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## **Confirmation Decision issued under section 139A of the Communications Act 2003 relating to contraventions of information requirements**

Confirmation Decision served on Telefónica UK Limited by the Office of Communications (Ofcom)

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Non-confidential version - redactions are indicated with [X].

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# 1. Overview

On 12 February 2021, following our investigation, Ofcom found that Telefónica UK Limited (trading as ‘O2’) had contravened its regulatory obligations in relation to accurate billing. O2 did so by failing to render or make available accurate final bills to be issued to customers after their cancellation of services (i.e. termination bills) and by overcharging a significant number of customers terminating their ‘Pay Monthly’ services with O2, between at least 26 May 2011 and 15 March 2019.

This document explains Ofcom’s separate and additional finding that O2 has also contravened its information requirements as part of our above-mentioned investigation. It also sets out why we consider this to be a serious breach of the information requirements and why we have decided to impose a penalty of £150,000 on O2.

## What we have found – in brief

**O2 has breached several information requirements.** We have found that O2 has contravened several information requirements under section 135 of the Communications Act 2003. It did so by providing inaccurate and incomplete information in response to our specific demands for required information under two different notices served on O2 during our investigation into O2's compliance with its billing requirements (the 'Billing Investigation').

**We are satisfied that this was a serious breach.** In particular, we consider that several aggravating factors are present that cumulatively support our finding that O2's contravention amounted to a serious breach of its information requirements and something which we have reflected in the significant penalty we have decided to impose on O2. Such factors include, in particular, that:

- the information contraventions related to key areas of the billing error;
- the information contraventions contributed to the Billing Investigation taking longer to complete than would otherwise have been necessary, requiring Ofcom to use additional resource and resulting in additional costs;
- O2's governance process for responding to our information requests were either not properly followed (at least in full) or were inadequate;
- O2 demonstrated a level of carelessness that is exacerbated in the light of Ofcom's previous enforcement decisions regarding compliance with information requirements; and
- O2's history of contraventions in this area.

**The deterrent effect of our penalty.** While we have considered all of the factors in the round, we consider that a significant penalty in O2's case is also appropriate in order to secure the objective of deterrence in light of our previous financial penalties imposed on O2 and other providers (including giffgaff, a wholly owned subsidiary of Telefónica UK Limited) for contraventions of information requirements. Our penalty is therefore at a level which also signals to others that any failures to comply with our information requirements will be taken very seriously by Ofcom.

**We have imposed a penalty of £150,000 on O2.** This includes a 25% discount applied to the penalty figure of £200,000 which we would have otherwise imposed. This discount reflects resource savings achieved by Ofcom as a result of O2 admitting liability and entering into a settlement with Ofcom. Our view is that this penalty is appropriate and proportionate to the information contraventions in question. In taking that view, we have had regard to all the evidence referred to in this document, together with our published Penalty Guidelines.

**O2 must review its processes and systems for responding to information requests.** In addition to imposing a penalty, we are also requiring O2 to review its processes and systems it has put in place for responding to information requests issued to it by Ofcom in order to assess the extent to which those processes and systems include the necessary level of oversight needed to ensure the accuracy and completeness of its responses. To the extent that such a review by O2 finds that those systems and processes do not have the necessary level of oversight, O2 must revise those systems and process to address the concerns it identifies.

**This overview is a simplified high-level summary only. Our findings and our reasoning are set out in the full document.**

## 2. Introduction and summary

### Purpose of this document

- 2.1 This document explains Ofcom’s decision to give a confirmation decision (the ‘**Confirmation Decision**’) to O2 under section 139A of the Communications Act 2003 (the ‘**Act**’) in respect of our finding that O2 has contravened its information requirements under section 135 of the Act. In particular, this document accompanies that Confirmation Decision by setting out (among other things) the extent to which we have found that O2 has contravened those requirements and our reasons for that finding. The Confirmation Decision itself given to (and served on) O2 is attached at Annex 1.

### Our billing investigation

- 2.2 General Condition (‘**GC**’) C3<sup>1</sup> is an important consumer protection provision which sets out the general conditions relating to metering and billing. In particular, GC C3.2 requires every person providing a public electronic communications service (‘**CPs**’) to render accurate bills to their customers and only to charge them for services actually provided.
- 2.3 In June 2019, Ofcom received a notification under the Metering and Billing Direction (the ‘**Direction**’) from the Approval Body for O2’s metering and billing system, TUV SUD BABT (‘**BABT**’). That notification (the ‘**BABT Notification**’) informed Ofcom that O2 had experienced an Extraordinary Performance Failure (‘**EPF**’) in relation to its metering and billing system, whereby 93,259 customers had been overcharged a total of £959,706.19 between at least 1 January 2012 to 7 March 2019.
- 2.4 On 10 July 2019, Ofcom opened an investigation into whether O2 had complied with its obligations under General Condition C3.2 (formerly General Condition 11.1) (the ‘**Billing Investigation**’).
- 2.5 On 13 December 2019, Ofcom opened a separate investigation into O2’s compliance with our requests for information under section 135 of the Act.<sup>2</sup> The purpose for requiring that information was to investigate O2’s compliance with the above-mentioned billing requirements following our receipt of the information contained in the BABT Notification.
- 2.6 On 12 February 2021, following our completion of the Billing Investigation, we found that O2 had contravened its billing requirements by failing to render or make available accurate final bills to customers after their cancellation of services (i.e. termination bills) and by overcharging a significant number of customers terminating their ‘Pay Monthly’ services with O2, between at least 26 May 2011 and 15 March 2019 (the ‘**Relevant Period**’). We imposed a penalty of £10.5 million on O2, which included a 30% discount applied to the penalty figure of £15 million which we would have otherwise imposed. That discount

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<sup>1</sup> An unofficial consolidated version of the General Conditions can be found at:

[https://www.ofcom.org.uk/data/assets/pdf\\_file/0021/112692/Consolidated-General-Conditions.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0021/112692/Consolidated-General-Conditions.pdf)

<sup>2</sup> Case reference CW/01252/12/19.

reflected resource savings achieved by Ofcom as a result of O2 admitting liability and entering into a settlement with Ofcom.

## Statutory information requirements

2.7 Ofcom has statutory powers contained in section 135 of the Act to require the provision of information which we consider necessary for the purpose of carrying out our functions under Chapter 1 of Part 2 of the Act.<sup>3</sup>

2.8 In that regard, section 135(3)(a) clarifies that:

*(3) The information that may be required by OFCOM under subsection (1) includes, in particular, information that they require for any one or more of the following purposes—*  
*(a) ascertaining whether a contravention of a condition or other requirement set or imposed by or under this Chapter has occurred or is occurring;*  
*[...]*

2.9 The subject-matter of our Billing Investigation was O2's compliance with its billing requirements under General Condition C3.2, which is a condition set under section 51 of the Act and it therefore falls under Chapter 1 of Part 2 of the Act.

2.10 Communications providers,<sup>4</sup> like O2, are among the persons from whom we may require information.<sup>5</sup>

2.11 Importantly, a person required to provide information under section 135 has a statutory duty to ('must') provide it to Ofcom in the manner requested and within such reasonable period as we may specify.<sup>6</sup> This is the so-called '**information requirement**'.

2.12 Section 135(5) of the Act provides that our powers under section 135 are subject to the limitations in section 137.

2.13 Section 137(2) provides that Ofcom is not to require the provision of information for the purpose of ascertaining whether a contravention of a general condition has occurred, or is occurring, unless one of the five exceptions listed in that subsection applies. One of those exceptions is that our information requirement is imposed for the purposes of an investigation that Ofcom has decided to carry out into whether or not the general condition in question has been complied with. This exception applied to our information requirements imposed on O2 for our Billing Investigation.

2.14 Section 137(3) also provides that Ofcom is not to require the provision of information under section 135, except:

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<sup>3</sup> See section 135(1)(c) of the Act.

<sup>4</sup> See section 405(1) of the Act, namely "a person who provides ... an electronic communications network or an electronic communications service."

<sup>5</sup> See section 135(2)(a) of the Act.

<sup>6</sup> See section 135(4) of the Act.

- by a demand for the information that describes the required information and sets out Ofcom's reasons for requiring it; and
- where the making of a demand for the information is proportionate to the use to which the information is to be put in the carrying out of Ofcom's functions.

2.15 These statutory powers are fundamental to Ofcom's ability to carry out our statutory functions in relation to communications matters, such as taking enforcement action, in line with our principal duty of furthering the interests of citizens and consumers under section 3 of the Act. In particular, they enable Ofcom to gather the information which we consider necessary to carry out our functions in a timely and effective manner. They are therefore key to the integrity of the regulation of the communications sector.

## Our enforcement of information requirements

2.16 Sections 138 to 144 of the Act give powers to Ofcom to enforce any contravention of our information requirements.

2.17 We investigate compliance with statutory information requests made under the Act in line with our enforcement guidelines for regulatory investigations.<sup>7</sup>

2.18 There are two main stages for our normal enforcement process which apply to this investigation.<sup>8</sup>

2.19 The first stage is to provide an opportunity to, in effect, consult with the person who is subject to our demand for the information and therefore required to comply with our information requirement. In this case, this is O2.

2.20 That stage involves us giving O2 our notification under section 138 of the Act setting out, in particular, our determination that we have reasonable grounds for believing that O2 has contravened our information requirements.<sup>9</sup> Specifically, that section provides:

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<sup>7</sup> Our most recent enforcement guidelines were published on 28 June 2017: see <https://www.ofcom.org.uk/consultations-and-statements/category-2/ofcoms-approach-to-enforcement>

<sup>8</sup> Sections 139B and 139C of the Act give Ofcom the power to deal with urgent cases by following a different process; sections 140 to 143 of the Act give Ofcom the power to suspend service provision for information contraventions by laying down another process. Those processes are not relevant at this stage.

<sup>9</sup> The second stage is that, after considering any representations, Ofcom may either give the person a decision (a "confirmation decision") under section 139A of the Act confirming the imposition of requirements on the person, or the giving of a direction to the person, or both, in accordance with the notification under section 138; or inform the person that they are satisfied with the person's representations and that no further action will be taken: see section 139A(2) of the Act.

*(1) Where OFCOM determine that there are reasonable grounds for believing that a person is contravening, or has contravened, a requirement imposed under section 135, 136 or 137A, they may give that person a notification under this section.*

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

*(a) sets out the determination made by OFCOM;*

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

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

*(d) specifies what the person must do in order to comply with the requirement;*

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

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

- 2.21 We issued O2 with such a notification under section 138 of the Act on 17 November 2021. As part of the settlement process, O2 admitted on 24 November 2021 its liability for infringing specified information requirements under section 135 of the Act as set out in that notification.
- 2.22 Section 139A(2) of the Act gives Ofcom the power to give the person subject to our investigation a ‘**confirmation decision**’, that is to say a decision confirming the imposition of requirements on the person, or the giving of a direction to the person, or both, in accordance with the notification previously given to that person under section 138. However, pursuant to section 139A(3), Ofcom can only give a confirmation decision, after considering any representations by the notified person (here, O2), if we are satisfied that the person has, in one or more of the respects notified, been in contravention of an information requirement notified under section 138. Ofcom also has the power to require the person to pay the penalty specified in the notification under section 138. Importantly, section 139A(5) imposes a statutory duty on the person to comply with any requirement imposed by a confirmation decision, which is enforceable in civil proceedings by Ofcom.
- 2.23 As explained at the outset of this Section, this document serves the purpose of giving such a Confirmation Decision to O2 (which is attached at Annex 1) and the main body of this document accompanies that Confirmation Decision by, in particular:
- giving details in Section 3 of our information requirements in this case and O2’s relevant responses, together with our reasons for being satisfied, after giving O2 the opportunity to make representations on our section 138 notification, that O2 has contravened the relevant information requirements in this case, including the extent to which we have found that O2 has contravened those requirements (the so-called ‘**information contraventions**’);

- setting out in Section 4 our assessment of the penalty that we have decided to impose on O2 in respect of those information contraventions; and
- setting out in Section 5 the remedial steps O2 must take in respect of those information contraventions.

## 3. Our findings

### Overview of our information gathering

#### Our seven demands (notices) for information from O2

- 3.1 As explained in Section 2, BABT notified Ofcom on 12 June 2019 that O2 had experienced a Category 1 EPF between at least 1 January 2012 and 7 March 2019. The BABT Notification gave details of (among other things) O2's explanation of its billing error. In particular, it contained O2's own description of the error, namely "*[i]n a very specific scenario, the termination bill will take a duplicate payment as part of the final Direct Debit*" and this had resulted in duplicate payments totaling £959,706.19 and affecting 93,259 accounts.
- 3.2 In light of that information, we served on 1 August 2019 our first demand (notice) for specified information from O2 to better understand various matters relating to its billing error (and to obtain associated evidence), such as:
- confirmations and clarifications about the accuracy and completeness of the information given by O2 relating to the billing error in the BABT Notification;<sup>10</sup>
  - information that O2 had made available on its termination bills to customers affected by the billing error;<sup>11</sup>
  - information and documents relating to its duration (with start and end dates) for affected services;<sup>12</sup>
  - documents relating to any corrective action taken by O2;<sup>13</sup>
  - explanations and documents detailing the governance systems in place during the Relevant Period to escalate and address billing system errors;<sup>14</sup> and
  - details of O2's relevant turnover.<sup>15</sup>
- 3.3 In the end, we had to prepare and serve a total of seven separate demands (notices) for specified information from O2 during the Billing Investigation to be satisfied that we had received sufficient reliable evidence from O2 relating to the billing error.
- 3.4 For ease of reference, Table 1 below gives an overview of our seven notices containing our information requirements imposed on O2, the dates on which we sent them to O2, and the dates on which O2 responded to those corresponding notices. Table 1 also explains how each notice and corresponding response from O2 will be referred to throughout this document.

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<sup>10</sup> Questions 1 to 4.

<sup>11</sup> Questions 5 to 8.

<sup>12</sup> Questions 9 to 11.

<sup>13</sup> Question 12.

<sup>14</sup> Questions 13 to 16.

<sup>15</sup> Questions 17 to 18.

**Table 1: Our seven notices and O2's responses**

<b>Ofcom's demand for information</b>	<b>O2's corresponding response</b>
First Information Request sent on 1 August 2019 – referred to as the <b>'First Notice'</b>	O2 responses received on 5 September 2019 and 3 October 2019 – collectively referred to as the <b>'First Response'</b>
Second Information Request sent on 2 October 2019 – referred to as the <b>'Second Notice'</b>	O2 responses received on 17 October 2019 and 5 November 2019, corrected by O2 on 7 November 2019 – collectively referred to as the <b>'Second Response'</b>
Third Information Request sent on 22 November 2019 – referred to as the <b>'Third Notice'</b>	O2 responses received on 26 November 2019, 29 November 2019 and 4 December 2019 – collectively referred to as the <b>'Third Response'</b>
Fourth Information Request sent on 6 January 2020 – referred to as the <b>'Fourth Notice'</b>	O2 response received on 7 February 2020 – referred to as the <b>'Fourth Response'</b>
Fifth Information Request sent on 17 March 2020 – referred to as the <b>'Fifth Notice'</b>	O2 response received on 28 April 2020 – referred to as the <b>'Fifth Response'</b> .
Sixth Information Request sent on 22 June 2020 – referred to as the <b>'Sixth Notice'</b>	O2 response received on 29 June 2020 – referred to as the <b>'Sixth Response'</b>
Seventh Information Request sent on 22 October 2020 – referred to as the <b>'Seventh Notice'</b>	O2 response received on 6 November 2020 – referred to as the <b>'Seventh Response'</b>

3.5 This document concerns the information provided by O2 in its response to those notices.

### **Other information received during the Billing Investigation**

3.6 In addition to the above-mentioned notices and responses, we received other information during the Billing Investigation that is referenced in this document. They are summarised below.

#### **The 'September Meeting'**

3.7 Upon reviewing O2's First Response, we identified several discrepancies in the information provided to us by O2 on 5 September 2019, including descriptions of its billing error. We therefore highlighted those discrepancies to O2 on 17 September 2019, and requested to have a meeting with O2, together with [X] (who runs O2's billing system), to discuss the billing error in more detail.

3.8 On 27 September 2019, prior to the meeting, O2 sent a note drafted by [redacted] which set out details of three scenarios that led to the billing error. After discussing the updated information and other aspects of the billing error at the meeting on 30 September 2019 (the **'September Meeting'**), Ofcom served the Second Notice on O2.

### **The 'Facts and Evidence Document' and O2's 'Response to the Facts and Evidence Document'**

3.9 On 15 August 2020, as part of the Billing Investigation, Ofcom issued a document to O2 detailing our initial thinking on the factual issues and evidence of the case as we understood it at that stage (the **'Facts and Evidence Document'**).

3.10 O2 was given an opportunity to review the Facts and Evidence Document and to provide us with any further facts that it considered Ofcom should be made aware of/take into account in mitigation as part of our investigation. O2 responded to the Facts and Evidence Document on 2 October 2020 (the **'Response to the Facts and Evidence Document'**).

## **Our findings of O2's information contraventions**

3.11 It is essential that Ofcom is able to rely on all of the information that is provided in response to our demands for specified information in our notices at face value and without having to interrogate it. Indeed, many problems can arise if we do not obtain reliable, accurate and complete information on time from those who are required to comply with our information requirements, including:

- the accuracy or quality of our decisions may be reduced, and we could come to a different decision from the one we would have reached if accurate and complete information had been provided;
- our work on the investigation may be delayed, which could have adverse implications not only for Ofcom but also our stakeholders;
- the costs of our investigation in relation to which we are seeking information may increase; and
- any remedial action that may be required as part our investigation may be prejudiced.

3.12 During the Billing Investigation, we identified several concerns about the accuracy and completeness of some information provided by O2 in response to the First and Second Notices.

3.13 Having completed the Billing Investigation, we deal below with our findings of O2's information contraventions. Those contraventions arise from several different specific information requirements, which we have grouped into four different broad heads of discussion below, namely O2's information contraventions relating to:

- the nature and scope of the billing error;
- the duration of the billing error;
- O2's awareness of the billing error; and
- establishing harm or potential harm.

## Information contraventions about the nature and scope of the billing error

### The importance of our information requirements

- 3.14 For any investigation's starting point, it is especially important for Ofcom to fully understand what led to and what happened in relation to the matters under our investigation, including the precise nature and scope of the issues being investigated.
- 3.15 Without us receiving accurate and complete information and evidence about such things, we cannot properly determine whether and how a contravention has taken place. Therefore, one of our main purposes of the First Notice was to obtain from O2 all relevant information to ensure that we had a complete and accurate understanding of the billing error and how it had occurred.
- 3.16 We deal below with two aspects of inaccurate/incomplete information that we received from O2 in relation to the nature and scope of the billing error. That information affected our understanding not only of how the billing error had been described and reported to BABT by O2 in the BABT Notification, but also in respect of the termination journey timeframe.

### O2's inaccurate/incomplete assessment of the billing error description in the BABT Notification

#### Our information requirement in the First Notice

- 3.17 Prior to opening the Billing Investigation, Ofcom's understanding of the billing error was based on the information given in the BABT Notification. In particular, we noted that the BABT Notification<sup>16</sup> contained O2's own description of the billing error:

*"In a very specific scenario, the termination bill will take a **duplicate payment as part of the final Direct Debit. This happens if the customer disconnects on a Saturday / Sunday and has an outstanding periodic bill.** The termination invoice should take into account payments made against the periodic bill when calculating the final payment. However, in **this scenario** payment for the termination invoice includes the value of the periodic bill meaning that we take **payment for that bill twice.** This issue is now fixed and we won't see any new instances."* (emphasis added)

- 3.18 We understood from that description that the billing error occurred if the customer (i) had an outstanding periodic bill; and (ii) disconnected (terminated) their account on a Saturday/Sunday.
- 3.19 In light of that description, we asked O2 for the following information in our First Notice:

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<sup>16</sup> BABT Notification, page 1, box titled 'Brief Description' of incident, dated 4 April 2019 and submitted by [redacted], Telefónica UK.

### Question 1(a) of the First Notice

Please confirm the **accuracy and completeness** of the information given by O2 on pages 1 and 2 relating to the Billing Error. If the information contains any errors, please **set out clearly all corrections together will** [sic] **a full explanation**. (emphasis added)

3.20 In asking that question, we defined 'Billing Error' in the First Notice as:

*The billing error identified in the BABT Notification as having occurred between 1 January 2012 and 7 March 2019 (i.e. for 7 years and 67 days).*

### O2's response

3.21 In its First Response, O2 responded to that Question 1(a) of the First Notice as follows:

### Question 1(a) of the First Response

*TUK has no reason to believe that the information provided on pages 1 and 2 the [sic] BABT notification is inaccurate or incomplete at the time of submission by TUK to BABT. We continue to be of this view.*

3.22 We took that response as O2 confirming that the information given by O2 on 4 April 2019 in the BABT Notification - including its above-mentioned description of the billing error - was accurate and that it remained accurate as at the date of the First Response (i.e. on 5 September 2019). We particularly considered this to be the case as Question 1(a) of the First Notice specifically invited O2 to "set out clearly all corrections together will [sic] a full explanation", if the BABT Notification contained any errors, and O2 set out no such corrections.

3.23 Further, and in support of its description in the BABT Notification being accurate, O2 provided an expanded example of how the billing error had occurred in its response to Question 2 of the First Notice, namely O2 stated:<sup>17</sup>

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<sup>17</sup> Question 2 of the First Notice asked O2 to "Please explain what O2 means (on page 1 of the BABT Notification) by "outstanding periodic bill"? For example, was it the case that the Billing Error would occur if customers owed money on their contracts, or would it occur if at one point customers had outstanding bills, which at the time of the Termination Bill being sent, had already been paid off completely?"

## Question 2 of the First Response

[...] By way of example:

- A customer's periodic bill is produced on a Saturday, e.g. 1st of the month.
- Payment for that periodic bill should be taken, two weeks later e.g. 14th of the month.
- However, in the interim the customer contacts O2 to terminate their account on a Sunday, e.g. 8th of the month.
- The Termination Bill should include the value of the outstanding periodic bill as a brought forward amount. Payment for the Termination Bill should be taken two weeks later e.g. on 22nd of the month, and should recognise any payment which has been received for the outstanding periodic bill and be reduced accordingly.
- As concerns the Billing Error, the Termination Bills of affected customers did not reflect payments received for any such outstanding periodic bills and therefore such customers were charged the same outstanding amount again. This error would have happened regardless of a customer's debt position as this was a technical fault that did not recognise that payment had been received for the outstanding periodic bill.

3.24 As with the description in the BABT Notification, this example again detailed a scenario where the customer had an outstanding periodic bill at the point that they disconnected (terminated) their account on a Saturday/Sunday. Our understanding from O2's response in that regard was therefore that those two preconditions - (i) having an outstanding periodic bill; and (ii) disconnecting (terminating) the account on a Saturday/Sunday - (i.e. "a very specific scenario" as O2 had referred to it in the BABT Notification) had to apply for the billing error to occur, and that the error would not occur in other circumstances (scenarios).

### O2's information contravention

3.25 After we had reviewed other information in O2's response to the First Notice, we had reason to believe that O2's description of the billing error in the BABT Notification (which it had confirmed as accurate and supported with its response to Question 2 of the First Response) was not accurate after all. In particular, we noted that the description of the billing error in the BABT Notification appeared to differ from an explanation of the billing error provided by [redacted] in one of the annexes provided as part of the First Response.<sup>18</sup> Further, other annexes attached to the First Response also contained references to a separate scenario not described in the BABT Notification.<sup>19</sup>

3.26 As a result of our review, Ofcom:

- highlighted those discrepancies to O2 on 17 September 2019;
- requested to have a meeting with O2 and [redacted];

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<sup>18</sup> Annex 11, First Response.

<sup>19</sup> Annex 7 (email from [redacted] to O2 on 8 March 2019 at 14:37) and Annex 14 (email from [redacted] to O2 on 20 February 2019 at 11:02), First Response.

- reviewed a note drafted by [X] that detailed three scenarios that led to the billing error and which we received from O2 on 27 September 2019;
- discussed the updated information and other aspects of the billing error at the meeting with O2 and [X] on 30 September 2019; and
- served the Second Notice on O2 on 2 October 2019.

3.27 Specifically, in our Second Notice, we asked O2 the following main question:<sup>20</sup>

#### **Question 1 of Annex 1 to the Second Notice**

*Please review O2's First Response to each question in Ofcom's First s135 Request dated 1 August 2019 and make all necessary revisions to ensure the information provided is complete and accurate in light of new information provided to Ofcom in O2's email of 27 September 2019 and in the meeting of 30 September 2019. In reviewing and revising the First Response, please:*

- clearly highlight any revisions made, or where the response remains the same, indicate that no changes have been made; and*
- take into account and respond to the questions in Annex 2 as discussed in the meeting of 30 September 2019. Where these questions are not specifically covered in the First Response [sic], please include your answers to these questions in addition to the revised First Response. (emphasis added)*

3.28 In its Second Response, O2 responded to that question by revising its previous response to Question 1(a) of the First Notice (referred to above) as follows:

#### **Question 1(a) of the First Response (as revised by the Second Response)**

*Original response - TUK has no reason to believe that the information provided on pages 1 and 2 the [sic] BABT notification is inaccurate or incomplete at the time of submission by TUK to BABT. We continue to be of this view.*

*Revised response – Further to Ofcom's questions to TUK on 17 September 2019, following TUK's First Response on 5 September 2019, it is now clear from information that has surfaced and clarified in conjunction with [X], that four scenarios have been identified and defined, which would result in the Billing Error occurring<sup>1</sup> [sic]. These are briefly set out below, fuller descriptions and examples are provided in response to question 2. In the Brief Description section of page 1 the BABT notification, the statement illustrates what has now been defined as Scenario 2 only. [...] (emphasis added)*

3.29 For the purpose of that revised response, we note O2's reference to the Billing Error. In our Second Notice, we adopted a modified definition of the 'Billing Error' which was "[t]he billing error identified in the BABT Notification as having occurred between 1 January 2012 and 7 March 2019 (i.e. for 7 years and 67 days), together with any similar billing error

<sup>20</sup> Additionally, in Annex 2 to the Second Notice, we also asked O2 specific follow-up questions arising from the September Meeting.

*arising from Scenarios 1 to 4*” (emphasis added). We therefore took O2’s reference to the ‘Billing Error’ as a reference to this amended definition.

- 3.30 We also took this revised response as O2 confirming that there were, in fact, four billing error scenarios and not a single scenario as it had previously set out in the BABT Notification and later confirmed as accurate in its First Response. In other words, O2’s First Response to Question 1(a) of the First Notice had, therefore, been inaccurate and incomplete.
- 3.31 In addition to O2’s First Response to Question 1(a) of the First Notice, we also consider that O2’s revised response to that question (as requested by Question 1 of Annex 1 to the Second Notice) was inaccurate. Specifically, despite O2’s revised response stating that the description in the BABT Notification illustrated “*what has now been defined as Scenario 2 only*”, upon review we found that neither that description, nor the supporting example O2 had provided in its original response to Question 2, correlated fully with any of the billing error scenarios as confirmed by the Billing Investigation.<sup>21</sup>
- 3.32 To start with, O2 had explained in the BABT Notification that “*This [very specific scenario] happens if the customer disconnects on a Saturday / Sunday and has an outstanding periodic bill.*”
- 3.33 As detailed above, our plain reading of that explanation is that the scenario described by O2 involved two preconditions:
- i) a customer had to terminate the service on a weekend; and
  - ii) that customer already had to have an outstanding monthly bill to pay for the service at that point – however, O2’s explanation did not indicate any dependency on the actual timing by which that bill needed to have been produced for this scenario to apply.
- 3.34 By the end of the Billing Investigation, we had established that Scenario 2 was indeed dependent on a customer terminating their service on a weekend. However, the definition of Scenario 2 in O2’s revised response to Question 1(a) of the First Notice (as provided by [X]) clarified that, in essence, this scenario would only occur where a customer terminated the service on the same weekend that the final monthly bill was produced. Specifically, O2 stated in its Second Response:

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<sup>21</sup> A description of all confirmed scenarios can be found in Annex 3.

TUK notes Ofcom's definitions [22] of each scenario in the Second notice, based on Annex 41, [3] have reviewed these and provided the definitions below which Ofcom may find clearer to interpret. [...]

**Scenario 2: Customer terminating on a Saturday or Sunday on the same weekend as their last periodic bill, which was produced on a Saturday.**

(emphasis added)

- 3.35 This necessity for termination to occur on the same weekend that the final monthly bill was produced was further made clear by the 'fuller descriptions and examples' provided in O2's revised response to Question 2 of the First Notice.<sup>23</sup>
- 3.36 Consequently, by stating that the BABT Notification described "Scenario 2 only", O2 also gave a confusing and inaccurate revised response to our original Question 1(a) of the First Notice. In particular, its revised response purported to give the impression that the scenario described in the BABT Notification remained (at least in part) relevant to describing the nature and scope of the billing error, when it, in fact, did not correlate fully with any of the billing error scenarios.
- 3.37 This inaccurate statement that the BABT Notification described "Scenario 2 only" was repeated in other parts of O2's Second Response,<sup>24</sup> exacerbating the confusion around the true nature and scope of the billing error.
- 3.38 Indeed, in our understanding of the information provided by O2, Scenario 2 would not have occurred if the outstanding monthly bill had been issued prior to the weekend on which a customer terminated their service, because payment for that bill would have been taken before the termination bill was generated.<sup>25</sup>
- 3.39 In that regard, it should be noted that we stated in our Facts and Evidence Document<sup>26</sup> that "The scenario described by O2 in its First Response and the BABT Notification does not fully correspond with Scenario A, C or D [Scenario D is how Ofcom referred to Scenario 2 in the Facts and Evidence Document]",<sup>27</sup> and O2 did not dispute that statement in its response to that Document.

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<sup>22</sup> In Part B of Annex 1 to the Second Notice, Ofcom defined "Scenario 2" to mean "As defined in the document titled "Direct Debit Issue scenarios" produced by [3] and attached to O2's email of 27 September 2019, namely: "If you terminate on 19 Jan 19/ 20 Jan 19, then the termination bill is set for 14 days in the future, if the periodic bill was produced 19 Jan 19 as in the above example, then when the termination bill is produced on 02 or 03 Feb 19, the payment for the periodic bill has not yet been taken, so this amount appears as a balance brought forward on the termination bill and is included within the payment request for this bill.""

<sup>23</sup> See paragraphs A3.5 to A3.6 in Annex 3 for a further explanation of Scenario 2, together with a worked example.

<sup>24</sup> Question 2 of the First Response (as revised by the Second Response) stated "the brief description originally provided to BABT related to Scenario 2" and Question 3 of the First Response (as revised by the Second Response) stated "TUK has highlighted in response to Question 1 that the information in the BABT notification related to Scenario 2, however, 3 additional scenarios have been identified and defined".

<sup>25</sup> See Annex 4 for an explanatory example.

<sup>26</sup> See footnote 31 of the Facts and Evidence Document.

<sup>27</sup> Scenario A was how we referenced Scenario 3, and Scenario C was how we referenced Scenario 1 – Scenario B. Scenario 4 was not referenced in that analysis from the Facts and Evidence Document as it was not an active scenario at the time the billing error was described in the BABT Notification. For the avoidance of doubt, however, the description in the BABT Notification did not correspond with Scenario 4 either.

## Summary of findings

- 3.40 In summary, we are satisfied that O2 has contravened the following information requirements:
- **Question 1(a) of the First Notice** – O2’s First Response confirmed that the description in the BABT Notification was accurate. However, that description – and another supporting description in its First Response – only described one scenario and did not make clear that multiple scenarios existed, nor did it align with any of the confirmed scenarios, resulting in an inaccurate and incomplete response from O2; and
  - **Question 1 of Annex 1 to the Second Notice** – O2’s Second Response inaccurately stated that the BABT Notification described or related to Scenario 2, when in fact it did not accurately reflect any scenario.

### **O2’s inaccurate information on termination journey timeframe**

#### Our information requirement in the First Notice

- 3.41 It was apparent to us from the BABT Notification that the billing error occurred during the termination process. It was therefore important for Ofcom to have a proper understanding about the customer termination journey, including associated timeframes.
- 3.42 We therefore asked O2 for the following information in our First Notice:

#### **Question 7 of the First Notice**

*Please set out the customer journey in terminating services—from the point at which a customer notifies O2 of their intention to terminate their contract to the point at which the Termination Bill is issued, payment received and the account is closed—against the processes and procedures that O2 had in place at each stage during the Relevant Period to ensure that customers received a Termination Bill that did not exceed the Public Electronic Communications Services provided to them.*

*In answering this question, please provide: [our request for related documents]*

#### O2’s response

- 3.43 In its First Response, O2 responded to that Question 7 of the First Notice as follows:

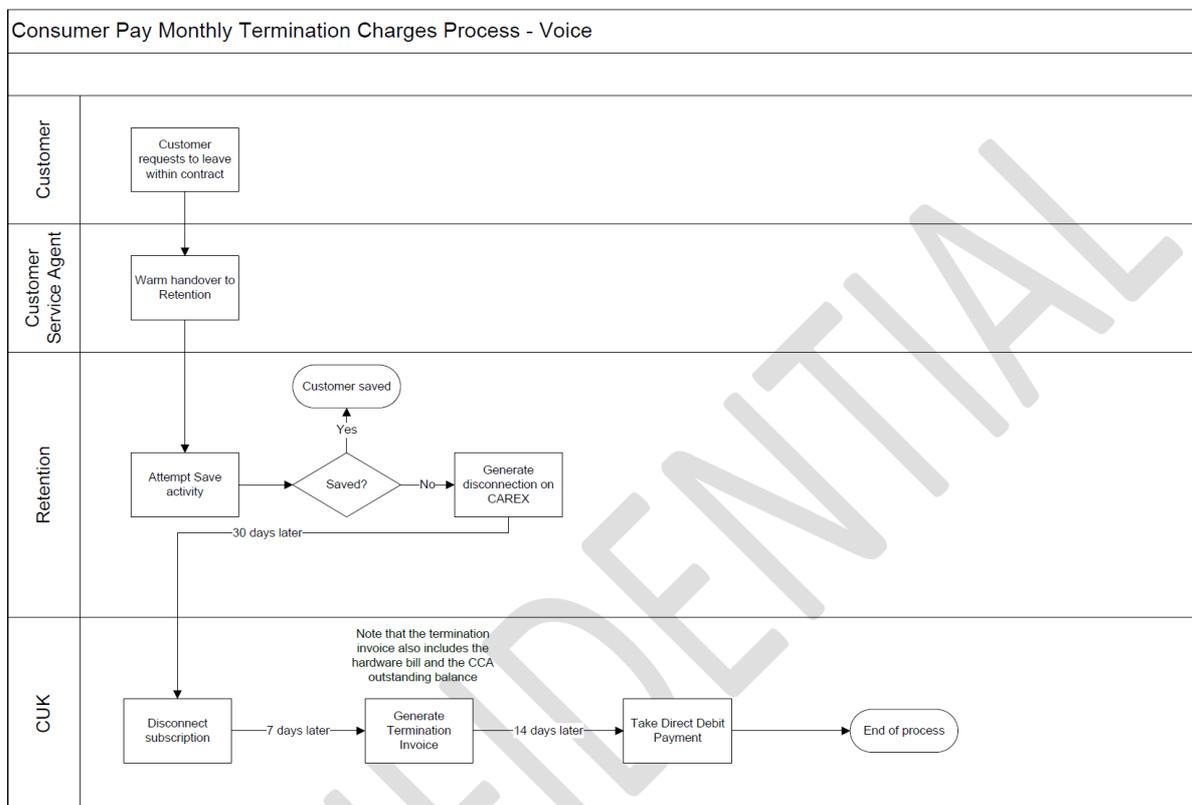
#### **Question 7 of the First Response**

*The customer journey that TUK sets out below refers to the Voice channel only, it was not possible for customers to disconnect online. The second customer journey sets out the process where termination was activated via the Port out route (where a Porting Authorisation Code (PAC) was submitted to another Provider).*

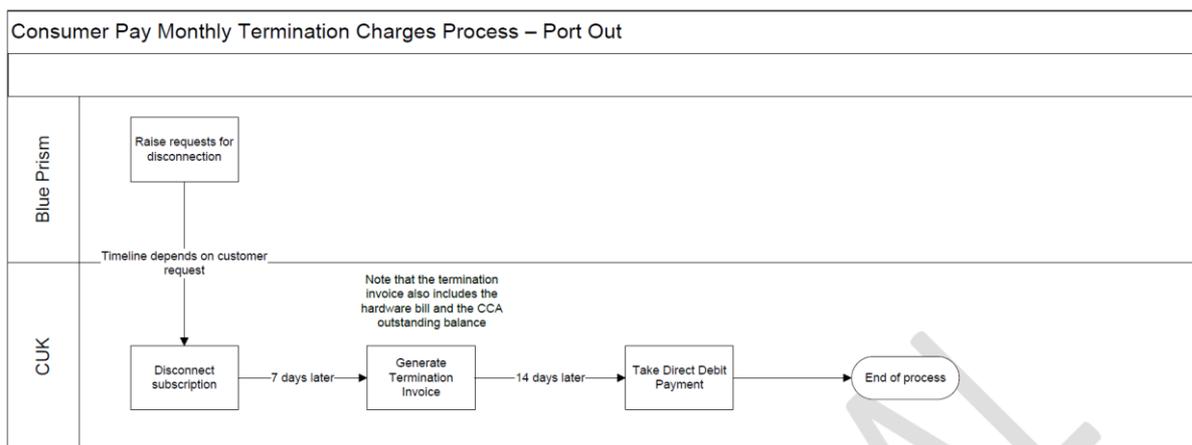
- 3.44 In doing so, O2’s response included two process maps - one describing the customer termination journey for a straight cease (voice channel only) and another for a port out to another provider.

3.45 In both process maps (see below), the timeframe between ‘Disconnect subscription’ and ‘Generate Termination Invoice’ was stated as “7 days later”. In other words, the consumer’s termination bill would be generated 7 days after their subscription was disconnected.

**Process map 1: Straight cease (voice channel only)**



**Process map 2: Port out**



O2’s information contravention

3.46 In responding to our Question 1 of Annex 1 to the Second Notice (which asked O2 to review and revise its First Response in order to ensure accuracy and completeness), O2

stated “*No change to original response*” in its revised response to the above-mentioned Question 7 of the First Notice.

- 3.47 However, when we reviewed other information provided by O2 in its Second Response, it appeared to us that the 7-day timeframe that O2 had stated in its above-mentioned process maps was inconsistent with other relevant timeframes stated in response to our other information requirements. For example, we asked in Question 1(a) of Annex 2 to the Second Notice for O2 to provide an updated and detailed explanation of its BAU process for issuing a termination bill.<sup>28</sup> O2 responded to that Question by stating (among other things) that “[t]ermination bills are usually produced 14 days after the last MPN [mobile phone number] on an account disconnects”.
- 3.48 In other words, other answers in O2’s Second Response stating a different timeframe (i.e. 14 days) between ‘Disconnect subscription’ and ‘Generate Termination Invoice’, appeared to contradict its revised response to Question 7 of the First Notice (as required by Question 1 of Annex 1 to the Second Notice) which continued to refer to the above-mentioned process maps that stated a 7-day timeframe. In light of those apparent inconsistencies, we asked O2 for the following information in our Fourth Notice:

#### **Question 6 of the Fourth Notice**

*Please:*

*(a) confirm whether the timeframe between ‘Disconnect subscription’ and ‘Generate Termination Invoice’ in the two process maps referenced above is accurate;*

*(b) if that timeframe is confirmed accurate, explain the reason why this timeframe is different from other relevant timeframes referenced in O2’s Second Response to other questions.*

- 3.49 In its Fourth Response, O2 responded to that Question 6 of the First Notice as follows:

#### **Question 6 of the Fourth Response**

*a) The timeframe within the customer journeys has been reviewed and has been confirmed by [X] as incorrect. The “7 days” should state “14 days”.*

### Summary of findings

- 3.50 In summary, we are satisfied that O2 has contravened the following information requirements:
- **Question 7 of the First Notice** – O2’s First Response stated that the timeframe between ‘Disconnect subscription’ and ‘Generate Termination Invoice’ was 7 days when, in fact, it was later confirmed as 14 days; and

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<sup>28</sup> This question was one of several follow-up questions arising from the September Meeting.

- **Question 1 of Annex 1 to the Second Notice** – O2’s Second Response incorrectly repeated, in effect, the wrong 7-day timeframe between ‘Disconnect subscription’ and ‘Generate Termination Invoice’ when it stated “No change to original response.”

## Information contraventions about the duration of the billing error

### The importance of our information requirements

- 3.51 The duration of any regulatory contravention is an important consideration for Ofcom to establish in any investigation. It is particularly important to understand the gravity and impact of a breach.
- 3.52 We normally also take into account the duration of a contravention as one potentially relevant factor in determining the amount of any penalty. It also helps Ofcom to establish other relevant matters, such as the window in which harm or potential harm could have occurred, and the effectiveness of any infringer’s processes in identifying and resolving any contravention.
- 3.53 We deal below with two aspects of inaccurate information that we received from O2 in relation to the duration of the billing error. That information affected our understanding not only of the total period of time that the error lasted, but also the duration of each of the identified scenarios of the error.

### O2’s inaccurate information on the end-to-end dates for the billing error’s total duration

- 3.54 By way of an overview, we explain below how O2 provided in its First Response and Second Response inconsistent and inaccurate dates showing the total duration of the billing error. As shown in Table 2 below, those date ranges were ultimately corrected by O2 in its Seventh Response.

**Table 2: Overview of different date ranges for total duration of the billing error**

	First Response	Second Response	Seventh Response
Billing error	7 March 2001 - 7 March 2019	May 2003 - 14 March 2019	5 December 2003 - 15 March 2019

### Our information requirement in the First Notice

- 3.55 Upon opening the Billing Investigation, we noted that pages 1 and 2 of the BABT Notification - which were completed by O2<sup>29</sup> - had reported that the incident had been ‘fully closed’ on “7<sup>th</sup> March 2019”. However, in response to the question ‘How long did the

<sup>29</sup> BABT Notification, page 2, box titled ‘Additional Documentation’ of incident, dated 4 April 2019 and submitted by [redacted], Telefónica UK.

incident last (first occurrence to closure)', O2 had simply reported that it was "[a] old legacy issue, recently identified".<sup>30</sup>

3.56 It was therefore unclear to us from the information completed by O2 what the total duration of the billing error had been. We did note, however, that O2 had also in the BABT Notification provided figures separated into "Post March 2012 (Up to 7 years old)" and "Prior to March 2012 (Older than 7 years)" for:

- i) the amount of customers impacted by the incident; and
- ii) the associated amount of financial value.<sup>31</sup>

This indicated to us that the billing error could have lasted for a significant duration.

3.57 We also noted on page 3 of the BABT Notification (see Figure 1 below) – which was completed by BABT – that it had been recorded that the incident had first occurred on 1 January 2012.

**Figure 1: BABT's comments on the total duration of the incident**

Approval Body Comments:

Please provide information to answer the below questions:

**This incident is classed as overbilling, in that O2 have taken payment twice. Please refer to the definition of an (Event) overcharged in Annex A1 of the Direction.**

- What is the incident reference number? [RA/2039](#)
- Please confirm the date the incident was first identified? [04/02/2019](#)
- After investigation by the Incident Team, when did this incident first occur? [01/01/2012](#)
- How long did the incident last (first occurrence to closure)? [1<sup>st</sup> January 2012 – 7<sup>th</sup> March 2019 = 7 years and 67 days.](#)
- When was the incident fully closed? [7<sup>th</sup> March 2019](#)

3.58 In light of that information, our request to O2 for the following information in our First Notice was also intended deal with other aspects relevant to the billing error, including its duration:

**Question 1(a) of the First Notice**

*Please confirm the accuracy and completeness of the information given by O2 on pages 1 and 2 relating to the Billing Error. If the information contains any errors, please set out clearly all corrections together with a full explanation. (emphasis added)*

and

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

### Question 1(b) of the First Notice

Please set out any observations on the **accuracy of information** that O2 has on **BABT's comments on pages 3 to 5**. (emphasis added)

#### O2's response

3.59 As already noted above,<sup>32</sup> O2's First Response to Question 1(a) of the First Notice advised that it had "*no reason to believe*" that the information on pages 1 and 2 of the BABT Notification was inaccurate or incomplete. Ofcom therefore understood that, as was stated in the BABT Notification, the billing error had ended on 7 March 2019.

3.60 We also noted that, in its First Response to Question 1(b) of the First Notice, O2 stated:

### Question 1(b) of the First Response

*TUK notes that on page 3 of the notification, BABT state that the first incident occurred on 1 January 2012; TUK is unsure where this date has come from, since on pages 1 and 2, as completed by [redacted], it is confirmed that the issue is a legacy one. **TUK wishes to confirm that the earliest instance as provided in the data from [redacted] is 7 March 2001**. The figures provided to BABT split the data into "Prior to 2012" and "Post 2012". (emphasis added)*

3.61 We took O2's combined response in that regard as confirming to us that the billing error had occurred between **7 March 2001 and 7 March 2019**.

#### O2's information contravention

3.62 Subsequent to O2 revising its First Response in response to Question 1 of Annex 1 to the Second Notice,<sup>33</sup> we identified that neither O2's confirmed start date (i.e. 7 March 2001), nor its confirmed end date (i.e. 7 March 2019), appeared to be accurate.

3.63 Specifically, O2's revised response to Question 1(a) of the First Notice directed us to its revised response to Question 2 for a fuller description of each billing error scenario, where it stated:

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<sup>32</sup> See paragraphs 3.21 and 3.28.

<sup>33</sup> As already set out above, Question 1 of Annex 1 to the Second Notice asked O2 to "*review O2's First Response to each question in Ofcom's First s135 Request dated 1 August 2019 and make all necessary revisions to ensure the information provided is complete and accurate in light of new information provided to Ofcom in O2's email of 27 September 2019 and in the meeting of 30 September 2019*".

### Question 1(a) of the First Response (as revised by the Second Response)

*Further to Ofcom’s questions to TUK on 17 September 2019, following TUK’s First Response on 5 September 2019, it is now clear from information that has surfaced and clarified in conjunction with [X], that four scenarios have been identified and defined, which would result in the Billing Error occurring<sup>1</sup> [sic]. These are briefly set out below, fuller descriptions and examples are provided in response to question 2. In the Brief Description section of page 1 the BABT notification, the statement illustrates what has now been defined as Scenario 2 only. [...]*

- 3.64 We consider below the different date ranges O2 stated for each scenario in those fuller descriptions, but our understanding following O2’s Second Response was that the earliest and latest dates for any scenario occurring, and therefore the overall date range for the billing error occurring, was actually between **sometime in May 2003 and 14 March 2019**.
- 3.65 We note, however, that O2’s Second Response did cause us some confusion around this revised start date. Specifically, O2’s revised response to Question 1(b) of the First Notice maintained that the earliest instance of the billing error was 7 March 2001 and was “*in relation to Scenario 2*”.

### Question 1(b) of the First Response (as revised by the Second Response)

*TUK notes that on page 3 of the notification, BABT state that the first incident occurred on 1 January 2012; TUK is unsure where this date has come from, since on pages 1 and 2, as completed by [X], it is confirmed that the issue is a legacy one. **TUK wishes to confirm that the earliest instance as provided in the data from [X] to-date is 7 March 2001, in relation to Scenario 2.** The figures provided to BABT split the data into “Prior to 2012” and “Post 2012”.*

*In addition, TUK is in the process of gathering further reports from [X] to ensure that all four scenarios in which the Billing Error could arise are captured, to assess whether the impacted customer and total financial value figures presented within the BABT notification require revision. (emphasis added)*

- 3.66 However, O2’s revised response to Question 2 of the First Notice gave the date range for Scenario 2 as being “*May 2003<sup>3</sup> – 14th March 2019*”, with footnote 3 stating:

### Footnote 3 of the Second Response

**New footnote:** *[X] have advised that they took over running the billing system in May 2003, the data relating to 2001-May 2003 was transferred from the [X] run system and [X] cannot confirm whether the issue was prevalent prior to May 2003, In the reports received from [X] to-date in relation to Scenario 2 there are instances of customers being affected by Scenario 2 in 2001. (O2’s own emphasis)*

- 3.67 Subsequent to the Second Response, and as we explain in our below assessment of the date ranges O2 provided for each specific billing error scenario, the start and end date for

the overall billing error later changed again with O2's Seventh Response with O2, in effect, stating that the billing error had occurred between **5 December 2003 and 15 March 2019**.<sup>34</sup> Compared to the dates O2 had stated in its First Response:

- the start date was over two and a half years later; and
- the end date was 8 days later.

3.68 Ultimately, due to the way in which the statutory scheme applies in relation to our enforcement of historical contraventions, this inconsistency did not affect our final decision in the Billing Investigation.<sup>35</sup> We nonetheless found O2's above-mentioned inconsistencies unhelpful and unsatisfactory.

#### Summary of findings

3.69 In summary, we are satisfied that O2 contravened the following information requirements:

- **Questions 1(a) and 1(b) of the First Notice; and**
- **Question 1 of Annex 1 to the Second Notice.**

3.70 It did so by inaccurately stating that the billing error had occurred between:

- 7 March 2001 and 7 March 2019 (First Response), and later
- May 2003 and 14 March 2019 (Second Response),

when, in fact, it had occurred between 5 December 2003 and 15 March 2019.<sup>36</sup>

#### **O2's inaccurate information on the end-to-end dates for each billing error scenario**

3.71 By way of an overview, we explain below how O2 provided in its Second Response inconsistent and inaccurate date ranges for each of the four scenarios of the billing error. As shown in Table 3 below, those date ranges were ultimately corrected by O2 in its Fourth Response and Seventh Response.

**Table 3: Overview of different date ranges for each billing error scenario**

	Second Response	Fourth Response	Seventh Response
Scenario 1	5 April 2012 - 14 March 2019	—	8 April 2012 - 24 February 2019
Scenario 2	May 2003 - 14 March 2019	21 April 2012 - 14 March 2019	21 April 2012 - 2 February 2019

<sup>34</sup> See paragraphs 3.91 and 3.92.

<sup>35</sup> See, in particular, paragraphs 3.22 to 3.28 of the Confirmation Decision for our discussion on the relevant period for O2's contravention of its regulatory obligations (i.e. GC 11.1 and GC C3.2), which we decided was the period beginning on 26 May 2011 and ending on 15 March 2019.

<sup>36</sup> Question 3 of the Seventh Response.

Scenario 3	May 2003 - 14 March 2019	—	5 December 2003 - 15 March 2019
Scenario 4	May 2003 - 4 April 2012	23 March 2006 - 18 April 2012	—

3.72 We explain below our reasons why we are satisfied that O2 contravened our information requirements in relation to the date ranges for each of the four scenarios of the billing error.

#### Our information requirement in the Second Notice

3.73 We noted in the introduction to Question 1 of Annex 2 to the Second Notice that: *“We understand from the meeting of 30 September 2019 [the September Meeting] that the discrepancies identified between [X]’s explanation in Annex 11 of the First Response and O2’s explanation in reply to Question 2 of the First Response were due to [X] had understood [sic] that Scenario 1 caused the Billing Error, whereas O2 had understood that Scenario 2 caused the Billing Error. As we understood it, at the time of its First Response, O2 did not realise that there were multiple scenarios in which the Billing Error could occur.”*

3.74 In light of that background, we asked O2 the following question in our Second Notice:

#### **Question 1(b) of Annex 2 to the Second Notice**

Please could O2 [...] Provide an updated and detailed explanation of the Billing Error, building on its “Direct Debit Issue scenarios” document send by email on 27/09/2019, including but not limited to:

- i. all scenarios which would cause the Billing Error, including Scenario 4 from 2001-2012 as discussed in yesterday’s meeting;
- ii. date ranges relevant to each scenario;**
- iii. a detailed explanation of how each scenario occurred; and
- iv. examples of each scenario. (emphasis added)

#### O2’s response and its information contraventions

3.75 In its Second Response, O2 responded to Question 1(b) by stating *“Please see response to Question 2 in Annex 1 above.”*

3.76 For ease of explanation, we set out below, by scenario:

- the dates O2 provided in its response to Question 2 of Annex 1 to the Second Notice; and
- how those dates proved to be inaccurate and, as such, contravened the information requirement set by Question 1(b) of Annex 2 to the Second Notice.

#### **Scenario 1 - Information contravention**

3.77 O2's response to Question 2 in Annex 1 was that Scenario 1 had occurred between "**5<sup>th</sup> April 2012 – 14<sup>th</sup> March 2019**".

3.78 However, in response to the Facts and Evidence Document, O2 stated<sup>37</sup> that:

[X]’s finalised reporting indicates the date range for occurrences of this scenario is **08/04/2012 – 24/02/2019**. (emphasis added).

3.79 We therefore sought clarification on the date range for Scenario 1 as part of our Seventh Notice.<sup>38</sup> O2's Seventh Response stated:

[X] has confirmed that the first instance of Scenario 1 arising was **08/04/2012** and the last instance **24/02/2019**. The date range set out in the Second Response, which had been provided by [X], was an assumed date range based on when the amended script was implemented; the fact that it was assumed was not communicated to TUK at the time of responding to the Second Notice.<sup>39</sup> (emphasis added)

3.80 Consequently, rather than Scenario 1 occurring between 5 April 2012 and 14 March 2019 - as per O2's response to Question 1(b)(ii) of Annex 2 to the Second Notice - the accurate date range was, in fact, between 8 April 2012 and 24 February 2019.

## Scenario 2 - Information contravention

3.81 O2's response to Question 2 in Annex 1 was that Scenario 2 had occurred between "**May 2003<sup>3</sup> – 14<sup>th</sup> March 2019**".

3.82 Upon reviewing the Second Response as a whole, however, we had concerns about the date on which Scenario 2 had first occurred. In particular, we noted that:

- O2 had stated that: "*TUK wishes to confirm that the earliest instance as provided in the data from [X] to-date is **7 March 2001**, in relation to Scenario 2.*"<sup>40</sup> (emphasis added)
- O2 had recorded Scenario 2 as beginning from "**May 2003**"<sup>41</sup> (emphasis added).
- O2 had stated that: "*[X] have advised that they took over running the billing system in May 2003, the data relating to 2001-May 2003 was transferred from the [X] run system and [X] cannot confirm whether the issue was prevalent prior to May 2003, In the reports received from [X] to-date in relation to Scenario 2 there are instances of customers being affected by Scenario 2 in **2001**.*"<sup>42</sup> (emphasis added)
- O2 had included two tables noting the number of customers affected by each billing error scenario during the period between 2000 and 2019. In both tables, O2's figures for impacted customers in relation to Scenario 2 started from **2012**, but O2 provided no figures in those tables for any year prior to 2012.<sup>43</sup>

<sup>37</sup> O2's comments against paragraph 1.26 in the Annex of O2's Response to the Facts and Evidence Document.

<sup>38</sup> Question 1 of the Seventh Notice.

<sup>39</sup> Question 1 of the Seventh Response.

<sup>40</sup> Second Response to Question 1(b) of Annex 1 of the Second Notice.

<sup>41</sup> Second Response to Question 2 of Annex 1 of the Second Notice.

<sup>42</sup> Footnote 3 of the Second Response.

<sup>43</sup> Second Response to Question 5 of Annex 2 of the Second Notice.

3.83 We therefore sought clarification on the date on which Scenario 2 had first occurred in our Fourth Notice.<sup>44</sup> O2's Fourth Response<sup>45</sup> stated:

*TUK has sought confirmation from [X], in respect of the date on which Scenario 2 first occurred. [X] provided an updated Scenarios document to TUK on 8 October 2019, this is attached as Annex 46. [X] have advised that when they ran the reports in October 2019, no affected customers prior to 2012, appeared within the reports. As a result, [X] have revised the date on which the scenario was deemed to be active. **There is no evidence of Scenario 2 occurring prior to 21 April 2012** (emphasis added).*

3.84 We took that response, as read together with its response to Question 1(b)(ii) of Annex 2 to the Second Notice in respect of the end date, as O2 confirming that Scenario 2 had occurred between **21 April 2012 and 14 March 2019**.

3.85 However, in its response to the Facts and Evidence Document, O2 stated<sup>46</sup> in relation to Scenario D (which is also Scenario 2) that:

*[X]'s finalised reporting indicates the date range for occurrences of this scenario is **21/04/2012 –02/02/2019** (emphasis added).*

3.86 Whilst that response reaffirmed the updated start date, it suggested a different end date. We therefore sought to confirm the date Scenario 2 last occurred in the Seventh Notice.<sup>47</sup> O2's Seventh Response stated:

*[X] has confirmed that **the last instance of Scenario 2 occurring was 02/02/2019**. The date set out in the Second Response, which had been provided by [X], was an assumed date, based on the date the amended script was implemented; the fact that it was assumed was not communicated to TUK at the time of responding to the Second Notice (emphasis added).*<sup>48</sup>

3.87 Consequently, rather than Scenario 2 occurring between May 2003 and 14 March 2019 - as per O2's response to Question 1(b)(ii) of Annex 2 to the Second Notice - the accurate date range was, in fact, between 21 April 2012 and 2 February 2019.

### **Scenario 3 - Information contravention**

3.88 O2's response to Question 2 in Annex 1 was that Scenario 3 had occurred between "**May 2003<sup>5</sup> –14th March 2019**".<sup>49</sup>

3.89 However, in its response to the Facts and Evidence Document, O2 stated<sup>50</sup> in relation to Scenario 3 that:

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<sup>44</sup> Question 1 of the Fourth Notice.

<sup>45</sup> Question 1, Fourth Response.

<sup>46</sup> O2's comments against paragraph 1.28 in the Annex of O2's Response to the Facts and Evidence Document.

<sup>47</sup> Question 2, Seventh Notice.

<sup>48</sup> Question 2, Seventh Response.

<sup>49</sup> Footnote 5 of that response stated, "See footnote 3". See paragraph 3.66 above for footnote 3.

<sup>50</sup> O2's comments against paragraph 1.20 in the Annex of O2's Response to the Facts and Evidence Document.

[X]’s finalised reporting indicates the date range for occurrences of this scenario is **05/12/2003 –15/03/2019**. (emphasis added)

- 3.90 That response suggested both a different start and end date for Scenario 3, as compared to O2’s previous Second Response. We therefore sought to confirm the dates in which Scenario 3 had occurred in the Seventh Notice.<sup>51</sup> O2’s Seventh Response stated:

[X] has confirmed that the date range for Scenario 3 occurring was **05/12/2003 – 15/03/2019**. The date range set out in the Second Response, which had been provided by [X], was an assumed date range, based on when the amended script was implemented, the fact that it was assumed was not communicated to TUK at the time of responding to the Second Notice.<sup>52</sup>

- 3.91 Consequently, rather than Scenario 3 occurring between May 2003 and 14 March 2019 - as per O2’s response to Question 1(b)(ii) of Annex 2 to the Second Notice - the accurate date range was, in fact, between 5 December 2003 and 15 March 2019.
- 3.92 These dates were the earliest and latest dates for any billing error scenario occurring, and as such, in effect, reflected the overarching date range for the overall billing error.

#### Scenario 4 - Information contraventions

- 3.93 O2’s response to Question 2 in Annex 1 was that Scenario 4 had occurred between “**May 2003<sup>6</sup> - 4<sup>th</sup> April 2012**”.<sup>53</sup>
- 3.94 In addition to Question 1(b)(ii) of Annex 2 to the Second Notice, we also asked the following related question:

#### **Question 4(e) of Annex 2 to the Second Notice**

*Please [...] confirm the date from which this issue [Scenario 4] arose and provide Documents on which your confirmation is based;*

- 3.95 In its Second Response, O2 responded to that question by stating that:

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<sup>51</sup> Question 3, Seventh Notice.

<sup>52</sup> Question 3 of the Seventh Response.

<sup>53</sup> Footnote 6 of that response stated, “See footnote 3”. See paragraph 3.66 above for footnote 3.

[X] have confirmed there is no documentation stating when the issue arose. [X] **have been running [X] since 2003 so the issue will have at least been present from then.** Prior to this the system was run by [X] and [X] have no details of what [X] were running at that point as to whether the issue was prevalent then also. The data in the system prior to **May 2003** is migrated data from the previous [X] system when [X] took over running the billing platform for O2. [X] cannot attest to the provenance and completeness of the data and raise concerns about whether an accurate analyses can be conducted on it. (emphasis added)

3.96 This response reaffirmed O2's statement that Scenario 4 first occurred in May 2003. However, and despite O2's explanation detailed above, the two tables O2 provided in its Second Response<sup>54</sup> which detailed the number of customers affected by each billing error scenario, gave figures for Scenario 4 starting from **2000**.

3.97 It was therefore unclear to us when Scenario 4 had first occurred and we sought to confirm this in Question 2(a) of the Fourth Notice. In the Fourth Response, O2 stated in response to that question that:

*Using the reports that were produced in October 2019, [X] have confirmed that Scenario 4 was active from **23 March 2006 until 18 April 2012**. [X] have not been able to provide an explanation or identify why this scenario only emerged on the billing system from 23 March 2006. (emphasis added)*

3.98 Consequently, rather than Scenario 4 occurring between May 2003 and 4 April 2012 - as per O2's responses to Question 1(b)(ii) and Question 4(e) of Annex 2 to the Second Notice - the accurate date range was, in fact, between 23 March 2006 and 18 April 2012.

#### Summary of findings

3.99 In summary, we are satisfied that O2 contravened the following information requirements:

- **Question 1(b)(ii) of Annex 2 to the Second Notice** (in respect of all four scenarios); **and**
- **Question 4(e) of Annex 2 to the Second Notice** (in respect of Scenario 4 only).

3.100 O2 contravened Question 1(b)(ii) of Annex 2 to the Second Notice by inaccurately stating that:

- Scenario 1 had occurred between 5 April 2012 and 14 March 2019 when, in fact, it had occurred between 8 April 2012 and 24 February 2019;
- Scenario 2 had occurred between May 2003 and 14 March 2019 when, in fact, it had occurred between 21 April 2012 and 2 February 2019;
- Scenario 3 had occurred between May 2003 and 14 March 2019 when, in fact, it had occurred between 5 December 2003 and 15 March 2019; and

3.101 It also contravened both Question 1(b)(ii) and Question 4(e) of Annex 2 to the Second Notice by inaccurately stating that:

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<sup>54</sup> Question 5 of Annex 2 to the Second Response.

- Scenario 4 had occurred between May 2003 and 4 April 2012 when, in fact, it had occurred between 23 March 2006 and 18 April 2012.

## Information contraventions about O2’s awareness of the billing error

### The importance of our information requirements

3.102 Another important factor for us to establish in any investigation is whether any action was taken by the regulated entity once it became aware of a potential contravention. Timely and effective steps taken by it, including the speed at which they were taken, can play a significant role in any penalty assessment.

### Our information requirement in the First Notice

- 3.103 In the BABT Notification, O2 itself did not make clear when it first became aware of the billing error. However, we noted that BABT commented on page 3 of the BABT Notification that O2 had first identified the incident on “04/02/2019”.
- 3.104 As already detailed in this document,<sup>55</sup> Question 1(b) of the First Notice asked O2 to set out “any observations on the accuracy of information that O2 has on BABT’s comments on pages 3 to 5” of the BABT Notification. O2 did not make any observations suggesting that the date of 4 February 2019 (as noted by BABT) was inaccurate.
- 3.105 Separate to this question, we also requested information - with associated documentary evidence - specifically about this matter in our First Notice. In particular, we requested from O2 the following:

#### Question 11(a)(ii) of the First Notice

*11. Please provide any Documents O2 holds which:*

*a. record **the date(s) when:** [...]*

*ii. **O2’s employees or other persons** working directly or indirectly on O2’s behalf **whom first became aware of the Billing Error;** (emphasis added)*

3.106 We supplemented that request by specifically asking O2 also for the following:

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<sup>55</sup> See paragraph 3.58 above.

### Question 11(b) of the First Notice

11. Please provide any Documents O2 holds which: [...]

**b. record any other discussions** relating to the **cause, discovery or escalation of the Billing Error**, including but not limited to:

*i. the technical issue with the [X] system that caused the Billing Error;*

*ii. why the Billing Error only occurred when customers disconnected on a Saturday or Sunday, and only when there was an outstanding periodic bill on the account; and*

*iii. the steps O2 took during its initial investigation between the date of the identification of the Billing Error and the date at which the Billing Error was communicated to BABT;*

*Where Documents held by O2 do not provide information in response to 11b.i – 11b.iii, please provide an explanation instead. (emphasis added)*

### O2's response

3.107 In its First Response, O2 responded to Question 11(a)(ii) above by stating:

### Question 11(a)(ii) of the First Response

*05/02/2019 Email from [X], Financial Analyst, to [X], TUK's relationship manager with [X] (Annex 9).*

3.108 That document was an email conversation between two O2 colleagues on 5 February 2019.<sup>56</sup> The email indicated that an error had recently been identified and raised concern that it may be “affecting a large number of customers who disconnect their account not long after their Periodic bill”. O2 did not provide any other documents detailing any discussions indicating an earlier ‘discovery’ of the Billing Error.

3.109 We took that response to Question 11(a)(ii) as O2 confirming that an unknown date recently before 5 February 2019 was the date on which O2 first became aware of the billing error.

3.110 As regards to Question 11(b), O2 responded as follows in its First Response:

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<sup>56</sup> Annex 9.

### **Question 11(b) of the First Response**

*i. the technical issue with the [X] system that caused the Billing Error;*

*Email from [X] dated 6 February 2019 (Annex 11).*

*ii. why the Billing Error only occurred when customers disconnected on a Saturday or Sunday, and only when there was an outstanding periodic bill on the account; and*

*Email from [X] dated 6 February 2019 (Annex 11).*

*iii. the steps O2 took during its initial investigation between the date of the identification of the Billing Error and the date at which the Billing Error was communicated to BABT;*

- *February 2019 TUK contacted [X] and asked them to investigate the issue we had found (Annex 11);*
- *March 2019 Initial MIS ([X] Information report) requested in order to scope the size of the issue and received (Annex 9);*
- *March 2019 More detailed MIS requested (Annex 12) & received (Annex 13);*
- *March 2019 Call from [X] to [X] to advise that we had a large Billing Issue (no document exists);*
- *March 2019-[X] notifies BABT-Phone call with [X] (no document exists).*

3.111 The annexes referenced in this response provided:

- email chains (internal emails and emails with [X]) seeking to:
  - understand the issue;
  - establish how many customers were affected; and
  - establish how much credit was owed to those customers.
- a spreadsheet showing the details of affected customers and the credits associated to their accounts.

3.112 The earliest email included in those annexes was the 5 February 2019 email (Annex 9) detailed above. We therefore took that response to Question 11(b) of the First Notice as O2 confirming that this email recorded the earliest discussion relating to the cause, discovery or escalation of the billing error.

### **O2's information contravention**

3.113 We have already mentioned above<sup>57</sup> that, after submitting its BABT Notification to BABT and responding to our First Notice, O2 identified that there had, in fact, been multiple scenarios of the billing error. Again, our Second Notice to O2 asked it to review its First Response to each question in the First Notice and make all necessary revisions to ensure the information provided is complete and accurate. In doing so, in its Second Response, O2

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<sup>57</sup> See paragraph 3.26 above.

revised its previous responses to Questions 11(a)(ii) and 11(b) of to the First Notice as follows:

**Question 11(a)(ii) of Annex 1 to O2's Second Response**

Original response: 05/02/2019 Email from [X], Financial Analyst, to [X], TUK's relationship manager with [X] (**Annex 9**).

Revised response:

05/02/2019 Email from [X], Financial Analyst, to [X], TUK's relationship manager with [X] (**Annex 9**).

14/11/2011 Change Request raised by O2 identifying what is now known to be Scenario 4 (**Annex 36**).

and

**Question 11(b)(i) of Annex 1 to O2's Second Response**

Original response: Email from [X] dated 6 February 2019 (**Annex 11**).

Revised response:

Emails from [X] dated 6 February 2019 (**Annex 11**) and 8 March 2019 (**Annex 12**).

The only document that has been found in relation to Scenario 4 is Annex 36.

- 3.114 In revising its First Response to those questions, O2's Second Response referred for the first time to 'Annex 36'.<sup>58</sup> That 'Annex 36' contained a so-called 'Change Request Form' completed by O2 on 14 November 2011. The Change Request Form stated:

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<sup>58</sup> O2's Second Response also referenced Annex 36 in its response to the following questions: **Question 4 of Annex 1** regarding an explanation as to what checks were carried out by O2 in relation to its complaints data, together with any documents where it was confirmed that no complaints had been received in relation to the billing error; **Question 11(c) of Annex 1** regarding documents O2 holds which record discussions on engaging [X] in relation to the billing error; and **Question 4(b) of Annex 2** regarding an explanation when O2 became aware of Scenario 4 and how, together with all documents that demonstrate when O2 became aware of this scenario.

### Annex 36, provided as part of O2's Second Response

*Where a customer disconnects - or is disconnected due to arrears - [X] will generate [sic] a termination bill, usually around 14 days in the future. If a customer has a periodic bill due before this date, this will still be generated and contain all the final bill charges, including any ETCs that are due. The termination bill will still be produced some time later, and if this happens to be before the Payment Request for the periodic bill has been exported, the balance from the periodic bill is carried into the termination bill, which then contains any late event charges plus this previous invoice total; this generates a further payment request for the combined total.*

*The customer experience is then of two invoices and potentially being "double charged" if they pay by direct debit.*

- 3.115 That explanation (as completed by O2 on 14 November 2011) describes Scenario 4 and shows that O2 had, in fact, first become aware of the billing error *at least* 2,678 days (7 years, 4 months and 1 day) before it was fixed on 15 March 2019. This was a significantly longer timeframe than indicated by O2's First Response which had indicated a period of 38 days (1 month and 10 days) between O2 identifying the billing error and it being fixed.
- 3.116 The change request form was the only additional document O2 provided as part of its Revised First Response in relation to the 'discovery' of the billing error. O2 stated that *"[i]t has not been possible to locate any other documentation in relation to when Scenario 4 was identified in 2011"*.

#### Summary of findings

- 3.117 In summary, we are satisfied that O2 contravened the information requirement in **Question 11(a)(ii) and Question 11(b) of the First Notice** by failing to provide a complete response. In particular, the Change Request Form was clearly a document that was relevant in O2 giving its best indication of dates when *"O2's employees or other persons working directly or indirectly on O2's behalf whom first became aware of the Billing Error"*; and it clearly discussed *"the cause, discovery or escalation of the Billing Error"*.
- 3.118 Whilst we appreciate that O2 had not identified all billing error scenarios when it compiled and submitted its First Response, it is unclear why the Change Request Form was not located as part of O2's search for documents relevant to, in particular, Question 11(b). Indeed, Annex 7 (provided as part of O2's First Response) included an email from [X] to O2 which stated *"We think the Billing Adapter logic to move the termination bill to the right when there is a periodic bill due within payment\_due\_days (usually 14 for dd payments), was added few years back, [...]"*. Given that the 'Billing Adapter logic' was key to the cause of the billing error,<sup>59</sup> and this email clearly indicates that that logic had previously been amended, it is unclear why all relevant documentation – such as the Change Request Form

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<sup>59</sup> As detailed in [X]'s explanation of the root cause in its email to O2 on 8 March 2019 (Annex 11, provided as part of O2's First Response).

which had led to that change – was not located and disclosed by O2 in response to the First Notice.

## Information contraventions about establishing harm or potential harm

### The importance of our information requirements

3.119 One of the key factors in any investigation for us is to identify the level of harm or potential harm that may have been caused by a contravention. This factor is particularly important where we are minded to impose a penalty, because one of our penalty factors is “[t]he degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants”. Another closely linked penalty factor covered by our Penalty Guidelines is: “[a]ny steps taken for remedying the consequences of the contravention”.

3.120 It was therefore important for the Billing Investigation that Ofcom understood (and collected associated evidence) of the following matters in particular:

- the number of customers affected by the billing error;
- the amount those customers paid in overcharges;
- the remedial steps taken in relation to those customers who paid; and
- the amount that was billed but not paid and why.

3.121 We deal below with two aspects of inaccurate/incomplete information that we received from O2 in relation to:

- the number of customers affected by the billing error and the amount of overcharges paid; and
- any remedial steps already taken by O2 for overcharges paid.

### O2’s inaccurate/incomplete information on customers affected by the billing error and the amount of overcharges paid

#### Our information requirements in the First and Second Notices

3.122 O2 had stated on page 2 of the BABT Notification that the billing error had affected a total number of “93,259” accounts (i.e. customers) and it had resulted in overcharges totalling “£959,706.19”. As already noted above,<sup>60</sup> O2 responded to Question 1(a) of the First Notice by stating that the information given on pages 1 and 2 of the BABT Notification was accurate and complete.

3.123 Following our understanding from the September Meeting that the situation was more complicated than what O2 had initially reported to BABT (in that additional billing error scenarios had been identified by O2), we specifically asked O2 to confirm the following information in our Second Notice:

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<sup>60</sup> See paragraph 3.21 and 3.22 above.

### Question 5 of Annex 2 to the Second Notice

Please provide:

- a. the **total amount of customers affected** by the Billing Error;
- b. the **total amount of the overcharge** by customers referred to in **Question 5(a)**; and
- c. a **breakdown of the number of affected customers**, together the associated amount of overcharge, **per calendar year** (starting from the earliest date on which the Billing Error occurred) **for each of Scenarios 1 to 4**. (emphasis added)

#### O2's response

3.124 In its Second Response,<sup>61</sup> O2 chose to provide figures and data tables for two groups of customers, rather than a total combined figure for all customers affected. For ease of reference, we refer to these groups of customers as Group A and Group B, meaning:

- **Group A:** those customers who were due to be refunded or had *“already been refunded as part of the refund programme already started in relation to the [X] reports provided to TUK in March 2019”*; and
- **Group B:** those customers who *“although initially affected by the Billing error, their account has been in zero balance or in debit and are not due a refund”*.

3.125 In that regard, O2's response stated, in effect, that:

- Group A consisted of 192,016 customers who had been overcharged £2,770,010.36, with 112,048 of those customers having been overcharged £1,171,898.63 during the Relevant Period – O2 broke these figures out by year as requested; and
- Group B consisted of 172,470 customers – however, O2 neither provided an overall amount that those customers had been overcharged, nor a yearly breakdown of overcharges as had been requested.

#### O2's information contravention

3.126 In light of O2's above-mentioned response, we remained unclear about the amount that those customers in Group B had been overcharged.

3.127 We therefore asked O2 in Question 3(b) of the Fourth Notice to restate the table provided in its Second Response *“to include the amount that customers initially affected by the Billing Error [i.e. Group B] were actually over-billed as a result of the Billing Error”*. The Fourth Notice explained that this information was being sought to *“understand what the potential harm could be from the Billing Error in relation to the affected customers”*.

3.128 In its Fourth Response, O2 responded to Question 3(b) of the Fourth Notice by stating *“Restated Table 2 to include values at Annex 47. As with Table 1 the migrated data from 2000-2003 has been extracted into a separate table. When attributing values to the*

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<sup>61</sup> Question 5 of Annex 2 to the Second Response.

*affected customers 2,748 accounts were found to have been fraudulent and therefore removed from the table.”*

- 3.129 In our understanding of O2’s table in that Annex 47, between 2003<sup>62</sup> and 2019, Group B consisted of 166,457 customers<sup>63</sup> who had been overbilled a total of £48,799,603.30. Of those customers, 139,497 had been overbilled £39,483,769.27 during the Relevant Period, indicating a significant potential harm. O2’s response did not provide any additional information in relation to this amount or otherwise elaborate on the potential harm, which was our stated purpose for which we were seeking this additional information.
- 3.130 To help us establish actual harm, we needed clarification and confirmation from O2 regarding the amount of overcharges that had been paid by O2’s customers. We already knew that those customers in Group A had paid (and were due to be refunded/had already been refunded) £1,171,898.63 during the Relevant Period. However, it was unclear how many (if any) of those customers whom O2 had referred to as customers ‘not due a refund’ (i.e. Group B) had paid overcharges and, if some had, how much they had paid.
- 3.131 Therefore, Question 1 of our Fifth Notice asked O2, for those customers falling within Group B, “...please confirm, per year, from 26 May 2011 until 14 March 2019 [i.e. the Relevant Period]: (a) the number of customers who paid the amount O2 overcharged as a result of the Billing Error; (b) the amount those customers paid to O2 relating to overcharges caused by the Billing Error; (c) the number of customers who received a refund of overcharges paid as a result of the Billing Error; and (d) the amount refunded to those customers as a result of overcharges caused by the Billing Error.”
- 3.132 In its Fifth Response, O2’s responded to that question<sup>64</sup> by stating that 27,818 of those customers in Group B had paid £1,242,589.02 in overcharges and all but 259 had received refunds.<sup>65</sup> This was a significant number of customers, and a significant amount paid.
- 3.133 When reading these figures together with those that O2 had already provided for Group A customers, we took that response as O2 confirming that, in total over the Relevant Period for the Billing Investigation:
- 139,866 customers had paid overcharges totalling £2,414,487.65; and
  - 111,682 customers had been billed but not paid £38,247,919.36 in overcharges.
- 3.134 Had we not followed up on O2’s failure to provide the requested figures for the “total amount of customers affected”, we would not have had an accurate or complete understanding of the number of customers who had paid overcharges as a result of the billing error, or the amount that they had paid. Specifically, had we relied on the figures O2

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<sup>62</sup> [3] took over responsibility for managing O2’s billing system in 2003.

<sup>63</sup> O2 explained that 3,265 customers included in its Second Response related to data from pre-2003 which could not be validated and were extracted. Further, O2 advised that “[w]hen attributing values to the affected customers 2,748 accounts were found to have been fraudulent and therefore removed from the table.”

<sup>64</sup> Question 1 of the Fifth Response.

<sup>65</sup> O2 advised that 259 customers “did not receive a refund because they either reconnected and the credit balance was reconciled against future bills, or later charges were applied to the account which fully used the credit balance.”

had provided for Group A customers only, the Billing Investigation would only have taken into account:

- c.80% of the total number of customers who paid overcharges; and
- c.49% of the total amount of overcharges paid by customers.

3.135 Further, we would not have been able to identify a significant amount of unpaid overcharges, which was an important consideration in our assessment of potential harm. In that regard, we also note that, despite Question 3(b) of the Fourth Notice making clear that it sought to “*understand what the potential harm could be from the Billing Error in relation to the affected customers*”, O2 did not divulge that a significant proportion (94%) of that amount related to accounts disconnected for arrears until its Response to the Facts and Evidence Document.

#### Summary of findings

3.136 In summary, we are satisfied that O2 contravened the following information requirements:

- **Question 1(a) of the First Notice** - O2’s First Response confirmed inaccurate figures for the total number of customers affected by the billing error and the amount they were overcharged (inaccurate);
- **Question 5(b) of Annex 2 to the Second Notice** – O2 provided incomplete figures for the total amount of overcharge for those customers in Group B; and
- **Question 5(c) of Annex 2 to the Second Notice** – O2 provided an incomplete breakdown of overcharging figures “*per calendar year*” for those customers in Group B.

3.137 Even if O2 had mistakenly understood Question 5 to only refer to overcharges *paid* by its customers, its response to Questions 5(b) and 5(c) were still incomplete as O2’s Fifth Response later confirmed that 27,818 of those customers ‘not due a refund’ (Group B) had paid £1,242,589.02 in overcharges.

#### **O2’s inaccurate/incomplete information about remedial steps taken by O2 for overcharges paid**

##### Our information requirement in the First Notice

3.138 In relation to the steps O2 took to remedy the overcharges that had been paid by customers, our First Notice asked O2 for the following:

### Question 12(b) of the First Notice

Please provide any Documents O2 holds containing the following information: [...] b. the steps O2 has taken to remedy the effects of the Billing Error on the affected End-Users, for example, by re-issuing corrected Termination Bills and/or providing customer refunds, broken down by: i. the steps taken **prior to the service of this Notice** [i.e. 1 August 2019], the number of End-Users in relation to whom those steps had been taken and, in relevant cases, the amounts of refunds and other remedial payments made to those End-Users; and ii. any further steps taken **as of the date of O2's response to this Notice**, the further number of End-Users in relation to whom those steps have been taken and, in relevant cases, the amounts of refunds and other remedial payments made to those further End-Users; and [...]

- 3.139 In asking that question, we also requested the following: “Where O2 does not hold Documents in relation to Question 12, please provide an explanation as required by Part C above. In such cases, please provide an explanation in response to Questions 12.a-c.”

#### O2's response

- 3.140 In its First Response, O2 responded to that question as follows:

### Question 12(b)(i) of the First Response

The steps taken to remedy the effects of the issue are set out at 12a above. Termination Bills have not been reissued. In addition, customer communications for this issue were agreed and signed off in July 2019 in readiness for the refund program to commence. **TUK has lined up a refund program for the affected customers**, however this is on hold pending the completion of the [X] refund program. This is a systems capacity issue, only 7,000 refunds can be run at a time, should this capacity be increased it would stop all other cheque activity. The refunds for the [X] issue will be finished by 18 September 2019. We will then be able to start the refunds for this issue. This will take around 18 working days to complete; **we estimate this to be completed on or around 14 October 2019**. The refund amount will also include an additional 4% interest payment.” (emphasis added)

and

### Question 12(b)(ii) of the First Response

The number of customers affected is static as the fix was implemented February 2019. Any outstanding actions relate to providing the refund to the customers affected, including any communications to accompany the refund.”

#### O2's information contravention

- 3.141 We then noted from O2's Second Response that it revised its response to the above-mentioned question by stating that:

### Question 12(b)(i) of Annex 1 to the Second Response

Initial steps have been taken to remedy the effects of some customers affected by the Billing Error and these are set out at 12a above, **TUK is awaiting updated reports from [X] to include Scenario 4 and to provide a breakdown, by scenario, which affected each customer.** Termination Bills have not been reissued. In addition, customer communications for this issue were agreed and signed off in July 2019 **in readiness for the refund program to commence. The refunds for customers identified in the initial set of [X] reports is due to complete this week.** The refund amount also included an additional 4% interest payment. (emphasis added)

and

### Question 12(b)(ii) of Annex 1 to the Second Response

The number of customers affected is static as the fix was implemented March 2019. TUK are in the process of identifying all affected customers in relation to all scenarios. Once this has been done, following receipt of the revised reports from [X] any outstanding actions relate to providing the refund to the customers affected, including any communications to accompany the refund.

- 3.142 In that regard, we understood O2's reference to its "refund program" as relating to those refunds being provided to its customers who fell within 'Group A' (as we have called them above).<sup>66</sup> However, in neither O2's First Response nor its Second Response did O2 provide any documents or explanations detailing refunds that had already taken place outside of its planned refund program.
- 3.143 We noted, however, that Annex 11 to O2's First Response included an email from [X] sent on 6 February 2019 (i.e. before O2's refund program started in March 2019) which, in relation to Scenario 1, stated "...such occurrences are seem [sic] to be corrected by CSA's themselves by raising refunds, probably when customer complain [sic]". Our own understanding of that statement by [X] was that some refunds might have already taken place.
- 3.144 We therefore needed further clarity on refunds. In particular, despite O2 claiming that some customers were "not due a refund" (whom we are referring to as 'Group B' customers above),<sup>67</sup> we sought to essentially understand by our above-mentioned Question 1 of the Fifth Notice<sup>68</sup> whether some of those customers that O2 considered were not owed a refund (i.e. Group B) had nonetheless already received a refund and, if so, what related amounts had actually been refunded. Furthermore, to supplement that Question 1, we separately asked O2 in Question 3 of the Fifth Notice: "For customers who paid

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<sup>66</sup> See paragraph 3.124 above.

<sup>67</sup> Ibid.

<sup>68</sup> See paragraph 3.131 above.

*overcharges in 2018 and were subsequently refunded, please analyse a sample of 20 accounts to identify what triggered the refund to be made.”*

- 3.145 As already explained above,<sup>69</sup> O2’s response to Question 1 of Ofcom’s Fifth Notice established that a significant number of customers in Group B (i.e. 27,818) had indeed paid overcharges during the Relevant Period (totalling £1,242,589.02) and all but 259 of those customers had previously received a refund. Further, O2’s analysis of 40 accounts<sup>70</sup> established that:
- 31 customers had received refunds as part of O2’s ‘Auto Refund Processing’; and
  - 9 customers had received refunds following a request from that customer.
- 3.146 However, in responding to Question 3 in its Fifth Response, O2 simply left a comment stating ‘Auto Refund Processing’ in relation to 18 sample accounts without giving Ofcom any explanation or further details. We therefore asked O2 to explain what ‘Auto Refund Processing’ meant and it did so under an email exchange. We followed up that email exchange as part of our Sixth Notice<sup>71</sup> to formally seek confirmation that the information we had received was accurate and complete.
- 3.147 In its Sixth Response, O2 confirmed that in order for ‘Auto Refund Processing’ to occur “[a] report is generated 30 days [O2 later corrected this to 31 days]<sup>72</sup> after the termination bill production date” and that “the process from there is manual.” O2 further explained that “[t]he report is reviewed and any account over £20 in credit [reduced to £5 from 1 June 2020]<sup>73</sup> is referred to our partner team, [§<], to process refunds. The refund issuance can vary but is usually a few days after the report is produced. This will mean that there will be a slight variation in the timescales for refund issuance.”<sup>74</sup> For accounts that were less than £20 in credit, O2 informed Ofcom that “credits below £20 will be refunded to the customer, on their request”.<sup>75</sup>

### Summary of findings

- 3.148 In summary, we are satisfied that O2 contravened the information requirement in **Question 12(b) of the First Notice**, because O2’s First Response (as well as its Second Response) provided an explanation of planned remedial steps in relation to those customers falling in Group A only. In doing so, however, O2 failed to explain or provide any documentation detailing the remedial steps that had already been taken for those customers falling in Group B, including any explanation of its ‘Auto Refund Processing’ policy. Such Group B customers clearly amounted to “*affected End-Users*” under that Question 12(b) and therefore O2 was required to explain the steps it had already taken to remedy the effects of the billing error on them.

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<sup>69</sup> See paragraph 3.132 above.

<sup>70</sup> O2 provided analysis of 20 accounts in its Fifth Response to Question 3 of the Fifth Notice, together with a subsequent analysis of a further 20 accounts in [§<]’s email sent to Ofcom on 12 May 2020 at 16:53.

<sup>71</sup> Question 3 of the Sixth Notice.

<sup>72</sup> Question 3 of the Sixth Response.

<sup>73</sup> Question 3 of the Sixth Response.

<sup>74</sup> Email from [§<] sent to Ofcom on 12 May 2020 at 16:53.

<sup>75</sup> Email from [§<] sent to Ofcom on 13 May 2020 at 14:55.

## Summary of O2's information contraventions

3.149 For the reasons set out above, we have set out in the Confirmation Decision attached at Annex 1 that we are satisfied that O2 contravened the following information requirements, by failing to provide complete and/or accurate information that we requested from it:

No.	Information Requirement	Subject-matter of information	Cross-referencing
1.	<b>Question 1(a) of the First Notice; and Question 1 of Annex 1 to the Second Notice</b>	O2's description of the billing error in the BABT Notification	Paragraphs 3.17 to 3.40
2.	<b>Question 7 of the First Notice; and Question 1 of Annex 1 to the Second Notice</b>	O2's information on termination journey timeframe	Paragraphs 3.41 to 3.50
3.	<b>Questions 1(a) and 1(b) of the First Notice; and Question 1 of Annex 1 to the Second Notice</b>	O2's information on the end-to-end dates for the billing error's total duration	Paragraphs 3.54 to 3.70
4.	<b>Question 1(b)(ii) of Annex 2 to the Second Notice; and Question 4(e) of Annex 2 to the Second Notice.</b>	O2's information on the end-to-end dates for each billing error scenario	Paragraphs 3.71 to 3.101
5.	<b>Question 11(a)(ii) of the First Notice; and Question 11(b) of the First Notice</b>	O2's information relating to its awareness of the billing error	Paragraphs 3.102 to 3.118
6.	<b>Question 1(a) of the First Notice; Question 5(b) of Annex 2 to the Second Notice; and Question 5(c) of Annex 2 to the Second Notice</b>	O2's information on customers affected by the billing error and the amount of overcharges paid	Paragraphs 3.122 to 3.137

<b>7.</b>	<b>Question 12(b) of the First Notice</b>	O2's information about remedial steps taken by O2 for overcharges paid	Paragraphs 3.138 to 3.148
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## 4. Penalty

### Summary

- 4.1 We have decided to impose a penalty of £150,000 on O2 in light of our findings discussed in previous Section 3 for its contraventions of the specified information requirements. The penalty includes a 25% discount reflecting the resource savings achieved by Ofcom as a result of O2 admitting liability and entering into a settlement with Ofcom.
- 4.2 In reaching this view, we have had regard to (among other things) the need to incentivise O2, as well as other CPs, to comply with their information requirements and to our principal duty of furthering the interests of citizens and consumers.
- 4.3 Ofcom's judgement is that this penalty is appropriate and proportionate to the information contraventions and will have the appropriate deterrent effect on O2 and the wider industry. When setting the particular penalty amount that we believe would achieve that objective, we have considered relevant factors in the round and have had regard to our Penalty Guidelines. Our reasons for reaching this view are set out fully below.

### Consideration of whether to impose a penalty

- 4.4 Under section 138(2)(e) of the Act, where Ofcom finds that there are reasonable grounds for believing there has been a breach, it may give that person a notification under section 138 specifying, among others, any penalty which Ofcom are minded to impose in accordance with section 139.
- 4.5 Section 139(3) of the Act provides that, where a notification under section 138 relates to more than one contravention, a separate penalty may be specified in respect of each contravention. However, section 139(5) of the Act provides that the amount of any penalty notified under section 138 has to be appropriate and proportionate to the contravention in respect of which it is imposed and it cannot exceed £2,000,000.
- 4.6 Section 139A(4) of the Act states that a confirmation decision may require the person to pay the penalty specified in the notification issued under section 138 of the Act, or such less penalty as Ofcom consider appropriate in the light of the person's representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention.
- 4.7 This case concerns the contravention of several different information requirements contained in two separate notices that are summarised in paragraph 3.149 in previous Section 3. Those information requirements were imposed on O2 as part of our Billing Investigation into its compliance with GC C3.2 and previous GC 11.1. As already explained in Section 2, those conditions require, in effect, CPs to accurately bill customers for their use of communication services.
- 4.8 In order to ensure that GC 3.2 (and other obligations) are effective at securing their policy objectives, Ofcom must be able to effectively monitor and enforce compliance with those

obligations. Ofcom's power to require the provision of information for the purpose of carrying out an investigation is therefore fundamental, and Ofcom considers that the information contraventions set out in Section 3 are serious matters. We discuss below our views on the seriousness of O2's information contraventions which, together with other aggravating factors that we set out in this section, cumulatively support our finding that this contravention is a serious one, noting that those information contraventions arise from several different information requirements contained in two separate notices.

- 4.9 Indeed, we have already discussed in Section 3<sup>76</sup> various possible problems that can arise if we do not obtain reliable, accurate and complete information on time from those who are required to comply with our information requirements. One of those problems is that our work on the investigation may be delayed, increasing our associated costs, which we discuss further below.<sup>77</sup> In that regard, we had to give O2 seven different notices imposing several information requirements by the end of our Billing Investigation. We consider that this volume of notices unnecessarily added both work and costs for Ofcom.
- 4.10 Moreover, we have already explained in Section 3 the importance of each of the information requirements subject to this investigation and in relation to which we have determined a breach by O2. We therefore consider that the way in which O2 responded to those requirements risked other problems happening, such as reducing the accuracy or quality of our final decision in the Billing Investigation, a decision that ultimately determined a serious breach and resulted in a significant penalty.
- 4.11 Also, whilst a contravention finding alone (without a penalty) may cause some reputational impact, we do not consider that it would act as a sufficient deterrent for O2 (or the wider industry) against failing to provide accurate and complete responses to our future statutory information requests. Indeed, we are mindful that these information contraventions occurred despite Ofcom having previously issued decisions and penalties against several providers, including O2 and giffgaff (a wholly owned subsidiary of Telefónica UK Limited), for contravening information requirements (see 4.44 below).
- 4.12 Overall, we consider that the extent of O2's failure to provide accurate and/or complete information contained in two separate notices indicates a degree of carelessness with regard to its regulatory responsibilities and this failure could have significantly limited the robustness and comprehensive nature of Ofcom's Billing Investigation. It is important that O2 - and the wider industry - recognises the seriousness of responding accurately, completely and on time to our statutory information requests and is incentivised to ensure that these failings are not further repeated.
- 4.13 Taking everything into account alongside our view on the seriousness of O2's failure, we are satisfied that a penalty is appropriate and proportionate in this case.

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<sup>76</sup> See paragraph 3.11.

<sup>77</sup> See paragraph 4.25 to 4.32.

## Penalty amount

4.14 In considering the level of penalty that should be applied, Ofcom has had regard to its published Penalty Guidelines.<sup>78</sup>

### Our Penalty Guidelines and assessment in the round

4.15 As set out in our Penalty Guidelines, the central objective of imposing a penalty is deterrence.

4.16 As a general matter, we consider that deterring contraventions of our information requirements is important as:

- statutory information requests are fundamental to Ofcom's ability to regulate the electronic communications sector effectively and in a timely manner; and
- Ofcom should be able to rely on responses to them at face value and without having to interrogate their veracity.

4.17 The level of any penalty must therefore be sufficient to incentivise O2 (and the wider industry) to ensure its future compliance with statutory information requests. It should also have regard to the seriousness of the infringement.

4.18 In this respect, our Penalty Guidelines set out a range of further factors which may be relevant in any particular case. We have assessed those relevant factors carefully in relation to the circumstances of this case and have considered whether there are any relevant precedents and the extent to which they should be followed. We have, however, decided the appropriate and proportionate amount of penalty in this case by taking all of those factors into account in the round. We set out below our consideration of each of the factors that we consider are relevant to the circumstances of O2's compliance with the information requirements we have discussed in Section 3.

### Seriousness of O2's information contraventions

4.19 Ofcom's powers under section 135 of the Act are fundamental to its ability to properly carry out its statutory functions. It is essential that Ofcom is able to rely on all of the information it is provided in response to a formal information request at face value and without having to interrogate it. As a result, we consider that an information contravention is inherently serious.

4.20 Where companies contravene our information requirements, Ofcom is at risk of being prevented from exercising its functions in the interests of citizens and consumers because of the asymmetry of information that exists - much of the information Ofcom requires is held by the providers that it regulates. In taking enforcement action, this asymmetry is likely to be pronounced because much of the information that Ofcom requires to determine whether (and, if so, how) any contravention has taken place will be held by the

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<sup>78</sup> Ofcom, [Penalty Guidelines](#), 14 September 2017.

subject of the investigation. This was indeed the case in Ofcom's Billing Investigation into the accuracy of O2's billing under GC C3.2 and previous GC 11.1.

- 4.21 Our Penalty Guidelines gives seriousness as a specific example of a factor we may take into account when determining a penalty. In addition to the inherent seriousness of contravening an information requirement, there are specific features of O2's information contraventions which contribute to the seriousness in the circumstances of O2's case.
- 4.22 We consider that O2's information contraventions directly related to key areas of the Billing Investigation, namely:
- the nature and scope of the billing error;
  - the duration of the billing error;
  - O2's awareness of the billing error; and
  - the level of harm or potential harm caused by the billing error.
- 4.23 O2's failure to provide us with accurate information relating to each of those areas could have significantly prevented us from understanding the true extent of the billing error, including (as explained above) its scale and scope, the level harm, and its duration. It could also have prevented Ofcom from ensuring that all necessary steps were taken to remedy the full impact of the billing error.
- 4.24 On this occasion, those risks did not materialise because Ofcom identified the inconsistencies in O2's responses and asked it to investigate and correct them. It is not clear whether, in the absence of Ofcom thoroughly questioning those inconsistencies, O2 would have conducted such investigations and realised that it had provided inaccurate information in response to statutory information requests. We nonetheless consider that there was a real possibility of one or more of those risks materialising and therefore something that should be treated as a serious matter.

### **The degree of harm caused by O2's information contraventions**

- 4.25 Another example of a factor in our Penalty Guidelines is the degree of harm, whether actual or potential, caused by the contravention. For this investigation, the harm caused by O2's provision information contraventions was harm caused to Ofcom and potentially to our Billing Investigation.
- 4.26 During our Billing Investigation, we issued O2 with a total of seven notices. This is a relatively high number of notices for a single investigation<sup>79</sup> and, although this was a complex matter, in our view, was at least in part driven by the information contraventions detailed in Section 3.
- 4.27 By way of example, O2 did not self-report the billing error to Ofcom, so our initial understanding of what had occurred was based solely on the information included in the

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<sup>79</sup> By way of an example, in the three billing investigations prior to the Billing Investigation (relating to EE, Plusnet and giffgaff) we issued three, two and four information notices respectively. Details of these investigations can be found in our Competition and Consumer Enforcement Bulletin: <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases>.

BABT Notification. It was therefore necessary for us to confirm the accuracy of that information – which was our overall intention of the First Notice - in order for us to begin our assessment of the matters under investigation and to determine what (if any) additional information from O2 might be necessary.

- 4.28 In that regard, we issued our First Notice on 1 August 2019 and received O2’s First Response on 5 September 2019.<sup>80</sup> Our expectation was that the information requested by the First Notice should have provided us with a sound understanding of (among other things) how the billing error had occurred, how long it had lasted, and the impact it had had on O2’s customers. However, for the reasons set out in Section 3, and following the September Meeting (which required additional time and resource for preparation, attendance and follow-up), as part of our Second Notice issued on 2 October 2019, we considered that it was necessary for Ofcom to ask O2 to review its First Response *“and make all necessary revisions to ensure the information provided is complete and accurate”*. O2 subsequently submitted its revised response to the First Notice on 17 October 2019.
- 4.29 The necessity for O2 to revise its First Response meant that Ofcom did not receive key information about the billing error until more than a month (42 days) after it should have done, significantly delaying Ofcom’s ability to begin its proper assessment of the matters being investigated.
- 4.30 Another example relates to Ofcom’s Second Notice, where we required O2 to provide the *“date ranges relevant to each scenario”*.<sup>81</sup> As explained in Section 3, none of the date ranges provided in O2’s Second Response (received on 17 October 2019) proved to be accurate, with the date ranges for three scenarios only finally being confirmed in O2’s Seventh Response (received on 6 November 2020, over a year later).
- 4.31 In that regard, we also note that our Seventh Notice was only issued after Ofcom received O2’s Response to the Facts and Evidence Document, a document issued by Ofcom as an additional step in the circumstances of this particular case, partly to satisfy ourselves that we could rely on the information received from O2 in response to our previous six notices issued up to that point. Had Ofcom not taken this additional step, it is unclear whether O2 would have corrected those scenario date ranges. This example again shows a delay to the progress of our Billing Investigation caused by additional work that we consider would have been unnecessary and avoidable had O2 taken better care in responding to our requests for information.
- 4.32 As demonstrated with these examples, we consider that the information contraventions detailed in Section 3 contributed to a substantial delay in completing the Billing Investigation. They also resulted in Ofcom having to use additional resources, something which increased our costs for the Billing Investigation. We therefore give weight to fact that the information contraventions had such impacts on our Billing Investigation as part of our penalty assessment.

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<sup>80</sup> Due to an oversight, O2 did not provide its response to Question 5(c) (a sample of 10 Termination Bills) until 10 October 2019.

<sup>81</sup> Question 1(b) of Annex 2 to the Second Notice

## The steps taken by O2 when responding to information requests

4.33 Alongside the seriousness and harm caused by a contravention, our Penalty Guidelines give examples of other potentially relevant factors that we may also take into account as part of our penalty assessment. In the following paragraphs, we set out our assessment of the factors that appear to us most relevant to deciding that our penalty is appropriate and proportionate to the information contraventions discussed in Section 3, namely:

- whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention;
- the extent to which the contravention occurred deliberately or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur; and
- whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it.

4.34 We assess each of those factors below. However, as explained in paragraph 1.11 of our Penalty Guidelines, we have considered all of the circumstances, including these additional factors, in the round in order to determine the appropriate and proportionate amount of the penalty.

### O2's processes and systems for responding to our information requests

4.35 We have seen no evidence to suggest that the information contraventions occurred deliberately. However, Ofcom's expectation of a company of O2's size and experience is that it should have the appropriate processes, systems and resources to provide accurate and complete responses to our statutory information requests in accordance with its obligations. In this case, our expectation was further enhanced by the fact that we had previously found both O2 and giffgaff (a wholly owned subsidiary of Telefónica UK Limited) to be non-compliant with statutory information requests (see paragraph 4.44 for more detail) and so those processes and systems for responding to such requests should have been reviewed in light of those decisions and, where appropriate, improved.

4.36 In that regard, we note especially that our previous investigation into O2's compliance with a statutory information request took into account as a mitigating factor that O2 had *"implemented a new governance process to ensure that the information is approved and validated by a member of its Senior Leadership Team before it is sent to Ofcom"*.<sup>82</sup>

4.37 However, O2's initial failure to provide accurate/complete information as part of the Billing Investigation indicates either that its new governance process was not properly followed (at least in full) or it remained inadequate in ensuring that complete and accurate responses were provided in response to our statutory information requests in this case.<sup>83</sup>

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<sup>82</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0012/144030/confirmation-decision-o2-non-confidential.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0012/144030/confirmation-decision-o2-non-confidential.pdf) (see paragraph 1.77)

<sup>83</sup> We did not ask for details of the identity of the person signing off on O2's responses to our initial statutory information requests and, as such, we do not know who approved O2's First Response or Second Response. However, because of the issues we later identified, we did ask for such details in the Fourth, Fifth, Sixth and Seventh Notices and, for each response, O2 confirmed that at least one member of its Senior Leadership Team had approved its responses.

We consider this to be a significant aggravating factor that should be taken into account as part of the penalty assessment.

#### O2's reliance on third parties in responding to our information requests

- 4.38 Ofcom acknowledges that O2 uses a third party, [X], to manage its billing system and that it was at times reliant on [X] to provide it with the necessary information needed to fully and accurately respond to some of the questions asked in our information requests. However, irrespective of whether O2 uses a third party to manage part of its business, it remains O2's responsibility to carefully scrutinise the information it intends to provide in response to our requests and to ensure its accuracy and completeness before it is submitted to Ofcom.
- 4.39 Indeed, we expect that all information within the scope of a statutory information request should be properly interrogated, cross-checked and reviewed through appropriate governance channels (including by the appropriate director/head of department) and responses to statutory information requests should only be sent to Ofcom when they are complete and accurate. Where it has not been possible to ensure such completeness or accuracy, any issues should be clearly explained to Ofcom and information should be provided with appropriate qualifications (if any).
- 4.40 The fact that Ofcom itself was able to identify discrepancies in O2's First and Second Responses shows that they could have—and should have—been picked up by O2 under adequate scrutiny. The fact that they were not demonstrates, in our view, a level of carelessness on the part of O2 that is exacerbated in the light of Ofcom's previous decisions and is an aggravating factor in this case.

#### O2's steps to correct errors in responding to our information requests

- 4.41 As explained in Section 3, a number of inaccurate and incomplete responses were identified and corrected following Ofcom querying O2's First Response. However, not only did O2 go on to provide a further incomplete and inaccurate response to the additional questions asked in the Second Notice, but it also provided further inaccuracies when providing its revised response to the First Notice (as required by the Second Notice). This also shows, in our view, a degree of carelessness from O2 with regard to its regulatory responsibilities and is a further aggravating factor in this case.
- 4.42 That said, Ofcom acknowledges and takes into account that, in some instances, inaccurate information (such as some scenario start and end dates) were flagged and corrected by O2 themselves in its Response to the Facts and Evidence Document.<sup>84</sup> Whilst it is unclear whether O2 would have made those corrections had Ofcom not taken the additional step of issuing a Facts and Evidence Document, Ofcom also acknowledges that, had O2 not made these corrections, it is unlikely that Ofcom would have been in a position to question their accuracy.

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<sup>84</sup> See paragraphs 3.78, 3.85 and 3.89.

## Relevant precedents and O2's history of information contraventions

4.43 As set out in our Penalty Guidelines, Ofcom will have regard to any relevant precedents set by previous cases where they are relevant, but we will not regard the amounts of previously imposed penalties as placing upper thresholds on the amount of any penalty. Our Penalty Guidelines also give another example of a potentially relevant factor concerning whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties). We consider that those factors are both relevant to the circumstances of this case, which we discuss below.

### Relevant precedents

4.44 Ofcom has issued a number of decisions under section 139A of the Act (or its equivalent) since revising its Penalty Guidelines in 2015. We have had regard to each of those decisions in determining our proposed penalty, and in particular the following cases:

- a) On 5 April 2017, Ofcom issued BT with a penalty of £300,000 for providing incomplete information in response to two information requests and misleading information in response to another during Ofcom's investigation into BT's use of deemed consent in Ethernet provisioning (the "Deemed Consent Decision").<sup>85</sup> This case concerned three separate contraventions and we found that BT's responses adversely affected Ofcom's ability to progress a regulatory process efficiently<sup>86</sup> and resulted in a high risk of harm to consumers and citizens.<sup>87</sup>
- b) On 25 January 2018, Ofcom issued BT with a penalty of £100,000 (reduced to £70,000 as a result of Ofcom applying a 30% settlement discount) for providing inaccurate and incomplete information about its pricing as part of the Wholesale Local Access market review (the "WLA Decision").<sup>88</sup> This was the second time we had issued a decision finding BT in breach of its information requirements. In this case, we found that BT's error should have been obvious to it and the fact it took no steps to end the contravention and in fact repeated the contravention in response to a subsequent statutory information request added to the seriousness.<sup>89</sup> We also found the risk of harm to consumers and citizens to be moderate because of the narrow scope of the information request.<sup>90</sup>
- c) On 16 November 2018, Ofcom imposed a penalty of £25,000 on Virgin Media for providing an incomplete response to an information request issued under section 135 of the Act in the context of Ofcom's investigation into Virgin Media's early termination

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<sup>85</sup> CW/01192/03/17: [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw\\_01192](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01192).

<sup>86</sup> [Deemed Consent Decision](#), paragraphs 5.19 – 5.20.

<sup>87</sup> [Deemed Consent Decision](#), paragraph 5.21.

<sup>88</sup> CW/01208/09/17: [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw\\_01208](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01208).

<sup>89</sup> [WLA Decision](#), paragraph 1.61.

<sup>90</sup> [WLA Decision](#), paragraph 1.64.

charges.<sup>91</sup> In this case, we found that the risk to citizens and consumers was low as the information did not have a substantive impact on Ofcom's investigation.

- d) On 30 November 2018, Ofcom found Cloud M in breach of requirements imposed under section 135 of the Act in relation to three information requests by: (i) not providing information that fell within the scope of the request; and (ii) not providing information by the deadline set by Ofcom.<sup>92</sup> Ofcom imposed a penalty of £5,000 on Cloud M, as well as an additional penalty of £100 per day (capped at £3,000) until the breach of the third request was remedied.
- e) On 22 March 2019, Ofcom imposed a penalty of £75,000 on O2 for contravening the requirements of a statutory information request issued under the Open Internet Access Regulations 2016.<sup>93</sup> We found that O2 had failed to provide accurate and complete answers to our questions about its traffic management practices which delayed Ofcom's assessment.
- f) On 30 July 2019, Ofcom imposed a penalty of £50,000 on giffgaff, a wholly owned subsidiary of Telefónica UK Limited, for contravening section 135 of the Act.<sup>94</sup> We found that giffgaff had provided inaccurate information in response to two notices issued as part of an investigation into whether giffgaff had complied with billing regulations. In this case, we noted that the penalty would have been significantly higher had giffgaff not identified and proactively made Ofcom aware of the inaccuracies in its responses.

4.45 As with this case, in all those cases we found an absence of effective systems for responding to statutory information requests which was indicative of a careless attitude towards responsibilities. We also note, and consider further below, that this is the second case related to O2, and the third case related to Telefónica UK Limited.

#### O2's history of previous information contraventions

4.46 Separate to this investigation and the Billing Investigation it relates to, we previously issued a decision that found that O2 had contravened the requirements of a statutory information request (see 4.44 above). Not only is this a relevant precedent in this case, but it also demonstrates a repeat contravention.

4.47 In relation to Telefónica UK Limited more widely, on 30 July 2019, Ofcom also issued two decisions to giffgaff. These related to:

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<sup>91</sup> CW/01198/06/17: [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw\\_01198](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01198).

<sup>92</sup> CW/01211/01/18: [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw\\_01211](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01211).

<sup>93</sup> CW/01236/02/19: [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw\\_01236](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01236).

<sup>94</sup> CW/01230/09/18: [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw\\_01230](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01230)

- compliance with billing regulations;<sup>95</sup> and
- compliance with information requirements under section 135 of the Act (see 4.44 above).

4.48 While our above-mentioned decision relating to giffgaff's compliance with billing regulations is not relevant to O2's information contraventions, we have taken into account as part of our penalty assessment our above-mentioned decision concerning giffgaff's failure to comply with the information requirements in that case. As with the previous O2 investigation, we consider that not only is this a relevant precedent in this case, but it also demonstrates a repeat contravention by Telefónica UK Limited. We consider this a significant aggravating factor.

### **Ofcom's decision on the penalty amount**

4.49 Considering all of the circumstances (including all relevant factors) discussed in paragraphs 4.15 to 4.48 above in the round, we have decided to impose a penalty on O2 of £150,000 for contravening the information requirements discussed in Section 3. This includes a 25% discount applied to the penalty of £200,000 which we would otherwise have set. That discount reflects resource savings achieved by Ofcom as a result of O2 admitting liability and entering into a settlement with Ofcom.

4.50 Ofcom's judgement is that this is an appropriate and proportionate penalty, given the importance of providing accurate responses to statutory information requests and the seriousness of the contraventions. In particular, we consider that several aggravating factors are present that cumulatively support our finding that this contravention is a serious one and the penalty imposed should reflect them accordingly. Such factors include, in particular that:

- the information contraventions related to key areas of the billing error;
- the information contraventions contributed to the Billing Investigation taking longer to complete than would otherwise have been necessary, requiring Ofcom to use additional resource and resulting in additional costs;
- O2's governance process for responding to our information requests were either not properly followed (at least in full) or were inadequate;
- O2 demonstrated a level of carelessness that is exacerbated in the light of Ofcom's previous enforcement decisions regarding compliance with information requirements; and
- O2's history of contraventions in this area.

4.51 The level of our penalty takes into account O2's size and turnover and, in our opinion, is at such a level which can change any potential non-compliant behaviour by O2, and by other providers.

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<sup>95</sup> [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw\\_01230](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01230)

## 5. Remedial steps

- 5.1 In addition to our penalty, Ofcom requires that, to the extent it has not done so already, O2 must review its processes and systems it has put in place for responding to information requests issued to it by Ofcom in order to assess the extent to which those processes and systems include the necessary level of oversight needed to ensure the accuracy and completeness of its responses. To the extent that such a review by O2 finds that those systems and processes do not have the necessary level of oversight, O2 must revise those systems and process to address the concerns it identifies.
- 5.2 O2 is required to take the step explained in paragraph 5.1 above within two months of receiving the Confirmation Decision issued by Ofcom under section 139A of the Act, with O2 providing written confirmation of the actions it has taken to Ofcom by no later than 10 days after the end of that two months.

# A1. Confirmation Decision to Telefónica UK Limited (trading as “O2”) of contraventions of information requirements under section 139A of the Communications Act 2003

## Section 135 Communications Act 2003

- A1.1 Section 135(1) of the Communications Act 2003 (the “**Act**”) allows the Office of Communications (“**Ofcom**”) to require a person falling within subsection (2) to provide them with all such information as they consider necessary for the purpose of carrying out Ofcom’s functions under Chapter 1 of Part 2 of the Act.
- A1.2 Section 135(2) sets out the persons falling within that subsection, which includes a communications provider.
- A1.3 Section 135(4) of the Act imposes a statutory duty so that a person required to provide information under section 135 must provide it in such manner and within such reasonable period as may be specified by Ofcom.
- A1.4 Section 135(5) of the Act provides that the powers in section 135 are subject to the limitations in section 137. Section 137(3) provides that Ofcom are not to require the provision of information under section 135 except:
- i) by a demand for the information that describes the required information and sets out Ofcom's reasons for requiring it; and
  - ii) where the making of a demand for the information is proportionate to the use to which the information is to be put in the carrying out of Ofcom's functions.

## Sections 138 and 139 of the Act

- A1.5 Section 138 of the Act empowers Ofcom to take enforcement action by issuing a notification to a person where Ofcom has reasonable grounds for believing that the person notified (i.e. the subject of the notification) is contravening or has contravened a requirement imposed under section 135 of the Act (“**information requirement**”).
- A1.6 A notification under section 138 of the Act is one which (among other things):
- sets out the determination made by Ofcom;
  - specifies the information requirement and contravention in respect of which that determination has been made;
  - specifies the period during which the person notified has an opportunity to make representations;

- specifies what the person must do in order to comply with the information requirement; and
- specifies any penalty which Ofcom is minded to impose in accordance with section 139 of the Act.

A1.7 Section 139 of the Act specifies the penalties that may apply for contravention of the information requirements where a person is given a notification under section 138.

## Section 139A of the Act

A1.8 Section 139A of the Act empowers Ofcom to enforce any information contraventions by issuing a decision (a “**Confirmation Decision**”) confirming the imposition of requirements on a person where:

- a) that person has been given a notification under section 138 of the Act;
- b) Ofcom has allowed that person an opportunity to make representations about the matters notified; and
- c) the period allowed for the making of representations has expired.

A1.9 Ofcom may not give a Confirmation Decision to a person unless, having considered any representations, they are satisfied that the person has, in one or more of the respects notified, been in contravention of a requirement specified in the notification under section

A1.10 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 a requirement notified under section 138(2)(d), or may specify a period within which the person must comply with the requirement; and
- d) may require the person to pay:
  - i) the penalty specified in the notification issued under section 138 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.

A1.11 Section 139A(5) imposes a statutory duty on the person to comply with any requirement imposed by the Confirmation Decision, which is enforceable in civil proceedings by Ofcom.

## Subject of this Confirmation Decision

A1.12 This Confirmation Decision is addressed to Telefónica UK Limited (trading as “**O2**”), whose registered company number is 01743099. O2’s registered office is 260 Bath Road, Slough, Berkshire, SL1 4DX.

## **Ofcom's previous Notification given to O2 under section 138 of the Act**

- A1.13 On 17 November 2021, Ofcom gave a notification under section 138 of the Act (the "**s138 Notification**") to O2 as Ofcom had reasonable grounds for believing that O2 had contravened specified information requirements, by failing to provide complete and/or accurate information that Ofcom requested from it under section 135 of the Act.
- A1.14 The s138 Notification also specified the penalty that Ofcom was minded to impose on O2 in respect of the contraventions of section 135 of the Act, and it specified some remedial steps to be taken by O2.
- A1.15 The s138 Notification allowed O2 the opportunity to make representations to Ofcom about the matters set out therein.

## **Confirmation Decision given to O2 under section 139A of the Act**

- A1.16 The period allowed for making representations has now expired. On 24 November 2021, O2 confirmed to Ofcom that it would not make any written or oral representations about the matters notified and accepted liability for the contraventions by admitting that it had contravened section 135 of the Act in the respects notified by Ofcom. Specifically, O2 accepted that it had contravened the following specified information requirements, by failing to provide complete and/or accurate information that Ofcom requested from it:

No.	Information requirement(s) <sup>96</sup>	Subject-matter of information	Cross-referencing <sup>97</sup>
1.	<b>Question 1(a) of the First Notice; and Question 1 in Annex 1 to the Second Notice</b>	O2's description of the billing error in the BABT Notification	3.17 to 3.40
2.	<b>Question 7 of the First Notice; and Question 1 in Annex 1 to the Second Notice</b>	O2's information on termination journey timeframe	3.41 to 3.50
3.	<b>Questions 1(a) and 1(b) of the First Notice; and Question 1 in Annex 1 to the Second Notice</b>	O2's information on the end-to-end dates for the billing error's total duration	3.54 to 3.70
4.	<b>Question 1(b)(ii) of Annex 2 to the Second Notice; and Question 4(e) of Annex 2 to the Second Notice.</b>	O2's information on the end-to-end dates for each billing error scenario	3.71 to 3.101
5.	<b>Question 11(a)(ii) of the First Notice; and Question 11(b) of the First Notice</b>	O2's information relating to its awareness of the billing error	3.102 to 3.118
6.	<b>Question 1(a) of the First Notice; Question 5(b) of Annex 2 to the Second Notice; and Question 5(c) of Annex 2 to the Second Notice</b>	O2's information on customers affected by the billing error and the amount of overcharges paid	3.122 to 3.137
7.	<b>Question 12(b) of the First Notice</b>	O2's information about remedial steps taken by O2 for overcharges paid	3.138 to 3.148

A1.17 Accordingly, Ofcom is satisfied that O2 has, in the respects notified in the s138 Notification, contravened section 135 of the Act. Ofcom has therefore decided to give O2 this Confirmation Decision, and to impose a financial penalty, in accordance with section 139A of the Act. The extent of those information contraventions and the reasons for Ofcom's decision are set out in the explanatory statement to which this Confirmation Decision is

<sup>96</sup> The expressions of 'First Notice' and 'Second Notice' used in this column have the meanings given in Table 1 in Section 3 of the explanatory statement accompanying this Confirmation Decision.

<sup>97</sup> These cross-referenced paragraphs are to paragraphs of the explanatory statement accompanying this Confirmation Decision.

annexed, noting in particular Ofcom's assessment in relation to each such contravention as set out in the paragraphs cross-referenced in the table above.

## Steps that should be taken by O2

- A1.18 In order to comply with section 135 of the Act going forwards, Ofcom requires that, to the extent it has not done so already, O2 must review its processes and systems it has put in place for responding to information requests issued to it by Ofcom in order to assess the extent to which those processes and systems include the necessary level of oversight needed to ensure the accuracy and completeness of its responses. To the extent that such a review by O2 finds that those systems and processes do not have the necessary level of oversight, O2 must revise those systems and process to address the concerns it identifies.
- A1.19 O2 is required to take the step explained in paragraph A1.18 above within two months of it receiving this Confirmation Decision, with O2 providing written confirmation of the actions it has taken to Ofcom by no later than 10 days after the end of that two-month period.

## Penalty

- A1.20 Ofcom has decided to impose a penalty of **£150,000** on O2 in respect of its contravention of above-mentioned information requirements. This includes a 25% discount applied to the penalty figure of £200,000 proposed in the s138 Notification as a result of O2 entering into a voluntary settlement with Ofcom.
- A1.21 O2 has until **5pm on 12 January 2022** to pay that penalty to Ofcom. If the penalty is not paid by that deadline, it can be recovered by Ofcom in accordance with section 139A(7) of the Act.

## Interpretation

- A1.22 Except insofar as the context otherwise requires, words or expressions used in this Confirmation Decision have the meaning assigned to them in this Confirmation Decision and otherwise any word or expression shall have the same meaning as it has been ascribed for the purpose of Part 2 of the Act.

Signed by

**Ian Strawhorne**

**Principal, Enforcement**

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

**1 December 2021**

## A2. Full text of the information requirements relevant to O2's contravention

A2.1 We set out in this Annex the full text of the specific questions containing the information requirements referred to in Section 3 that are relevant to O2's contravention in this case.

### First Notice

#### Question 1

1. Regarding the information provided in the BABT Notification (see Annex 2):
  - a. Please confirm the accuracy and completeness of the information given by O2 on pages 1 and 2 relating to the Billing Error. If the information contains any errors, please set out clearly all corrections together with a full explanation.
  - b. Please set out any observations on the accuracy of information that O2 has on BABT's comments on pages 3 to 5.

#### Question 5

5. Please explain the information that an End-User affected by the Billing Error was able to view on their Termination Bill during the Relevant Period. In so doing, please also confirm (and provide):
  - a. whether the amount for the outstanding periodic bill would have been visible on the bill;
  - b. whether the Termination Bill took into account, and listed on the bill, any payments the customer might have made against the outstanding periodic bill;
  - c. a sample of 10 Termination Bills from End-Users affected by the Billing Error. Please include bills from a range of dates within the Relevant Period.

#### Question 7

7. Please set out the customer journey in terminating services—from the point at which a customer notifies O2 of their intention to terminate their contract to the point at which the Termination Bill is issued, payment received and the account is closed—against the processes and procedures that O2 had in place at each stage during the Relevant Period to ensure that customers received a Termination Bill that did not exceed the Public Electronic Communications Services provided to them. In answering this question, please provide:
  - (a) any Documents O2 holds in relation to such processes and procedures, such as manuals, instructions, guidelines and procedures for O2's employees to follow in dealing with the billing of services to End-Users. For example (without limitation), Documents setting out the process for O2's employees in carrying out regular manual bill checks or O2's systematic bill checks (if any); and

- (b) any Documents O2 holds on related governance processes it had in place during the Relevant Period to ensure that Termination Bills were accurate, such as audits, any other system or bill checks and complaints monitoring. For example, management reports, audit reports and actions for implementing any issues.

## Question 11

11. Please provide any Documents O2 holds which:

- a. record the date(s) when:
  - i. the Billing Error first occurred;
  - ii. O2's employees or other persons working directly or indirectly on O2's behalf whom first became aware of the Billing Error;
  - iii. such employees or persons whom first made their managers aware of the Billing Error; and
  - iv. Senior Management Staff whom were first made aware of the Billing Error;
- b. record any other discussions relating to the cause, discovery or escalation of the Billing Error, including but not limited to:
  - i. the technical issue with the [X] system that caused the Billing Error;
  - ii. why the Billing Error only occurred when customers disconnected on a Saturday or Sunday, and only when there was an outstanding periodic bill on the account; and
  - iii. the steps O2 took during its initial investigation between the date of the identification of the Billing Error and the date at which the Billing Error was communicated to BABT;

Where Documents held by O2 do not provide information in response to 11b.i – 11b.iii, please provide an explanation instead.

- c. record discussions on engaging [X] in relation to the Billing Error;
- d. record discussions on engaging BABT in relation to the Billing Error.

## Question 12

12. Please provide any Documents O2 holds containing the following information:

- a. the steps O2 has taken to identify each of the End-Users affected by the Billing Error and the dates on which O2 took them;
- b. the steps O2 has taken to remedy the effects of the Billing Error on the affected End-Users, for example, by re-issuing corrected Termination Bills and/or providing customer refunds, broken down by:

- i. the steps taken prior to the service of this Notice, the number of End-Users in relation to whom those steps had been taken and, in relevant cases, the amounts of refunds and other remedial payments made to those End-Users; and
- ii. any further steps taken as of the date of O2's response to this Notice, the further number of End-Users in relation to whom those steps have been taken and, in relevant cases, the amounts of refunds and other remedial payments made to those further End-Users; and
- c. the number of End-Users affected by the issue whom O2 has been unable personally to identify and/or contact, and/or in respect of whom O2 has not taken any steps to remedy the effects of those issues, and the reasons why not.

Where O2 does not hold Documents in relation to Question 12, please provide an explanation as required by Part C above. In such cases, please provide an explanation in response to Questions 12.a-c.

## Second Notice

### Question 1, Annex 1

1. Please review O2's First Response to each question in Ofcom's First s135 Request dated 1 August 2019 and make all necessary revisions to ensure the information provided is complete and accurate in light of new information provided to Ofcom in O2's email of 27 September 2019 and in the meeting of 30 September 2019. In reviewing and revising the First Response, please:
  - a. clearly highlight any revisions made, or where the response remains the same, indicate that no changes have been made; and
  - b. take into account and respond to the questions in Annex 2 as discussed in the meeting of 30 September 2019. Where these questions are not specifically covered in the First Reponse, please include your answers to these questions in addition to the revised First Response.

### Question 1, Annex 2

1. We understand from the meeting of 30 September 2019 that the discrepancies identified between [X]'s explanation in Annex 11 of the First Response and O2's explanation in reply to Question 2 of the First Response were due to [X] had understood that Scenario 1 caused the Billing Error, whereas O2 had understood that Scenario 2 caused the Billing Error. As we understood it, at the time of its First Response, O2 did not realise that there were multiple scenarios in which the Billing Error could occur. In light of this background, please could O2:
  - a. Provide an updated and detailed explanation of the its BAU process for issuing a Termination Bill.
  - b. Provide an updated and detailed explanation of the Billing Error, building on its "Direct Debit Issue scenarios" document send by email on 27/09/2019, including but not limited to:

- i. all scenarios which would cause the Billing Error, including Scenario 4 from 2001-2012 as discussed in yesterday's meeting;
  - ii. date ranges relevant to each scenario;
  - iii. a detailed explanation of how each scenario occurred; and
  - iv. examples of each scenario.
- c. Review and make revisions to its First Response to ensure that all answers are accurate and complete. Please highlight where revisions have been made.

### **Question 4, Annex 2**

2. As regards identification of a possible Scenario 4 which was discussed in yesterday's meeting and in O2's email of 27/09/2019 - where any customers in between 2001-2012 who terminated their contract within 14 days of their periodic bill were potentially affected – we understood O2 as saying that its analysis of affected customers prior to 2012 only included customers who were periodically billed on a Saturday (but not customers who had a periodic bill on any other day, i.e. Monday-Friday or Sunday). Please:
  - a. confirm if our understanding is correct;
  - b. explain when O2 became aware of this scenario and how - please provide all Documents that demonstrate when O2 became aware of Scenario 4;
  - c. explain the steps that O2 took to remedy the effect of the Billing Error caused by Scenario 4 at the time it was identified;
  - d. explain whether this scenario would only occur if the periodic bill falls on a Saturday or Sunday, or whether the Billing Error would occur regardless of when the periodic bill date is;
  - e. confirm the date from which this issue arose and provide Documents on which your confirmation is based;
  - f. explain the fix that was applied in 2012 which resolved Scenario 4;

### **Question 5, Annex 2**

5. Please provide:
  - a. the total amount of customers affected by the Billing Error;
  - b. the total amount of the overcharge by customers referred to in Question 5(a); and
  - c. a breakdown of the number of affected customers, together the associated amount of overcharge, per calendar year (starting from the earliest date on which the Billing Error occurred) for each of Scenarios 1 to 4.

## A3. The billing error scenarios

A3.1 We describe in this Annex each of the four different scenarios in which O2’s billing error occurred as confirmed to us by O2. For each scenario, we note that, as standard:

- prior to April 2012, the termination bill was automatically generated 14 days after the date the termination occurred;
- bills were generated on the date specified by the system regardless of whether that fell at the weekend; and
- payments are taken 14 days after a bill is generated (both monthly and termination bills), except for when the payment date falls on a weekend in which case it is taken the following Monday.

### Scenario 1 – Regular monthly bill payment due at the weekend (8 April 2012 - 24 February 2019)

A3.2 A change implemented in April 2012 (see A3.12), in effect, meant production of the termination bill was rescheduled to take place 15 days after the regular monthly bill was produced and, therefore, after payment of that bill would normally be taken.

A3.3 However, if a customer’s monthly bill payment was scheduled to fall on a Saturday, because of O2’s “*weekend payment rules*”, it would not take the payment until the following Monday. This meant that when the termination bill was generated the day after the scheduled payment date i.e. the Sunday, the monthly bill payment had not yet been taken and was again included on the termination bill despite payment already being scheduled. Consequently, the customer ended up paying the same amount twice.

Figure 1: Example of Scenario 1

Day	Date	Action	Invoice	Payment	Owed by customer
Friday	1 January	Customer terminated their account. Because of a regular monthly bill being due for generation within 14 days of this termination, the termination bill was scheduled to be generated 14 days + 1 day after the regular monthly bill was produced.			
Saturday	2 January	Regular monthly bill generated. Payment scheduled for 14 days later on Saturday 16 January.	£20		£20
Saturday	16 January	Payment of regular monthly bill <u>not</u> taken due to weekend			

		payment rules. Payment rescheduled for Monday 18 January.			
Sunday	17 January	Termination bill generated and includes: <ul style="list-style-type: none"> <li>Charges related to termination - £5</li> <li>Outstanding monthly charges (delayed to Monday 18 January due to weekend payment rules) - £20</li> </ul> Payment for termination bill scheduled for 14 days later on 31 January.	£25		£25
Monday	18 January	Payment for regular monthly bill taken.		£20	£5
Sunday	31 January	Payment for termination bill <u>not</u> taken due to weekend payment rules and rescheduled for Monday 1 February.			
Monday	1 February	Payment for termination bill taken.		£25	-£20

A3.4 O2 has confirmed that this scenario occurred from at least 8 April 2012 until 24 February 2019.<sup>98</sup>

**Scenario 2 – Terminating service the same weekend that the regular monthly bill was produced on a Saturday (21 April 2012 – 2 February 2019)**

A3.5 Scenario 2 occurred when a customer’s monthly bill was produced on a Saturday and the customer terminated their service that same weekend. Whilst the termination bill would be generated 2 weekends later, because of O2’s “weekend payment rules”, payment for the customer’s monthly bill would not be taken until the following Monday. This meant that when the termination bill was generated, the monthly bill payment had not yet been taken and was included in the termination bill despite payment already being scheduled. Consequently, the customer ended up paying the same amount twice.

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<sup>98</sup> Question 1, Seventh Response.

Figure 2: Example of Scenario 2

Day	Date	Action	Invoice	Payment	Owed by customer
Saturday	2 January	Regular monthly bill generated. Payment scheduled for 14 days later on Saturday 16 January.	£20		£20
Sunday	3 January	Customer terminated their account. Termination bill scheduled to be generated 14 days later on Sunday 17 January.			
Saturday	16 January	Payment of regular monthly bill <u>not</u> taken due to weekend payment rules. Payment rescheduled for Monday 18 January.			
Sunday	17 January	Termination bill generated and includes: <ul style="list-style-type: none"> <li>Charges related to termination - £5</li> <li>Outstanding monthly charges (delayed to Monday 18 January due to weekend payment rules) - £20</li> </ul> Payment for termination bill scheduled for 14 days later on 31 January.	£25		£25
Monday	18 January	Payment for regular monthly bill taken		£20	£5
Sunday	31 January	Payment for termination bill <u>not</u> taken due to weekend payment rules and rescheduled for Monday 1 February.			
Monday	1 February	Payment for termination bill taken		£25	-£20

A3.6 O2 has confirmed that this scenario occurred from at least 21 April 2012<sup>99</sup> to 2 February 2019.<sup>100</sup>

**Scenario 3 – Agent amends date of termination bill production (5 December 2003 to 15 March 2019)**

A3.7 Scenario 3 occurred when O2’s agents changed the date of a pending termination bill so that it was generated between the date that a customer’s regular monthly bill<sup>101</sup> was produced and the date that payment of that monthly bill was taken. Due to an error, because payment for the regular monthly bill had not yet been taken when the termination bill was produced, this ‘outstanding’ amount was also included on the termination bill despite payment already being scheduled. Consequently, the customer ended up paying the same amount twice.

Figure 3: Example of Scenario 3 pre-2012

Date	Action	Invoice	Payment	Owed by customer
1 January	Regular monthly bill generated. Payment scheduled for 14 days later on 15 January.	£20		£20
7 January	Customer terminated their account. Termination bill automatically scheduled to be generated 14 days later on 22 January (after payment of the regular monthly bill was scheduled) but the agent brings this date forward to 14 January (before payment of the regular monthly bill is taken).			
14 January	Termination bill generated and includes: <ul style="list-style-type: none"> <li>Charges related to termination - £5</li> <li>Outstanding monthly charges (already scheduled for payment on 15 January) - £20</li> </ul> Payment for termination bill scheduled for 14 days later on 28 January.	£25		£25
15 January	Payment for regular monthly bill taken.		£20	£5
28 January	Payment for termination bill taken.		£25	-£20

<sup>99</sup> Question 1, Fourth Response.

<sup>100</sup> Question 2, Seventh Response.

<sup>101</sup> Referred to by O2 as the ‘periodic bill’.

A3.8 In April 2012,<sup>102</sup> O2 implemented a change to its system intended to fix a different scenario, Scenario 4 (see A3.12). Specifically, the billing system was changed so as to schedule production of the termination bill for the day after the monthly bill payment was due i.e. “the Periodic Bill date + delay days [the timeframe for scheduled payment (i.e. 14 days)] + 1”. However, despite this change, Scenario 3 remained ongoing.

Figure 4: Example of Scenario 3 post-April 2012

Date	Action	Invoice	Payment	Owed by customer
1 January	Customer terminated their account. Because a regular monthly bill was due for generation within 14 days of this termination, the termination bill was automatically scheduled to be generated 14 days + 1 day after the regular monthly bill was produced (after payment of the regular monthly bill was scheduled) but an agent brought this date forward to 8 January (before payment of the regular monthly bill was taken).			
2 January	Regular monthly bill generated. Payment scheduled for 14 days later on 16 January.	£20		£20
8 January	Termination bill generated and includes: <ul style="list-style-type: none"> <li>• Charges related to termination - £5</li> <li>• Outstanding monthly charges (already scheduled for payment on 16 January) - £20</li> </ul> Payment for termination bill scheduled for 14 days later on 22 January.	£25		£25
16 January	Payment for regular monthly bill taken.		£20	£5
22 January	Payment for termination bill taken.		£25	-£20

<sup>102</sup> Question 11(b)(iii), Annex 1, Second Response.

- A3.9 O2 has confirmed that, on 15 January 2019, the monthly record prior to the date the billing error was identified, 867 O2 agents had access to a system which allowed them to manually override the set billing date.<sup>103</sup>
- A3.10 O2 has confirmed that this scenario occurred from at least 5 December 2003 to 15 March 2019<sup>104</sup> when a fix was implemented (see 3.55 and 3.56 below).

**Scenario 4 – Terminating within 14 days of the next monthly bill (23 March 2006 - 18 April 2012)**

- A3.11 If a customer terminated their account within 14 days of their next regular monthly bill being generated, at the point the termination bill was produced (14 days after termination), payment for the regular monthly bill would not have yet been taken. An error meant that this ‘outstanding’ amount was also included on the termination bill despite payment already being scheduled. Consequently, the customer ended up paying the same amount twice. This scenario occurred regardless of the day that the regular monthly bill fell on.

Figure 5: Example of Scenario 4

Date	Action	Invoice	Payment	Owed by customer
1 January	Customer terminated their account. Termination bill scheduled to be generated 14 days later on 15 January.			
7 January	Regular monthly bill generated. Payment scheduled for 14 days later on 22 January.	£20		£20
15 January	Termination bill generated and includes: <ul style="list-style-type: none"> <li>Charges related to termination - £5</li> <li>Outstanding monthly charges (already scheduled for payment on 22 January) - £20</li> </ul> Payment for termination bill scheduled for 14 days later on 29 January.	£25		£25
22 January	Payment for regular monthly bill taken.		£20	£5
29 January	Payment for termination bill taken.		£25	-£20

<sup>103</sup> Question 3, Annex 2, Second Response.

<sup>104</sup> Question 3, Seventh Response.

- A3.12 On or before 14 November 2011,<sup>105</sup> O2 identified Scenario 4 and implemented a fix in April 2012.<sup>106</sup> This fix amended the billing system to *“ensure that the termination bill is produced after the payment for the periodic bill had been taken.”*<sup>107</sup> Specifically the billing system was changed so as to schedule production of the termination bill for the day after the monthly bill payment was due i.e. *“the Periodic Bill date + delay days [the timeframe for scheduled payment (i.e. 14 days)] + 1”*. At the time this fix was implemented, O2 was unaware of any of the other billing error scenarios.
- A3.13 O2 has confirmed that Scenario 4 occurred from at least 23 March 2006 - 18 April 2012.<sup>108</sup>

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<sup>105</sup> Annex 36, Second Response.

<sup>106</sup> Question 11(b)(iii), Annex 1, Second Response.

<sup>107</sup> Question 4(f), Annex 2, Second Response.

<sup>108</sup> Question 2(a), Fourth Response.

## A4. Example scenario based on O2's response to Question 2 of the First Notice

A4.1 Figure 6 sets out how the example scenario detailed in O2's First Response to Question 2 of the First Notice would not have resulted in the billing error occurring.

Figure 6: The example scenario

Day	Date	Action	Invoice	Payment	Owed by customer
Saturday	1 January	The customer's regular monthly bill is generated. Payment scheduled for 14 days later on 15 January.	£20		£20
Saturday	8 January	Customer terminated their account. Termination bill automatically scheduled to be generated 14 days later on 22 January.			
Saturday	15 January	Payment of regular monthly bill <u>not</u> taken due to weekend payment rules. Payment rescheduled for Monday 17 January.			
Monday	17 January	Payment taken for regular monthly bill		£20	£0
Saturday	22 January	Termination bill generated and includes: <ul style="list-style-type: none"> <li>Charges related to termination - £5</li> </ul> Payment for termination bill scheduled for 14 days later on 5 February.	£5		£5
Saturday	5 February	Payment of termination bill <u>not</u> taken due to weekend payment rules. Payment rescheduled for Monday 7 February.			

Monday	7 February	Payment for termination bill taken.		£5	£0
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