice' - the fourth information notice issued to VM on 15 March 2018 under section 135 of the Act.

'Fourth Response' - VM's response to the Fourth Notice, dated 4 and 6 April 2018.

'General Conditions' or **'GCs'** - the General Conditions of Entitlement.

'headline packages' – the 112 fixed term telecoms packages which VM makes available across all sales channels and about which VM provided data to Ofcom in its First and Second Responses.

'home move replacement acquisition calculation' - VM's approach to calculating the potential for VM to replace lost revenue when a customer terminates as a result of a home move by signing up the person(s) moving into the vacated premises.

'initial commitment period' - the period specified in a fixed term contract, during which the consumer agrees to purchase communications services from the communications provider.

'March 2018 Letter' – the letter dated 19 March 2018 from [member of VM's Regulatory Team] to Lynn Parker, Ofcom.

'May 2017 Response' - the letter dated 26 May 2017 from [member of VM's Regulatory Team] to Lynn Parker, Ofcom.

'Oral Representations' – the oral representations that VM made to Ofcom on 14 September 2018 in support of its Written Representations.

'Relevant Period' - the period from 1 September 2016 to 22 August 2017.

'Representations' – these are made up of both VM's Written Representations submitted to Ofcom on 25 July 2018 and its Oral Representations which it made to Ofcom on 14 September 2018.

'rolling contract' - a retail contract which renews from month to month and which a subscriber can terminate without charge at any point during the contract by providing 30 days' notice.

'Second Notice' - the second information notice issued to VM on 17 November 2017 under section 135 of the Act.

'Second Response' - VM's response to the Second Notice, dated 30 November 2017.

'Section 96A Notification' – the notification Ofcom gave VM under section 96A of the Act setting out our provisional view that we had reasonable grounds for believing that between 1 September 2016 and 22 August 2017 (the Relevant Period) VM contravened GC 9.2(j) and GC 9.3.

'Seventh Notice' – the seventh information notice issued to VM on 2 October 2018 under section 135 of the Act.

'Seventh Response' – VM's response to the Seventh Notice, dated 8 October 2018.

'Sixth Notice' - the sixth information notice issued to VM on 27 April 2018 under section 135 of the Act.

'Sixth Response' - VM's response to the Sixth Notice, dated 3 May 2018.

'solus' - the provision of a single communications service under a contract.

'subscriber' - a consumer who is party to a fixed term contract.

'Third Notice' - the third information notice issued to VM on 17 January 2018 under section 135 of the Act.

'Third Response' - VM's response to the Third Notice, dated 14 February 2018.

'triple play' - the provision of three types of communications service, such as broadband, phone and pay TV, under one contract.

'VM' - Virgin Media Limited, whose registered company number is 02591237.

'VM's ETC webpage' – a page on VM's website setting out how it calculated its ETCs and its ETC rate cards which VM linked to in its terms and conditions. The page is available here:

<http://www.virginmedia.com/shop/the-legal-stuff/terms-and-conditions-for-fibre-optic-services/early-disconnection-fees.html>

'Written Representations' – these are the written representations VM submitted to Ofcom on 24 July 2018 in response to the Section 96A Notification.

A3. Ofcom's Investigation

Engagement with VM before the investigation

- A3.1 During the course of 2016 and 2017, we received complaints into our consumer contact team (CCT) on a regular basis about VM's ETCs, in particular its policy of charging consumers on fixed term contracts ETCs when they move house to a location outside of VM's network. We first wrote to VM about the issue on 23 May 2016¹⁷⁸ and then again on 28 April 2017 (the April 2017 Letter).¹⁷⁹ In the April 2017 Letter, we:
- noted that VM did not "make any exceptions or reductions in ETCs in circumstances where a customer is moving house to an area where Virgin services are not available";
 - observed that VM "has an opportunity to win the customer moving into the existing address"; and
 - invited VM to reconsider its policy with respect to customers moving house, either by adopting the practice of other CPs of waiving ETCs in these circumstances or by offering a reduction in ETCs "to reflect Virgin's ability to mitigate its loss by reselling services at the relevant address".
- A3.2 VM responded to the April 2017 Letter on 26 May 2017 (the May 2017 Response).¹⁸⁰ VM said in its response that "ETCs are applied to legitimately recover costs incurred to service a customer". It explained:
- "...our approach to ETCs is required to comply with the CMA Guidance on Unfair Terms, particularly in respect of mitigating our ETCs and, where relevant, to charge less than the remaining contracted charge. We do mitigate our ETCs, however, we have commenced a review of our approach to ensure that the level of mitigation is appropriate."*
- A3.3 VM also said that it had started its periodic review of its cable terms and conditions, which included "a review of our practices in respect of ETCs to ensure that no type of customer is unfairly disadvantaged."

Opening the investigation and scope

- A3.4 On 27 June 2017, we opened an investigation into VM's compliance with GC 9.3 and the application of section 62 of the Consumer Rights Act 2015¹⁸¹. We said that the scope of the investigation was whether the terms and conditions of VM's consumer contracts for broadband, phone and pay TV services, which require the payment of ETCs when a

¹⁷⁸ Letter from Lynn Parker at Ofcom to [member of VM's Regulatory Team] dated 23 May 2016 in relation to the Cancellations and terminations enforcement programme (CW/01158/06/15).

¹⁷⁹ Letter from Lynn Parker at Ofcom to [member of VM's Regulatory Team] dated 28 April 2017.

¹⁸⁰ Letter from [member of VM's Regulatory Team] to Lynn Parker at Ofcom dated 26 May 2017.

¹⁸¹ <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted>

customer terminates a fixed term contract (including circumstances where a customer is terminating because of a change of address), complied with GC 9.3 and/or were unfair for the purposes of section 62 of the Consumer Rights Act 2015 during the period 1 September 2016 to 30 June 2017.¹⁸²

- A3.5 During the course of the investigation, we extended the end date of the period under investigation from 30 June 2017 to 22 August 2017. The latter date is when VM made changes to its ETCs and implemented a new methodology for calculating ETCs (see Annex 4, paragraph A4.7 and Table A4.3). It also broadly reflects the end date of the period VM has used internally when gathering data relating to its calculations of refunds due to customers. We refer to the period 1 September 2016 to 22 August 2017 as the Relevant Period in this Confirmation Decision.
- A3.6 Following a review of the evidence, we identified material which gave us reasonable grounds to believe that VM had also contravened GC 9.2(j) in addition to GC 9.3 and this additional finding is therefore included in this Confirmation Decision.

Information gathering

- A3.7 In total, we issued seven formal notices to VM under section 135 of the Act requiring it to provide information to us for the purposes of our investigation.

First information notice

- A3.8 The first information notice issued to VM on 21 August 2017 (First Notice) required it to provide information about VM's retail fixed term contracts offered to consumers at any time between 1 September 2016 to 30 June 2017, including:
- the applicable monthly subscription charges and ETCs;
 - the number of subscribers that terminated their package, including a breakdown of subscribers that terminated as a result of a home move;
 - the number of subscribers that had an ETC raised against their account and the total value of ETCs raised; and
 - in relation to subscribers who terminated as a result of a home move:
 - the number of subscribers who signed up to a new initial commitment period with VM at their new address; and
 - the number of new subscribers VM signed up at the former address of a subscriber that terminated as a result of a home move.
- A3.9 We also required VM to provide information and internal documents which relate to:
- how it calculated its ETCs and the factors/types of cost relevant to those calculations;
 - reviews or proposed changes to its ETC procedures and/or the way VM calculated ETCs, in particular any organisational structures for keeping its ETC policy under review;

¹⁸² https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01198

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- its organisational structures for review of its ETC policies and any documents considered by these organisational structures during the period under investigation;
- any amendments made to its terms and conditions in relation to its ETC policy during the period of our investigation; and
- the review of its ETCs and terms and conditions which VM had referred to in its May 2017 Response.

A3.10 VM responded to the First Notice on 2, 9 and 13 October 2017 (First Response).

Second information notice

A3.11 We issued a second information notice to VM on 17 November 2017 (Second Notice). The purpose of the Second Notice was to clarify aspects of VM's First Response. VM responded on 30 November 2017 (Second Response).

Third information notice

A3.12 On 17 January 2018, we issued to VM a third information notice (Third Notice). The Third Notice was issued following a meeting with VM on 12 December 2017 (December 2017 Meeting) in which VM presented slides about its review of ETCs and its revised approach to their calculation. The Third Notice requested information in relation to VM's slide presentation, including:

- confirmation of changes to VM's fixed term contracts in September 2016;
- confirmation of whether VM changed its ETC rate card at the same time;
- an explanation of VM's revised practice for calculating ETCs introduced on 22 August 2017, including details of its new 'home move replacement acquisition calculation'; and
- details of the number and amount of refunds paid, or expected to be paid, to customers who had been overcharged ETCs.

A3.13 The Third Notice also asked for information about VM's organisational structure and internal governance and about the volumes of complaints received by VM concerning ETCs.

A3.14 VM responded to the Third Notice on 14 February 2018 (Third Response).¹⁸³

Fourth information notice

A3.15 We issued a fourth information notice to VM on 15 March 2018 (Fourth Notice). This requested a breakdown of the total number of customers to whom VM had issued, or expected to issue, refunds and the total amount of ETCs VM had over-recovered from these customers.

¹⁸³ Following a review of the Third Response, on 2 March 2018 we requested further clarification from VM on aspects of its response. The response to the follow up was received on 8 March 2018. The Third Response consists of both the original response and the updated response but where we refer to the updated response only, we call it the Follow-up Third Response.

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A3.16 In addition, the Fourth Notice requested further information about VM's home move replacement acquisition calculation.

A3.17 VM responded to the Fourth Notice on 4 and 6 April 2018 (Fourth Response).¹⁸⁴

Fifth information notice

A3.18 We issued a fifth information notice to VM on 18 April 2018 (Fifth Notice). We requested that VM confirm the data provided in its Fourth Response, in particular:

- the total amount that VM had paid by way of refund to customers who paid ETCs as a result of terminating their fixed term contract during an initial commitment period at any point during 1 September 2016 to 31 August 2017;
- the total amount that VM expects to pay by way of a refund to customers who paid ETCs as a result of terminating their fixed term contract during an initial commitment period at any point during 1 September 2016 to 31 August 2017; and
- the total amount that VM had donated to charity.

A3.19 In addition, the Fifth Notice requested further information about the steps VM had or was intending to take, in relation to home movers, as it had set out in its letter to Ofcom on 19 March 2018 (the March 2018 Letter).¹⁸⁵

A3.20 VM responded to the Fifth Notice on 25 April 2018 (Fifth Response).

Sixth information notice

A3.21 We issued a sixth information notice to VM on 27 April 2018 (Sixth Notice) to obtain information to clarify VM's Fifth Response.

A3.22 VM responded to the Sixth Notice on 3 May 2018 (Sixth Response).

Seventh information notice

A3.23 Following VM's Oral Representations on 14 September 2018, we issued a seventh information notice to VM on 2 October 2018 (Seventh Notice) to clarify certain matters raised in those representations.

A3.24 VM responded to the Seventh Notice on 8 October 2018 (Seventh Response).

Engagement with VM during the investigation

A3.25 Ofcom met with VM, at its request, on 12 December 2017 (December 2017 Meeting). VM presented slides (December 2017 Meeting Slides) setting out information about its ETC

¹⁸⁴ Following a review of the Fourth Response, on 5 April 2018 we requested further clarification from VM on some of the data provided in its response. VM responded with updated data on 6 April 2018. The Fourth Response consists of both the original response and the clarification response, but where we refer to the updated response only, we call it the Follow-up Fourth Response.

¹⁸⁵ Letter from [member of VM's Regulatory Team] to Lynn Parker at Ofcom dated 19 March 2018 (March 2018 Letter).

conditions and procedures and steps it had taken since the investigation opened (see Section 3 of this document for further details).¹⁸⁶

A3.26 VM wrote to Ofcom on 19 March 2018 (the March 2018 Letter), to set out its views on the investigation and to explain actions it had taken to remedy the over recovery of ETCs and its revised approach to the calculation of ETCs. It also explained that it would be amending its terms and conditions in order to enable existing customers on a fixed term contract to continue that contract at a new address, where VM services are available. VM said that during the period under investigation:

“all customers that moved to a new address were required to enter into a new contract for [VM] services. This was because [VM’s] IT systems were still aligned to the former cable franchises and, as a consequence, customers moving location had to be re-entered onto the system to reflect their new address, generating the need for a new contract rather than simply assigning a new address to an existing customer.”¹⁸⁷

A3.27 VM concluded that it had: *“found no evidence that charging of ETCs and the over recovery in the period September 2016 – August 2017 has dissuaded customers from leaving VM”*.¹⁸⁸

A3.28 Ofcom met with VM on 27 March 2018 (March 2018 Meeting). At the meeting, the case team outlined its provisional findings from the investigation.¹⁸⁹

Section 96A Notification and VM’s Representations

A3.29 On the basis of the information gathered above, we provisionally determined that we had reasonable grounds for believing that VM contravened GC 9.3 and GC 9.2(j) during the Relevant Period, which we set out in the Section 96A Notification that we issued to VM on 21 May 2018.

A3.30 The Section 96A Notification set out the steps that we provisionally concluded VM should take to comply with the requirements of GC 9.3 and GC 9.2(j) and remedy the consequences of the contraventions. It also set out our provisional view that we were minded to impose a penalty for the contraventions and the amount of the penalty that Ofcom considered would be appropriate and proportionate. VM was given the opportunity to make written and/or oral representations on the notified matters.

A3.31 VM provided its Written Representations on the notified matters on 24 July 2018. It also made its Oral Representations on the notified matters on 14 September 2018. The final transcript of the Oral Representations was provided to VM on 22 October 2018.

¹⁸⁶ ETCs: Update for Ofcom presentation made by Virgin 12 December 2017 (December 2017 Meeting Slides).

¹⁸⁷ VM March 2018 Letter, p.4.

¹⁸⁸ VM March 2018 Letter, p.5.

¹⁸⁹ December 2017 Meeting Slides.

A4. VM's ETC rate cards during the Relevant Period

A4.1 During the Relevant Period, VM published three different ETC rate cards on its website. These are set out below.

A4.2 The first published ETC rate card was issued on 1 September 2016. The ETC rate card published on VM's website at the start of the Relevant Period is set out at Table A4.1 below. It provides separate ETC rates by reference to each VM service provided under the fixed term contract (phone, broadband, TV) and, within each service type, different ETCs according to the service level/tier provided. As shown in Table A4.1 below, the published ETC rate card primarily used "T-shirt sizes" to distinguish between service tiers (e.g. M, L, XL etc) within that service.¹⁹⁰

Table A4.1: VM published ETC rate card – 1 September 2016 to 20 March 2017

	Service tier	Published ETC rate card 1 September 2016 – 20 March 2017
Phone	M	£10.00
	L	
	XL	
	XXL	
Broadband	S	£15.00
	M	£15.00
	L	£20.00
	XL	£25.00
	XXL	£30.00
	XXL Gamer	£32.50
	XXXL	£35.00
TV Solus	Player	£0.00
	More TV	£15.00
	Mix	£16.50
	Fun	£20.00
	Full House	£25.00
TV Duals/Triples	Player	£0.00
	More TV	£2.00
	Mix	£3.00
	Fun	£10.00
	Full House	£12.00

Source: First Response, Annex 6 – response to Q8 and Annex 7 – response to Q8

¹⁹⁰ First Response, question 8, email from [VM employee] to [Senior Commercial Manager] dated 31 January 2017, VM0004.

A4.3 Text below the published table explained how the ETC rate card was applied by VM in calculating the total amount due from the customer in the event of early termination:

“For example, if you have 3 months left to run on your contract and the bundle of services you’re cancelling is: Phone size: M, Broadband Size: M and TV size: Mix, the Early Disconnection Fee that you’ll be charged is: £10.00 (for Phone M) + £15.00 (for Broadband M) + £3.00 (for Mix TV) = £28.00 multiplied by 3 (i.e. 3 months left on your minimum contract), giving a total Early Disconnection Fee of £84.00.

Note: The maximum early disconnection fee is capped at £240.”¹⁹¹

A4.4 Thus, where the customer’s fixed term contract was for two or more services (e.g. phone and broadband; phone, broadband and pay TV services), the ETC rate was calculated by adding the ETCs shown in the table for each service at the relevant service tier. The ETC rate was then multiplied by the number of months left in the customer’s initial commitment period. Subject to the overall cap of £240, this provided the total amount of the ETC which the customer was required to pay under what were conditions M11 to M13 of VM’s terms and conditions in the Relevant Period.

A4.5 On 20 March 2017, VM published a new ETC rate card on its website.¹⁹² As is shown in Table A4.2 below, VM made the following changes in this version of the ETC rate card:

- it replaced the broadband service tiers based on T-shirt sizing with the specific broadband product name, e.g. ‘VIVID 50’ or ‘VIVID 300’. These changes followed a customer complaint that it was not clear from the T-shirt sizes which ETC rate applied to which VM bundle;¹⁹³
- it removed the phone service from the table and added separate text that stated “*All our home phone tiers carry an Early Disconnection Fee of £10.80*”;¹⁹⁴
- it increased the published ETC rates for all its phone and broadband services and the majority of its pay TV services to reflect the ETC rates that had been effective since 1 November 2016 (see paragraph 3.15 in Section 3 and Table A4.2 below).

Table A4.2: VM published ETC rate card – 20 March 2017 to 21 August 2017

	Service tier	Published ETC rate card: 20 March 2017 to 21 August 2017
Phone	-	£10.80
Broadband	Superfast 50/70	£21.50
	VIVID 100/150	£26.50
	VIVID 200	£31.50

¹⁹¹ First Response, Annex 6 – response to Q8 and Annex 7 – response to Q8.

¹⁹² First Response, question 13, email from [VM employee] to [Senior Commercial Manager] and others dated 20 March 2017, VM20001. First Response, question 8, VM00013.

¹⁹³ First Response, question 8, email from [member of VM’s Legal Team] to [VM employee] dated 9 January 2017, VM00004.

¹⁹⁴ First Response, question 8, VM00013.

	VIVID 300	£36.50
TV Solus	Player	£0.00
	Mix	£18.00
	Fun	£21.50
	Full House	£26.50
TV Duals/Triples	Player	£0.00
	Mix	£3.00
	Fun	£10.00
	Full House	£12.00

Source: First Response, question 8, VM00013 and VM's Third Response, question 21.

A4.6 The method of calculating the customer's ETC rate remained unchanged.¹⁹⁵

A4.7 VM introduced a new ETC rate card on 22 August 2017. This reduced the ETC rate for VM's phone service to zero and made substantial reductions to the majority of VM's rates for its broadband and pay TV services. The new rate card is set out in Table A4.3 below:

Table A4.3: VM current published ETC rate card from 22 August 2017

	Service tier	Published ETC rate card from: 22 August 2017
Phone	-	£0
Broadband	Fibre 20	£10
	Superfast 20/30/50	£13
	Superfibre 50/70	£13
	VIVID 100/150	£19
	VIVID 200	£24
	VIVID Gamer	£24
	VIVID 350	£24
TV Solus	Mix	£10
	M+	£10
	Fun	£19
	Full House	£24
TV Duals/Triples	Player	£3
	Mix	£6
	M+	£4
	Fun	£10
	Full House	£10

Source: VM's Third Response, question 21 and VM's current website¹⁹⁶

¹⁹⁵ First Response, question 8, VM00013.

¹⁹⁶ <http://www.virginmedia.com/shop/the-legal-stuff/terms-and-conditions-for-fibre-optic-services/early-disconnection-fees.html>