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## **Confirmation Decision under section 96C of the Communications Act 2003**

Confirmation Decision served on EE Ltd (EE) by the Office of Communications (Ofcom) for contraventions of General Conditions 9.2(j) and 9.3

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

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# 1. Overview

- 1.1 Ofcom has set a number of General Conditions to protect consumers. Communications Providers must comply with them in order to further consumers' interests and protect them from poor practices.
- 1.2 We have penalised EE for breaking these rules on more than one occasion before. We have now found it in breach again. Each time, EE has failed to take adequate care of its consumers' interests and ensure they do not suffer harm. This suggests it has not taken compliance with consumer protection rules seriously enough.
- 1.3 In this case we are satisfied that EE has broken two rules. The first makes sure consumers have information about their contracts which is clear and accurate, so they know what their rights and obligations are and can make decisions about the right services to buy. The second ensures that the process for consumers to switch providers is as smooth as possible - so that they do not face obstacles if they want to change provider to get a better deal.
- 1.4 We have found that EE broke the first rule by having contract terms which did not set out clearly the charges consumers would have to pay if they ended their contract early (early termination charges or ETCs). It broke the second by setting those charges too high for a large number of consumers.
- 1.5 The evidence suggests these breaches affected somewhere between 8m and 15m consumer contracts over a six-year period. Around 400,000 consumers ended these contracts early and EE billed them for excessive ETCs by somewhere between £11.4m and £13.5m. Taking account of ETCs that were not paid, EE's customers actually overpaid by around £3m-£4.3m.
- 1.6 The rules EE has broken are very important consumer protection rules. They ensure consumers can get the maximum benefit from a competitive market. We have decided to impose a substantial penalty, of **£6.3m**, on EE to deter it from further breaches. That penalty includes a 30% discount applied to the penalty we would have set, as a result of EE admitting liability and entering into a settlement with Ofcom. The penalty would have been significantly higher had EE not co-operated closely with our investigation, and taken steps to remedy the breaches and to ensure it complies with the GCs.
- 1.7 This Confirmation Decision explains each of these matters in more detail.

## 2. Introduction

- 2.1 This document explains Ofcom’s decision to issue EE Ltd (trading as ‘EE’) with a Confirmation Decision under section 96C of the Communications Act 2003 (the Act) in respect of its contraventions of General Conditions (GCs) 9.2(j) and 9.3. The Confirmation Decision is at **Annex 1**.
- 2.2 Consumers buy communication services (home phone and mobile services) from EE on fixed term contracts which last for up to 24 months. Ofcom has found that EE contravened GCs 9.2(j) and 9.3<sup>1</sup> in relation to those contracts for those services.
- 2.3 GC 9.2(j)<sup>2</sup> requires communications providers (CPs) to specify in their contracts with consumers the charges due on termination of the contract in a clear, comprehensible and easily accessible form. GC 9.3<sup>3</sup> requires CPs to ensure that conditions and procedures for contract termination do not act as a disincentive for end-users against changing providers.
- 2.4 These GCs are key consumer protection provisions which directly transpose mandatory minimum harmonisation requirements of the EU telecommunications framework (the Universal Service Directive (USD), as amended by the Citizens’ Rights Directive (CRD)).<sup>4</sup> They are designed to ensure consumers can make, and give effect to, informed choices about the services that best suit their needs and take advantage of the benefits of competition between providers. Those benefits to consumers are jeopardised where they do not have appropriate information and are hindered by obstacles to switching, including contractual conditions and charges.
- 2.5 We have investigated EE’s compliance with GCs 9.2(j) and 9.3, as set out in Annex 2. Based on the evidence we have gathered, we are satisfied that between at least 1 January 2012 and 5 June 2018 (for consumers of mobile services) and 1 January 2012 and 7 August 2018 (for consumers of home services) (the Relevant Period(s)) EE contravened those GCs as follows.
- 2.6 First, EE contravened GC 9.2(j) by having terms which did not specify in a clear, comprehensive and accessible form the charges due on termination of the contract (ETCs). They did not specify in such form the amounts that make up its ETCs for mobile consumers and did not enable such consumers to calculate their potential liability when considering ending their contracts, from at least 1 January 2012 to 5 June 2018.
- 2.7 Second, EE contravened GC 9.3 by having conditions and charges relating to contract termination (i.e. ETCs) which did not take into account discounts given to consumers of its mobile and home services (‘discount consumers’)<sup>5</sup> on their recurring retail subscription

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<sup>1</sup> Ofcom has 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.

<sup>2</sup> Now Condition C1.2(k).

<sup>3</sup> Now Condition C1.3.

<sup>4</sup> Directive 2002/22/EC, as amended by Directive 2009/136/EC.

<sup>5</sup> Throughout this document, unless the context suggests otherwise, we refer to any consumers of EE’s mobile or home services in receipt of a recurring discount to their periodic subscription price as ‘discount consumers’.

price. They were not based on the retail price the relevant consumers were actually paying and instead were based on a higher, undiscounted retail price.

- 2.8 In other words, discount consumers were allowed to pay one retail price while they remained EE customers but treated as if they were paying another, higher price if they wanted to leave and they were liable to pay ETCs based on that higher price. They were, therefore, subject to contractual terms that required them to pay an excessive ETC if they wished to switch provider during the fixed term of their contract. EE accordingly failed to ensure that its conditions and procedures for contract termination did not act as disincentives for consumers against switching from at least 1 January 2012 to 21 May 2018 (for mobile discount consumers) and 1 January 2012 to 7 August 2018 (for home discount consumers).
- 2.9 The evidence suggests that EE had somewhere between 8m and 15m<sup>6</sup> fixed term contracts with discount consumers during the Relevant Periods which contained terms that required the consumers to pay an excessive ETC. Accounting for cases in which ETCs were waived, the evidence from EE indicates that approximately 400,000 of those consumers exited their contracts during their fixed term and were billed for an ETC that was higher than it should have been, by somewhere between £11.4m and £13.5m.<sup>7</sup>
- 2.10 We recognise that not all discount consumers who received a bill for an ETC paid it (for example, because the charge was subsequently waived by EE). Taking account of ETCs that were not paid, EE estimates that discount consumers actually overpaid in the order of £3m-£4.3m during the Relevant Periods. We also recognise that EE has undertaken to provide refunds of c.£2.7m to those consumers it has been able to identify from its billing records who were billed for an ETC that was higher than it should have been. However, this means up to £1.6m of the amount overpaid is unable to be refunded.
- 2.11 There is no evidence to suggest that EE had processes in place to review or check its contractual terms or ETCs for compliance with GCs 9.2(j) or 9.3 during the Relevant Periods. EE also has a history of non-compliance with the GCs, particularly on issues relating to charging and billing consumers.
- 2.12 In all the circumstances, there is a need to impose a penalty on EE that has a strong deterrent effect. We have decided to impose a penalty of **£6.3m**. This includes a 30% discount applied to the penalty figure of £9m we would otherwise have imposed, as a result of EE admitting liability and entering into a settlement with Ofcom.

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<sup>6</sup> Our upper bound (15m) is based on the sum of the number of in-contract discount consumer contracts EE had in each year in the Relevant Periods. We note that some consumers are likely to have been on contracts for more than 12 months, so this figure is likely to overestimate the total number of consumer contracts affected. Our lower bound figure (8m) is based on an assumption that the average consumer contract duration was 24 months (the maximum permitted contract duration in the Relevant Periods). Our lower bound is likely to understate the total number of consumer contracts affected as the average consumer contract duration would have been shorter than 24 months.

<sup>7</sup> The precise figures within this range depend on the extent of the discounts EE gave discount consumers. The upper end of the range is based on the figures it first provided to Ofcom (Second Response – see Annex 3). It subsequently contended that the discounts it gave consumers may have been lower at times in the Relevant Period (3<sup>rd</sup> clarification to Second Response). The lower end of the range reflects that.

## Confirmation Decision

- 2.13 Our regulatory judgment is that this penalty would be appropriate and proportionate to the contraventions in respect of which it would be imposed. In taking that view, we have had regard to all the evidence referred to in Sections 3 and 4 of this document, together with our published Penalty Guidelines.
- 2.14 The penalty would have been significantly higher but for EE's close co-operation with our investigation, and the steps it has taken to remedy the breaches and to ensure it complies with the GCs. The basis for our view as to the amount of the penalty is explained further in Section 4 below.
- 2.15 In light of Ofcom's concerns, EE's senior management have agreed to conduct a review of EE's commercial processes and systems. EE will keep Ofcom updated throughout that process and it is aiming to have prepared initial findings early next year with an implementation phase to follow thereafter.

## 3. Contravention of GCs 9.2(j) and 9.3

### The Regulatory Framework

#### General conditions 9.2(j) and 9.3

- 3.1 EE is a provider of electronic communications services trading as EE, Orange and T-Mobile. Since January 2016, EE has been integrated into the BT Group. Like all CPs who offer services consisting in the provision of electronic communications networks or services, it is subject to a number of GCs which have been imposed by Ofcom under sections 45 to 55 of the Communications Act 2003 (the Act).<sup>8</sup>
- 3.2 GC 9.2(j) requires CPs to specify certain information in a clear, comprehensible and easily accessible form in their contracts with consumers. In particular, GC9.2(j)(iii) requires contracts to specify *“any charges due on termination of the contract, including any cost recovery with respect to terminal equipment”*.
- 3.3 GC 9.3 requires that, *“Without prejudice to the initial commitment period, CPs shall ensure that conditions or procedures for contract termination do not act as disincentives for End-Users against changing their CP.”*
- 3.4 Both conditions give effect to mandatory minimum harmonisation provisions of the USD, as amended by the CRD.<sup>9</sup> Recital 49 USD says, *“This Directive should provide for elements of consumer protection, including clear contract terms...”*. Articles 1.1 and 1.2 make clear (i) that the Directive’s aim is to ensure the availability throughout the EU of good quality publicly available services through effective competition and choice; and (ii) that it establishes consumers’ rights and CPs’ corresponding obligations.
- 3.5 GC 9.2(j) transposes Article 20.1 USD, which in turn reflects Recital 30 of that Directive:
- “Contracts are an important tool for users and consumers to ensure a minimum level of transparency of information and legal security. ... Specifically, consumers should enjoy a minimum level of legal certainty in respect of their contractual relations with their direct telephone service provider, such that the contractual terms, conditions, quality of service, conditions for termination of the contract and the service, compensation measures and dispute resolution are specified in their contracts. ... The measures to ensure transparency on prices, tariffs, terms and conditions will increase the ability of consumers to optimise their choices and thus to benefit fully from competition.”*
- 3.6 Clear, comprehensible and easily accessible contract terms should enable consumers who are considering switching provider to calculate their liability to their current provider if they

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<sup>8</sup> General Conditions of Entitlement, <http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/general-conditions/>.

<sup>9</sup> Directive 2002/22/EC, as amended by Directive 2009/136/EC.

terminate their contract. That would give them certainty, enabling them to make an informed and optimised choice about which provider to contract with and thereby to benefit fully from competition.

- 3.7 GC 9.3 gives effect to Article 30 USD, headed “Facilitating change of provider,” and which is in the same terms as the GC. It reflects Recital 47 CRD which explains the policy objective behind the provision:

*“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.”<sup>10</sup>*

- 3.8 Ofcom implemented Article 30(6) by modifying GC 9 in May 2011.<sup>11</sup> In our accompanying statement, we said that “...disincentives can be both contractual (early termination charges, automatically renewable contracts) or can be industry processes”, noting:

*“... 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”.*<sup>12</sup>

- 3.9 The specific requirements of GC 9.3 are important. They oblige CPs to ensure their conditions and procedures for contract termination do not act as disincentives for consumers to switch provider. A disincentive need not amount to a prohibition of a course of action.<sup>13</sup> The nature of these requirements reflects the importance of consumers being able to make and give effect to informed choices without hindrance.

- 3.10 When consumers agree to buy communications services for a fixed term — the initial commitment period — their provider may make it a term of the agreement that the consumer will pay an ETC if they terminate the contract before the end of the fixed term. The term can operate to hold the consumer to the fixed term and, if they terminate the contract early and the ETC becomes payable, to compensate the provider for the loss it incurs.

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<sup>10</sup> Directive 2009/136/EC, recital 47.

<sup>11</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0023/33449/annex\\_2.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0023/33449/annex_2.pdf)

<sup>12</sup> Ofcom, *Changes to the General Conditions and Universal Service Conditions Statement*, dated 25 May 2011, paragraph 7.76.

<sup>13</sup> According to the Shorter Oxford English Dictionary, is, “a source of discouragement, esp. in an economic or commercial matter.”



- 3.11 Where consumers are liable to pay ETCs which are too high these are disincentives falling within the requirements of GC 9.3 (just as it would be an incentive to switch if the provider gave the consumer money to do so). Examples of such disincentives include:
- a) requiring consumers to pay more to terminate their contract during the fixed term than they would have been required to pay if they had remained with the CP for its duration; and
  - b) requiring them to pay an ETC that is calculated based on an amount that is higher than they pay in their recurring monthly subscription price (e.g. because it does not take into account retail price discounts) and which is therefore higher than it should be given the subscription price the consumer actually pays.

Such disincentives self-evidently put an obstacle in the way, in the form of contractual conditions and charges, which hinders consumers' abilities to make informed choices and to change providers when it is in their interests (and take full advantage of the competitive environment). In imposing such contractual terms, a CP fails to ensure its conditions and procedures for contract termination do not act as disincentives within the meaning of the condition.

## EE's consumer contracts

- 3.12 EE contracts with consumers on standard terms and conditions to provide them with mobile and home (fixed-line) communication services for fixed terms (up to 24 months). Those contracts require consumers to pay a recurring (usually monthly) subscription price for that period. Some consumers receive a discount to their recurring subscription price. Whether or not they receive a discount, the contracts include terms requiring the consumer to pay an ETC if they terminate their contract before the end of its fixed term.

## Organisational processes for setting prices, discounts and ETCs

- 3.13 EE's consumer contract terms relating to prices, discounts and ETCs are the responsibility of its marketing department. It sets and proposes changes to them for mobile and home consumers. The Marketing Directors for Mobile (for mobile services) and for Home, Mobile Broadband and TV (for home services) have ultimate responsibility for these matters. Other EE personnel have an oversight role in relation to them and are kept updated of proposed changes as projects are implemented. Those personnel include the Customer Services, Finance, Regulatory, Legal and Technical (IT/Billing) departments and their Directors.<sup>14</sup>

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<sup>14</sup> First Response, Q3, (Annex A EE Mobile customers), p.3 and Q3 (Annex B EE Home customers), p.7.

- 3.14 EE reviews pricing for its home services typically once or twice a year.<sup>15</sup> It has told us that, in consequence of any such reviews, its ETCs are automatically adjusted using the calculation method it employs to set those charges.<sup>16</sup>
- 3.15 For its mobile services, EE has said that a proposal to change its ETCs would follow its *“normal business as usual formal project process,”* although, *“a project involving changes to the calculation of ETCs has not taken place for some time so it is hard to provide a specific example of how exactly a project or review of ETCs would take place”*.<sup>17</sup>
- 3.16 Ofcom required EE to provide documents showing the consideration given to, and decisions made by, its senior management relating to ETCs between 1 January 2012 and 30 April 2018.<sup>18</sup> The documents it provided did not include any prior to 20 July 2017. The documents it did provide show that they only gave these issues very limited, reactive consideration on later dates, after we started an industry-wide programme looking into providers’ ETCs:
- a) We opened our industry-wide programme in June 2017. On 20 July 2017, EE flagged to the BT Group Risk Committee, *“increased scrutiny around ETCs.”*<sup>19</sup>
  - b) In response to a media enquiry in February 2018, when senior managers were discussing the lack of complaints about EE’s ETCs, it was suggested that the reason for the low level of complaints was due to the fact:

*“1) we're a little opaque about how its calculated so people don't really check, just pay and leave 2) customers who buy out their contract to upgrade early with EE get a further 20% discount as we take the VAT off too for them, as no service is provided But given the issues, I am surprised it doesn't come up more often so wonder if in reality agents do discount the MRC?”*<sup>20</sup>
  - c) When our investigation into EE’s compliance with the relevant GCs began in May 2018, the BT Group Executive Committee were advised that, *“EE and its predecessor companies have applied monthly recurring discounts for many years... We cannot be sure what ETC policies weried to historic discounts”*.<sup>21</sup>

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<sup>15</sup> According to its First Response.

<sup>16</sup> First Response, Q3, (Annex B EE Home customers), p.7.

<sup>17</sup> First response, Q3, (Annex A EE Mobile customers), p.3.

<sup>18</sup> See the Second Notice.

<sup>19</sup> BT Group plc, Consumer Business Unit Review Q 2017/18, p.16 (separate document provided in Second Response, Q10-11, p.65).

<sup>20</sup> Email from [redacted] dated 16 February 2018 at 18:59 forwarded to various Directors including CEO of Consumer [redacted], Mobile Marketing Director [redacted] on 18 February 2018 at 9:32 (separate document bundle provided in Second Response, Q10-11, p.54-55).

<sup>21</sup> BT Group plc, Executive Committee Information Paper on Ofcom Investigation into EE’s Mobile Early Termination Charges, dated 8 May 2018 (separate document bundle provided in Second Response, Q10-11, p.46).

## Discounts

- 3.17 EE gives consumers a number of different types of discounts to their recurring subscription prices. It provided us with a list of discounts that were given to mobile discount consumers between March 2017 and April 2018.<sup>22</sup> It has not provided us with a similar list in respect of home consumers and does not have information about all discounts applied during the Relevant Periods (though it contends that, “... we know that discounts in prior periods were much less rich than they are today and applied to a smaller percentage of customer groups.”)<sup>23</sup>
- 3.18 Some of the discounts are substantial. For example, a Family and Friends (F&F) discount has been available to EE employees since 2012. It is a “heavily discounted monthly charge”<sup>24</sup> of between [X]%. Other types of discount EE offered during the Relevant Period, according to its list, include: £X loyalty discount (£[X]); £X credit (£[X]); X% discount ([X]% off plan charge); price rise discount; new customer discount; staff discount; and [X].<sup>25</sup>
- 3.19 EE has indicated that, for the period October 2016 to April 2018, a significant number of mobile discount consumers received a discount of more than 21% on their recurring subscription price. This is important because of the way EE calculated their ETCs.
- 3.20 In particular, it did not make any adjustment to those ETCs to take account of the discounts. Instead, it calculated them by taking the undiscounted retail price the consumer would otherwise have paid and deducting VAT and a 4% discount for accelerated receipt – see paragraphs 3.24 - 3.27 below. The effect was that, in that period, c.24% of mobile discount consumers were liable to pay an ETC, if they ended their contract early, that was higher than the amount that they would have paid to EE in discounted monthly subscriptions for the remainder of their fixed term.<sup>26</sup>

## Contractual terms and ETCs

### Mobile consumers’ contractual terms and ETCs during the Relevant Period

- 3.21 EE provided us with copies of some standard terms and conditions that applied during the Relevant Periods. The following clauses from EE’s Network Terms and Conditions applied to its mobile consumers on fixed term contracts between 1 January and 31 July 2017, for example:

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<sup>22</sup> Second Response, Q4, pp.2-5.

<sup>23</sup> Second Response, Q4, p.5.

<sup>24</sup> EE’s response to our initial assessment of its compliance, 20 April 2018, p.4.

<sup>25</sup> Second Response, Q4, p.2-5, which provided discounts available from March 2017 to April 2018.

<sup>26</sup> We have estimated this based on the information provided in EE’s Second Response (clarification #1) about the number of mobile discount customers in receipt of a discount that was greater than 21%. Consumers who had a discount of greater than 21% on their full (non-discounted) monthly subscription price would have been liable to pay more to exit their contract than if they had stayed with EE for their remaining fixed term. This is because the cost mitigations EE applies in calculating its ETCs (i.e. VAT and a 4% discount for accelerated receipt of funds) amount to 21% of a consumer’s monthly subscription price.

*"8. Ending this Agreement: [from Summary]*

*...Unless We tell You otherwise You will have to pay a charge for ending the Agreement before the end of the Minimum Term which We call the Cancellation Charge. The **Cancellation Charge is the total of the Monthly Charges for the remainder of the Minimum Term, less any discount You are entitled to...***

*8.1.1 If (except as set out in point 8.4) in Our total discretion, We accept notice from You to terminate this Agreement within the Minimum Term, You will have to pay Us a Cancellation Charge and, if applicable, the Additional Commitment Service Cancellation Charge. You May be entitled to a **discount** on Your Cancellation Charge, **see Our Plan Price Guide or Non-Standard Price Guide for details**"<sup>27</sup> [Emphasis added].*

- 3.22 EE has stated that the 'discount' referred to was explained to mobile consumers in its "price plan guides".<sup>28</sup> During the Relevant Period, EE's Plan Price Guide did not contain a reference to discounts or ETCs, but its **Non-Standard** (emphasis added) Price Guide stated:

*"Terminating your agreement with us:*

*...If you are terminating whilst you are within your existing minimum term, a cancellation charge will apply. We calculate a cancellation charge by firstly adding together all outstanding monthly (or other periodic) monthly charges (or any other charges stated in the terms and conditions for any service) for the remainder of your minimum term. **We then take off 4% of that figure to get to the final charge.**" [Emphasis added]*

- 3.23 Similar terms and conditions applied to EE's fixed term contracts for mobile consumers throughout the Relevant Period.<sup>29</sup> Similar information to that extracted above from EE's Non-Standard Price Guide was available on its website and provided to consumers during the sales process throughout that period.<sup>30</sup>
- 3.24 During the Relevant Period, and pursuant to the terms and conditions that then applied, EE calculated mobile consumers' ETCs using the following formula:

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<sup>27</sup> EE s135 response to the First Notice (First Response), Q2 (Annex A – EE Mobile customers), p.2. See also EE email to Ofcom 19 February 2018 at 19:26.

<sup>28</sup> EE's response to our initial assessment of its compliance, 20 April 2018, p.2.

<sup>29</sup> EE s135 response to the Second Notice, 11 July 2018 (Second Response), Q3, confirms "terms to the same or similar effect have applied since January 2012".

<sup>30</sup> Second Response, Q3, confirms "terms to the same or similar effect have applied since January 2012". EE states that the customer information form (CIF) which is provided to all mobile customers who take out a pay monthly contract in store varies "depending on the type of connection taken however they all contain the same terms on ETCs"; EE's response to our initial assessment of its compliance, 20 April 2018, pp.2-3.

*"[Monthly rental charge (calculated per day) x days remaining in contract term] x 0.96".<sup>31</sup>*

- 3.25 EE has clarified that the "monthly rental charge" in this calculation used the retail price excluding VAT and that "no VAT is applied to the ETC charge".<sup>32</sup> EE has confirmed that, during the Relevant Period, this monthly rental charge *did not* take into account recurring subscription discounts. It has stated that:

*"The monthly charge is the amount a customer agrees to pay for their plan, before any loyalty or friends & family discounts are applied, as these discounts may not be for the entire term of a contract or carry through any changes the customers take to their plan. The calculation is set out in our terms and conditions..."<sup>33</sup>*

- 3.26 EE has also confirmed that the discount referred to in its ETC terms for mobile consumers only makes allowance for its accelerated receipt of the rental charge which would otherwise have been paid each month by the consumer.<sup>34</sup> It was set at a "4% discount" [i.e. the "x 0.96" in the ETC calculation above] and has been used since 2002.
- 3.27 The effect, therefore, was that EE charged mobile discount consumers ETCs that were equivalent to the full retail price they would have paid but for the discount EE gave them, less 21%.

### Home consumers' contractual terms and ETCs during the Relevant Period

- 3.28 EE also gave us copies of some of its standard terms and conditions for home consumers that applied during the Relevant Periods. The following clauses from its Home Network Terms and Conditions (dated 24 October 2017) applied to those consumers on fixed term contracts:

*"5. Ending the Agreement [from Summary]*

*...Unless we tell You otherwise, You will have to pay a charge for ending the Agreement early (before the end of the Minimum Term) which We call the Cancellation Charge. The **Cancellation Charge is the total of the Price Plan Charges for the remainder of the Minimum Term, less any discount You are entitled to** (see points 9.1 to 9.3 of the terms and conditions).*

*...9.2. If You terminate this Agreement within the Minimum Term, You will have to pay Us a Cancellation Charge. **You may be entitled to a discount on Your Cancellation Charge, see our Price Guide for details.**"<sup>35</sup> [Emphasis added]*

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<sup>31</sup> First Response, Q1(b) (Annex A – EE Mobile customers), p.1.

<sup>32</sup> EE, 2<sup>nd</sup> clarification to the First response, 19 December 2017. This is not explained to customers in EE's Price Plan Guide; according to EE's response to our initial assessment of its compliance, dated 20 April 2018, p.3.

<sup>33</sup> EE confirmed this to Ofcom by email on 19 February 2018.

<sup>34</sup> EE, 1st clarification to First Response, 8 December 2017.

<sup>35</sup> First Response, Q2 (Annex B – Home customers), p.7 which included the document EE Home Network Terms, version 2 dated 24 October 2017. Extracts above are from pages 2, 4 and 12 of EE Home Network Terms. Available here:

3.29 EE's Home Price Guide contained details of how the ETC was calculated.<sup>36</sup> In the section of the Home Price Guide entitled "Early Cancellation Charges" was a table setting out the "termination cost for each month left of your minimum term" for all plans available since 26 October 2016. It stated:

*"Early cancellation charges apply when you cancel your broadband and phone while still within your minimum term. Your early cancellation charge depends on what broadband plan you are on and how many months you have left in your minimum term - use the table below to work out this charge. For example, if you are on the Unlimited Broadband and Weekend Calls plan and cancel, and have 2 months left in your minimum term, your early cancellation fee will work out to £27.46 (£13.73 charge x 2 months left in your minimum term)."*<sup>37</sup>

3.30 Similar terms and conditions to those set out above also applied to EE's fixed term contracts for home consumers throughout the Relevant Period. Such terms have applied since EE launched home services on 30 October 2012 (and since Orange began providing home services on 1 June 2006).<sup>38</sup> Similar information to that extracted above from EE's Home Price Guide was available on its website and provided to consumers during the sales process.<sup>39</sup>

3.31 During the Relevant Period, and again pursuant to the terms and conditions that applied, EE calculated its home consumers' ETCs using the following formula:<sup>40</sup>

*ETC payable = [\*Total monthly cost of line rental/broadband/TV]*

*Less*

*[VAT, any wholesale costs (consisting line rental, broadband, call packages and any other monthly Openreach costs) and a monthly service cost of £0.25]*

*\* Calculated daily so only includes remaining days and not whole months*

3.32 EE has volunteered admissions to us that the "total monthly cost" for home consumers *did not* take into account recurring subscription discounts.<sup>41</sup> It has also confirmed that, during

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<https://ee.co.uk/help/accounts-billing-and-topping-up/terms-and-conditions/ee-terms-and-conditions/broadband--home-phone-eetv-terms/home-network>. See also EE, 2nd clarification to Second Response, 9 July 2018.

<sup>36</sup> EE confirmed this in the First Response.

<sup>37</sup> First Response, Q2 (Annex B – Home customers), p.7 which included the document EE Home Price Guide, dated 1 October 2017. Extracts above are from pages 12 of EE Home Price Guide. The current version is available here:

<https://ee.co.uk/help/help-new/billing-usage-and-top-up/call-text-and-data-charges/ee-tv-broadband-and-home-phone-price-plans>; <https://ee.co.uk/help/accounts-billing-and-topping-up/terms-and-conditions/ee-terms-and-conditions/broadband--home-phone-eetv-terms/home-network>

<sup>38</sup> Second Response, Q3, confirms "terms to the same or similar effect have applied since January 2012". We assume this applies since the launch of home services on 30 October 2012 and Orange services prior to that time (Second Response, Q1, p.1).

<sup>39</sup> Second Response, Q3, confirms "terms to the same or similar effect have applied since January 2012". We assume this applies since the launch of home services on 30 October 2012 and Orange services prior to that time (Second Response, Q1, p.1).

<sup>40</sup> First Response, Q1 (Annex B – Home customers), p.5.

<sup>41</sup> EE meeting with Ofcom, 10 May 2018 referred to in Annex 1 below; Second Response, Q6 and 8.

the Relevant Period, its ETC calculation for home consumers *did not* include any discount for accelerated receipt.<sup>42</sup>

- 3.33 Home discount consumers were, accordingly, in a similar (though not identical) position to mobile ones as far as their ETCs were concerned.

### Discount consumers' ETCs during the Relevant Periods

- 3.34 We estimate<sup>43</sup> that EE had somewhere between 8m and 15m<sup>44</sup> fixed term contracts with discount consumers, across its mobile and home services, during the Relevant Periods. Each of them was subject to the terms set out above. That is, terms that required the consumers to pay an ETC, if they wished to switch provider during the fixed term of their contract, which did not take into account the discount given to the consumer and was instead based on a higher, undiscounted recurring subscription price. If they wanted to leave, they were treated as if they were paying a higher price and liable to ETCs based on that.
- 3.35 The relevant group of discount consumers included:
- a) those who, owing to the amount of the discount to their recurring subscription price, would have been liable to pay an ETC higher than that price; and
  - b) those who, even if not falling within (a), were subject to terms that meant they were liable to pay more than if EE had calculated the ETC based on the actual recurring subscription price they were paying (and which, in the case of home discount consumers, also did not take account of a discount for accelerated receipt).
- 3.36 We asked EE to provide data about the number of discount consumers who terminated their contracts during the Relevant Periods and were subject to contractual terms that provided for a liability to pay an ETC. EE stated that it was unable to do so<sup>45</sup> and instead provided us with data for customers who were billed for an ETC (though it submits that its policy was to waive approximately [X]% of ETCs for mobile consumers).<sup>46</sup>
- 3.37 EE has retained billing records since 1 October 2016 for mobile consumers and since 28 June 2016 for home consumers. The data it gave us therefore comprises actual data going back to those dates and estimates for the remainder of the Relevant Periods. Ofcom's calculations based on EE's actual and estimate figures are set out in Annex 3, and our summary is set out below.
- 3.38 EE told us that the average length of time left in the relevant consumers' contracts on their termination was [X] days for mobile consumers and [X] months for home consumers in

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<sup>42</sup> EE, 2<sup>nd</sup> clarification to Second Response, 9 July 2018.

<sup>43</sup> Using the information from EE's Second Response.

<sup>44</sup> See footnote 6.

<sup>45</sup> EE, 1<sup>st</sup> clarification to Second Response, clarification #3, p.2.

<sup>46</sup> EE, Second Response, Q5, p.5. EE has not provided us with a similar figure for home consumers but it has told us that only [X]% of home consumers actually paid ETCs.

12-month contracts and [36] months for home consumers on 18-month contracts.<sup>47</sup> The following table shows the estimated average amount of overcharge on each mobile and home discount consumer's ETC during the Relevant Periods.<sup>48</sup> That is, the average amount by which their ETC set based on an undiscounted subscription price exceeded that which would have applied had it been based on the discounted subscription price they actually paid.

**Table 1: Average total ETC overcharge per customer**

	2011/2012 Q4	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18
Mobile	£2	£8	£11	£16	£16	£13	£15
Home		£5	£5	£20	£32	£62	£50

3.39 EE estimates that, in total, approximately 400,000 discount consumers terminated their contracts during the Relevant Periods and were billed for an ETC that was higher than it should have been. The overcharge was between £11.4 and £13.5m in total.<sup>49</sup>

3.40 We recognise that not all discount consumers who received a bill for an ETC paid it (for example, because the charge was subsequently waived by EE). EE contends that only [36]% of home consumers' ETCs were actually paid.<sup>50</sup> On that basis, it estimates that discount consumers actually overpaid in the order of £3m-£4.3m in ETCs during the Relevant Periods.<sup>51</sup>

## Changes to contractual terms and ETCs after the Relevant Periods

3.41 Since we opened our investigation, EE has undertaken to make changes to its terms and conditions, its ETCs and its online materials for consumers (the Undertakings).<sup>52</sup> The Undertakings involve EE taking a number of different steps at different times.

3.42 EE undertook first of all that, for all mobile discount consumers who from 21 May 2018 end their contracts early, it would not in practice rely on its Mobile Network Terms and Conditions and its Non-Standard Price Guide set out above.<sup>53</sup> It gave a similar undertaking in respect of home discount consumers with effect from 7 August 2018. In each case, it agreed it would instead use the following revised ETC calculation:<sup>54 55</sup>

<sup>47</sup> Second Response, Q7.

<sup>48</sup> EE, 3<sup>rd</sup> clarification to Second Response.

<sup>49</sup> See footnote 7.

<sup>50</sup> Which EE contends is the rate of actual payment, 3<sup>rd</sup> clarification to Second Response.

<sup>51</sup> EE, 3<sup>rd</sup> clarification to Second Response; see also Annex 3 for Ofcom calculations.

<sup>52</sup> Undertakings provided by EE to Ofcom, dated 21 May 2018 for mobile services and 27 July 2018 for home services.

<sup>53</sup> See Schedules 1 and 2 of the Undertakings.

<sup>54</sup> See Mobile Undertakings 1 and 2 of the Undertakings.

<sup>55</sup> Undertakings provided by EE to Ofcom, dated 27 July 2018 (Home Undertakings 1 and 2).



- a) adding the discounted subscription prices, less VAT (20%), for the remainder of the fixed term of the contract to make a lump sum; and
- b) then deducting from that sum such costs, if any, as it saves and such losses, if any, as it can mitigate on early termination of the contract and applying to the resulting lump sum a discount of 4% for its accelerated receipt.

3.43 EE also committed to make changes to its online and written materials. By deadlines of 5 June 2018 (for mobile)<sup>56</sup> and 1 August 2018 (for home),<sup>57</sup> it amended its website to include a new page explaining its terms, policies and procedures regarding ETCs for consumers.<sup>58</sup> That page explains that ETCs will be calculated by adding together all outstanding periodic charges, taking any recurring subscription discount into account and excluding VAT, and making a further deduction for accelerated receipt. It includes an example of an ETC calculation including a subscription discount:

***“Example 2 – You have a monthly recurring contract for £45 a month, with six and a half months left. You also have a monthly recurring discount of £10. We multiply £35 (£45 - £10 discount) by six and a half, totalling £227.50, and take VAT off that figure, leaving it at £189.58. Finally, we take 4% off that figure, making your final Early Termination Charge (ETC) £182.”***

3.44 Additionally, on 5 June 2018 (for mobile)<sup>59</sup> and on 1 August 2018 (for home),<sup>60</sup> EE revised its price guides. It clarified that its ETCs exclude VAT, take into account recurring subscription discounts and include the deduction for accelerated receipt.<sup>61</sup> For example, its Non-Standard Price Guide for mobile customers now states that:

***“1. We add together all outstanding monthly (or other periodic) charges for the remainder of your minimum term, excluding VAT. If you have a monthly recurring subscription discount we will take that into account.***

***2. Finally, we take 4% off that figure to get the final charge you owe us.”** [Emphasis added]*

3.45 EE has also amended its guidance for customer service agents who process ETCs,<sup>62</sup> and it undertook formally to amend its written Mobile Network Terms and Conditions to reflect the above changes to its ETCs by 31 August 2018.<sup>63</sup> It amended its written Home Terms and Conditions on 1 August 2018.<sup>64</sup>

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<sup>56</sup> Undertakings provided by EE to Ofcom, dated 21 May 2018 (Mobile Undertaking 4).

<sup>57</sup> Undertakings provided by EE to Ofcom, dated 27 July 2018 (Home Undertaking 4).

<sup>58</sup> <https://ee.co.uk/help/help-new/managing-and-using-my-account/leaving-ee/early-termination-charges-explained>

<sup>59</sup> Undertakings provided by EE to Ofcom, dated 21 May 2018, (Mobile Undertaking 3).

<sup>60</sup> Undertakings provided by EE to Ofcom, dated 27 July 2018 (Home Undertaking 5).

<sup>61</sup> EE TV, Broadband and Home Phone Charges Price Guide, 1 August 2018, available at: <https://ee.co.uk/content/dam/ee-help/Help-PDFs/home-broadband/ee-home-price-guide.pdf>

<sup>62</sup> Second Response, Q9, p.11.

<sup>63</sup> Undertakings provided by EE to Ofcom, dated 21 May 2018, (Mobile Undertaking 5).

<sup>64</sup> Undertakings provided by EE to Ofcom, dated 27 July 2018, (Home Undertaking 5).

3.46 The effect of all these steps is that, from 21 May 2018, EE calculated ETCs for mobile discount consumers taking into account their discounted recurring subscription prices. As of 31 August 2018, this is reflected in its online materials and its written terms and conditions. A similar position applies for home discount consumers from 7 August.<sup>65</sup>

## Contraventions of GC 9.2(j) and 9.3

3.47 In light of the above, we have considered whether EE's terms and conditions during the Relevant Periods:

- a) enabled consumers to calculate their potential liability when considering ending their contracts, such that they can be said to have specified, in a clear, comprehensible and easily accessible form any charges due on termination of contract in accordance with GC 9.2(j); and
- b) subjected mobile and home discount consumers to contractual conditions making them liable to pay excessive ETCs if they wished to switch provider during the fixed term of their contract, and as such that EE failed to ensure its conditions and procedures for contract termination did not act as a disincentive to switch within the meaning of GC 9.3.

3.48 We have found, as set out below, that EE contravened each of the relevant GCs in the Relevant Periods.

## Findings under GC 9.2(j)

3.49 Looking at EE's relevant terms and conditions that applied in the Relevant Period (and we note that similar terms and conditions applied throughout that period), a mobile consumer will have seen from clause 8 only that *"the Cancellation Charge is the total of the Monthly Charges for the remainder of the Minimum Term, less any discount [they] are entitled to."* They would not have been able to work out their liability for ETCs.

3.50 Looking at that term, consumers may have understood 'discount' to mean their monthly recurring discount. That would have been incorrect because EE's ETC calculation did not take this into account during the Relevant Periods.

3.51 Clause 8.1.1, meanwhile, told the consumer that, "You May be entitled to a discount on Your Cancellation Charge," and that they should, "... see Our Plan Price Guide or Non-Standard Price Guide for details." The Price Plan Guide, however, made no reference to cancellation charges or discounts, and the Non-Standard Price Guide said:

*"If you are terminating whilst you are within your existing minimum term, a cancellation charge will apply. We calculate a cancellation charge by firstly adding together all outstanding monthly (or other periodic) monthly charges (or any other*

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<sup>65</sup> EE has also "recently" amended its guidance for customer service agents who process ETCs to include the line "any applicable discounts will also be applied to the final ETC", which is consistent with its revised ETC calculation. Second Response, Q9, p.11.

*charges stated in the terms and conditions for any service) for the remainder of your minimum term. We then take off 4% of that figure to get the final charge.”*

- 3.52 An average consumer is unlikely to have considered, looking at these terms, that the ETC was calculated on an ex-VAT basis and was therefore 20% lower than the retail price they pay. Rather, they are likely to have understood the terms as referring to the amount they pay EE each month, which included VAT (as well as their monthly recurring discount). Furthermore, a consumer needed to refer to an additional document on the EE website, that is separate from its terms and conditions, to find out that the reference to ‘discount’ meant the deduction for accelerated receipt (but not their monthly recurring discount).
- 3.53 The combination of these factors meant the consumer could not look at the terms and calculate their liability. On that basis, EE’s contract terms were not clear, comprehensive or easily accessible to customers in accordance with the requirements of GC9.2(j).
- 3.54 EE has now taken steps to make this information more clearly available to consumers. By 5 June 2018, it had clarified its terms and conditions on its website and its EE Non-Standard Price Guide to specify that its ETCs are calculated “*less VAT (20%),*” as well as accounting for discounts. It also undertook formally to update its written terms and conditions by 31 August 2018 with similar clarifications.<sup>66</sup>
- 3.55 We accordingly find that EE was in breach of GC 9.2(j) from at least 1 January 2012 to 5 June 2018.

### Findings under GC 9.3

- 3.56 As set out above, during the Relevant Periods EE’s discount consumers were subject to terms and conditions that required them, if they wished to switch provider during the fixed term of their contract, to pay ETCs that did not take account of their discounted recurring subscription price. The ETCs were instead set based on a higher, undiscounted subscription price. In other words, discount consumers paid one retail price while they remained EE customers but were treated as if they were paying another, higher price if they wanted to leave and they were liable to ETCs based on that higher price. The conditions therefore required them to pay ETCs that were higher than they would have been had they been based on the subscription prices the consumers were actually paying.
- 3.57 Such a contractual condition (and corresponding liability) was self-evidently a disincentive to switch for any discount consumer considering doing so. Based on the data provided by EE, between 8m and 15m<sup>67</sup> contracts with discount consumers were subject to such terms. EE accordingly failed to ensure its conditions and procedures for contract termination did not act as disincentives for those consumers to switch within the meaning of GC 9.3. The contravention lasted from 1 January 2012 to 21 May 2018 for mobile discount consumers

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<sup>66</sup> See above.

<sup>67</sup> See footnote 6.

and 1 January 2012 to 7 August 2018 for home discount consumers, on which latter dates EE completed the changes to the ETCs it applied to those consumers.

- 3.58 The very large affected group of consumers included a number of sub-groups. One of them was discount consumers who, as a result of the amount of the discount to their recurring subscription price, were subject to terms requiring them to pay ETCs greater than that price. They included c.24% of all mobile discount consumers between October 2016 and April 2018.<sup>68</sup> EE has been unable to provide sufficient data to estimate the total number of discount consumers who would have been affected throughout the rest of the Relevant Periods.<sup>69</sup> However, given the prevalence of discounts and numbers of discount consumers, a proportion of those consumers are also likely to have been liable to pay more to exit their contracts than if they had stayed with EE for their fixed term.
- 3.59 The group of affected consumers also included all other discount consumers who were subject to terms and conditions requiring them to pay more in ETCs than they should have done, because those ETCs were set based on a higher, undiscounted subscription price than that the consumers were actually paying. In the case of home discount consumers, the ETCs also failed to take account of a discount for accelerated receipt.
- 3.60 Approximately 400,000 discount consumers whom EE estimates terminated their contracts during the Relevant Periods were billed by it for an ETC that was higher than it should have been, by between £11.4 and £13.5m.<sup>70</sup> Taking account of EE's contention regarding the level of non-payment of ETCs,<sup>71</sup> this group actually overpaid ETCs in the order of at least £3m-£4.3m.<sup>72</sup>

## Conclusion

- 3.61 For the reasons set out above, we are satisfied that EE contravened GCs 9.2(j) and 9.3 in the Relevant Periods.
- 3.62 Our first finding is that during the Relevant Periods EE contravened GC 9.2(j) by having terms which did not specify in a clear, comprehensive and accessible form the charges due on termination of the contract. In particular, they did not specify in such form the amounts that make up its ETCs for mobile consumers, and did not enable such consumers to calculate their potential liability when considering ending their contracts, from at least 1 January 2012 to 5 June 2018.

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<sup>68</sup> See paragraphs 3.19 – 3.20 above.

<sup>69</sup> The data available from March 2017 to April 2018 (EE's 1<sup>st</sup> clarification to the Second Response, 9 July 2018, clarification 1(a)), suggests that 9,713 mobile discount customers received a discount of more than 21%. EE also confirms there were 'similar discounts' available for mobile customers from October 2016 to March 2017 but has not quantified or estimated how many customers this would have affected. It has been unable to provide data prior to October 2016 for mobile consumers and has not provided us with any estimate for home consumers. We have, therefore, not been able to estimate the total number of discount consumers that were liable to pay an ETC that was higher than the amount that they would have paid to EE in monthly subscriptions for the remainder of their fixed term throughout the Relevant Periods.

<sup>70</sup> See footnote 7.

<sup>71</sup> See paragraph 3.40 above where EE contends that between [3<] % of home consumers actually pay ETCs.

<sup>72</sup> See Annex 3.

- 3.63 We also find that EE contravened GC 9.3 by subjecting mobile and home discount consumers to contractual terms making them liable to pay excessive ETCs if they wished to switch provider during the fixed term of their contract. By doing so, EE failed to ensure that its conditions and procedures for contract termination did not act as a disincentive to switch within the meaning of GC 9.3. This contravention lasted from at least 1 January 2012 to 21 May 2018 for mobile discount consumers and 1 January 2012 to 7 August 2018 for home discount consumers.

## 4. Penalty and remedial steps

- 4.1 Ofcom's has decided to impose a penalty of **£6.3m** on EE for its contraventions of GCs 9.2(j) and 9.3. This figure includes a 30% discount applied to the penalty amount as a result of EE's admitting liability and entering into a settlement with Ofcom. We are also requiring EE to take steps to comply with the requirements of those conditions and remedy their contravention.
- 4.2 In reaching this decision, Ofcom has had regard to the need to incentivise CPs to comply with their regulatory obligations and to our principal duty of furthering the interests of citizens and consumers. When setting a penalty that would achieve that objective, we have considered relevant factors in the round. Our reasons for reaching this decision are set out fully below.

### Consideration of whether to impose a penalty

- 4.3 Ofcom's principal duty in carrying out our functions is to further the interests of citizens and consumers in relevant markets, where appropriate by promoting competition. GCs 9.2(j) and 9.3 are important consumer protection provisions, designed to ensure consumers can obtain the benefits of competition between CPs, and which directly reflect mandatory minimum harmonisation requirements of the EU framework.
- 4.4 In particular, GC9.2(j) reflects that the availability of clear, comprehensible and easily accessible information about ETCs, "*.... will increase the ability of consumers to optimise their choices and thus to benefit fully from competition.*"<sup>73</sup> In failing to specify such information in its contracts, EE hindered consumers' abilities to calculate their liabilities when considering switching providers and to choose services in their best interests.
- 4.5 The objective of GC 9.3 is to ensure that consumers are able to take full advantage of the competitive environment and to change providers when it is in their interests, without being hindered by legal, technical or practical obstacles, including contractual conditions and charges. Subjecting discount consumers who were party to somewhere between 8m and 15m fixed term contracts to terms and conditions requiring them to pay excessive ETCs, if they wished to switch, hindered them from taking advantage of competition between CPs. A substantial number of EE's discount consumers were billed for and paid excessive ETCs.
- 4.6 Taking account of these points, and our principal duty, our judgment is that EE's contraventions were sufficiently serious, and caused a sufficient degree of actual and potential harm to consumers and competition, as to warrant the imposition of a penalty. We also take account that there is no evidence to suggest that EE had processes in place to review or check its contractual terms or ETCs for compliance with these GCs during the Relevant Periods. Likewise, that it has a history of non-compliance with the GCs,

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<sup>73</sup> Recital 30, USD, Directive 2002/22/EC, as amended by Directive 2009/136/EC.

particularly on issues relating to charging and billing consumers. A penalty is therefore also warranted to have the appropriate deterrent effect. We have decided to impose one, notwithstanding that EE has taken some steps to remedy the contraventions and has co-operated with our investigation.

## Penalty amount

4.7 In considering the level of penalty which should be applied, Ofcom has had regard to its published Penalty Guidelines.<sup>74</sup>

### The Penalty Guidelines and relevant factors

4.8 As set out in the Penalty Guidelines, the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient, having regard to the relevant turnover, to have a material impact on the regulated body so that it is incentivised to bring itself into compliance and avoid recurrences of the contraventions in future. It is also important that the penalty imposed serves to deter the wider industry from contravening the regulatory requirements.

4.9 The Penalty Guidelines set out a range of further factors which may be relevant in any particular case and Ofcom has assessed those factors carefully. Ofcom has also considered whether there are any relevant precedents and the extent to which they should be followed in this case. The appropriate and proportionate amount of penalty in this case has been determined taking these factors into account in the round. The following sections set out Ofcom's consideration of each of these factors.

### Turnover of EE

4.10 Section 97 of the Act sets out that the 'relevant period' to be taken into account in determining turnover of the regulated body is one year ending 31 March prior to the date of the notification of contravention.<sup>75</sup> In the second response, EE stated its turnover for its relevant business in the relevant period was £[X].<sup>76</sup> The maximum penalty which Ofcom may impose in respect of a contravention by EE during this period may not therefore exceed £[X].

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<sup>74</sup> 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/data/assets/pdf\\_file/0022/106267/Penalty-Guidelines-September-2017.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf)

<sup>75</sup> Section 97 of the Act provides that a penalty may be such amount not exceeding ten per cent of the notified person's turnover for relevant business for the relevant period as Ofcom determine to be appropriate and proportionate to the contravention for which it is imposed.

<sup>76</sup> Second Response, Q13, pp.13-14.

## Seriousness and culpability

- 4.11 For the reasons set out above, breaches of GCs 9.2(j) and 9.3 have an inherent degree of seriousness. They are liable to cause significant harm to consumers and competition.
- 4.12 We note that EE's contravention of GC 9.3 involved charging excessive ETCs to consumers who were in receipt of discounts to their recurring subscription price, rather than charging ETCs that were excessive by reference to undiscounted prices. We also note that not all the discount consumers who were subject to contractual terms that required them to pay an excessive ETC if they wished to switch would necessarily have considered switching. We have taken these factors into account in considering the seriousness of EE's contravention.
- 4.13 Even taking these factors into account, however, EE's contravention is serious, given the number of consumers affected, the harm it caused to them and its duration. We note, and have taken into account in the penalty, each of these points:
- a) Discount consumers were subject to between 8m and 15m<sup>77</sup> contracts containing the offending terms and excessive charges.
  - b) A substantial sub-group of those consumers were subject to terms requiring them to pay ETCs greater than the recurring subscription price they were paying under their contract. That sub-group comprised at least c.24% of mobile discount customers between October 2016 and April 2018.<sup>78</sup> The data available from March 2017 to April 2018 suggests that 9,713 mobile discount customers fell within this category. So, too, did any other discount consumers who received a similar sized discount during the Relevant Periods.
  - c) Another substantial sub-group of the affected discount consumers were subject to terms requiring them to pay ETCs calculated based on a higher recurring subscription price than they were paying. These ETCs were higher than they would have been calculated based on the subscription price the consumers were actually paying. In the case of home discount consumers, EE's ETCs also failed to take account of a discount for accelerated receipt.
  - d) Approximately 400,000 discount consumers, according to EE's estimates, terminated their contracts during the Relevant Periods and were billed for excessive ETCs, by between £11.4m and £13.5m in total.<sup>79</sup> We recognise that not all those ETCs were paid but, even taking account of EE's contention regarding levels of non-payment of ETCs,<sup>80</sup> these consumers actually overpaid at least c.£3m-£4.3m.<sup>81</sup>
  - e) As a reflection of the size of the harm it caused, EE has itself calculated that it will repay a total of c.£2.7m to mobile and home discount consumers for the harm caused to them by overcharging ETCs in just part of the Relevant Periods (between 1 October

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<sup>77</sup> See footnote 6.

<sup>78</sup> See paragraphs 3.19 – 3.20 above.

<sup>79</sup> See footnote 7.

<sup>80</sup> See paragraph 3.40 above where EE contends that between [3<] of home consumers actually pay ETCs.

<sup>81</sup> See Annex 3.



2016 to 21 May 2018 – (i.e. c.19mths) for mobile consumers and 28 June 2016 and 6 August 2018 (i.e. 25mths) for home consumers).

- f) The contravention continued for at least six years and, owing to its duration, EE has been unable to provide refunds to all affected customers. Taking account of the repayments EE will make, up to £1.6m of the amount overpaid will not be refunded – it is unrepaid gain to EE and un-remedied harm to consumers.

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

- 4.14 EE’s Marketing Department was responsible for setting ETCs, in conjunction with other relevant departments, including Directors who form part of EE’s senior management team.
- 4.15 Such evidence as EE has been able to provide in response to formal information notices suggests its ETC calculations for mobile consumers were established “*some time ago*” (perhaps before the Relevant Periods) and had not been reviewed during the Relevant Periods.<sup>82</sup> It appears EE was relying on its ETC calculation for home consumers to “*automatically adjust*” to respond to changing prices and to calculate its ETCs correctly.<sup>83</sup> EE is unsure what ETC policies it or its predecessor companies historically applied to discount consumers.<sup>84</sup>
- 4.16 EE contends that it is “*confident that had such a policy been considered today it would not have been approved.*”<sup>85</sup> However, there is no evidence that compliance with GCs 9.2(j) and/or 9.3 was considered by EE’s senior management at any time during the Relevant Periods until the matter was raised generally with them after Ofcom opened its industry-wide programme in June 2017. Nor is there any evidence of them taking steps to ensure the company brought itself into compliance with these GCs until after we opened our initial assessment of EE’s compliance in March 2018.
- 4.17 The evidence shows EE’s senior management only considered the compliance of its ETCs with the GCs in the following limited ways:
- a) on 20 July 2017, when EE flagged to the BT Group Risk Committee, “*increased scrutiny around ETCs;*”<sup>86</sup>
- b) in February 2018, when, in response to a media enquiry, senior managers were discussing the lack of complaints about EE’s ETCs, and it was suggested that the reason for the low level of complaints is due to the fact:

*“1) we’re a little opaque about how its calculated so people don’t really check, just pay and leave 2) customers who buy out their contract to upgrade early with EE get*

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<sup>82</sup> See paragraphs 3.14 – 3.16 above.

<sup>83</sup> See paragraphs 3.14 – 3.16 above.

<sup>84</sup> See paragraphs 3.14 – 3.16 above.

<sup>85</sup> EE cover letter to Second Response, 20 June 2018, p.2.

<sup>86</sup> BT Group plc, Consumer Business Unit Review Q 2017/18, p.16 (separate document provided in Second Response, Q10-11, p.65).

*a further 20% discount as we take the VAT off too for them, as no service is provided But given the issues, I am surprised it doesn't come up more often so wonder if in reality agents do discount the MRC?"*,<sup>87</sup> and

- c) when our investigation began in May 2018, and the BT Group Executive Committee were advised that, "EE and its predecessor companies have applied monthly recurring discounts for many years...We cannot be sure what ETC policies were applied to historic discounts".<sup>88</sup>
- 4.18 EE therefore missed clear opportunities, that it should have taken, to draw the matter to its senior management's attention and to come into compliance with the relevant conditions:
- a) when we opened our industry-wide enforcement programme in June 2017;
- b) in September 2017 when we served the first statutory information notice on EE; and
- c) in February 2018, when EE received a media enquiry on the matter and we corresponded with it.
- 4.19 Given the importance of compliance with these GCs, and the responsibility EE says its senior management had for setting prices, discounts and ETCs, we would have expected them to have considered or been aware of its approach to the transparency of its ETCs and the effects of discounts on ETCs when setting or changing prices. Likewise, to have taken appropriate steps when relevant matters were raised with the company.

#### **Whether EE took timely and effective steps to end and remedy the contraventions**

- 4.20 EE has now taken some significant steps to end the contraventions and partly to remedy their effects.
- 4.21 In particular, EE undertook to change its terms and charges over the summer of 2018 as set out in section 3 above. It also undertook, by 31 August 2018, to take reasonable steps to refund all mobile discount consumers who were charged an excessive ETC from 21 November 2016 to 21 May 2018. It has also undertaken, by 31 October 2018, to refund all home discount consumers who were charged an excessive ETC between 28 June 2016 and 6 August 2018.
- 4.22 The reasonable steps EE were to take with regard to refunds included:
- a) where the consumer remains a customer of EE with the same billing account, making payment of the refund to that account;
- b) where the consumer is no longer a customer of EE, or has terminated the relevant billing account, but formerly paid their bills by direct debit, and EE holds their last

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<sup>87</sup> Email from [redacted] dated 16 February 2018 at 18:59 forwarded to various Directors including CEO of Consumer [redacted], Mobile Marketing Director [redacted] on 18 February 2018 at 9:32 (separate document bundle provided in Second Response, Q10-11, p.54-55).

<sup>88</sup> BT Group plc, Executive Committee Information Paper on Ofcom Investigation into EE's Mobile Early Termination Charges, dated 8 May 2018 (separate document bundle provided in Second Response, Q10-11, p.46).

known bank account details, seeking to credit the refund directly to the customer's bank account and sending a letter to the customer's last known address notifying them of the refund; and

- c) where it is unable to pay the refund in accordance with a) or b) (for example, because the customer did not previously pay EE by direct debit or the bank rejects the refund), sending a letter with a cheque to the customer's last known address.<sup>89</sup>

- 4.23 EE stated that the refunds it will pay to mobile and home discount consumers will amount to refund approximately £2.7m (and for mobile discount consumers will go back to 1 October 2016).
- 4.24 We welcome these steps, which repay some of the gain EE made from the contraventions, and give it due credit for them in our penalty assessment. However, even in that respect we note that it only took the steps after we started our initial assessment of EE's compliance with the conditions and over the course of our investigation, despite the opportunities it had to identify the contraventions earlier.
- 4.25 We also note (as set out above) that EE's repayments only go back over a quarter of the Relevant Period for mobile consumers and a third of it for home consumers. The duration of the contravention and the limited records EE holds means the contraventions in the majority of the Relevant Periods will be un-remedied.

#### EE's history of contraventions and other precedents

- 4.26 Ofcom has imposed penalties on EE under section 96C of the Act for breaches of consumer protection-focussed GCs, including those relating to billing and charging consumers, on more than one occasion previously. The contraventions in those cases were serious and the penalties we imposed were significant. These are relevant in our calculation of a penalty likely to have the proper deterrent effect on EE.
- 4.27 By way of illustration:
- a) In July 2015, we imposed on EE a penalty of £1m for contravention of GC 14 for failing to have, and comply with, procedures about consumer complaints handling.<sup>90</sup>
- b) In January 2017, we imposed on it a penalty of £2.7m for contraventions of GC 11.1. As a result of failings in its billing system, EE overcharged at least 39,000 customers approximately £245,000 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.<sup>91</sup>
- 4.28 Our Penalty Guidelines say it may be necessary in appropriate cases to set higher penalties than those set previously, to secure a stronger deterrent effect. We take account that the

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<sup>89</sup> Undertakings provided by EE to Ofcom, dated 21 May 2018, (Mobile Undertaking 7) and dated 27 July 2018 (Home Undertaking 7).

imposition of penalties should deter subsequent wrongdoing (including ongoing wrongdoing).

- 4.29 Imposing penalties on EE does not appear to have the appropriate effect of changing its behaviour - its breaches of GCs 9.2(j) and 9.3 continued after we imposed the previous penalties. It did not review its ETCs for compliance with the GCs in light of those penalties. Doing so could at least have shortened the Relevant Periods and limited the harm to consumers. This is another significant failing which, in our judgment, should be reflected in a penalty likely now to have a deterrent effect on EE.

## Deterrence

- 4.30 As set out in the Penalty Guidelines, our central objective in 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 regulatory requirements.
- 4.31 Any penalty we set should therefore be sufficiently high to discourage bad conduct and incentivise EE's management to change the conduct of the company, encouraging good practices and a culture of compliance across the organisation. The level of the penalty should ensure that EE's senior management recognises that it is not more profitable for it to break the law and pay the consequences, than to comply in the first place. It should make clear that it is not worth taking the risk of non-compliance because it will cost the company to do so.
- 4.32 Under section 97 of the Act, the maximum penalty Ofcom may impose on EE is 10 per cent of its turnover for its relevant business for the period 1 April 2017 to 31 March 2018.<sup>92</sup> In the Second Response, EE stated that its turnover for its relevant business in that period was £[redacted].<sup>93</sup> The maximum penalty we may impose on it in respect of the contraventions is £[redacted].
- 4.33 To assess the amount of the penalty that might serve as an effective deterrent to prevent further wrongdoing by EE, we have also considered the size of the gain EE made from the contraventions. In this regard, as indications of its size, we have taken into account:
- a) the refund of c.£2.7m EE has estimated it will repay for overcharging discount consumers in respect of their ETCs between 1 October 2016 and 21 May 2018 – (i.e. c.19mths) for mobile and between 28 June 2016 and 6 August 2018 (i.e. 25mths) for home<sup>94</sup> and up to £1.6m that EE is unable to refund. Together, these sums indicate EE made a substantial gain from the contraventions; and

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<sup>92</sup> Given that this Confirmation Decision is being issued in the 2018-2019 financial year, this is the relevant period for the purposes of calculating the maximum penalty, as defined in section 97(5) of the Act.

<sup>93</sup> Second Response, Q13, pp.13-14.

<sup>94</sup> Email EE to Ofcom, 27 July 2018 at 16:38.

- b) the large number of discount consumers who were subject to the relevant contractual terms and charges and liable to have been disincentivised from switching by them.
- 4.34 Each of the above matters suggests a substantial penalty would be appropriate and proportionate in pursuit of the objective of deterrence.

## Co-operation with Ofcom's investigation

- 4.35 We have also taken account of the level of EE's co-operation with our investigation.
- 4.36 EE has generally provided Ofcom with information in a timely manner and co-operated with our industry-wide enforcement programme, our initial assessment of its compliance and our investigation.<sup>95</sup>
- 4.37 EE indicated on 3 May 2018, when we opened our investigation, its willingness to enter into settlement discussions rather than challenge our findings (which is reflected in the settlement discount it has received). It also volunteered admissions to us on 10 May about the contraventions in respect of its home services. It promptly gave us the Undertakings, on 21 May for mobile services and 27 July for home services, to end the contraventions and partially to remedy them. These are matters for which we give EE credit in our penalty assessment.

## Ofcom's conclusion on the penalty amount

- 4.38 Considering all of the above factors in the round, the penalty we have decided to impose on EE is **£6.3m**. This includes a 30% discount applied to the penalty of £9m we would otherwise have set, as a result of EE admitting liability and entering into a settlement with Ofcom.
- 4.39 We would have imposed a substantially higher penalty on account of the overall seriousness of the contravention and the need, in light of previous penalties imposed on EE, to secure an appropriate deterrent effect. However, EE's co-operation with our investigation, and the compliance and remedial steps it has taken, are factors we take into account when assessing the appropriate incentives our action should place on it to come into compliance.
- 4.40 Ofcom's judgement, therefore, is that this level of penalty would be appropriate and proportionate to the contraventions in respect of which it would be imposed. Our objectives in setting it are:
- a) to impose an appropriate and proportionate sanction that reflects the seriousness and significance of EE's contraventions of GCs 9.2(j) and 9.3 and its culpability in those contraventions; and

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<sup>95</sup> Although in some instances it failed to provide full explanations of the information it gave us, which required us to seek further clarifications of some of it.

- b) to deter EE from contravening the GCs in future, and GCs 9.2(j) and 9.3, in particular.

- 4.41 Having regard to EE's very large turnover, our judgment is that a penalty of **£6.3m** (including the settlement discount) would secure 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.
- 4.42 If that penalty, and the incentives our action gives EE to comply with the GCs in future, do not result in compliance, and we find it in contravention again, we would take fully into account the opportunity we had given EE to comply. We would reflect this in any future penalty.

### **Actions required of EE**

- 4.43 The steps which EE now needs to take, to the extent it has not already taken them, to comply with the requirements of GCs 9.2(j) and 9.3 and to remedy their contravention are:
- a) EE must ensure that all staff in its Marketing Department and BT Group Board members who participate in the preparation, oversight, review or approval of pricing proposals or separate proposals affecting ETCs undertake compliance training within three months of a Confirmation Decision under section 96C of the Act, to secure an understanding at all levels of the organisation of EE's regulatory obligations and the consequences of non-compliance.
  - b) EE must implement a process for the review and approval of ETC calculations (including cost mitigations) on an annual basis by senior managers of an equivalent or higher grade to the leadership group of the Marketing team.
  - c) EE must provide Ofcom with proof of the repayments made pursuant to the Undertakings, including a schedule setting out the amounts of repayments made and the number of consumers who received them, within two weeks of a Confirmation Decision under Section 96C of the Act.
- 4.44 We also note, and welcome, that, in light of the matters set out in this document, EE's senior management have agreed to conduct a review of EE's processes and systems. EE will keep Ofcom updated throughout that process and it is aiming to have prepared initial findings early next year with an implementation phase to follow thereafter.

# A1. Confirmation Decision to EE of contraventions of General Conditions 9.2(j) and 9.3 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,<sup>96</sup> 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.

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<sup>96</sup> 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, set out the General Conditions of Entitlement (the “General Conditions” or “GCs”) which applied to all Communications Providers (“CPs”) defined in each GC until 1 October 2018. The GCs were 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: ...*

*(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 powers 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 EE Ltd (“EE”), whose registered company number is 02382161. EE’s registered office is Trident Place, Mosquito Way, Hatfield, Hertfordshire, AL10 9BW.

## Notification given by Ofcom under section 96A of the Act

A1.9 On 7 November 2018 Ofcom gave a notification under section 96A of the Act (‘the Section 96A Notification’) to EE as Ofcom had reasonable grounds for believing that during the periods between at least 1 January 2012 and 5 June 2018 (for consumers of mobile



services) and 1 January 2012 and 7 August 2018 (for consumers of home services) (the Relevant Period(s)), EE contravened GCs 9.2(j) and 9.3.

- A1.10 The Section 96A Notification also specified the penalty that Ofcom was minded to impose on EE in respect of the contraventions of GC 9.2(j) and GC 9.3.
- A1.11 The Section 96A Notification allowed EE the opportunity to make representations to Ofcom about the matters set out in the Notification.

## Confirmation Decision under section 96C of the Act

- A1.12 On 12 November 2018, in a letter to Ofcom, EE confirmed that it waived its rights to make representations about the matters notified and admitted liability for the contraventions. The period for EE to make representations has therefore expired.
- A1.13 Accordingly, Ofcom is satisfied that during the periods between at least 1 January 2012 and 5 June 2018 (for consumers of mobile services) and 1 January 2012 and 7 August 2018 (for consumers of home services) (the Relevant Period(s)), EE contravened GCs 9.2(j) and 9.3. It did so in relation to GC 9.2(j) by failing to specify in its contracts with consumers the charges due on termination of the contract in a clear, comprehensible and easily accessible form. It did so in relation to GC 9.3 by failing to ensure that its conditions and procedures for contract termination did not act as a disincentive for end-users against changing providers.
- A1.14 Specifically:
- a) EE did not specify in the required form the amounts that make up its ETCs for mobile consumers and did not enable such consumers to calculate their potential liability when considering ending their contracts, from at least 1 January 2012 to 5 June 2018, in contravention of GC 9.2(j) (iii); and
  - b) EE's conditions and charges relating to contract termination did not take into account discounts given to consumers of its mobile and home services on their recurring retail subscription price. The charges were not based on the retail price the relevant consumers were actually paying, but instead were based on a higher, undiscounted retail price. They were consequently excessive, in contravention of GC 9.3.
- A1.15 Ofcom has therefore decided to give EE a Confirmation Decision confirming its contraventions of GC 9.2(j) and GC 9.3 and our decision to impose a financial penalty on EE in respect of these contraventions of £6.3m.
- A1.16 The reasons are set out in the document to which this Confirmation Decision is annexed.

## Steps that should be taken by EE

- A1.17 In order to comply with GCs 9.2(j) and 9.3, EE must, to the extent it does not already do so, take such steps as are necessary for ensuring that:

## Confirmation Decision

- a) All staff in its Marketing Department and BT Group Board members who participate in the preparation, oversight, review or approval of pricing proposals or separate proposals affecting ETCs undertake compliance training within three months of a Confirmation Decision under section 96C of the Act, to secure an understanding at all levels of the organisation of EE's regulatory obligations and the consequences of non-compliance;
- b) EE must implement a process for the review and approval of ETC calculations (including cost mitigations) on an annual basis by senior managers of an equivalent or higher grade to the leadership group of the Marketing team; and
- c) EE must provide Ofcom with proof of the repayments made pursuant to the Undertakings (as defined in the accompanying explanatory statement), including a schedule setting out the amounts of repayments made and the number of consumers who received them, within two weeks of the service of this Confirmation Decision.

## Penalty

- A1.18 Ofcom has determined that EE must pay a penalty of **£6.3m** in respect of its contraventions of GC 9.2(j) and GC 9.3 during the Relevant Periods. This includes a 30% discount to the penalty Ofcom would otherwise have imposed, as a result of EE admitting liability and entering into a settlement with Ofcom
- A1.19 EE 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.<sup>97</sup>

## 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.



**Gaucho Rasmussen**

**Director of Enforcement,**

**as final decision maker for Ofcom**

**16 November 2018**

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<sup>97</sup> Section 96C(7) Communications Act 2003.

## A2. Chronology of Ofcom's investigation

- A2.1 On 28 June 2017, Ofcom opened an industry-wide enforcement programme<sup>98</sup> (the Programme) in relation to the ETCs imposed by CPs under the terms and conditions of their consumer contracts. As part of that Programme, we issued EE with a formal information notice to assess compliance of its ETC procedures with the relevant regulations.<sup>99</sup>
- A2.2 Following a media query, we wrote to EE on 16 February 2018, seeking confirmation of whether its ETC calculation took account of any discount to a customer's monthly subscription price; for example, Friends & Family or other discounts. EE confirmed, on 19 February 2018, that its ETC calculation used the full monthly charge and did not take into account any discounts.<sup>100</sup>
- A2.3 On 22 March 2018, we began an initial assessment (IA) of EE's compliance with relevant regulatory provisions and wrote to it. The concerns we highlighted to EE included that:
- a) its terms and conditions did not specify or make clear the amounts that comprise its ETC calculation as required under GC 9.2; and
  - b) its failure to account for discounts given to customers on their monthly retail price amount when calculating the ETC was a disincentive against switching under GC 9.3.
- A2.4 We gave EE an opportunity to make representations on the IA. It responded on 6 April 2018, we met with it on 16 April 2018 and we received a further response from it on 20 April 2018 (collectively referred to as 'EE's IA Response'). In EE's IA Response, it indicated that it was prepared to make changes to its terms and conditions for mobile consumers to increase transparency and to offer refunds to discount mobile consumers who, in the previous 18 months, had paid an ETC that was not calculated using their monthly subscription price including any discount.
- A2.5 Having considered all the matters raised in the above correspondence in light of our Enforcement Guidelines,<sup>101</sup> we opened an investigation into EE's compliance with GCs 9.2 and 9.3 on 3 May 2018<sup>102</sup> (the Investigation).

### Information gathering

#### Information requests to EE

- A2.6 We have issued two formal notices to EE under section 135 of the Act, requiring it to provide information to us.

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<sup>98</sup> [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw\\_01199](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01199)

<sup>99</sup> See 'information gathering' below.

<sup>100</sup> EE email to Ofcom dated 19 February 2018 at 19:26.

<sup>101</sup> Ofcom, *Enforcement Guidelines*, 28 June 2017, available [here](#).

<sup>102</sup> [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw\\_01217](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01217)

## First Notice

A2.7 The information notice issued to EE under the Programme on 14 September 2017<sup>103</sup> (the First Notice) required it to provide information about how it calculates its ETC for consumers terminating their fixed term contracts and about the number of subscribers who had terminated contracts with an ETC from 1 January 2017 to 31 July 2017. We received EE's response to the First Notice on 24 October 2017 (the First Response) and further follow-up responses on 8 and 19 December 2017.

## Second Notice

A2.8 The information notice issued to EE under the Investigation on 4 June 2018<sup>104</sup> (the Second Notice) required it to provide further information about whether it (i) specified in its consumer contracts the amounts that make up its ETCs and (ii) took into account in its calculation discounts for discount consumers. It also required EE to provide information about the numbers of its discount consumers in the Relevant Periods, those who had paid ETCs that did not take account of relevant discounts, its relevant turnover and other matters relevant to Ofcom's determination of any penalty in accordance with our penalty guidelines.

A2.9 EE responded to the Second Notice on 20 June 2018 (the Second Response). We had a teleconference with it on 29 June to discuss its response and it provided us with clarifications to its response on 9, 10<sup>105</sup> and 23 July 2018.<sup>106</sup>

## Other engagement with EE and undertakings

A2.10 As well as meeting EE on 16 April 2018 as part of the IA, we had a further meeting with it on 10 May 2018 as part of the Investigation. EE provided further detail about its proposals to increase transparency of its contractual terms and ETCs for mobile consumers and refund affected mobile discount consumers going back 18 months. EE also volunteered admissions to us that its ETCs for home consumers, like those for mobile consumers, were also calculated based on the undiscounted price of the contract and did not take into account any discounted rate.

A2.11 Following that 10 May meeting, on 21 May EE gave us written undertakings about its future conduct in relation to consumers on fixed-term pay monthly contracts for its mobile services. It did the same with regard to consumers on fixed-term contracts for its home services on 27 July 2018 (and collectively these undertakings are referred to throughout this document as 'the Undertakings').

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<sup>103</sup> s135 Notice issued to EE under the Programme dated 14 September 2017 (the 'First Notice'). In the First Notice we informed EE that we were assessing industry compliance with GC 9.3 in relation to ETCs and that "*Where required, we will open individual investigations and/or take direct enforcement action, as appropriate under the Programme.*"

<sup>104</sup> s135 Notice issued to EE under the Investigation dated 4 June 2018 (the 'Second Notice').

<sup>105</sup> EE 1<sup>st</sup> clarification to Second Response and EE 2<sup>nd</sup> clarification to Second Response.

<sup>106</sup> EE 3<sup>rd</sup> clarification to Second Response.

## Ofcom's provisional notification and the settlement procedure

- A2.12 On 7 November 2018 we issued a notification under section 96A of the Act ('the Section 96A Notification') to EE, setting out our findings that we had reasonable grounds for believing that during the periods between at least 1 January 2012 and 5 June 2018 (for consumers of mobile services) and 1 January 2012 and 7 August 2018 (for consumers of home services) (the Relevant Period(s)), EE contravened GCs 9.2(j) and 9.3. The Section 96A Notification also specified that Ofcom was minded to impose a penalty of £9m on EE in respect of the contraventions of GC 9.2(j) and GC 9.3.
- A2.13 On 12 November 2018 EE wrote to Ofcom as part of the voluntary settlement procedure it had entered into with Ofcom:
- i) admitting it had contravened GC 9.2(j) and GC9.3 as set out in the Section 96A Notification;
  - ii) waiving its rights to submit representations; and
  - iii) confirming its recognition that the penalty to be imposed by Ofcom for its contraventions would be £6.3m (reduced from £9m because of its admissions).

## A3. Ofcom calculations

[Redacted]