



Notification of contravention of General Condition 11 under section 96C of the Communications Act 2003

Notification served on EE Limited ("EE") by the Office
of Communications ("Ofcom")

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redacted. Redactions are indicated
by [X]

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Contents

Section		Page
1	Explanatory statement	3
Annex		Page
1	Notification to EE Limited of contravention of General Condition 11 under section 96C of the Communications Act 2003	19

Section 1

Explanatory statement

1.1 This document explains Ofcom’s confirmation decision to EE Limited (“EE”) under section 96C of the Communications Act 2003 (the “Act”) in respect of its contravention of General Condition (“GC”) 11.1 (the “Confirmation Decision”). The Confirmation Decision itself is at Annex 1.

Executive summary

1.2 Ofcom has determined that, in respect of the periods between 1 July 2014 and 20 July 2015 and 18 November 2015 and 11 January 2016 (the “Relevant Periods”), EE breached GC 11.1. We have imposed a penalty of £2,700,000 on it.

1.3 GC 11.1 prohibits a communications provider (“CP”) rendering inaccurate bills and billing information to its subscribers of services such as mobile services. This is important because it ensures consumers receive the services they pay for and are charged correctly for them.

1.4 EE contravened GC11.1 in respect of the first of the Relevant Periods by overcharging at least 32,145 customers¹ in the order of £245,700 for calls to its customer services department using the number ‘150’ (the “first contravention”). It did so in respect of the second by overcharging 7,674 customers £2,203.33 for calls and text messages to that number (the “second contravention”). In each case, the contraventions occurred after EE made changes to its tariffs. In total, it overcharged at least 39,819 customers in the order of £247,900.

1.5 Ofcom has considered all the circumstances and determined that the penalty is appropriate and proportionate. The numbers of customers, the amounts involved and the durations mean EE’s contraventions were serious, especially the first. EE acted carelessly or negligently by giving a third party supplier instructions that led to the first contravention, not checking these were implemented correctly (or noticing they were not) and not testing the tariff changes that produced the overcharging.

1.6 EE also failed to take appropriate steps when it became aware of the first contravention. It did not preserve detailed billing records, warn customers or notify promptly the body which approves its billing system,² which would have helped it to identify and re-imburse affected customers. It did not intend to re-imburse the majority of those affected by the first contravention until Ofcom began investigating the matter and decided not to re-imburse one group of customers.³ More than 6,905 customers were left more than £60,000 out of pocket.

1.7 The penalty Ofcom imposes is nonetheless lower than it would otherwise have been because EE entered into a settlement agreement with us, thereby saving the public money and resources that would have been required to complete the case.

¹ Although the various figures EE has provided to us have been updated over time and do not entirely add up.

² GC 11.4 places an obligation on CPs who provide Publicly Available Telephone Services and have a relevant turnover exceeding £40m to apply to an approval body for approval of their Total Metering and Billing System in accordance with the Ofcom Metering and Billing Direction. EE’s is approved by TÜV SÜV BABT.

³ Those affected by the first contravention between 1 and 10 April 2015.

Process

Regulatory provisions

1.8 General Condition 11.1 says:

“The Communications Provider shall not render any Bill to an End-User in respect of the provision of any Public Electronic Communications Services unless every amount stated in that Bill represents and does not exceed the true extent of any such service actually provided to the End-User in question.”

1.9 Sections 96A – 96C and 97 of the Communications Act 2003 (the “Act”) give Ofcom powers to enforce that condition.

1.10 Section 96A provides for Ofcom to issue a notification where we have reasonable grounds to believe a person has contravened such a condition (a “section 96A notification”). Amongst other things, that notification can specify a penalty Ofcom is minded to impose and must specify a period within which the person notified may make representations in response.

1.11 Section 96C provides for Ofcom to issue a confirmation decision, once the period for making representations has expired, if after considering any representations we are satisfied the person has contravened the relevant condition. A confirmation decision may, amongst other things, confirm imposition of the penalty specified in the section 96A notification or a lesser penalty.

1.12 Section 97 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. Section 392 of the Act requires Ofcom to publish and have regard to guidelines for determining penalties.

Investigation

1.13 On 16 September 2015, TÜV SÜV BABT (“BABT”), the body which approves EE’s metering and billing system in accordance with the Ofcom Metering and Billing Direction for the purposes of GC 11.4, notified Ofcom of an Extraordinary Performance Failure (“EPF”)⁴ by EE in relation to that system. On 19 November 2015 issued a Formal Report Notification form, relating to that EPF, to Ofcom.

1.14 The EPF notification form stated that EE had charged for calls from within the European Economic Area (“EEA”) to its 150 customer services number at the higher rate applicable to calls to the US. It said the issue was caused by the Data Clearing House EE uses in respect of roaming services,⁵ [§<], “stripping ‘44’” (the relevant UK international dialling code) from the records of some calls made to the customer services number while roaming. It said the calls were then interpreted by EE’s billing system as beginning with “1” and charged as if they were calls to the US.

1.15 It also said EE had used available detailed customer data going back to April 2015 to calculate refunds of £40,797.36, which it paid on 17 September 2015, to 5933 of the

⁴ As defined in the Metering and Billing Direction.

⁵ For customers who are roaming, mobile operators use Data Clearing Houses which act as agents to exchange billing information about the calls made.

affected customers. It said EE planned to conduct a further assessment going back to the beginning of 2014 and make a charity payment for the balance of the overcharged amounts.

- 1.16 In response, Ofcom opened an enquiry into the matter. We wrote to EE on 11 December 2015 in order to establish whether there was a case to answer and whether we should carry out a formal investigation.
- 1.17 EE responded on 8 January 2016 re-iterating what was set out in the BABT EPF notification form: the problem had arisen because [X] was removing the '44' international dialling code from relevant call records for calls from roaming customers to 150 and passing them to EE in the form '00150,' causing EE's billing systems to identify the calls as made to the US. It said that, when the rates for intra-EEA calls to 150 were changed to 19 pence per minute ("ppm") on 1 July 2014, to comply with the EU Roaming Regulation,⁶ it also changed the rate for US calls to 120ppm. This resulted in it charging for the relevant intra-EEA calls to 150 at the higher US rate.
- 1.18 EE said it became aware of the overcharging in January 2015 and resolved the majority of the problem on 23 April that year. However, some overcharging continued. It was addressed on 20 July 2015 by EE requiring [X] to prefix the records of called numbers with the relevant country code where short code numbers, including '150', are dialled.
- 1.19 EE's letter also included information on the billing records it held, and the steps it had taken, or was proposing to take, to prevent a recurrence of the issue, including plans to extend its call testing programme to include roaming calls. Amongst the accompanying documents was an updated version of the EPF Notification Form dated 30 November 2015 and information about the numbers of affected customers and the amounts EE had overcharged them.
- 1.20 Ofcom carefully considered EE's representations and the EPF Notification in line with our enforcement guidelines⁷ and with regard to our administrative priorities. On 29 January 2016 Ofcom opened its investigation (the "Investigation") into EE's compliance with GC 11.
- 1.21 During the Investigation Ofcom issued three formal notices to EE under section 135 of the Act. These required it to provide information to us.⁸
- 1.22 EE's response to the first notice (the "First Response") provided specified documents and information relating to the first contravention. This included information confirming that the contravention had arisen as described in EE's letter of 8 January 2016 (see above). It said that [X] had been removing the 44 dialling code from relevant calls since 2008 following a request from EE⁹ that it do so, and confirmed that Orange and PAYG customers were unaffected.
- 1.23 The First Response also contained information and documents about EE's processes for calculating and issuing bills to roaming customers, steps it took to prevent inaccurate bills being issued, representative examples of bills issued to customers

⁶ Regulation of the European Parliament and of the Council (EU) No 531/2012 of 13 June 2012 on roaming on public mobile communications networks within the Union.

⁷ http://stakeholders.ofcom.org.uk/binaries/consultations/draft-enforcement-guidelines/annexes/Enforcement_guidelines.pdf

⁸ One on 8 March and two on 16 June 2016.

⁹ Operating at the time as "T-Mobile."

affected by the first contravention and steps it had taken to resolve and remedy the matter.

- 1.24 Another part of the response was a document headed “EE Major Incident Report,” which described the first contravention, its causes and action EE had taken in response. This made reference to the second contravention. It said that, on 18 November 2015, EE reduced to zero the price for intra-EEA calls and messages to the 150 number but, until 11 January 2016, had continued to charge for some of them.
- 1.25 EE’s response to the second notice (the “Second Response”) provided information and documents relating to the steps it took to prevent the first contravention and those it might have taken to identify and address it sooner. Likewise, information about the billing records it held (or no longer held) and how it had sought to identify and compensate affected customers.
- 1.26 The response said EE only retained call data records (“CDRs”) for 90 days. It had therefore sought to identify and compensate some of the affected customers, for whom it did not retain CDRs, using PDF copies of their old bills. It said EE had by the date of that response refunded £248,123.19 to 25,956 of the 32,145 customers affected by the first contravention.¹⁰
- 1.27 The response also said that EE planned to donate to charity a total of £61,959.60. This was an estimate in respect of the 6,905 customers affected by the first contravention between July 2014 and July 2015 whom it had not been able specifically to identify¹¹ and those affected between 1 and 10 April 2015 whom it had not identified. EE acknowledged that it could have identified the latter group using PDF copies of their old bills, but had decided not to because it considered doing so disproportionate.
- 1.28 EE’s response to the third notice (the “Third Response”) included information describing the second contravention and its causes, as well as information about the steps EE took between the end of the first contravention and the start of the second to prevent the issuing of inaccurate bills to customers, and representative examples of those issued to customers affected by the second contravention. It confirmed that the contravention arose when EE reduced the charge for intra-EEA calls to its 150 number to zero. It said an error in the algorithm used to calculate the charges meant that, between 18 November 2015 and 11 January 2016, 7,674 customers were charged £2,203.33 for calls to that number which should have been free.

Provisional findings and settlement agreement

- 1.29 On the basis of the information and evidence gathered as part of the Investigation, Ofcom determined that we had reasonable grounds for believing that EE contravened GC 11.1 in respect of the Relevant Periods. We decided to issue EE with a notification under section 96A of the Act (the “section 96A Notification”) on 4 November 2016.
- 1.30 The section 96A Notification set out Ofcom’s provisional finding that EE had contravened GC 11.1 in relation to the Relevant Periods. More specifically, that it did so:

¹⁰ Although the various figures EE has given us have been updated over time and do not entirely add up.

¹¹ Because of the shortfall in its CDRs.

- in respect of the first of those periods by overcharging at least 32,145 customers in the order of £245,700 for calls to its customer services department using the number 150; and
 - in respect of the second, by overcharging 7,674 customers £2,203.33 for calls and text messages to that number.
- 1.31 The section 96A Notification further notified EE that Ofcom was minded to impose a penalty in respect of the contraventions. It also set out requirements Ofcom was minded to impose on EE for the purposes of complying with GC11.1 and remedying its contraventions. It gave EE the opportunity to make written and/or oral representations about all the notified matters.
- 1.32 Ofcom also wrote to EE, on 10 November 2016, outlining a procedure under which EE could enter into a settlement agreement on the basis of its admissions as to the matters notified to it in the section 96A Notification. Pursuant to that procedure, settlement discussions between Ofcom and EE took place in December 2016. EE confirmed that it did not wish to make written or oral representations about the matters notified and on 16 January 2017 it wrote to Ofcom:
- admitting its liability in relation to the nature, scope and duration of the contraventions as set out in this document;
 - confirming its acceptance that this document would be published, being a formal finding of contravention against it;
 - confirming that it would pay the penalty set out in this finding;
 - confirming its acceptance that it will no longer benefit from the settlement discount to that penalty if it appeals the decision or it fails to comply with the requirements of the settlement; and
 - confirming that it would accept a streamlined administrative process for the disposition of this matter.

Ofcom's findings

- 1.33 EE is a CP which provides Public Electronic Communications Services to End Users. It is therefore subject to the requirements of GC 11.1 that:
- “The Communications Provider shall not render any Bill to an End-User in respect of the provision of any Public Electronic Communications Services unless every amount stated in that Bill represents and does not exceed the true extent of any such service actually provided to the End-User in question.”
- A “Bill” is defined in GC11.6 as including, “..... the information issued by a Communications Provider to an End-User of the charges levied and due for payment”
- 1.34 On the basis of the information and evidence set out above, and the admissions EE has made, Ofcom is satisfied that in respect of the Relevant Periods EE contravened GC11.1 by rendering Bills to End-Users in respect of the provision of Public Electronic Communications Services in which the amounts stated did not represent and exceeded the true extent of the service actually provided to the End-User in question.

- 1.35 Specifically, it did so in respect of the period between 1 July 2014 and 20 July 2015 by overcharging at least 32,145 customers in the order of £245,700 for calls made to its customer services department using the number 150 whilst roaming in the EEA. It processed and charged for those calls at the (higher) rate applicable to calls to the US. EE also contravened GC11.1 in respect of the period between 18 November 2015 and 11 January 2016 by overcharging 7,674 customers £2,203.33 for intra-EEA calls and text messages to that number that should have been free.
- 1.36 The relevant facts and matters that comprise those contraventions and the action EE took in response are as follows.

The first contravention

- 1.37 As set out in a document dated 3 August 2008 that EE provided to us, and as it confirmed in the First Response, in July that year EE (operating as T-Mobile) requested to [X] that it remove the 44 UK international dialling code from the records of calls made to certain short code numbers, including 150, by customers whilst roaming. That document recorded EE's and [X]'s agreement that [X] would do so.
- 1.38 Thereafter, again as EE confirmed in the First Response, this arrangement had the effect that [X] passed relevant call records to EE in the form '00150' such that EE's billing systems charged for those calls as if they had been made to the US. Until July 2014, this anomaly did not result in overcharging because EE's rate for calls from the EEA to the US was the same as that for intra-EEA calls.
- 1.39 In (or before) April 2014 EE began planning to implement changes to its tariffs in order to comply with the EU Roaming Regulation from 1 July that year. In the First Response, it provided us with its project planning documents. These set out requirements for the proposed changes to its tariffs and billing systems, and indicated that some pre-launch testing of the new tariffs was proposed. It also provided us with some test results headed, "Rater Parts 2 and 3 interzone EU to RoW," showing, "... system testing (configuration changes) performed by the configuration test team before deployment of the proposition into production."
- 1.40 On 1 July 2014, EE introduced the tariff changes necessary to comply with the Roaming Regulation. These included reducing the cost to consumers of making an intra-EU call whilst roaming to 0.19 ppm (excluding VAT). At the same time, it also increased its rate for calls from the EEA to the US to 120 ppm.
- 1.41 The effect, in light of the change to the call records in 2008 described above, was that from that point calls from the EEA to the 150 number were processed as if they were calls to a US destination. EE's billing systems charged incorrectly for those calls at the higher US rate. The representative examples of bills that EE provided with the First Response show that it issued bills to customers that levied these incorrect charges.
- 1.42 According to its internal documents, EE first became aware of this contravention of GC11.1 on 21 January 2015, as a result of a customer complaint. From that date, it started investigating what had happened and in the rest of January and throughout February 2015 certain staff took steps to establish that the causes of the overcharging were as described in paragraphs 1.37 – 1.41 above.

- 1.43 Relevant EE management staff, including members of its Billing Excellence Forum (“BEF”)¹² and its Revenue Incident Management Board (“RIMB”),¹³ were made aware of the matter in January 2015, including that EE may have been overcharging customers around £40,000 a month and over £50 in some individual cases. EE convened a meeting of its RIMB on 2 February and, according to the minutes of the RIMB review meetings dated from 4 March 2015 onwards, the matter was discussed at those meetings.
- 1.44 EE’s internal emails show that, having established the underlying cause of the problem as the 2008 removal of the 44 dialling code, in March 2015 EE proposed a solution – reversal of the 2008 change – and checked with its billing platform provider, [X], that this would not have unintended adverse consequences. They also show that, in April, once [X] had confirmed its view that the proposed solution would not have unintended consequences, EE instructed [X] to implement it and sought to ensure it did so promptly. The emails show that [X] implemented the proposed solution on 23 April 2015.
- 1.45 That solution, however, did not work. Further emails show that on 29 April EE checked relevant call records and these showed that some calls continued to be charged incorrectly. A series of communications between EE and [X] in May and June 2015 show that EE sought to get [X] to resolve the matter quickly, but [X] said it could not do so owing to the complexity involved. On 20 July 2015, [X] applied the further solution (a new software application) which was successful in ensuring that calls to the 150 number were billed at the correct rate.
- 1.46 Alongside, and after, the above events, EE also took other steps. In March 2015, EE’s customer billing team introduced a new process for post-production testing and monitoring of tariff and billing changes that it is unable to test prior to their launch, such as those for roaming calls, in order to check that such changes are implemented correctly.
- 1.47 Later in 2015 EE paid refunds to some of the affected customers. Its Second Response set out that:
- in June 2015, it used the relevant CDRs to identify 5,933 customers who had been affected by the first contravention in March 2015 and, in September that year, paid them refunds of £40,797.36; and
 - in August 2015, it used CDRs to identify a further 3,250 customers who were affected by the first contravention between 11 April and 20 July 2015 and, again in September that year, paid them refunds of £33,137.65.
- 1.48 EE also made charitable payments of £1,093.53 in respect of the customers it could not personally identify who were affected by the overcharging in the periods referred to above and of £11,027.41 in respect of customers overcharged between 1 and 10 April 2015 that it had not identified.
- 1.49 EE notified BABT of the first contravention on 16 September 2015 and, on 30 November, provided it with further information, relating in particular to the identification of affected customers and the payment of refunds. The revised version

¹² EE’s BEF is one of the groups it has established for dealing with billing issues. Its role in this matter is described more fully below.

¹³ EE’s RIMB is a group of more senior staff it has established for dealing with more serious billing issues. Its role in this matter is again described more fully below.

of the EPF Notification Form on that second date said EE had estimated that 32,923 customers had been overcharged between January 2014 and January 2015 and 1 and 10 April 2015. It said, "It will not be possible to identify and credit these customers accurately [because EE no longer held the relevant CDRs], so a charity payment [of £339,851] will be made in lieu."

- 1.50 Nonetheless, as set out in the First and Second Responses, EE then, sometime after December 2015, used PDF copies of bills issued in these periods to calculate that 22,891 customers had been overcharged £210,093.60 between 1 July 2014 and 28 February 2015. In April 2016, it refunded £161,154.94 to the 16,057 of them it could identify. It also planned to pay £48,938.66 to charity in respect of those 6,834 it could not, which sum it paid sometime between 23 and 30 June 2016. Additionally, EE said that sometime between 1 April and 23 June 2016 it identified a further 716 customers affected by the first contravention and refunded them £13,033.24.
- 1.51 This all means that – although the various figures EE has provided to us have been updated over time and do not entirely add up – in total between June 2015 and 30 June 2016 EE:
- calculated that at least 32,145 customers were affected by the first contravention between 1 July 2014 and 20 July 2015;
 - identified and refunded to 25,240 of them (or 25,956 depending on whether EE double counted 716 of the refunded customers referred to in its Second Response) a total of £248,123.19;
 - planned to make a payment of £61,959.60 to charity in respect of the remaining 6,905 customers affected by the first billing error between July 2014 and July 2015 whom it could not identify and in respect of the period between 1 and 10 April 2015; and
 - the total amount EE refunded or paid out (or planned to pay out) was £310,082.79.

The second contravention

- 1.52 The Major Incident Report EE provided with the Second Response stated that a second billing error relating to intra-EEA calls and text messages to the 150 customer services number occurred in respect of the period between 18 November 2015 and 11 January 2016. On the first of those dates, EE made some voluntary changes to its tariffs so that all such calls and messages would be free of charge.
- 1.53 In its Third Response EE provided copies of the High-Level Design Configuration Document, Test Plan Reports and results of tests it did to check the relevant tariff changes would result in accurate charging and billing. These show that, between early September and mid-November 2015, EE planned, designed and tested these tariff changes, including that a third-party performed 695 test voice calls and 417 test text messages and detected no errors.
- 1.54 The tariff changes came into effect on 18 November and on 30 November EE found that it was still charging for some calls and messages that should have been free. Chains of emails between EE staff, which it also provided to us with its Third Response, show that on 17 December it undertook post-implementation testing of the tariff changes and identified that some such calls and messages, from around 30 November onwards, were still being charged for. The representative examples of

bills that EE provided with the Third Response show that it issued bills to customers that levied these incorrect charges.

- 1.55 Between 17 December 2015 and 11 January 2016 EE took prompt action to stop charging for the relevant calls and messages. Between 23 December 2015 and 8 March 2016, according to EE's Third Response, it used its detailed CDRs to identify 7,674 customers who were overcharged £2,203.33 and to refund them those amounts.

Penalty

- 1.56 EE's contraventions were serious and its culpability for them is exacerbated by a number of factors. Ofcom's judgment is that a substantial penalty is appropriate and proportionate to those contraventions and to have the appropriate deterrent effect on a CP of EE's size and relevant turnover and on other CPs. The penalty we have decided to impose is £2,700,000.
- 1.57 EE did have in place billing systems and processes that were designed generally to ensure it charged customers accurately for the services it provided to them and that it complied with its regulatory obligations. It also promptly took some steps, on becoming aware of the contraventions, to correct them and to remedy their consequences. Ofcom takes account of these matters in determining that we should impose a penalty on EE and in setting its amount.
- 1.58 However, GC 11.1 is an important consumer protection provision that requires CPs to ensure their systems give customers the services they pay for and that they are charged accurately for them. It reflects, amongst other things, that consumers tend to take their bills for electronic communications services on trust and that CPs, rather than their customers, are responsible for errors in their billing systems. In the absence of Ofcom taking firm and effective enforcement action, consumers receiving inaccurate bills would be forced to rely on bringing multiple complaints and/or contractual claims for what may be fairly small amounts in any individual case.
- 1.59 During the Relevant Periods, and the first of them in particular, EE contravened GC11.1 to a significant extent. A systemic failure meant it overbilled c.39,800 customers by c.£247,900 in two breaches over twelve months and around six weeks, respectively, with first breach continuing for six months after EE was aware of it. EE made gains and caused consumers harm of that amount (notwithstanding that it did not seek intentionally to make an unwarranted gain from its customers and subsequently re-imbursed some of those affected and made charity payments).¹⁴
- 1.60 On these bases, Ofcom judges EE's contraventions of GC11.1, the first especially, to have been serious. The penalty we impose reflects this.
- 1.61 Moreover, whilst it had a number of general processes in place to ensure accurate billing, EE did not take appropriate specific steps to prevent the first contravention in particular from occurring. In some respects, it acted carelessly or negligently.¹⁵ It gave its third-party data clearing house, [X], instructions that led to that contravention, does not appear to have checked these were implemented correctly

¹⁴ For which remedial steps we give it some credit as set out below.

¹⁵ We also take account, as set out in detail below, that EE does not appear to have acted carelessly or negligently in respect of the second contravention. We do not propose to add to the penalty on those grounds.

(or noticed they were not), and did not test the tariff changes that produced the overcharging either before or on their implementation.

- 1.62 There were also a number of shortcomings in what EE did to correct and remedy the first contravention, in particular. Although senior managers were informed almost as soon as EE became aware of it, EE did not take any steps to preserve the detailed call records which would have enabled it to identify and re-imburse affected customers. It did not do anything to notify customers in a way that might have enabled them to protect themselves and it did not notify BABT promptly in accordance with the requirements of the Metering and Billing Direction.
- 1.63 Neither did EE intend to re-imburse customers affected by the first contravention between 1 July 2014 and 28 February 2015 until Ofcom started looking into the matter in December 2015. It could not identify or reimburse 6,905 customers affected by that contravention between July 2014 and July 2015. It has acknowledged that it could, but decided not to, re-imburse those affected by that contravention between 1 and 10 April 2015. The overall effect was that more than 6,905 customers were left more than £60,000 out of pocket.
- 1.64 Each of these matters adds to the seriousness of EE's contraventions and its culpability for them. Likewise, to the penalty we impose.
- 1.65 Considering some of those matters in more detail, the general processes EE had in place, and for which we give it some credit, included the following:
 - 1.65.1 Established and documented schemes, processes and standards for the transfer of roaming call records into billing data and for testing and making changes to its tariffs. According to their contents, these "... Allow[s] the identification of control gaps, risks and issues in order to ensure that the appropriate controls are in place" and include "Control Objectives" that, "... provide reasonable assurance that roamer files and records are accurately processed," and "... provide reasonable assurance that file processing errors are identified and corrected."
 - 1.65.2 An independent audit report of [X]'s Data Clearing House system as of 30 October 2013, setting out [X]'s opinion that the system would provide reasonable assurance that its "Control Objectives" would be met, including that "... records charged for roaming services are accurately and timely rated."
 - 1.65.3 [X redacted reference to commercially confidential information relating to improvements to billing systems.]
 - 1.65.4 The RIM and BEF described above. The RIMB's terms of reference state that its functions included handling major billing incidents, ensuring regulatory compliance in billing matters and minimising adverse customer impacts from charging system or process errors. The BEF's say it is a forum for managing billing incidents that affect customers.
 - 1.65.5 Some processes designed to ensure the tariff changes made in July 2014 to comply with the EU Roaming Regulation (and which led to the first contravention) resulted in accurate billing. These included a "Proposition Requirements Document" ("PRD") and "Detailed Design Configurations" ("DCD") as well the testing for some of the tariff changes (the "Rater Parts 2 and 3 interzone EU to RoW" described in paragraph 1.39 above).

- 1.66 There is similarly some evidence EE took steps to prevent the second contravention. These include the High-Level Design Configuration Document and the testing previously referred to. They also include the process for post-production testing and monitoring of tariff and billing changes which EE introduced in March 2015 and which led to EE's discovery of the second contravention in this case.
- 1.67 However, there were also a number of other steps EE took, or failed to take, which led to, or failed to prevent (as the case may be), the first contravention in particular.
- 1.68 As described above, the first contravention arose because EE (T-Mobile) instructed [§<] to remove the 44 UK dialling code from the records of calls made to short code numbers including the 150 customer services number. There is no evidence EE (T-Mobile) checked that the 2008 change was implemented correctly or noticed or took action because it was not, despite EE's Major Incident Report (referred to in paragraph 1.24 above) noting that it should have done so. If it had, it should have picked up the discrepancy and corrected it.
- 1.69 The PRD, DCD and test results EE has provided to Ofcom, meanwhile, all indicate that no testing was done to check if the July 2014 tariff changes applicable to roaming calls to short code numbers would be successfully implemented. The PRD contains no specific reference to short code or customer service calls. Likewise, the DCD. The test results EE has provided do not relate to calls from the EU to the UK (the type for which EE has overcharged) and none show any test calls to the 150 short code number. This lack of testing is corroborated by the Major Incident Report and EE's internal emails.
- 1.70 There is also no evidence EE checked that the tariff changes leading to the first contravention were producing accurate charges and bills once they were implemented. Such evidence as there is suggests not. In its Third Response, EE stated that it only introduced its post-hoc testing process, in respect of changes such as to roaming call tariffs, in March 2015.
- 1.71 The first contravention therefore arose because of EE's carelessness or negligence in the instructions it gave its data clearing house, in its failure properly to supervise their implementation and in its failure adequately to test the relevant tariff changes. If it was not possible to test the changes in advance of their implementation, it was incumbent on EE to check after the event that they had been implemented successfully. Had it done these things it is likely the first contravention would not have occurred or at least that EE would have discovered it promptly and prevented at least its continuation, if not its occurrence.
- 1.72 As to the steps EE took to end the contraventions once it became aware of them, the matters for which we give it credit include detailed chains of internal email correspondence dating from 21 January 2015, when EE became aware of the first contravention, showing that it sought:
- 1.72.1 in January and February, to establish the cause of the contravention as its 2008 request to [§<] to remove the 44 UK dialling code from relevant call records and the effect of the changes to roaming tariffs in July 2014;
- 1.72.2 promptly to notify relevant management staff, including the BEF and the RIMB (whose review minutes from March onwards show the matter was discussed and progressed at its monthly meetings);

- 1.72.3 in March, to propose a solution – reversal of the 2008 removal of the 44 dialling code – and to check its effect with its billing platform provider, [X];
- 1.72.4 in April, once [X] had confirmed its view that the proposed solution would not have unintended consequences, to instruct [X] to implement it and to ensure it did so promptly;
- 1.72.5 to check the effectiveness of that solution and to begin action to address its inefficacy within a week of its implementation; and
- 1.72.6 between the end of April and 20 July 2015 to secure that [X] developed and implemented an effective alternative solution.
- 1.73 We also give EE credit for the post-implementation testing it undertook, on 17 December 2015, of the second tariff change (implemented a month earlier). Likewise, the high priority it attached to the resolution of the second contravention, as described above.
- 1.74 EE has also taken some steps to remedy the consequences of the contraventions. As is noted elsewhere in this document, the various figures EE has provided to us have been updated over time, and do not entirely add up, but its responses to the statutory information notices¹⁶ state that EE has repaid just over £248,000 to between 25,240 and 25,956 customers affected by the first contravention and made charitable payments of just under £62,000 in respect of the remainder. These sums represent the total amounts of the charges for the relevant calls, not just the overcharges. EE has also identified and refunded the 7,674 customers affected by the second contravention.
- 1.75 Ofcom takes account in this connection that paragraph 4.8.3 of the Ofcom Metering and Billing Direction, with which EE is bound to comply by virtue of GCs 11.3 – 11.5, sets out requirements relating to the “Extraordinary Performance Failure” of billing systems, such as that which occurred in the first contravention here. It says that, “The CP shall ensure that End-Users are not financially disadvantaged, but where individual End-Users cannot be identified, the CP shall derive no financial benefit from the failure, either by donating an equivalent sum to charity or by an adjustment of tariffs.”
- 1.76 The penalty Ofcom imposes is lower than it otherwise would have been on account of these steps EE took to end and to remedy the contraventions. Nonetheless, it also reflects the following significant flaws in the steps EE took or failed to take.
- 1.77 First, EE only kept billing records (the CDRs) that would have enabled it to identify those affected by the first contravention for 90-day rolling periods. Neither did it take steps to preserve those records when it became aware of the first contravention on 21 January 2015.
- 1.78 Had EE preserved the relevant records for longer, or at least from the time it became aware of the first contravention, it would have been able to identify all, or at least more of, the affected customers and fewer would have ended up out of pocket as a result of the overcharging. At the least, all those who were overcharged in the 90 days prior to 21 January 2015, and from that date onwards, could have been identified and re-imbursed.

¹⁶ Second response answers 3 and 4 and first response answer 9 – see Annexes 8 and 5

- 1.79 Moreover, Ofcom infers that this step could and should have happened from EE's statement in its Second Response that:
- “We have since introduced changes in our processes to ensure that as soon as we are able to confirm the nature of a billing error we will begin extracting data from our data warehouse and Rater as soon as possible to allow us to retrieve as much detail of the issue and impacted customers while the data is still held in the data warehouse and Rater.”
- 1.80 EE's payments to charity in respect of the unidentified customers does not wholly remedy this shortcoming in the preservation of relevant billing records, notwithstanding the requirements of the Metering and Billing Direction. The relevant money was the customers,' not EE's to give to charity. Even after taking this step, at least 6,905 customers (including an unidentified number affected between 1 and 10 April 2015) remained c.£61,000 out of pocket owing to EE's first contravention.
- 1.81 Second, while EE took steps promptly to fix the first contravention so that its billing system worked correctly in future, it did not take any steps to help customers liable to be affected in the meantime. For example, it could have warned customers about the problem. That may have enabled them to consider whether they wished to call the 150 number or EE's alternative international contact number while roaming.
- 1.82 Such steps would at least have enabled those who had been overcharged to check their bills and to contact EE seeking re-imburement. This would have helped to mitigate the effects of it not having CDRs for all the affected customers and helped to secure that fewer of them ended up out of pocket.
- 1.83 The opposite seems to have happened at least in some cases. Some customers whose price plans included roaming calls were sent standard form text messages telling them that calls to the 150 customer services number were free.
- 1.84 Third, although it ultimately did so, the evidence shows that EE had decided not to re-imburse the majority of the customers affected by the first contravention. It only did so once Ofcom became involved in the matter.
- 1.85 As noted above, EE told BABT on 30 November 2015 it was unable to identify the large majority of the affected customers and had decided to make a charity payment in respect of them. EE's RIMB review minutes record decisions to that effect. No other documents from 2015 make any reference to EE refunding such customers.
- 1.86 The first reference to any possibility of identifying and refunding those customers was in EE's reply of 8 January 2016 to Ofcom's enquiry letter of 11 December 2015. Amongst other things, our letter invited EE to make representations about any steps it had taken to remedy the consequences of any contraventions that had occurred. EE replied that it had begun investigating whether it could identify and refund further customers (though it would only do so if it could devise an automatic, rather than manual, process, for doing so).
- 1.87 On the basis of these documents, EE was not going to re-imburse the relevant customers of its own volition. Its position would have left the large majority of affected customers out of pocket. Only once Ofcom was involved did EE consider that it had a means of identifying and re-imbursing most of those customers (and even then it was prepared to leave the customers out of pocket if it thought repaying them was too onerous).

- 1.88 Fourth, EE in any event made a conscious decision not to identify and re-imburse customers affected by the first contravention between 1 and 10 April 2015. It stated in its Second Response that it could have used PDF copies of bills to identify these customers, as it had in respect of earlier periods, but decided this was too onerous, saying, “..... To do so would have required significant manual resource This was felt to be disproportionate given the time period in question.”
- 1.89 Where EE chooses to leave customers out of pocket, it must bear the consequences of doing so. Where it has overcharged customers in breach of GC 11, taken their money, left itself in a position where it considers re-paying them too difficult and left them in a position where they lose money, those consequences include an increase in the seriousness of EE’s wrongdoing and the consequent size penalty Ofcom imposes.
- 1.90 Fifth, EE’s eventual repayment of those customers affected by the first contravention between 1 July 2014 and 20 July 2015 that it was able to identify, and the charity payments to unidentified customers, were unduly delayed. Having only begun considering whether it could identify and repay these customers in December 2015, it did not identify and start repaying them until April 2016, and the charity payments were not paid until late June 2016 (all according to EE’s Second Response).
- 1.91 These times for payment are 15 and 17 months, respectively, after EE was aware of the first contravention. Evidence suggests EE itself recognises this inadequacy. Its RIMB review minutes for October 2015, dated 25 November that year, say, “[<] further noted that the delay in providing the charity payment estimate was too long – BABT and Ofcom had picked up on this. [<] agreed that in future more focus will be on ensuring that credits and charity payments will be calculated in a timely manner.”
- 1.92 Sixth, EE did not notify BABT of the first contravention, notwithstanding that it was an Extraordinary Performance Failure, until 16 September 2015, eight months after it was aware of it. EE’s notification to BABT also said EE became aware of the matter in March 2015, when its internal emails show that it had that awareness from 21 January that year.
- 1.93 Paragraph 4.8.3 of the Ofcom Metering and Billing Direction (referred to above), and with which EE was required to comply by virtue of GCs 11.3 – 11.5, requires CPs to notify their billing approval body of any extraordinary performance failures within five working days of their identification. It also requires the CP to provide a recovery plan to the approval body within a further ten working days. Ofcom’s July 2014 statement about the current Direction¹⁷ said that these notification requirements are designed to ensure that the approval body is alerted to significant problems and can work with the CP to understand the cause and the corrective measures the CP intends to take or has taken.
- 1.94 A prompt notification of EE’s EPF to BABT (which could in turn then have notified Ofcom) could have served the sort of purpose outlined in our 2014 statement. BABT (and Ofcom) could have understood, considered and possibly intervened in relation to EE’s proposals for resolving and remedying the first contravention. That would at least have increased the possibility of steps EE did not take (such as retaining relevant billing records and notifying affected customers) being taken, or of those it only took belatedly (like re-imbursing most of the affected customers) being taken quicker (noting that once BABT and Ofcom were involved, EE did take steps to

¹⁷ <http://stakeholders.ofcom.org.uk/binaries/consultations/metering-billing-2014/statement/statement.pdf>

identify and repay customers where previously it had decided not to). This would have mitigated the harm to customers.

- 1.95 Each of these matters adds to the gravity of the first contravention. We also take account that, during the period when the flawed steps described above were taken, senior managers within EE, like those on the RIMB, were aware of, and in some cases noting and approving, those steps. That, in our view, adds to the seriousness of those shortcomings.

Deterrence

- 1.96 On the above bases, Ofcom regards EE's contraventions as serious, and treats that seriousness and EE's culpability as exacerbated by the factors described. We consider that a significant penalty is warranted on those grounds.
- 1.97 In making our overall judgment about the appropriate and proportionate penalty, we have also considered the amount required to secure our central objective of deterrence. In particular, that any penalty must be sufficient to act as an effective incentive for compliance and to have a positive impact on EE's behaviour, having regard to the seriousness of its contraventions and its size and turnover.
- 1.98 We have also taken into account that we revised our Penalty Guidelines in December 2015¹⁸ on the basis that the penalties we had set prior to that date had not secured the appropriate deterrence. We said then that it might be necessary in appropriate cases to set higher penalties to have a stronger effect.
- 1.99 In light of that revision of the Guidelines, the importance of the consumer protection provisions EE has contravened, our previous actions against CPs for breaching those provisions as a result of billing system errors,¹⁹ ²⁰and the action we have previously taken against EE for breach of the General Conditions,²¹ we place significant weight on the need for a deterrent effect in this case. Relevant penalties we have imposed before now have not had the appropriate deterrent effect on EE.
- 1.100 Taking those points, and EE's large turnover into account, together with our assessment of the seriousness of its contraventions, our judgment is that a penalty of

¹⁸ <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines>

¹⁹ Ofcom has previously imposed penalties under our 2011 penalty guidelines on TalkTalk and Tiscali of £1,524,728 and £1, 512, 392, respectively, for contravention of GC11.1 (equivalent in each case to approximately 0.7 of their turnover for relevant business in the relevant period). In TalkTalk's case it had charged 19,840 customers approximately £1.25m for services not provided to them over a period of at least 10 months, as a result of failings in its transition of its billing systems. For the same reasons, Tiscali had done so to 41,879 customers, for around £500,000, for services not provided over a similar period.

²⁰ On 25 October 2016, Ofcom imposed on Vodafone a penalty of £3,700,000 (including a discount that takes into account Vodafone's co-operation in settling the relevant case) for conduct that involved a contravention of GC11.1. As a result of errors in its billing system, over a 17-month period Vodafone had taken in the region of £150,000 from 10,452 of its customers for services it did not provide to them. The steps Vodafone took once it was aware of the problem were, like EE's, flawed. It, too, did not take steps that would have limited the effects on its customers, nor take steps to reimburse the affected customers until Ofcom began investigating the matter. That case demonstrates the seriousness with which Ofcom regards matters in which CPs overcharge their customers and/or do not provide them with the services they pay for. Whilst the imposition of that penalty cannot itself have deterred EE's misconduct in the present case, it is important that Ofcom acts consistently with that case in establishing the appropriate deterrent to that type of behaviour.

²¹ Ofcom has previously imposed a penalty on EE under section 96C of the Act of £1m for contravention of GC14.5. That penalty sought to reflect the seriousness of the contravention involved and deter future regulatory contraventions.

£2,700,000 would secure our objective of deterrence and be appropriate and proportionate to the contraventions for which it is imposed.

- 1.101 That penalty includes a discount that reflects EE's agreement to the settlement of this matter. Ofcom considers that discount to be appropriate and proportionate given the saving of public money and resources that completion of the case would otherwise have required.

Overall conclusions and action required by EE

Contraventions of General Condition 11

- 1.102 On the basis of the evidence, reasoning and admissions contained in this Explanatory Statement, Ofcom is satisfied that in respect of the Relevant Periods EE contravened GC 11.1. It did so to the extent set out in this document, and specifically by rendering Bills to End-Users of its pay monthly Mobile Telephony Service that did not accurately represent the true extent of the service that had been provided to them.

Penalty

- 1.103 Ofcom imposes a penalty of £2,700,000 on EE. EE has until 5.00pm on 14 February 2017 to pay it.

Steps that must be taken by EE

- 1.104 The requirements Ofcom imposes on EE in order to comply with GC11.1 are that it must, to the extent it has not already taken them, within three months of the date of this notification take such steps as are necessary for ensuring that:
- it tests all types of calls and messages before launching changes to the tariffs that apply to them or has in place comprehensive post-hoc monitoring processes, in either case to ensure that such calls and messages are charged at the correct rates; and
 - when rendering a Bill to a customer, the amount stated fully represents the true extent of the services actually provided.
- 1.105 The requirements Ofcom imposes on EE in order to remedy the consequences of its contraventions of GC 11.1 that it must, to the extent it has not already taken them, within three months of the date of this notification take the steps necessary to:
- identify all customers affected by the contraventions (those in the Relevant Periods to whom EE rendered bills for calls and/or text messages to the 150 customer services number that were in excess of the amount they should have been charged for the call(s) and/or messages, including in particular those so charged between 1 and 10 April 2015);
 - re-imburse fully for the excessive charges such of that group who remain its customers; and
 - write to the last-known address of such of that group who are no longer its customers inviting them to contact EE for the same re-imbusement, and to pay such re-imbusement on request by such former customers.

Annex 1

Notification to EE Limited of contravention of General Condition 11 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, we are 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 decision;
 - 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,²² 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.
- A1.4 The Schedule to a Notification issued by the Director General of Telecommunications on 22 July 2003 under section 48(1) of the Act, which took effect from 25 July 2003, sets out the General Conditions of Entitlement (the

²² Such requirements include those steps that Ofcom thinks should be taken by the person in order to comply with a General Condition, or to remedy the consequences of a contravention of a General Condition.

“General Conditions” or “GCs”) which apply to all Communications Providers (“CPs”) defined in each GC. The GCs have, from time to time, been amended.²³

General Condition 11

A1.5 General Condition 11 (“GC 11”) was one of the General Conditions introduced in July 2003 and its material parts for the purpose of this Confirmation Decision are substantially unchanged since that time.

A1.6 Amongst other things, GC11 requires CPs providing Public Electronic Communications Services to ensure that bills are accurate and obliges providers to maintain records so that this can be checked. GC 11.1 requires that:

“The Communications Provider shall not render any Bill to an End-User in respect of the provision of any Public Electronic Communications Services unless every amount stated in that Bill represents and does not exceed the true extent of any such service actually provided to the End-User in question.”

Subject of this Confirmation Decision

A1.7 This Confirmation Decision is addressed to EE Limited (“EE”), trading as EE, Orange and T-Mobile, 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

A1.8 On 4 November 2016, Ofcom decided to issue a notification under section 96A of the Act (“the section 96A Notification”) to EE, stating that Ofcom had reasonable grounds for believing in respect of the periods between 1 July 2014 and 20 July 2015 and 18 November 2015 and 11 January 2016 (the “Relevant Periods”), EE contravened GC 11.1 by rendering Bills to End-Users of its Public Electronic Communications Services that did not accurately represent the true extent of the service that had been provided. It did so by over-charging them for calls they made to its customer service number, 150.

A1.9 The section 96A Notification also specified the penalty Ofcom was minded to impose on EE.

A1.10 EE was given until 2 December 2016 to make written representations to Ofcom about the matters set out in the section 96A Notification. It did not make any such representations and instead entered into a settlement procedure with Ofcom.

Confirmation Decision

A1.11 Having served the section 96A Notification on EE, which allowed it the opportunity to make representations, the period allowed for making representations having now expired, EE having decided not to make any representations and in light of the admissions EE made to us in a letter dated 16 January 2017, Ofcom is satisfied that EE has, in the respects notified in the section 96A Notification, contravened GC 11.1 in the Relevant Periods. Ofcom has decided to give EE a Confirmation

²³ A consolidated version of the General Conditions as at 28 May 2015 is available at: https://www.ofcom.org.uk/_data/assets/pdf_file/0026/86273/CONSOLIDATED_VERSION_OF_GENERAL_CONDITIONS_AS_AT_28_MAY_2015-1.pdf

Decision, and to impose a financial penalty, in accordance with section 96C of the Act. The reasons are set out in the Explanatory Statement to which this Confirmation Decision is annexed.

Requirements

- A1.12 The requirements Ofcom imposes on EE in order to comply with GC11.1 are that it must, to the extent it has not already taken them, within three months of the date of this Confirmation Decision take such steps as are necessary for ensuring that:
- a) it tests all types of calls and messages before launching changes to the tariffs that apply to them or has in place comprehensive post-hoc monitoring processes, in either case to ensure that such calls and messages are charged at the correct rates; and
 - b) when rendering a Bill to a customer, the amount stated fully represents the true extent of the services actually provided.
- A1.13 The requirements Ofcom imposes on EE in order to remedy the consequences of its contraventions of GC 11.1 that it must, to the extent it has not already taken them, within three months of the date of this Confirmation Decision take the steps necessary to:
- a) identify all customers affected by the contraventions (those in the Relevant Periods to whom EE rendered bills for calls and/or text messages to the 150 customer services number that were in excess of the amount they should have been charged for the call(s) and/or messages, including in particular those so charged between 1 and 10 April 2015);
 - b) re-imburse fully for the excessive charges such of that group who remain its customers; and
 - c) write to the last-known address of such of that group who are no longer its customers inviting them to contact EE for the same re-imburement, and to pay such re-imburement on request by such former customers.

Penalty

- A1.14 Ofcom has determined that a penalty of £2,700,000 be imposed on EE. EE has until 5.00pm on 14 February 2017 to pay Ofcom the penalty.

Interpretation

- A1.15 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.

Lindsey Fussell, Ofcom

17 January 2017