



Confirmation Decision under section 96C of the Communications Act 2003 relating to a contravention of General Condition 24

Confirmation Decision issued to Supatel Limited
("Supatel") by the Office of Communications ("Ofcom")

Non-confidential version

Issue date: 21 June 2013

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Section 1

Confirmation Decision to Supatel Limited of a contravention of General Condition 24 under section 96C of the Communications Act 2003

Section 96C of the Communications Act 2003

- 1.1 Section 96C of the Communications Act 2003 (the “Act”) gives the Office of Communications (“Ofcom”) the power to issue a decision (a “Confirmation Decision”) confirming the imposition of requirements on a person where: that person has been given a notification under section 96A of the Act; Ofcom have allowed that person an opportunity to make representations about the matters notified; and the period allowed for the making of representations has expired. Ofcom may not give a Confirmation Decision to a person unless, having considered any representations, we are satisfied that the person has, in one or more of the respects notified, been in contravention of a condition specified in the notification under section 96A.
- 1.2 A Confirmation Decision:
- a) must be given to the person without delay;
 - b) must include reasons for the decision;
 - c) may require immediate action by the person to comply with requirements of a kind mentioned in section 96A(2)(d) of the Act¹, or may specify a period within which the person must comply with those requirements; and
 - d) may require the person to pay-
 - i) the penalty specified in the notification issued under section 96A of the Act, or
 - ii) such lesser penalty as Ofcom consider appropriate in light of the person's representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention, and may specify the period within which the penalty is to be paid.

General Condition 24

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

¹ Such requirements include those steps that Ofcom thinks should be taken by the person in order to comply with a General Condition, or to remedy the consequences of a contravention of a General Condition.

- 1.4 The Schedule to a Notification issued by the Director General of Telecommunications on 22 July 2003 under section 48(1) of the Act, which took effect from 25 July 2003, sets out the General Conditions of Entitlement (the “General Conditions” or “GCs”) which apply to all Communications Providers (“CPs”) defined in each GC. The GCs have, from time to time, been amended.²
- 1.5 Ofcom introduced new sales and marketing rules, as well as rules concerning the use of Cancel Other³, in a new General Condition 24 (“GC24”)⁴ which came into force on 18 March 2010 (see Annex 1 for the full text of GC24).
- 1.6 GC24 applies to all CPs who sell Fixed-Line Telecommunications Services to Domestic and Small Business Customers⁵ (“Customers”) (see GC24.1).
- 1.7 GC24.3 requires that:

“When selling or marketing Fixed-Line Telecommunications Services, the Gaining Communications Provider must not:

- a) engage in dishonest, misleading or deceptive conduct;*
- b) engage in aggressive conduct;*
- c) contact the Customer in an inappropriate manner; or*
- d) engage in Slamming⁶.”*

² A consolidated version of the General Conditions as at 22 November 2012 is located on the Ofcom website at: <http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/general-conditions22nov12.pdf>

³ Cancel Other is a consumer protection mechanism which allows the Customer’s existing CP to cancel a transfer order placed by another CP for reasons specified in GC24. It was designed to ensure Customers are not transferred between CPs (“switched”), without their express knowledge and/or consent. For the purpose of this Notification, we have only taken account of where the Losing CP has placed Cancel Others where the customer has alleged slamming.

⁴ <http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/narrowband/statement.pdf>

⁵ “Domestic and Small Business Customer” has the meaning set out in section 52(6) of the Act: *“In this section “domestic and small business customer”, in relation to a public communications provider, means a customer of that provider who is neither –*

(a) himself a communications provider; nor

(b) a person who is such a customer in respect of an undertaking carried on by him for which more than ten individuals work (whether as employees or volunteers or otherwise)”.

⁶ “Slamming” is defined in GC24.19(m) and means where a request for CPS, WLR and/or LLU has been made without the Customer’s express knowledge and/or consent; that is in the following circumstances:

(i) where the Customer has never been contacted by the Gaining Communications Provider;

(ii) where the Customer has been contacted by the Gaining Communications Provider, but has not given the Gaining Communications Provider authorisation to transfer some or all of their telephone calls and/or line rental to the Gaining Communications Provider;

(iii) where the Customer has agreed to purchase a product or service from the Gaining Communications Provider and the Gaining Communications Provider has submitted a request for a different product or service which the Customer has not agreed to purchase; or

(iv) where the Customer has agreed to transfer some or all of their telephone calls and/or line rental to the Gaining Communications Provider having understood, as a result of a deliberate attempt by the Gaining Communications Provider to mislead, that they are making an agreement with a different Communications Provider;

Subject of this Confirmation Decision

- 1.8 This Confirmation Decision is addressed to Supatel Limited (“Supatel”), a company registered in Cyprus, whose registered company number is HE267725. Supatel trades in the UK under the names “Supanet” and “timetalk”⁷. It operates from its principal office in the UK at Totalcare Support Centre, Time Technology Park, Blackburn Road, Burnley, Lancashire, BB12 7TW, and provides Fixed-Line Telecommunications Services.⁸ The subject of this Confirmation Decision is Supatel’s activities with respect to timetalk.

Notification given by Ofcom under section 96A

- 1.9 On 27 March 2013 Ofcom issued a Notification under section 96A of the Act (“the Notification”) to Supatel, stating that Ofcom had reasonable grounds for believing that, from 1 October 2012 to 30 November 2012 (“the Relevant Period”), Supatel had contravened GC24, and specifically the provision relating to slamming under GC24.3(d), by repeatedly placing transfer orders for Customers’ Fixed-Line Telecommunications Services without those Customers’ express knowledge that such an order was being placed and/or having given their consent to that order.
- 1.10 The Notification set out the steps that Ofcom thought should be taken by Supatel to comply with the requirements of GC24.3(d) and to remedy the consequences of the contravention.
- 1.11 The Notification also notified Supatel that Ofcom were minded to impose a penalty of £65,000 on Supatel in respect of the contraventions.
- 1.12 Supatel was given until 5pm on 25 April 2013 to make written representations to Ofcom about the matters notified. Supatel also had the opportunity to make oral representations.
- 1.13 Supatel provided written representations on 25 April 2013, but chose not to make any oral representations.

Confirmation Decision

- 1.14 Having served the Notification on Supatel, Supatel has now had the opportunity to make representations to us. The period allowed for making representations expired on 25 April 2013. Ofcom has now carefully considered Supatel’s representations and is satisfied that, during the Relevant Period, Supatel contravened GC24, specifically GC24.3(d), in the manner and to the extent described in the Notification (and as reiterated in this Confirmation Decision). Therefore, Ofcom has decided to confirm the imposition of requirements on Supatel in accordance with the Notification. The reasons for Ofcom’s determination are set out in the following Explanatory Statement.

⁷ Referred to throughout this Confirmation Decision in lower case to reflect the branding predominantly used on its website.

⁸ Within the meaning of GC24.1 and GC24.19(h).

The Requirements

- 1.15 Whilst taking full account of the steps it has taken in these regards, the steps which Ofcom confirms must be taken by Supatel to comply with the requirements of GC24, and GC24.3(d) in particular, are:
- i) to have in place processes to ensure that Supatel, trading as timetalk, is only placing transfer orders where the Customer has express knowledge and/or has given consent to a transfer order being placed;
 - ii) to fully document policies and procedures in relation to ensuring compliance with GC24, including an effective quality assurance process to monitor the compliance by Supatel's, trading as timetalk, agents (both its own staff and those it contracts with) who are placing transfer orders for Fixed-Line Telecommunications Services; and
 - iii) to provide appropriate training to all Supatel's, trading as timetalk, agents (both its own staff and those it contracts with) who are engaged in placing transfer orders for all Supatel's, trading as timetalk, Fixed-Line Telecommunications Services in order to ensure compliance with GC24.
- 1.16 Again taking full account of the steps it has taken in these regards, the steps which Ofcom confirms must be taken by Supatel to remedy the consequences arising from its contravention of GC24.3(d) include but are not limited to:
- allowing the 83 Customers to whom this contravention relates, to cease their contract with Supatel, trading as timetalk, regardless of the length of contract served, with no requirement to pay an Early Termination Charge ("ETC") or disconnection fee and no requirement to pay any charges for services other than those the Customer has used. Where the Customer chooses to return to their previous CP, this would include compensation for any charges the Customer may incur in the process of returning to their previous CP; and
 - where these 83 Customers who may otherwise have fallen into the above category but who have already returned to their previous CP, and have incurred charges in doing so, Supatel, trading as timetalk, must compensate them for those charges.

Penalty

- 1.17 Ofcom has determined that a penalty of £60,000 be imposed on Supatel in respect of its contravention of GC24.3(d) during the Relevant Period.

Next Steps

- 1.18 Supatel has until 5.00pm on Thursday 4 July 2013 to comply with the requirements imposed by this Confirmation Decision.
- 1.19 Supatel has until 5.00pm on Monday 22 July 2013 to pay Ofcom the imposed penalty of £60,000.

Interpretation

- 1.20 Words or expressions used in this Confirmation Decision have the same meaning as in the GCs or the Act, unless otherwise stated.

Nuala Cosgrove (Legal Director) and

Tony Close (Director of Standards) as decision makers for Ofcom

21 June 2013

Section 2

Executive Summary

- 2.1 The remainder of this document is an Explanatory Statement in support of the Confirmation Decision Ofcom gives to Supatel, under section 96C of the Act, in respect of its contravention of GC24.3(d). This Confirmation Decision applies to Supatel Limited. For ease of reference, where we refer to timetalk, we are referring to Supatel trading under its brand “timetalk”.
- 2.2 Ofcom introduced new sales and marketing rules in a new GC, GC24,⁹ set under section 45 of the Act, which came into force on 18 March 2010. These rules explicitly prohibit all companies from engaging in dishonest, misleading or deceptive conduct, and/or slamming, and oblige CPs to ensure consumers fully understand and consent to a contract before it is agreed. GC24 also sets out the information that must be made available at the point of sale and during the Transfer Period¹⁰ and, the right to terminate a contract without charge before the completion of the Transfer Period.
- 2.3 On 18 March 2010, Ofcom opened an own initiative investigation (the “Programme”) to monitor industry-wide compliance with GC24¹¹.
- 2.4 Following an increase in complaints to the Ofcom Consumer Contact Team (“CCT”) in August 2012, alleging contraventions of GC24 by timetalk, we decided to monitor closely the conduct of timetalk through the Ofcom CCT data. During this initial monitoring period we noted that complaints increased significantly in October 2012 and November 2012 and therefore decided to open an investigation into Supatel’s compliance with GC24 (the “Investigation”). On 13 November 2012 we informed Supatel of our decision and issued it with an information request under section 135 of the Act on 3 December 2012. We issued Supatel with a further information request on 11 February 2013.
- 2.5 On 31 January 2013 Ofcom sent an information request under section 135 to British Telecommunications Plc’s (“BT”) “Openreach” division (‘Openreach’), requesting information relating to transfer orders that had been placed by timetalk, including the Calling Line Identity Numbers (“CLIs”) relating to the specific complaints received by Ofcom’s CCT.
- 2.6 Between 14 February 2013 and 22 February 2013, Ofcom also sent questionnaires to a selection of individuals who had complained specifically about having been slammed by timetalk.¹² The purpose of these questionnaires was to elicit further detail from those complainants as to the circumstances giving rise to their complaints. The evidence obtained from the responses to those questionnaires is discussed in section 6.

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http://stakeholders.ofcom.org.uk/binaries/consultations/protecting_consumers_misselling/statement/statement.pdf

¹⁰ As defined in GC24.19 (n), meaning the period of 10 Working Days from before a customer’s order can be activated.

¹¹ See http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01045/

¹² Paragraph 4.24 sets out our process for selecting individuals to complete questionnaires.

- 2.7 In light of the information gathered by Ofcom, including Ofcom's CCT complaints data and further evidence provided by Customers through the questionnaires, together with the responses to the information requests sent to Supatel and Openreach, Ofcom had reasonable grounds to believe that Supatel had contravened GC24.3(d) of the GCs.
- 2.8 Specifically, Ofcom had reasonable grounds for believing that during the Relevant Period, Supatel had contravened GC 24.3(d) in respect of 83 CLIs¹³ by repeatedly placing transfer orders¹⁴ for Customers' Fixed-Line Telecommunications Services where that Customer had either:
- i) never been contacted by timetalk¹⁵; or
 - ii) been contacted by timetalk, but had no express knowledge that such an order was being placed and/or had not given consent to timetalk to transfer their Fixed-Line Telecommunications Services to timetalk¹⁶.
- 2.9 It was on this basis that, on 27 March 2013, Ofcom issued Supatel with the Notification. The steps which Ofcom considered should be taken by Supatel to comply with the requirements of GC24, and GC24.3(d) in particular, were:
- i) to have in place processes to ensure that Supatel, trading as timetalk, is only placing transfer orders where the Customer has express knowledge and/or has given consent to a transfer order being placed;
 - ii) to fully document policies and procedures in relation to ensuring compliance with GC24, including an effective quality assurance process to monitor the compliance by Supatel's, trading as timetalk, agents (both its own staff and those it contracts with) who are placing transfer orders for Fixed-Line Telecommunications Services; and
 - iii) to provide appropriate training to all Supatel's, trading as timetalk, agents (both its own staff and those it contracts with) who are engaged in placing transfer orders for all Supatel's, trading as timetalk, Fixed-Line Telecommunications Services in order to ensure compliance with GC24.
- 2.10 The steps Ofcom considered Supatel should take to remedy the consequences arising from its contravention of GC24.3(d) included, but were not limited to:
- allowing Customers who believe they were slammed by Supatel, trading as timetalk, to cease their contract with Supatel, trading as timetalk, regardless of the length of contract served, with no requirement to pay an Early Termination Charge ("ETC") or disconnection fee and no requirement to pay any charges for services other than those the Customer has used. Where the Customer chooses to return to their previous CP, this would include compensation for any charges the Customer may incur in the process of returning to their previous CP; and

¹³ "CLIs" means "Caller Line Identification" which is effectively the Customer's telephone number.

¹⁴ A "repeat transfer order" is where a subsequent transfer order has been placed by timetalk against the same line, despite the previous transfer order having been cancelled.

¹⁵ As per GC24.19(m)(i).

¹⁶ As per GC24.19(m)(ii).

- where Customers who may otherwise have fallen into the above category but who have already returned to their previous CP, and have incurred charges in doing so, Supatel, trading as timetalk, should compensate them for those charges.
- 2.11 Supatel had until 25 April 2013 to make written representations in relation to the matters set out in the Notification. Ofcom received Supatel's written representations on that date.
- 2.12 Ofcom has carefully considered Supatel's representations (both those made to us on 25 April 2013 and in an earlier letter dated 24 January 2013). We now confirm the decision set out in the Notification on the bases that:
- i) Ofcom is satisfied that during the Relevant Period, Supatel contravened GC24.3(d) as set out in paragraph 2.8 above;
 - ii) in order to comply with the requirements of GC24.3(d) Supatel must meet the requirements set out in paragraph 2.9 above; and
 - iii) in order to remedy the consequences of the contravention, Supatel must take the steps set out in paragraph 2.10 above.
- 2.13 Ofcom also confirms its decision, in all the circumstances, to impose on Supatel a penalty in the sum of £60,000.
- 2.14 Ofcom's view is that the penalty of £60,000 is appropriate and proportionate to the contravention in respect of which it is imposed. In taking that view Ofcom has had regard to Ofcom's CCT complaints data and further evidence provided by Customers through the questionnaires, the response to the information requests sent to Supatel and Openreach, Supatel's representations, the steps Supatel has taken to comply with GC24 and to remedy the consequences of its contravention in relation to the 83 CLIs identified, and Ofcom's published Penalty Guidelines.
- 2.15 Supatel has until 5.00pm on Thursday 4 July 2013 to comply with the requirements of this Confirmation Decision.
- 2.16 Supatel has until 5.00pm on Monday 22 July 2013 to pay Ofcom the imposed penalty of £60,000.

Section 3

Background

The statutory framework

- 3.1 Ofcom is the national regulatory authority for electronic communications networks and services. We have a number of duties and functions under the Act.

Ofcom's duties and functions

- 3.2 Ofcom's principal duty when performing our functions is set out in section 3(1) of the Act:

- “(1) It shall be the principal duty of OFCOM, in carrying out their functions—*
- (a) to further the interests of citizens in relation to communications matters; and*
 - (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.”*

- 3.3 Section 3(3) of the Act states that:

- “(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—*
- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and*
 - (b) any other principles appearing to OFCOM to represent the best regulatory practice.”*

- 3.4 With section 3(3) in mind, Ofcom has published a statement of regulatory principles.¹⁷ These include that Ofcom will:

- a) regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives;
- b) operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required;
- c) strive to ensure our interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome; and
- d) always seek the least intrusive regulatory mechanisms to achieve our policy objectives.

- 3.5 Ofcom's functions, for present purposes, in performing which we must fulfil the duties above, and the powers we have to perform those functions, are as follows.

¹⁷ <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>

- 3.6 Under section 45 of the Act, Ofcom has the power to set (and the function of setting) GCs binding the persons to whom they are applied in accordance with section 46. Under section 46, a GC may be applied generally to every person providing an electronic communications network or electronic communications service, or to every person providing such a network or service of a particular description specified in the GC. GCs can only contain provisions authorised or required by one or more of sections 51, 52, 57, 58 or 64 of the Act.
- 3.7 The Schedule to a Notification issued by the Director General of Telecommunications on 22 July 2003 under section 48(1) of the Act, which took effect from 25 July 2003, sets out the General Conditions of Entitlement which apply to all CPs defined in each GC. The GCs have, from time to time, been amended.¹⁸
- 3.8 Ofcom introduced new sales and marketing rules in a new GC, GC24,¹⁹ made under section 45 of the Act, which came into force on 18 March 2010. These rules explicitly prohibit all companies from engaging in dishonest, misleading or deceptive conduct, and slamming, and oblige CPs to ensure consumers fully understand and consent to a contract before it is agreed. GC24 also sets out the information that must be made available at the point of sale and during the Transfer Period and, the right to terminate a contract without charge before the completion of the defined Transfer Period.
- 3.9 Ofcom also has the following functions and powers relating to the enforcement of GCs under the Act.
- 3.10 Under section 96A where Ofcom determines that there are reasonable grounds for believing that a person is contravening, or has contravened, a condition (other than an SMP²⁰ apparatus condition) set under section 45, Ofcom may give that person a Notification. Section 96A(2) states:

“A notification under this section is one which-

- (a) sets out the determination made by Ofcom;*
- (b) specifies the condition and contravention in respect of which that determination has been made;*
- (c) specifies the period during which the person notified has an opportunity to make representations;*
- (d) specifies the steps that Ofcom think should be taken by the person in order to-*
 - (i) comply with the condition;*
 - (ii) remedy the consequences of the contravention;*

¹⁸ A consolidated version of the GCs as at 22 November 2012 is located on the Ofcom website at <http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/general-conditions22nov12.pdf>

¹⁹ http://stakeholders.ofcom.org.uk/binaries/consultations/protecting_consumers_misselling/statement/statement.pdf

²⁰ “Significant Market Power”.

- (e) *specifies any penalty which Ofcom are minded to impose in accordance with section 96B;*
 - (f) *where the contravention is serious, specifies any direction which Ofcom are minded to give under section 100; and*
 - (g) *where the contravention relates to a condition set under sections 87 to 91, specifies any direction which Ofcom are minded to give under section 11A.”*
- 3.11 Section 96A was inserted into the Act by paragraph 55 of the first Schedule to the Electronic Communications and Wireless Telegraphy Regulations 2011 (the “2011 Regulations”).²¹ The 2011 Regulations came into force on 26 May 2011 and included amendments to the Act for the purpose of implementing Directives 2009/136/EC²² and 2009/140/EC.²³
- 3.12 The process set out in section 96A applies in respect of any contravention occurring on or after 26 May 2011 and, in relation to a continuing contravention, in respect of the period of contravention from 26 May 2011 onwards.
- 3.13 As set out above, where the Notification under section 96A specifies any penalty which Ofcom are minded to impose, the penalty must be in accordance with section 96B.
- 3.14 Section 96B states:
- “(1) This section applies where a person is given a notification under section 96A which specifies a proposed penalty.*
- (2) Where the notification relates to more than one contravention, a separate penalty may be specified in respect of each contravention.*
- (3) Where the notification relates to a continuing contravention, no more than one penalty may be specified in respect of the period of contravention specified in the notification.*
- (4) But, in relation to a continuing contravention, a penalty may be specified in respect of each day on which the contravention continues after—*
- (a) the giving of a confirmation decision under section 96C(4)(c) which requires immediate action; or*
 - (b) the expiry of any period specified in the confirmation decision for complying with a requirement so specified.*
- (5) The amount of a penalty under subsection (4) is to be such amount not exceeding £20,000 per day as OFCOM determine to be—*
- (a) appropriate; and*
 - (b) proportionate to the contravention in respect of which it is imposed.”*

²¹ <http://www.legislation.gov.uk/ukxi/2011/1210/made>

²² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:En:PDF>

²³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:0069:EN:PDF>

- 3.15 Section 97 is concerned with the amount of the penalty notified under section 96A (other than a penalty falling within 96B(4)).
- 3.16 Section 97(1) says:
- “The amount of a penalty imposed under section 96 or notified under section 96A (other than a penalty falling within section 96B(4)) is to be such amount not exceeding ten per cent of the turnover of the person's relevant business for the relevant period as OFCOM determine to be—*
- (a) appropriate; and*
 - (b) proportionate to the contravention in respect of which it is imposed.”*
- 3.17 Section 97(3) states the turnover of a person's relevant business for a period shall be calculated in accordance with any rules set out in an order made by the Secretary of State. It also says that such an order may provide for determining what is to be treated as the network, service, facility or business by reference to which the calculation of that turnover falls to be made.
- 3.18 Section 97(5) states that, as far as relevant here, that “relevant business” means (subject to the provisions of an order under section 97(3)) *“so much of any business carried on by the person that consists in any one or more of the following:*
- a) the provision of an electronic communications network;*
 - b) the provision of an electronic communications service;*
 - c) the making available of associated facilities;*
 - d) the supply of directories for use in connection with the use of such a network or service; and*
 - e) the making available of directory enquiry facilities for use for purposes connected with the use of such a network or service.”*
- 3.19 Section 97(5) also states that, for present purposes, the “relevant period”, in relation to a contravention by a person of a condition set under section 45, means *“...the period of one year ending on 31 March before the notification of the contravention was given under section 96A”*.
- 3.20 The Electronic Communications (Networks and Services) (Penalties) (Rules for Calculation of Turnover) Order 2003²⁴ sets out rules governing the way in which the turnover of a notified CP of electronic communications networks, services, facilities, or apparatus should be calculated for the purposes of section 97. Relevant paragraphs of the Schedule to that Order state:
- “1. The turnover of a notified provider shall be calculated in conformity with accounting practices and principles which are generally accepted in the United Kingdom.*
 - 2. The turnover of a notified provider shall be limited to the amounts derived by that provider from the relevant business after deduction*

²⁴ See <http://www.legislation.gov.uk/ukxi/2003/2712/contents/made>

of sales rebates, value added tax and other taxes directly related to turnover.

3. *When a notified provider's relevant business consists of two or more undertakings that each prepare accounts then the turnover shall be calculated by adding together the turnover of each, save that no account shall be taken of any turnover resulting from the supply of goods or the provision of services between them."*

- 3.21 Section 392(1) of the Act, meanwhile, requires Ofcom to publish a statement containing the guidelines we propose to follow in determining the amount of penalties imposed by us under provisions in the Act (or any other enactment apart from the Competition Act 1998). Section 392(6) says Ofcom has a duty, in determining the amount of any penalty to be imposed by us under the Act (or any other enactment apart from the Competition Act 1998) to have regard to the guidelines contained in the statement for the time being in force.
- 3.22 Section 96C of the Act confers on Ofcom the power to issue a decision confirming the imposition of requirements on a person where: that person has been given a notification under section 96A of the Act; Ofcom has allowed that person an opportunity to make representations about the matters notified; and the period allowed for the making of representations has expired.
- 3.23 Ofcom may not give a confirmation decision to a person unless, after considering any representations, we are satisfied that the person has, in one or more of the respects notified, been in contravention of a condition specified in the notification under section 96A.
- 3.24 Section 96C(4) states:
- "A confirmation decision:*
- (a) must be given to the person without delay;*
 - (b) must include reasons for the decision;*
 - (c) may require immediate action by the person to comply with requirements of a kind mentioned in section 96A(2)(d), or may specify a period within which the person must comply with those requirements; and*
 - (d) may require the person to pay-*
 - i) the penalty specified in the notification under section 96A, or*
 - ii) such other 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."*
- 3.25 It is the duty of the person to whom a confirmation decision is issued to comply with the requirements imposed by that decision. Ofcom may enforce those requirements in civil proceedings (for example, by way of an injunction).

- 3.26 As with section 96A, section 96C was inserted into the Act by paragraph 55 of the first Schedule to the 2011 Regulations and became effective in relation to contraventions occurring on or after 26 May 2011.

Ofcom's penalty guidelines

- 3.27 On 13 June 2011, Ofcom published revised guidelines under section 392 (the "Penalty Guidelines").²⁵
- 3.28 The Penalty Guidelines will be in force and applicable at the time Ofcom decides whether to impose a penalty on Supatel, and determines its amount, in this matter. Accordingly, Ofcom has had regard to them in taking the views in this document.
- 3.29 The Penalty Guidelines provide that:
- "Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement."*
- 3.30 The Penalty Guidelines also set out examples of potentially relevant factors in the determination of a penalty, such as:
- a) the degree of harm, actual or potential, caused by the contravention;
 - b) the duration of the contravention;
 - c) any gain (financial or otherwise) made as a result of the contravention;
 - d) any steps taken for remedying the consequences of the contravention;
 - e) whether the regulated body in breach has a history of contraventions;
 - f) whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention;
 - g) the extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, it was occurring or would occur;
 - h) whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it; and
 - i) the extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body.
- 3.31 The Penalty Guidelines also say that Ofcom will have regard to precedents set by previous cases, and to the need for transparency in applying our penalty guidelines, particularly as regards the weighting of the factors considered in taking our preliminary view and final decision-making process. They also say Ofcom may

²⁵ Also available at <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>

increase a penalty where the regulated body fails to comply fully with Ofcom's Investigation.

General Condition 24

3.32 Following the consultation '*Protecting Consumers from Mis-selling of Fixed-Line Telecommunications Services*', Ofcom published a statement on 18 December 2009. This introduced new sales and marketing rules along with rules concerning Customers' termination rights. These rules were included in the new GC24 which came into force on 18 March 2010. GC24 applies to all CPs who sell Fixed-Line Telecommunications Services to Customers. Under GC24, CPs are prohibited from mis-selling Fixed-Line Telecommunications Services including (amongst other things) slamming Customers, and are obliged to ensure Customers fully understand and consent to a contract before it is agreed. GC24 also provides for the right to terminate a transfer from one CP to another within the defined Transfer Period.

3.33 GC24.3 is the focus of this Confirmation Decision. It requires that:

"When selling or marketing Fixed-Line Telecommunications Services, the Gaining Communications Provider must not:

- a) engage in dishonest, misleading or deceptive conduct;*
- b) engage in aggressive conduct;*
- c) contact the Customer in an inappropriate manner; or*
- d) engage in Slamming."*

3.34 "Slamming" is defined in GC24.19(m). It means where a request for CPS, WLR and/or LLU has been made without the Customer's express knowledge and/or consent. That is, in the following circumstances:

- (i) where the Customer has never been contacted by the Gaining Communications Provider;*
- (ii) where the Customer has been contacted by the Gaining Communications Provider, but has not given the Gaining Communications Provider authorisation to transfer some or all of their telephone calls and/or line rental to the Gaining Communications Provider;*
- (iii) where the Customer has agreed to purchase a product or service from the Gaining Communications Provider and the Gaining Communications Provider has submitted a request for a different product or service which the Customer has not agreed to purchase; or*
- (iv) where the Customer has agreed to transfer some or all of their telephone calls and/or line rental to the Gaining Communications Provider having understood, as a result of a deliberate attempt by the Gaining Communications Provider to mislead, that they are making an agreement with a different Communications Provider.*

3.35 Of the various forms of slamming identified above, those set out in paragraphs 3.34(i) and (ii) are the most relevant for the purposes of this Confirmation Decision.

The Programme

- 3.36 On 18 March 2010, Ofcom opened the Programme to monitor industry-wide compliance with GC24. Under the Programme, Ofcom actively monitors CPs' compliance with the rules through complaints made to Ofcom by industry and members of the public. Ofcom also gathers monthly industry data from Openreach²⁶ to support its monitoring activities. Analysing this data over time enables Ofcom to determine benchmarks in relation to mis-selling, which then provides us with a basis for targeting regulatory intervention against those CPs whose performance is outside normal industry parameters in any given month. Ofcom opens individual investigations and/or takes direct enforcement action under this Programme where required.²⁷
- 3.37 Tackling mis-selling of Fixed-Line Telecommunications Services (including slamming) remains an important Ofcom priority. Mis-selling works against the interests of consumers, both directly through harm and distress as well as undermining confidence in the development of competition and in the industry as a whole.

²⁶ Openreach's role and responsibilities is explained below at paragraph 4.20.

²⁷ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01045/

Section 4

The Investigation and the section 96A Notification

- 4.1 On 13 November 2012, Ofcom opened the Investigation into Supatel to examine its compliance with GC24, and specifically to determine Supatel's compliance with the mis-selling prohibition (GC24.3).²⁸
- 4.2 The decision to conduct an Investigation into Supatel was primarily driven by complaints received by Ofcom's CCT from consumers who alleged that they had been mis-sold Fixed-Line Telecommunications Services by timetalk.
- 4.3 Throughout this Confirmation Decision we make references to various time periods. The following table summarises key dates in the Investigation, including the Relevant Period (1 October 2012 – 30 November 2012) in respect of which Ofcom makes the determination which is the subject of this Confirmation Decision:

Figure 4.1: Time periods relevant to the case

Key dates	Description of period
13 November 2012	The date the Investigation was opened.
1 July 2012 to the date of the Notification (27 March 2013)	The period the Investigation covered.
1 August 2012 to 14 November 2012	The period during which Ofcom received 95 complaints about timetalk and for which we specifically requested the associated sales records in the First Information Request (see below)
1 August 2012 to 29 January 2013	The period during which Ofcom received 195 complaints about timetalk and for which we specifically requested the associated transfer information in the Openreach Information Request (below)
1 October 2012 to 30 November 2012	The "Relevant Period", being the period during which we have determined that the contravention of GC24.3(d) occurred. In particular, we have determined that Supatel placed repeated transfer orders for 83 Customers during this period. These 83 corroborated complaints represented 2.39% of transfer orders placed during this period.
27 March 2013	The date the Notification was issued to Supatel.
Other relevant dates	Description of period
1 April 2012 to 31 January 2013	The period for which Ofcom requested information in the Openreach Information Request more generally, in relation to the volume of transfer orders, Cancel Others, and Cancel Owns pertaining to timetalk. NB. The reason why we asked for information from April 2012 is explained at footnote 37 below.
1 July 2012 to 3 December 2012	The period for which Ofcom requested more general information from Supatel in the First Information Request and which is set out at paragraph 4.12 below.
1 July 2012 to 29 January 2013	The period during which we found evidence suggesting that Supatel had placed repeated transfer orders for 87 Customers, from which we subsequently focused on 83 cases in the Relevant Period.

²⁸ The Investigation was also originally opened to consider the information that timetalk provided its Customers at the point of sale (GC24.6). However, the scope was further refined as the Investigation progressed.

- 4.4 The Investigation covered the period 1 July 2012²⁹ to the date of the Notification. As set out in paragraph 1.9, the activities to which this Confirmation Decision relates occurred during the Relevant Period. The Relevant Period has been selected because, during the course of this Investigation, our analysis of the evidence obtained showed that the contravention of GC24.3(d) occurred during the months of October 2012 and November 2012. Specifically, we found that timetalk had repeatedly placed transfer orders for Customers' line without their express knowledge and/or consent during this period.
- 4.5 Supatel is a Limited Company registered in Cyprus and was incorporated on 19 May 2010. In late 2010, Supatel acquired the customer base of Supanet who predominantly provided internet services but also provided Fixed-Line Telecommunications Services. In or about March 2012, Supatel developed a range of new Fixed-Line Telecommunications Services and due to the incompatibility of these packages with Supanet's existing offerings, it decided to develop a further brand, 'timetalk', for the purpose of marketing and selling these new offerings. For the purposes of this Confirmation Decision (and noting what Supatel said as to this in its representations), Supatel's principal office in the UK is at Totalcare Support Centre, Time Technology Park, Blackburn Road, Burnley, Lancashire, BB12 7TW. It provides Fixed-Line Telecommunications Services to Customers in the UK.
- 4.6 According to timetalk's website³⁰, timetalk offers fixed telephony and internet services.

Scoping the Investigation

- 4.7 During the period of 1 August 2012 to 29 January 2013, Ofcom received 195 complaints from consumers, where they had provided permission for Ofcom to share their details, alleging a range of mis-selling and slamming activities by timetalk³¹. From Ofcom's analysis of the complaints, it appeared to Ofcom that allegations had been made against timetalk that it had continued to repeatedly place transfer orders for Customers *after* those Customers had decided to cancel their initial (or previous) transfer order. Ofcom's CCT complaints indicated that these repeated transfer orders were placed without those Customers' express knowledge and and/or consent to the placing of those orders, as required by GC24.3(d). In Ofcom's view, the alleged conduct was (or would, if proven, have been) serious in terms of causing detriment to consumers. For this reason, Ofcom decided to focus this Investigation on determining whether or not there were reasonable grounds to believe that Supatel was engaging in slamming by repeatedly placing transfer orders for Customers' lines without their express knowledge and/or consent, thereby contravening GC24.3(d).
- 4.8 [§<].

²⁹ Ofcom's CCT started receiving complaints from consumers in August 2012 alleging they had been mis-sold Fixed-Line Telecommunications Services. We considered that these complaints likely stemmed from conduct that occurred in July 2012, therefore it was necessary to consider July as the starting point of the Investigation.

³⁰ <http://www.TimeTalk.co.uk/>

³¹ The total volume of complaints against timetalk during this period was actually 217.

Information gathering

- 4.9 As part of the Investigation, Ofcom issued notices under section 135 of the Act to Supatel and Openreach, requesting information to assist Ofcom to determine Supatel's compliance with GC24.

First Information Request to Supatel

- 4.10 On 3 December 2012, Ofcom issued a notice under section 135 of the Act to Supatel (the "First Information Request") requiring it to provide specified information by 21 December 2012. The First Information Request is attached at Annex 2.
- 4.11 Following receipt of the First Information Request, Supatel requested an extension to the deadline for its response. Ofcom considered this request and decided it was appropriate to provide an extension until 2 January 2013.
- 4.12 The First Information Request requested certain specified documents and information relating to Supatel, including:
- the different sales and marketing channels used by timetalk;
 - flow diagrams showing the entire sales process from first contact until the completion of the transfer;
 - the total number of sales and marketing calls made during the period 1 July 2012 to 3 December 2012;
 - call recordings of all sales and marketing calls, as well as call recordings of all calls where a Customer had called to cancel their contract during the Transfer Period, for the first seven calendar days of each of the months July 2012 to November 2012;
 - call recordings of all sales and marketing calls, as well as call recordings of all calls where a Customer had called to cancel their contract during the Transfer Period, for the 95 CLIs identified in Annex 2 of the First Information Request. These 95 CLIs related to the CCT complaints received from 1 August 2012 to 14 November 2012³²;
 - in the absence of call recordings, all written records pertaining to sales and Customers' requests to cancel during the Transfer Period, for the period 1 July 2012 to 3 December 2012;
 - an explanation of its process for actioning Customers' requests to terminate their contracts without charge within the Transfer Period;
 - information on the quality assurance and auditing processes carried out by timetalk for its sales and marketing activities;
 - details of bonus and incentive schemes used by timetalk, including any clawback mechanisms; and
 - information on its relevant turnover.

³² At the time the First Information Request was sent to Supatel in draft form on 19 November 2012, Ofcom only had "permission to share" complaint details up until 14 November 2012.

Supatel's response to the First Information Request

4.13 Supatel provided a response (the "First Response") to the First Information Request on 2 January 2013 (see Annex 3). The First Response included:

- details of the sales and marketing channels it uses to market its Fixed-Line Telecommunications products and services;
- flow diagrams covering three different periods during the period of 1 July 2012 to 3 December 2012 showing its entire sales process;
- the number of sales and marketing calls made during the period of 1 July 2012 to 3 December 2012;
- all written records during the period of 1 July 2012 to 3 December 2012, including sales notes, cancellation notes, and notification of transfer ("NoT")³³ Letters sent to Customers;
- a flow diagram showing the cancellation process and, details of the number of cancellation requests received from Customers and the number of "Cancel Owns"³⁴ placed by timetalk;
- a copy of induction slides used for training;
- copies of Telesales Commission Schemes for the period of July 2012 to November 2012;
- a policy on the sale of Fixed-Line Telecommunication Services between timetalk and Total Care and Support Limited³⁵;
- a copy of its Customer Complaints Code; and
- details of Supatel's relevant annual turnover.

Supatel's letter to Ofcom on steps it has taken to achieve compliance with GC24³⁶

4.14 In addition to the First Response, Supatel wrote to Ofcom on 24 January 2013 to advise Ofcom that it became aware of some deficiencies in the training of a number of agents involved in the sales and marketing of timetalk's Fixed-Line Telecommunications Services in October 2012, and that timetalk's policies, processes, and procedures required improvement. Following this discovery, a decision was taken by Supatel to suspend all sales and marketing activity of timetalk products pending a review and audit. Supatel stated that its sales and

³³ A requirement of GC24, specifically GC24.7, is that when a Customer enters a contract for Fixed-Line Telecommunications Services, both the Losing and Gaining CPs must send the Customer a letter, stating that the Customer is transferring their Fixed-Line Telecommunications Services as well as clearly setting out certain information.

³⁴ "Cancel Own" is the process used by the Gaining CP to cancel its own order, normally at the request of the Customer, before completion of the transfer.

³⁵ Timetalk has outsourced the sales and marketing of its products and services to Total Care and Support Limited.

³⁶ This letter is attached at Annex 6.

marketing of timetalk's products did not recommence until 9 January 2013 when it was satisfied that all steps had been taken to ensure full compliance with GC24.

4.15 In this letter, Supatel also set out:

- the issues which it had identified;
- the steps which it had taken to ensure compliance with GC24; and
- the action it was taking to review historic sales for the period August 2012 to November 2012 and to remedy those where it considered it had not been fully compliant with GC24.

Second Information Request to Supatel

4.16 On 11 February 2013, Ofcom issued a further notice under section 135 of the Act to Supatel (the "Second Information Request") requiring it to provide specified information by 26 February 2013. The purpose of this request was to clarify aspects of the First Response and also matters arising in Supatel's letter of 24 January 2013. The Second Information Request is attached at Annex 4.

4.17 The Second Information Request requested certain specified documents and information relating to Supatel, including:

- timetalk's call retention policy;
- details of its customer base;
- the steps it has taken to remedy mis-selling and/or slamming of its Fixed-Line Telecommunications Services;
- correspondence discussing compliance issues; and
- clarification on the annual turnover information provided in response to the First Information Request.

Supatel's response to the Second Information Request

4.18 Supatel provided a response (the "Second Response") to the Second Information Request on 26 February 2013 (see Annex 5). Its response included:

- an explanation of why no call recordings were available in response to the First Information Request and details of the previous and current call retention policies;
- details of timetalk's customer base;
- details of the steps Supatel has taken to identify Customers that have been mis-sold to and/or slammed, and the action it has taken to remedy matters in respect of any such Customers;
- details of how compliance issues were identified and the actions Supatel has/is taking to resolve these; and
- confirmation of Supatel's relevant annual turnover.

Information Request to Openreach

- 4.19 Ofcom also issued a notice under section 135 of the Act to Openreach (the “Openreach Information Request”) requiring it to provide specified information by 13 February 2012. The Openreach Information Request is attached at Annex 7.
- 4.20 Openreach is the infrastructure division of British Telecommunications Plc. It is required to ensure that all CPs have equal access to BT’s local network, and it is responsible for installing and repairing these services. In doing so, Openreach retains the records of all the services it provides to CPs using the local BT network, including “transfer order records” for each CP. These records provide details of the date on which a CP placed a Customer’s order for services (i.e. their “transfer order”) and the date on which those transfer orders were completed or cancelled.
- 4.21 The Openreach Information Request required certain specified information relating to timetalk for the period of 1 April 2012 to 31 January 2013³⁷, including:
- details of all the transfer activity on the relevant CLIs for all consumers who complained to Ofcom’s CCT for the period of 1 August 2012 to 29 January 2013³⁸. This related to 195 CLIs;
 - details of the total number of transfer orders placed by timetalk for the period of 1 April 2012 to 31 January 2013;
 - details of the total number of “Cancel Other” orders placed against timetalk for the period of 1 April 2012 to 31 January 2013; and
 - details of the total number of “Cancel Own” orders placed by timetalk for the period of 1 April 2012 to 31 January 2013.

Openreach’s response to the Information Request

- 4.22 Openreach provided its complete response (the “Openreach Response”) to the Openreach Information Request on 28 February 2013 (see Annex 8). Its response included:
- details of all the transfer activity on the relevant CLIs for all consumers who complained to Ofcom’s CCT for the period of 1 August 2012 to 29 January 2013³⁹;
 - details of the total number transfer orders placed by timetalk for the period of 1 April 2012 to 31 January 2013;
 - details of the total number of Cancel Other orders placed against timetalk for the period of 1 April 2012 to 31 January 2013; and

³⁷ Ofcom requested specified information from Openreach for the period of 1 April 2012 until 31 January 2013 because we were aware, through Supatel’s letter of 24 January 2013, that it had commenced sales of timetalk’s Fixed-Line Telecommunications Services in April 2012 and, in order to determine if a transfer order, during the period of the Investigation was a “repeat” transfer order, obtaining the transfer details from 1 April 2012 was considered appropriate.

³⁸ When Ofcom sent the Openreach Information Request on 31 January 2013, the complaint details for timetalk were only available up until 29 January 2013.

³⁹ In total there were 195 complaints from consumers who had provided us with ‘*permission to share their details*’ which we sent to Openreach. Of these 195 complaints, Openreach provided us with transfer activity for 192 and was unable to obtain the information for the remaining 3 complaints.

- details of the total number of Cancel Own orders placed by timetalk for the period of 1 April 2012 to 31 January 2013.

Questionnaires

- 4.23 In order to assess timetalk's compliance with GC24.3(d), Ofcom also gathered evidence from Customers through the use of questionnaires. Ofcom's view was that this additional information was necessary for Ofcom to more clearly understand whether Customers had agreed to switch services to timetalk, the reasons behind repeated transfer orders being placed and what communication there had been between timetalk and these Customers.
- 4.24 Ofcom, therefore, attempted to make contact with all the Customers who had complained to Ofcom about timetalk during the period of 1 August 2012 to 29 January 2013 and whom, based on Ofcom's analysis of the information available, Ofcom considered may have experienced repeated slamming attempts. Ofcom sent questionnaires to 35 consumers during 14 February 2013 and 22 February 2013 and received 30 completed and signed questionnaires. These are attached at Annex 9.

Notification under section 96A of the Act

- 4.25 On the basis of the facts before it, Ofcom was satisfied that Supatel was a Communications Provider who was providing a Fixed-Line Telecommunications Service to Domestic and Small Business Customers by way of Wholesale Line Rental ("WLR"), and that Supatel was engaged in the business of transferring the provision of such services from another Communications Provider to itself. Accordingly, Ofcom was satisfied that GC24 applied to Supatel⁴⁰.
- 4.26 Further, on the basis of the information gathered above, Ofcom determined that it had reasonable grounds to believe that, during the Relevant Period, Supatel had contravened GC24, specifically the provision relating to slamming under GC24.3(d) in respect of 83 CLIs, by repeatedly placing transfer orders for Customer's Fixed-Line Telecommunications Services without those Customers' express knowledge and/or consent that such transfer orders were being placed.
- 4.27 On 27 March 2013, Ofcom issued Supatel with the Notification. This set out the steps that Ofcom considered Supatel should take in order to comply with the requirements of GC24 and, in particular, GC24.3(d) and to remedy the consequences of the contravention. The Notification also notified Supatel that Ofcom were minded to impose on it a penalty of £65,000 in respect of the contravention.
- 4.28 Supatel was given until 5pm on 25 April 2013 to make written representations to Ofcom about the matters notified. Supatel also had the opportunity to make oral representations but chose not to.
- 4.29 Supatel provided written representations on 25 April 2013. Supatel's representations (both those provided to Ofcom on 25 April 2013 and the representations made in its earlier letter of 24 January 2013) are considered in section 6 and section 7 of this Confirmation Decision.

⁴⁰ See section 5 of the Notification.

Section 5

Application of General Condition 24 to Supatel

- 5.1 This section sets out Ofcom's reasoning and findings with respect to whether Supatel falls within the scope of GC24.

GC24

- 5.2 GC24.1 states that:

"A Communications Provider who provides a Fixed-Line Telecommunications Service to Domestic and Small Business Customers ('the Customer') must comply with this General Condition with respect to such Customers".

- 5.3 GC24.2 notes that:

"This General Condition is only applicable where the Customer is transferring a Fixed-Line Telecommunications Service between Communication Providers."

- 5.4 The definition of "Slamming" in GC24.19(m), meanwhile, makes clear the relevant rules apply where a request is made to transfer services provided by means of Carrier Pre-Selection ("CPS")⁴¹, Wholesale Line Rental ("WLR")⁴² and/or Local Loop Unbundling ("LLU")⁴³.

- 5.5 Therefore, in issuing a Confirmation Decision under section 96C to Supatel in relation to contraventions of GC24, Ofcom must be satisfied that Supatel:

- a) is a CP as defined in GC24.1;
- b) provides a Fixed-Line Telecommunications Service to Domestic and Small Business Customers;
- c) has transferred a Fixed-Line Telecommunications Service for Customers from another CP to Supatel; and
- d) the relevant transfers related to Fixed-Line Telecommunications Services provided by means of CPS, WLR or LLU.

Communications Provider

- 5.6 "Communications Provider" is defined in GC24.19(c), which states:

⁴¹ CPS is defined in GC24.19(d) as "a facility which allows a customer of a Publicly Available Telephone Service to select a provider designated in advance to apply on every occasion where no other providers have been pre-selected for the use of a telephone number."

⁴² WLR is defined in GC34.19(o) as "a facility which BT provides other CPs with the ability to offer monthly line rental and associated services (such as fault repair) on the BT line."

⁴³ LLU is defined in GC24.19(j) as "the process by which a dominant provider's local loops are physically disconnected from its network and connected to a competing provider's network."

““Communications Provider” means the provider of an Electronic Communications Network and/or Electronic Communications Service, both as defined in section 32 of the Act.”

- 5.7 “Electronic Communications Network” (“ECN”) is defined in section 32(1) of the Act, and means:

“(a) a transmission system for the conveyance, by use of electrical, magnetic or electro-magnetic energy, of Signals of any description; and

(b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the Signals –

- i. apparatus comprised in the system;*
- ii. apparatus used for the switching or routing of the Signals;*
- iii. software and stored data; and*
- iv. (except for the purposes of sections 125 to 127) other resources, including network elements which are not active.”*

- 5.8 An “Electronic Communications Service” (“ECS”) is defined in Section 32(2) of the Act, which states:

““Electronic Communications Service” means a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service.”

- 5.9 “Signal” is defined in Section 32(10) of the Act, and includes –

““(a) anything comprising speech, music, sounds, visual images or communications or data of any description; and

(b) signals serving for the impartation of anything between persons, between a person and a thing or between things, or for the actuation or control of any apparatus.”

- 5.10 Supatel has stated it delivers services over the BT Wholesale Network. Information from Openreach shows that Supatel uses Kingston Communications, as its wholesale provider, in order to provide wholesale telephone access line and call services to its Customers. Taken together, these two services are referred to as wholesale line rental (“WLR”). Supatel uses those services to enable it to offer retail line rental and call services to customers. That is, it re-sells the services purchased.

- 5.11 WLR is a wholesale regulated product currently offered by BT Wholesale⁴⁴. WLR enables other CPs to offer line rental, calls and other associated services (e.g. fault repair) to end-users over BT's local network. This usually means that the end-user no longer has a contractual relationship with BT and is billed solely by the WLR CP.

⁴⁴ Kingston Communications also offers WLR as a wholesale regulated product in the Hull area only. In this particular case, Kingston Communications is not providing Supatel with its WLR wholesale regulated product in Hull, it will in fact be purchasing BT Wholesale's WLR regulated product and then re-selling this to Supatel.

- 5.12 By means of WLR Supatel is able to provide integrated telephony services comprising calls and access, billed on a single monthly bill to compete with other CPs for the provision of retail telephony services.
- 5.13 Supatel, therefore, provides a service which consists of the conveyance of signals (i.e. speech) by way of BT's ECN. This falls within the definition of ECS contained in Section 32(2) of the Act.
- 5.14 In summary, Supatel provides an ECS and therefore it falls within the definition of CP for the purposes of GC24.1.

Fixed line telecommunications services

- 5.15 In addition to falling within the definition of a CP for the purposes of GC24.1, Supatel must also provide "Fixed-Line Telecommunications Services to Domestic and Small Business Customers".
- 5.16 "Fixed-Line Telecommunications Services" is defined in GC24.19 which states:
"Fixed-Line Telecommunications Services" means Narrowband call and/or line rental services provided to Domestic and Small Business Customers;"
- 5.17 "Narrowband" is defined in GC24.19 which states:
"Narrowband" means services provided over a traditional Public Communications Network, excluding services provided over a Cable Network;"
- 5.18 "Cable Network" is defined in GC24.19 which states:
"Cable Network" means a hybrid fibre-coax Electronic Communications Network that uses a combination of optical fibres and coaxial cable;"
- 5.19 "Public Communications Network" ("PCN") is defined in Part 1 of the GCs which states:
"Public Communications Network" means an Electronic Communications Network used wholly or mainly for the provision of Public Electronic Communications Services which support the transfer of information between Network Termination Points;"
- 5.20 A "Public Electronics Communications Service" ("PECS") is defined in section 151 of the Act⁴⁵ as "any electronic communications service"⁴⁶ that is provided so as to be available for use by members of the public".
- 5.21 The relevant part of the definition of "Network Termination Point" ("NTP") is contained in Part 1 of the GCs, which states:
"Network Termination Point" means the physical point at which a Subscriber is provided with access to a Public Electronic Communications Network..."
- 5.22 Finally, "Subscriber" is defined in Part 1 of the GCs as:

⁴⁵ See Part 1(2)(a) of the GCs.

⁴⁶ See paragraph 5.8 above.

“Subscriber” means any person who is party to a contract with a provider of Public Electronic Communications Services for the supply of such services;”

- 5.23 Therefore, to fall within the definition of providing Fixed-Line Telecommunications Services, Supatel must provide a Narrowband call and/or line rental service. The definition of Narrowband excludes cable networks and is defined to mean services provided over a PCN. The definition of PCN requires that the relevant Narrowband call and/or line rental services are PECS.
- 5.24 As discussed above, Supatel provides its services by using wholesale inputs from BT Wholesale. These services are provided over copper wire and are therefore not cable networks. However, in order to fall within the definition of a Narrowband service, such service must be carried over a PCN. This means that BT’s ECN must be used to provide PECS and must allow the transfer of information, between NTPs.
- 5.25 It appears to Ofcom that, in providing its timetalk products to Consumers, Supatel is providing services that consist in, or have as their principal feature, the conveyance by means of an electronic communications network of signals. It is the conveyance of such signals that enables Consumers to make telephone calls. Further, it appears that Supatel is making these services available for use by members of the public. On that basis, it appears that Supatel, through its provision of timetalk products, is providing PECS.
- 5.26 Further, it appears that Supatel’s PECS is being provided over a PCN. In particular, BT appears to be providing Supatel with an ECN for the purposes of carrying Supatel’s services and supporting the transfer of information between NTPs. This is where telephone calls are being made by Supatel’s Customers (or “Subscribers”, for the purposes of Part 1 of the GCs), which satisfies the relevant part of the definition of NTP.
- 5.27 Accordingly, BT’s ECN appear to fall within the definition of a PCN. As Supatel provides its call and/or line rental services over these networks, and not cable networks, it is providing a Narrowband call and/or line rental service to its Customers.
- 5.28 In summary, by providing Narrowband call and/or line rental services, Supatel falls within the definition of providing Fixed-Line Telecommunications Services.

Domestic and small business customer

- 5.29 “Domestic and Small Business Customer” is defined in section 52(6) of the Act and means, in relation to a CP, a Customer of that CP who is neither –

“(i) himself a communications provider; nor

(ii) a person who is such a customer in respect of an undertaking carried on by him for which more than ten individuals work (whether as employees or volunteers or otherwise)”

- 5.30 “Customers” is defined in Part 1 of the GCs, which states:

“Customers”, in relation to a Communications Provider, means the following (including any of them whose use or potential use of the network or service is for the purposes of, or in connection with, a business):

- (a) *the persons to whom the network or service is provided in the course of any business carried on as such by the Communications Provider;*
- (b) *the persons to whom the Communications Provider is seeking to secure that the network or service is so provided;*
- (c) *the persons who wish to be so provided with the network or service, or who are likely to seek to become persons to whom the network or service is so provided;”*

- 5.31 Supatel provides its services to persons in the course of its business. As a result, its customers fall into the definition of “Customer” for the purpose of Part 1 of the GCs. Having considered the complaints made by such Customers to Ofcom about Supatel, it is clear some at least of these were Domestic and Small Business Customers.
- 5.32 Therefore, Supatel is a CP who provides Fixed-Line Telecommunications Services to Domestic and Small Business Customers and therefore it falls within the definition of CP for the purposes of GC24.1.

Customer transferring its Fixed-Line Telecommunications Service

- 5.33 Supatel provided correspondence that demonstrates it has transferred Customers, and/or attempted to transfer Customers, from other CPs to Supatel (see Annex 3).
- 5.34 In summary, Supatel has transferred Customers for Fixed-Line Telecommunications Services from other CPs to Supatel and therefore it falls within the scope of application of GC24 for the purposes of GC24.2.

Slamming: CPS, WLR and/or LLU

- 5.35 As defined in GC24.19(m), “ ‘*slamming*’ means where a request for CPS, WLR and/or LLU has been made without the Customer’s express knowledge and/or consent...” As set out above, Supatel provides Fixed-Line Telecommunications Services by means of WLR. The requests to which this Confirmation Decision relates are, therefore, capable of falling within this part of the definition.
- 5.36 Supatel has not, either in its letter of 24 January 2013 or its representations of 25 April 2013, disputed that it is a Communications Provider subject to GC24. To the contrary, in its letter of 24 January 2013 Supatel states, “In or about March 2012 a decision was taken by Supatel to develop a range of packages targeted at LLU customers, offering an easy and affordable means for customers on an LLU network to switch services delivered over the BT Wholesale Network” and “...a decision was made to use a different trademarked brand, namely ‘timetalk’, for the purpose of marketing and selling the new packages...”.
- 5.37 Further, in its representations of 25 April 2013, Supatel states that “[I]n or about April 2012, Supatel began selling and promoting new service packages comprising wholesale line rental, carrier pre-select services and broadband services under its ‘time talk’ brand” and that “Supatel is a reseller of electronic communications services (within the meaning [of] Section 32(2) of the Communications Act 2003 (the ‘Act’). UK retail services, including wholesale line rental, carrier pre-select and broadband services are provided over the BT Wholesale Network through KCOM acting as a wholesale provider. Supatel looks to achieve a margin on the difference

between its retail selling price and the wholesale purchase price of the services it provides to end-users” (paragraphs 1.4 -1.5).

- 5.38 Supatel does dispute, however, Ofcom’s interpretation of GC24.3, insofar as we have applied it in this particular case. This is considered further in section 6.

Section 6

Evidence of contravention

- 6.1 This section sets out in detail the grounds and supporting evidence relied upon which Ofcom, having carefully considered Supatel's representations, is satisfied that Supatel has contravened GC24 (specifically GC24.3(d)).
- 6.2 Ofcom's findings are based on evidence obtained from:
- individual Customer complaints identified through analysis of Ofcom's CCT complaints data during the period 1 August 2012 to 29 January 2013;
 - information provided by Supatel in its responses to the First and Second Information Requests of 19 November 2012 and 6 February 2013 respectively;
 - information provided by Openreach in its response to the Openreach Information Request of 31 January 2013;
 - a letter from Supatel dated 24 January 2013 which sets out, amongst other things, steps it has taken to achieve compliance with GC24;
 - analysis of Customer questionnaire responses; and
 - information contained in Supatel's representations to Ofcom of 25 April 2013.
- 6.3 As set out in section 5, Ofcom considers that Supatel:
- a) is a CP (as defined in GC24.1);
 - b) provides Fixed-Line Telecommunication Services;
 - c) has had Customers transferring Fixed-Line Telecommunications Service from other CPs to timetalk; and
 - d) provides Fixed-Line Telecommunications Services by means of WLR for the purposes of the definition of slamming.

Contravention of GC24.3(d)

- 6.4 GC 24.3(d) requires that:

"When selling or marketing Fixed-Line Telecommunications Services, the Gaining Communications Provider must not engage in Slamming."

- 6.5 In order for a CP to comply with GC24.3(d), it must not engage in slamming, as defined in GC24.19. In order to consider whether Supatel was engaging in slamming Ofcom must establish if its conduct fell within one (or more) of the definitions in GC24.19 (m) (i)-(iv).⁴⁷

⁴⁷ Refer to footnote 6 for a full definition of "Slamming".

- 6.6 Following initial analysis of Ofcom's CCT complaints data, Ofcom had reason to believe that Supatel may not have been conducting its activities in accordance with GC24.3(d), in particular with reference to GC24.19(m)(i) and (ii) which state:

"Slamming means where a request for CPS, WLR and/or LLU has been made without the Customer's express knowledge and/or consent; that is in the following circumstances:

- i) where the Customer has never been contacted by the Gaining Communications Provider; and*
- ii) where the Customer has been contacted by the Gaining Communications Provider, but has not given the Gaining Communications Provider authorisation to transfer some or all of their telephone calls and/or line rental to the Gaining Communications Provider."*

- 6.7 Where transfer orders are repeatedly placed, Ofcom interprets GC24.19(m)(i) and (ii) to cover the following scenario, amongst others. Where a Customer initially consents to the Gaining CP making a request for their Fixed-Line Telecommunications Services, and this request is subsequently cancelled (either by the Losing CP or the Gaining CP), the Gaining CP no longer has consent to transfer the Customer's Fixed-Line Telecommunications Service. In this event, each subsequent transfer order must then be treated as a new request for services where, if the Gaining CP does not contact the Customer again, the Customer has "never been contacted" for the purposes of that particular transfer order. In other words, despite any prior contact, the Customer has not given the Gaining CP the relevant authorisation (i.e. consent) to place a subsequent transfer order.

- 6.8 In other words, Ofcom considers that any subsequent request for services requires the Customer to have express knowledge and/or have given their consent to the transfer of the relevant service(s).

- 6.9 In its representations of 25 April 2013, Supatel disagrees with Ofcom's application of GC24.3(d), as set out in paragraph 6.7 above. In Supatel's view, this is an expansion of the GC which is not supported when given the natural and ordinary meaning of the words. In particular, Supatel says:

- a) "GC24.3 is directed at the practice of selling and uses the words 'When selling or marketing'. The sale is completed when the contract with the Customer is formed i.e. when the Order Confirmation is issued by Supatel"⁴⁸;*
- b) GC24.19(m) is a definition and not a prohibition in its own right;*
- c) The definition 'slamming' (GC24.19(m)) is to be considered in the context of GC24.3;*
- d) On the natural interpretation of the words used in GC24.3 it is directed to steps taken prior to conclusion of the sale, not steps taken after the sale has been completed;*
- e) The Guidelines⁴⁹ in respect of General Condition 24 make no mention of, nor do they address or allude to the scenario described at paragraph 6.7 above. The*

⁴⁸ Condition 2,2 of Supatel's Residential Terms and Conditions states that "...the contract between you and time talk is formed and becomes legally binding when you receive the Order Confirmation".

purpose of the guidelines is (as stated in paragraph A6.3 and A6.4) is, inter alia, to (i) assist CP's in achieving compliance; (ii) to give guidance on the approach Ofcom is likely to take enforcing GC24; (iii) to provide clarity on the meaning of terms and concepts; and (iv) to describe factors that Ofcom might consider when applying the requirements or obligations;

- f) *Even Ofcom's account of the purpose of GC24 set out in paragraph 3.28⁵⁰ of the Notification refers the application of the mis-selling prohibition to a point in time prior to the conclusion of the contract."*

- 6.10 Supatel states that in its submission, "...the mis-selling prohibition is directed to circumstances prior to the conclusion of a contract (ie. to selling and marketing) and does not extend to circumstances where the customer has knowledge of the transfer and has given consent but that the (sic) consent is subsequently said to have been withdrawn." Supatel's argument appears to rely on a particular interpretation of the phrase "selling and marketing" in GC24.3(d), where this is confined to the activity which takes place prior to a Customer first making a request for a transfer order to be placed and the CP first raising an Order Confirmation in order to give effect to this.
- 6.11 Ofcom has carefully considered but does not accept this submission. The prohibition against slamming set out in GC24.3(d) is only capable of making sense when a proper, more purposive view is taken of the concept of "selling and marketing," and it is read in conjunction with the definition of slamming described in GC24.19(m).
- 6.12 "Selling and marketing" can only sensibly mean the process of seeking to gain Customers by making services generally available to them. One purpose of the rules is to ensure that, whilst CPs are doing this, Customers are able to choose their own CP from competitors in the market, without being forced to change CPs against their will.
- 6.13 The definition of slamming should be read with this point in mind. It is demonstrated by the inclusion within the definition of GC24.19(m)(i), setting out that slamming occurs:
- "... where the Customer has never been contacted by the Gaining Communications Provider..."*
- 6.14 Without the sensible, broader and purposive interpretation described, it might be argued that a Customer who has never been contacted by a CP has not been the subject of "selling or marketing" activity. That clearly cannot be right.
- 6.15 The other definitional provisions in GC24.19(m) should be read in the same light. In particular, where a Customer gives, but then properly withdraws, consent to a transfer, there is "selling" in the broader sense described here if the Gaining CP places a subsequent transfer order without further contacting and/or getting consent from the Customer. It is making its services available to Customers in the relevant sense. Moreover, its conduct falls squarely within the mischief the rules are designed to prevent. It has sought to change the Customer's CP without their consent.

⁴⁹ See footnote 4.

⁵⁰ This is paragraph 3.32 of this Confirmation Decision.

6.16 Indeed, even on a more literal view of GC24.19(m), Supatel's conduct in this scenario falls squarely within sub-paragraphs (i) and/or (ii). Once the first transfer order is cancelled, the "sale" to which that order relates is cancelled, and becomes irrelevant. In relation to the subsequent transfer order, either the Customer has never been contacted by the Gaining CP or has been contacted but not authorised the transfer. On this basis, even on Supatel's own argument, there is "selling" in relation to the subsequent transfer order.

6.17 Ofcom has considered Supatel's representation to the effect that we are acting inconsistently with our guidance on GC 24. We disagree, noting three points.

6.18 First, as paragraphs A6.4, 6.5 and 6.6, respectively, say:

"The guidelines set out some useful summaries, examples and guidance on the approach Ofcom is likely to take to enforcing GC 24.....;" but

"For the avoidance of doubt, where the guidelines set out examples of the way in which Ofcom considers a Communications Provider may comply with a GC, Ofcom is not bound by this and Ofcom will at all times determine compliance on the basis of individual circumstances whilst having regard to these guidelines. If in any given situation we decide to depart from the principles set out in these guidelines we will normally set out our reasons for doing so.....;" and

"These guidelines are not in any way incorporated into the GCs set by Ofcom. The obligations which apply to a Communications Provider will be determined solely according to the GCs. However, when applying GC24, as stated in A6.5 above, Ofcom will have regard to these guidelines and will normally set out its reasons when departing from the principles set out therein...."

6.19 The approach set out in this Confirmation Decision is, for the reasons given, consistent with the rules in GC24. To the extent we are taking a different position to that in the guidance (and we do not agree we are), we have explained why.

6.20 Second, we note that, in any event, the guidance does not set out what constitutes slamming in particular scenarios. Rather, paragraph A6.9 of the guidance reiterates the different circumstances in which slamming occurs. To that extent, we are not departing from the guidance.

6.21 Third, we note that paragraph A6.2 provides a definition of the 'Cancel Other' process (as to which see further below). This demonstrates that the rules on slamming have the purpose, and support the broader, purposive interpretations, set out above:

"Cancel Other is a consumer protection mechanism designed to ensure that Customers are not switched between Communications Providers without their permission. Therefore, Cancel Other should only be used in certain circumstances, in particular, where the Customer believes they are a victim of slamming."

6.22 On these bases, having considered Supatel's representations regarding the applicability of GC24.3(d), Ofcom is satisfied that it has correctly interpreted and applied the GC in this case.

- 6.23 Ofcom's further analysis of the complaints data, taken with other evidence from Supatel and Openreach and further evidence from some Customers, provides a basis for the Confirmation Decision Ofcom now makes, as follows.

Evidence obtained from analysis of Ofcom complaints

- 6.24 During the period 1 August 2012 to 14 November 2012, Ofcom's CCT received 95 complaints against Supatel, relating to timetalk's sales and marketing activities of Fixed-Line Telecommunications Services. This was significant in terms of overall Ofcom CCT complaints received with regards to mis-selling (including slamming) for this period. It was these complaints to Ofcom's CCT which initially prompted Ofcom to open the Investigation.
- 6.25 Ofcom then conducted a more detailed analysis of these 95 CLIs in order to gain a better understanding of the key issues. This included a review of the available case summaries for each of these complaints in order to more fully consider the specific nature of each complaint, both in relation to the initial call received from the Customer, and also any subsequent calls received from that individual. We also assessed the complaints against any information about the relevant transfer orders placed on the service provider gateway⁵¹ already requested from Openreach. This is something Ofcom routinely does when we receive slamming complaints from consumers.
- 6.26 This detailed analysis revealed that, in 35 of the 95 CLIs, timetalk appeared to have placed a transfer order following some form of contact with the Customer and these transfers orders were subsequently cancelled by the Customer.⁵² After these orders had been cancelled by the Customer's Losing CP, it appeared that, for these 35 cases, timetalk then repeatedly placed further transfer orders in an attempt to take over the same Customer's telephone line. The detail of the complaints appeared to demonstrate that timetalk may have placed these subsequent orders without the Customer's express knowledge and/or consent, in breach of GC24.3(d).
- 6.27 As a matter of administrative priority, and given the seriousness of this particular issue and, specifically, what appeared to be apparent repeated slamming, Ofcom subsequently decided the scope of the Investigation would be focussed on this behaviour.⁵³
- 6.28 Ofcom's CCT continued to receive complaints from Customers about timetalk's sales and marketing activity. This meant that during the period of 1 August 2012 to 29 January 2013, a total of 195 complaints⁵⁴ had been received (including the complaints for the 95 CLIs mentioned above). It appeared that, of the 195 complaints, 126 had been received during October 2012 and November 2012. This was the second highest volume of complaints from a single CP during this period, regardless of size.
- 6.29 To illustrate the scale of the number of complaints received during October 2012 to November 2012, relative to the size of the CP, information provided by Openreach (see Annex 8) shows that timetalk placed 3,470 transfers during this period. The CP

⁵¹ The service provider gateway is the online ordering tool CPs can use to place and track their transfer orders.

⁵² These transfer orders were cancelled by the Customer's current CP using the Cancel Other process.

⁵³ See section 4 "Scoping the investigation".

⁵⁴ These were complaints where consumers had provided "*permission to share*". The total volume of mis-selling and slamming complaints against timetalk during this period was actually 214.

with the highest number of complaints during the same period had [X] complaints and placed circa [X] transfers over the same period. By contrast, in July and August, timetalk was only the eleventh most complained about CP with 14 complaints.

- 6.30 Furthermore, placing the number of complaints received about timetalk in the context of the total number of the transfers it placed for the period of 1 October 2012 to 30 November 2012, 3.6% of all transfer orders placed resulted in a complaint to Ofcom's CCT. By comparison, the most complained about CP's proportion of complaints against transfer orders placed was 0.25%.
- 6.31 Ofcom forwarded these 195 CLIs to Openreach (as described above in paragraphs 4.21 to 4.22 and below in 6.36 to 6.37) in order to determine if there was corroborative evidence of timetalk placing repeated transfer orders for these CLIs without the Customer's express knowledge and/or consent. The information received from Openreach is detailed further below.

Conclusions

- 6.32 The following factors all contribute to Ofcom having had at the time of the Notification reasonable grounds to believe, and in this Confirmation Decision for being satisfied, that Supatel contravened GC24.3(d) by engaging in slamming in the ways described:
- Of the 95 mis-selling (including slamming) complaints received about timetalk between 1 August and 14 November 2012, 35 (or 36.8%) appeared to show that timetalk may have placed these subsequent transfer orders without the Customer's express knowledge and/or consent. This is significant as it would appear to suggest that of the mis-selling and slamming complaints received during this period, more than one third involved repeated attempts to take over the line.
 - An analysis of the 195 total number of complaints received by Ofcom's CCT in relation to mis-selling (including slamming) against timetalk for the period of 1 August 2012 to 29 January 2013 indicated that 126 of these were received during October and November 2012 (i.e. the Relevant Period).
 - In the context of these two months, the volume of Ofcom's CCT complaints about timetalk's sales and marketing activities was high in absolute terms, i.e. 126 complaints (from 3,470 transfer orders placed), as compared to [X] complaints (from around [X] transfer orders placed) pertaining to the CP with the highest number of complaints over the same period.
 - The volume of complaints received about timetalk was also high as a proportion of its transfer orders placed during October and November 2012, where 3.6% of all transfer orders placed by timetalk resulted in a complaint to Ofcom's CCT. By comparison, the most complained about CP's proportion of complaints against transfer orders placed was 0.25%.

Evidence obtained from analysis of information provided by Supatel

- 6.33 Ofcom has obtained the following evidence from the First and Second Information Requests, and from the letter from Supatel dated 24 January 2013 (Annexes 3, 5, and 6):

- written records for the period of 1 July 2012 until 3 December 2012. These include sales notes, cancellation notes, terms and conditions, and copies of NoT letters sent to Customers;
- details of timetalk's Customer base at the end of each month for the period July 2012 until February 2013, which show that timetalk was a small CP with a small Customer base, as demonstrated in *Figure 6.1* below:

Figure 6.1: Timetalk Customer base

[X]

- details of Supatel's relevant annual turnover for the period 1 April 2011 to 31 March 2012 which was [X] excl VAT;
- a breakdown of the 95 CLIs identified in the First Information Request, where Supatel states that it had placed transfer orders for 72 of these⁵⁵. Of these, the information provided said 35 transfer orders had been cancelled by the Customer before the transfer order completed. Some 24 of the remaining 37 CLIs which were transferred to timetalk have since transferred to another CP without the Customer being charged ETCs. This shows a large proportion of consumers (72 of 95), who complained to Ofcom's CCT that they had not given their consent to transfer to timetalk, had in fact had transfer orders placed by timetalk in respect of their services. In at least 59 of these cases, they cancelled the transfer order(s) before they were completed or took action to transfer away from timetalk once the transfer had completed; and
- a document entitled "*Company policies on the sale of Fixed Line Telecommunications Services*", which clearly sets out the requirements of GC24 and the correct process to be followed when placing transfer orders, specifically when a transfer order has previously been cancelled by the Losing CP. Supatel states that this was introduced in November 2012, although the document is dated 18 December 2012 (and in paragraph 5.14 of its representations of 25 April 2013, Supatel has confirmed that the new policies were finalised "on or around 16 December 2012"). Supatel's First Response stated that prior to the policy being implemented, there were no documented training materials or procedures in place which clearly spelt out to agents what slamming is and the steps they must take to avoid engaging in it.

Conclusion

6.34 Ofcom's analysis of the information obtained from Supatel shows the following, which contributes to Ofcom having had at the time of the Notification reasonable grounds to believe, and in this Confirmation Decision for being satisfied, that Supatel contravened GC24.3(d) by engaging in slamming in the ways described:

- In at least 59 cases for the period of 1 August 2012 to 14 November 2012, the evidence indicates, or is consistent with, Supatel having transferred the Customer's fixed line to itself from another CP at a time when the Customer had no express knowledge and had not given their consent. In 35 of these, the evidence suggests the transfer order was completed after the Customer

⁵⁵ In Supatel's letter of 24 January 2013, it only noted that 90 CLIs had been included in Annex 2.

withdrew any consent. In 24 of these, the Customer's subsequently transferred away from timetalk without being required to pay any ETC. This is consistent with the transfer having been made without the Customer's express knowledge and/or consent, and with Supatel acknowledging this was the case.

- Supatel does not appear to have had in place proper procedures for processing transfer orders in accordance with GC24 until November 2012 at the earliest (based on its initial assertion) and, at the latest, until 18 December 2012 (based on the date of the relevant document), or 16 December according to its representations.

Evidence obtained from analysis of information from Openreach

- 6.35 Ofcom's analysis of Ofcom's CCT complaints indicated that Supatel repeatedly placed transfer orders for Customers' Fixed-Line Telecommunications Services in a number of cases, in particular in October 2012 and November 2012. On the basis of the evidence we have subsequently obtained from Customers and Openreach, we have further reason to be satisfied that these orders were placed without the Customer having express knowledge and/or having given their consent (i.e. that Customers may have been slammed).
- 6.36 In order to assess further the extent to which slamming may have occurred, we sought additional information from Openreach under section 135 of Act, as follows:
- i) details of all the transfer activity for the relevant CLIs for all Customers who complained to Ofcom's CCT during the period 1 August 2012 to 29 January 2013 (a total of 195 CLIs, which included the 95 in the First Information Request served on Supatel);
 - ii) details of the total number transfer orders placed by timetalk during the period 1 April 2012 to 31 January 2013;
 - iii) details of the total number of timetalk transfer orders which were cancelled by the Losing CP using Cancel Other during the period 1 April 2012 to 31 January 2013; and
 - iv) details of the total number of Cancel Own orders placed by timetalk during the period 1 April 2012 to 31 January 2013.
- 6.37 The first of these pieces of information was required in order to obtain evidence to corroborate the complaints Ofcom had received from Customers that transfer orders had been placed against their lines without their express knowledge and/or consent. This included information where the transfer orders had been cancelled by the Losing CP using the Cancel Other process, whether the transfer had completed, and whether the line was still with timetalk or had transferred back to the original (or a different) CP. Ofcom was able to assess the information by analysing all the transfer activity provided by Openreach to consider whether timetalk had placed any transfer orders for the relevant Customers' lines and, if so, on how many occasions such transfer orders had been placed by timetalk for those individual CLIs.
- 6.38 This analysis also enabled Ofcom further to identify specific Customers that were affected by this conduct. We were then able to contact them to request further details of their experiences, obtaining further information from them by way of a

questionnaire, and to compare this to the information provided by Openreach. Further details of this are provided below in paragraphs 6.66 to 6.70.

- 6.39 The second piece of information was required to help Ofcom assess the magnitude of any breach by timetalk of GC24.3(d).
- 6.40 The third and fourth pieces were required to enable us better to assess the extent of any slamming by timetalk in breach of GC24.3(d). In particular, to gauge how systemic and widespread the conduct may have been. This information was aimed at assisting Ofcom to assess matters such as:
- the number of transfer orders placed by timetalk and against which, as a proportion, the number of cases in which there is evidence of slamming may be assessed; and
 - the possible extent to which slamming may have occurred beyond that indicated by an analysis of Ofcom's CCT complaints data alone (given, for example, the number of timetalk transfer orders cancelled by the Losing CP using Cancel Other).
- 6.41 In general terms, Ofcom considers that where there is a high proportion of cases in which Cancel Other is used, compared with the total volume of transfer orders and the industry average, this is consistent with the likely occurrence of slamming in at least a proportion of the cases. Cancel Other can only properly be used by a Losing CP where it has reasonable grounds to believe that its Customer has been slammed. At the time of the Openreach Information Request, this was a point Ofcom was considering.
- 6.42 As to the first of the pieces of information, and the corroboration of the complaints Ofcom had received from Customers, Ofcom's assessment is as follows.
- 6.43 Ofcom considers GC24.3(d) to require that, once a transfer order has been cancelled, it is necessary for there to be further contact between the Gaining CP and the Customer, and that the Customer has express knowledge and/or has given their consent, before another transfer order can properly be placed.
- 6.44 Of the 195 CLIs about which Ofcom required information from Openreach, Openreach provided the transfer activity for 192 of these. Of those, the records relating to 86 indicated that no transfer order had been placed, or only one completed order had been placed. In other words, even if there had been slamming at all, it occurred, at most, only in relation to the placing of a single transfer order.
- 6.45 In the other 109 cases, however, the information indicated the possibility of repeated transfer orders. The information provided showed that in respect of 87 of the CLIs, timetalk had repeatedly placed transfer orders in the period of 1 July 2012 and 29 January 2013 (see Annex 8). This is 45% of the total CLIs about which information was sought (195) and 80% of the 109 CLIs in respect of which repeated orders may have been placed.
- 6.46 This number supports a finding that a significant proportion of the Customers who complained to Ofcom's CCT alleging they had been slammed by timetalk had, in fact, experienced repeated transfer orders being placed for their Fixed-Line Telecommunications Services. It is consistent with their complaints to Ofcom that transfers had occurred without their express knowledge and/or consent, either

because none had been given or because the transfer occurred after they had cancelled their request (and, so, at a time when no consent existed).

- 6.47 When looking at the date the transfer orders were placed, it is apparent that the majority of these repeated transfer orders were placed in October 2012 and November 2012. More specifically, for this period, Openreach information indicated that there was a possibility for repeated transfer orders to be placed in 99 cases in this two-month period (of the total of 109 in which such a possibility existed for the whole period covered by the Openreach information). Of these 99, the information showed that timetalk had repeatedly placed transfer orders in respect of 83 (84% of the 99) of these CLIs, during October 2012 and November 2012.
- 6.48 More specifically still, the information showed that after the cancellation of the original transfer order, timetalk placed transfer orders in October for 62 of the relevant CLIs and in November for 38 of them.⁵⁶ Accounting for the overlap, this adds up to repeated transfer orders being made in respect of 83 CLIs in these two months. This amounts to 66% of the 126 CLIs about which Ofcom received complaints in October 2012 and November 2012.
- 6.49 In addition, Openreach's information also highlighted the degree of repetition and persistence in the placing of the relevant transfer orders. It is clear from Annex 8 and as summarised below that, in a number of instances, timetalk did not limit the further transfer orders to one per CLI. Rather, in some cases it placed up to six separate further orders, as follows:
- six separate transfer orders were made for three of the CLIs;
 - five separate transfer orders were made for eight of the CLIs;
 - four separate orders were made for 20 of the CLIs;
 - three separate orders were made for 19 of the CLIs; and
 - two separate transfer orders were made for 33 of the CLIs.⁵⁷

In relation to the 83 CLIs in respect of which timetalk made repeated transfer orders in October 2012 and November 2012, it made 164 further orders in total, 121 in October 2012 and 43 in November 2012.

- 6.50 Moreover, of the 87 CLIs where timetalk repeatedly placed transfer orders between July 2012 and January 2013, it managed successfully to transfer 59 (68%) of them. Of the 83 CLIs in respect of which repeated orders were placed in October 2012 and November 2012, successful transfers occurred in 56 (67%) of cases. This suggests that, in these cases at least, the orders were placed systematically until timetalk obtained the transfer of the CLI.
- 6.51 Taken together, these points suggest it was a repeated practice, rather than an isolated incident, during October 2012 and November 2012, for timetalk repeatedly to place transfer orders for Customers' lines, without their express knowledge

⁵⁶ The total number of repeated transfer orders placed by timetalk was 182. In June 2012 there were 4, August 2012 there were 3, September 2012 there were 7, December 2012 there was 1 and January 2013 there was 3.

⁵⁷ Annex 8 shows the transfer activity provided in the BT Response for all 195 CLIs and also identifies the CLIs where we consider that repeat transfer orders have been placed by timetalk.

and/or consent, following the withdrawal of consent by the Customer (and the initial (or previous) order having been cancelled by the Losing CP using the Cancel Other process). We have taken into account that, in its representations of 25 April 2013, Supatel disagrees with Ofcom that this was a repeated practice. Supatel does also note, however, that *“almost 94% of repeat orders were placed during the Relevant Period.”*

- 6.52 As a proportion of the total number of transfer orders timetalk made, the 87 corroborated complaints for the period of July 2012 and January 2013 represents 1.17% (87 of a total of 7,433 transfer orders placed). Of the 83 corroborated complaints for the period of October 2012 and November 2012, they represent 2.39% (83 of a total of 3,470 transfer orders placed).
- 6.53 These figures are in themselves significant. By way of comparison, as indicated above, Ofcom received [X] complaints about mis-selling (which could include, but is not limited to slamming) for the period of October 2012 and November 2012 relating to the CP which was the subject of the highest number of such complaints (compared to 126 about timetalk). This other CP made circa [X] transfer orders in that period. Even if it were the case that all of these mis-selling complaints involved slamming, this would have represented only 0.25% of transfer orders.
- 6.54 When comparing the 2.39% figure for timetalk to the 0.25% figure for the most complained about CP, it is evident the relative size and seriousness of corroborated complaints against timetalk for the Relevant Period, is almost 10 times worse than for the most complained about CP.
- 6.55 It is not clear to Ofcom why any CP should be generating such a high level of corroborated slamming complaints as timetalk did for the period of October 2012 and November 2012. Indeed, it is our view that the actual rates may be higher, since these rates relate only to cases in which timetalk placed repeated transfer orders (rather than just a single order involving slamming).
- 6.56 Also instructive as a measure of the contravention is the number of repeated transfer orders as a proportion of timetalk’s overall Customer base. Taking into account the highest possible number of Customers for the period of October 2012 and November 2012, it appears that timetalk had [X] Customers in November, during which period timetalk placed repeated transfers without consent in respect of 83 CLIs. This represents [X] of its overall customer base for that period. An important comparison here is with the [X] complaints about the most complained of CP and its Customer base. In this particular case, the comparative Customer base is [X] meaning that the [X] non-corroborated complaints represents only [X] of that Customer base.
- 6.57 When comparing the [X] figure for timetalk to the [X] figure for the most complained about CP, it is evident the relative size and seriousness of corroborated complaints against timetalk for the Relevant Period, is 2,513 times worse than for the most complained about CP.
- 6.58 In assessing the evidence described above, we have carefully considered Supatel’s representations. In particular, Supatel notes that the transfer orders to which the contravention of GC24.3(d) relates were either largely, or all, cancelled by the Customer using the Cancel Other process, as opposed to the Customer contacting Supatel directly to cancel those orders.

- 6.59 Supatel further notes that in the period immediately preceding the Relevant Period, it had experienced an increase in the use of Cancel Other and, in particular, the ‘customer never contacted’ code. Supatel had reason to believe that these codes may be being used inappropriately, where its systems simply did not allow an order to be placed without first having the Customer’s payment details (hence necessitating some form of Customer contact to have taken place). At the same time, Supatel noticed a significant number of Customers were contacting them to inquire as to the date their services would be activated, where the Losing CP had already cancelled the relevant transfer orders.
- 6.60 Supatel states that in October 2012 they experienced a significant increase in orders but, by late October, there had also been a significant increase in the use of Cancel Other. It submitted that enquiries made of Supatel’s call centre agents, Total Care and Support Limited, “*suggested that the spike was attributable to mis-use of Cancel Other.*” In support of this submission, Supatel provided “Appendix A” to its representations of 25 April 2013, comprising a spreadsheet that identified 30 instances where Cancel Other had appeared to have been used inappropriately⁵⁸. Supatel provided a further “Appendix B” comprising an email complaint from a Customer in relation to a Losing CP taking unwanted steps to prevent the transfer of his services to Supatel.
- 6.61 Having considered Supatel’s representations in relation to the use of Cancel Other, we do not consider that this changes the position.
- 6.62 Regardless of whether or not the Cancel Other process has been used correctly in the generality of cases (which was not the subject of this investigation and on which Ofcom does not, therefore, have a view), Ofcom is concerned only with the 83 cases in respect of which a finding was made in the Notification. In relation to these particular cases, Customers’ complaints and testimonies in relation to slamming (see below in relation to the questionnaire responses) are corroborated by the records obtained from Openreach (as set out above). There is no evidence of inappropriate use of Cancel Other in these 83 cases. On the contrary, the evidence sufficiently precludes that possibility. We have compared the 30 CLIs identified by Supatel in Appendix A and the CLIs referred to in Appendix B, with our 83 corroborated complaints and there is no overlap between the cases identified by Ofcom and those identified by Supatel.
- 6.63 We also note that in paragraph 5.16 of its representations Supatel said:
- “Since becoming aware of the specific details of the Complaint, Supatel has undertaken further investigations into the circumstances of the Complaint. In Supatel’s submission the high number of Cancel Others during the Relevant Period relate or arise from a three week period from early/mid October to late October/early November 2012. It is Supatel’s belief that issues relating to the repeated placing of transfer orders arose due to a combination of reasons, namely:*
- (a) *Mistakes made in order management.*
- (b) *A failure to adhere to the transfer procedure in place.*
- (c) *A general perception amongst call centre personnel Cancel Other was being inappropriately used.*

⁵⁸ On 29 April, Supatel provided Ofcom with the CLIs for each of these 30 instances.

(d) The belief that if Cancel Other had been incorrectly [used] then there was no requirement to contact the Customer and/or if contact was attempted and failed a further transfer order could be placed and in doing so GC24.3 would not be contravened.

(e) Confusion caused by incorrect use of Cancel Other

(d) Temporary staff

(e) Pressure of work”

6.64 None of these factors is exculpatory. They are consistent with the findings Ofcom now makes in respect of the 83 CLIs, not with the inappropriate use of Cancel Other in those cases.

Conclusions

6.65 In light of all of the above, the following factors derived from the Openreach information all contribute to Ofcom having had at the time of the Notification reasonable grounds to believe, and in this Confirmation Decision for being satisfied, that Supatel contravened GC24.3(d) by engaging in slamming in the ways described:

- The information is consistent with, and so is corroborative of, complaints of slamming made to Ofcom by Customers.
- In particular, it is corroborative of there having been slamming in the placing of repeated transfer orders by timetalk in respect of 87 CLIs about which Ofcom received complaints and, most particularly, in respect of 83 such CLIs.
- Those figures amount to 45% of the CLIs in relation to which Ofcom received complaints and sought information from Openreach and, most relevant, to 66% of those in relation to which Ofcom received complaints for the period of October 2012 and November 2012.
- The 83 CLIs in respect of which repeated transfer orders were made in October 2012 and November 2012 represent 84% of the 99 cases in which the possibility of making repeated transfer orders existed during those months.
- The figure of 87 CLIs represents 1.17% of the 7,433 transfer orders timetalk placed for the period of 1 July 2013 and 31 January 2013 and, again most relevant, the 83 CLIs represent 2.39% of the 3,470 transfer orders it placed for the period of October 2012 and November 2012.

Evidence obtained from analysis of Questionnaires

6.66 As described above, using the complaints and the Openreach information, Ofcom identified Customers from whom we obtained further information in the form of questionnaires. This section sets out a sample of the evidence obtained through analysis of responses to those questionnaires. Ofcom has received 30 of them, completed and signed. Copies are attached at Annex 9.

Summary of questionnaire responses

6.67 Analysis of the 30 questionnaire responses revealed the following important themes in relation to the repeated transfer orders placed by timetalk:

Second transfer order

- In 26 of the 30 cases, the Customer said timetalk had placed a second transfer order despite cancellation of the initial transfer order to take over their line. There were only four responses in which the Customer indicated that timetalk had not placed any further transfer orders to the best of their knowledge;⁵⁹
- in 19 cases, the Customer reported having no contact with timetalk prior to this second transfer order being placed;
- in seven cases, the Customer reported having contact with timetalk but not authorising a second transfer order for their telephone line;⁶⁰ and
- in the four remaining cases, the Customer did not report that a second transfer order had been placed (although the Openreach information indicates that repeat transfer orders were placed for each of these Customers' lines.)

Subsequent transfer orders

- in 17 of the 30 cases, the Customer said timetalk had placed a further transfer order despite cancellation of the second request to take over their line;
- in 13 of these cases, the Customer reported having no contact with timetalk prior to the third transfer order being placed;
- in four of the remaining cases, the Customer reported having contact with timetalk but not authorising a third transfer order for their telephone line;
- in 10 of the 30 cases, the Customer said timetalk had placed at least four or more transfer orders despite cancellation of the third subsequent transfer order;
- in seven of these 10 cases, the Customer reported having no contact with timetalk prior to the fourth transfer order being placed; and
- in three of these 10 cases, the Customer reported having contact with timetalk but not authorising a fourth transfer order being placed.

Figure 6.2. Number of questionnaire responses which reported repeated transfers orders for Customers' lines without Customer's having express knowledge and/or giving their consent.

Number of transfer orders	2 or more orders	3 orders or more	4 orders or more	5 orders or more
Number of Customers	26	17	10	4

⁵⁹ However, information provided by BT indicated that timetalk placed repeat transfer orders without their express knowledge or consent.

⁶⁰ [Customer eight] advised that timetalk spoke to someone else within the household while [Customer seven] advised that she initiated contact with timetalk following cancellation of the first transfer order.

6.68 As set out at paragraph 6.45 and 6.48 above, the Openreach Response indicated that timetalk repeatedly placed transfer orders in respect of 45% of the CLIs about which we required information, and 66% of those in respect of which we required information for the period of October 2012 and November 2012. When this data is considered alongside our analysis of Customer questionnaire responses,⁶¹ the evidence further confirms that, in the particular cases referred to in the questionnaires, the slamming was repeated and persistent.

6.69 The following is a sample of what the relevant Customers said in their questionnaire responses. These are provided for illustrative purposes only and they are intended to be representative of patterns of behaviour identified in the questionnaire responses. It does not mean these are the only instances of this behaviour.

[Customer one]

- [Customer one] said she initially agreed to transfer her telephone services to timetalk towards the end of September 2012.
- However, when she realised this would involve a transfer of services to a new CP she contacted her existing CP to cancel the order.
- Despite this cancellation, timetalk subsequently placed a further five transfer orders to take over her telephone services without her express knowledge and/or consent. She received daily letters from her existing CP advising her of disconnection of her services.
- [Customer one] has also provided us with copies of the NoT letters issued by her existing CP on the following dates: 30 September 2012, 1 October 2012, 2 October 2012, 3 October 2012, 5 October 2012 and 22 October 2012.
- Ofcom compared this to information provided by Openreach which showed that timetalk placed orders to take over [Customer one's] telephone services on the following dates: 29 September 2012, 1 October 2012, 2 October 2012, 4 October 2012, 18 October 2012 and 30 October 2012.

[Customer two]

- [Customer two] said he initially agreed to transfer his telephone services to timetalk in September 2012.
- However, when he realised this would involve a transfer of services to a new CP, [Customer two] contacted his existing CP to cancel the order.
- Yet, despite this cancellation, timetalk placed a further three transfer orders over the course of a month in an attempt to take over his telephone services without his express knowledge and/or consent.
- [Customer two] provided us with a copy of a NoT letter issued by his existing CP on 2 October 2012. [Customer two] explained that he no longer had copies of the other letters he received advising of a transfer to timetalk.

⁶¹ 81% of questionnaire responses reported repeat transfer orders being placed by timetalk without their knowledge or express consent.

- Ofcom compared this to information provided by Openreach which showed that timetalk repeatedly placed transfer orders to take over [Customer two's] telephone service on the following dates: 22 September 2012, 1 October 2012 and 16 October 2012.

[Customer three]

- [Customer three] said she first became aware timetalk had attempted to take over her line without her express knowledge and/or consent at the beginning of October 2012.
- [Customer three] subsequently cancelled this transfer with her existing CP but later became aware that timetalk had placed a further two transfer orders in an attempt to take over her line without her express knowledge and/or consent.
- [Customer three] provided us with copies of NoT letters issued by her existing CP on the following dates: 8 October 2012 and 19 October 2012.
- Ofcom compared this to Openreach's information which showed that timetalk had repeatedly placed transfer orders to take over [Customer three's] line on the following dates: 25 September 2012, 5 October 2012 and 18 October 2012.

[Customer four]

- [Customer four] said he first became aware timetalk had attempted to take over his line following receipt of a NoT letter dated 18 October issued by his existing CP.
- [Customer four] subsequently cancelled this transfer with his existing CP and also stated that: *"I explicitly ordered timetalk not to interfere with his [existing] account and reminded them that they did not have my permission or authority to remove my account."*
- [Customer four] said timetalk proceeded to place a further four transfer orders without his express knowledge and/or consent, but he was unable to provide specific dates. Ofcom compared this to Openreach's information which showed that timetalk had placed orders to take over [Customer four's] line on the following dates: 31 May 2012, 22 June 2012, 8 August 2012, 7 October 2012, 7 November 2012 and 14 November 2012.

[Customer five]

- [Customer five] said timetalk first attempted to take over her line without her express knowledge and/or consent at the beginning of November 2012.
- [Customer five] contacted her existing CP to in order to understand what had happened and was informed that another CP had placed a transfer order for her line. She (subsequently) cancelled this transfer order with her existing CP.
- [Customer five] also said she received a further NoT letter from her existing CP shortly after this cancellation. Upon contacting her existing CP, she was again advised that another CP had placed a subsequent transfer order for her line.
- Ofcom compared this to Openreach's information which showed that timetalk had placed transfer orders to take over [Customer five's] telephone service on the following dates: 5 November 2012 and 16 November 2012.

Conclusions

6.70 Ofcom's analysis of the information obtained from the questionnaires shows the following, in particular, which contribute to Ofcom having had at the time of the Notification reasonable grounds to believe, and in this Confirmation Decision for being satisfied, that Supatel contravened GC24.3(d) by engaging in slamming in the ways described:

- 26 of the 30 Customers who responded to our questionnaires reported that timetalk had repeatedly placed transfer orders to take over their telephone line without their express knowledge and/or consent.
- 17 of them reported that timetalk had placed at least three or more transfer orders without their express knowledge and/or consent.

Overall Conclusions

6.71 On the bases set out above, Ofcom is satisfied and therefore confirms that Supatel contravened GC24.3(d) from 1 October 2012 to 30 November 2012 by repeatedly placing transfer orders for Customers' lines without their express knowledge and/or consent. There are such grounds to be satisfied that it did so in respect of 83 CLIs, representing 2.39% of the transfer orders it placed during those months. Ofcom relies on all the evidence set out, to the extent described, and in particular on the following:

- Ofcom received 126 complaints of slamming against timetalk in October 2012 and November 2012.
- Those complaints are supported by 26 of the 30 Customers who responded to our questionnaires and who said timetalk had repeatedly placed transfer orders to take over their telephone line without their express knowledge and/or consent.
- Those complaints are corroborated by the information Ofcom has obtained from Supatel and/or Openreach in respect of 83 CLIs (66% of those in relation to which Ofcom received complaints in October 2012 and November 2012) and 84% of the CLIs in respect of which timetalk had the possibility of placing repeated transfer orders during the Relevant Period.
- Those 83 CLIs represent 2.39% of the 3,470 transfer orders timetalk placed in those months.
- Ofcom has no grounds to believe that the Cancel Other process was used inappropriately in relation to these 83 CLIs (and the evidence above indicated otherwise).
- timetalk does not appear to have had in place proper procedures for processing transfer orders in accordance with GC24 until November 2012 at the earliest (based on its assertion) and, at the latest, until sometime between 16 - 18 December 2012 (based on the date of the relevant document and on Supatel's representations of 25 April 2013).

Section 7

Ofcom's Decision to impose a penalty

7.1 This section sets out Ofcom's decision to impose a penalty on Supatel. It explains why we consider a penalty to be appropriate and why the amount is appropriate and proportionate to the contravention in respect of which it is being imposed. We have had regard to the following matters in particular:

- (a) the evidence that Supatel has engaged in slamming, as set out in section 6 above;
- (b) the actual and potential harm and distress for consumers where they have been transferred from another CP, or an attempt has been made to transfer their Fixed-Line Telecommunications Services, to Supatel, and the dampening effect this has on good competition outcomes for consumers;
- (c) Supatel's representations in relation to the imposition of a penalty; and
- (d) the Penalty Guidelines that are in force under section 392 of the Act.

7.2 The applicable legal framework is set out in section 3 of this document.

Consideration of whether to impose a penalty

7.3 As set out in section 3 above, section 96A(2)(e) of the Act provides that a Notification under section 96A may specify any penalty which Ofcom are minded to impose in accordance with section 96B. Ofcom may specify a fixed penalty in respect of the period covered by the Notification and, where a contravention is continuing, may also specify a penalty in respect of each day on which the contravention continues after the giving of a Confirmation Decision under section 96C(4)(c).

7.4 Ofcom considers a contravention to be a "*continuing contravention*" for the purposes of section 96B where we have reasonable grounds to believe that the contravention is continuing as at the date a Notification under section 96A of the Act is issued.

7.5 A Confirmation Decision may, under section 96C(4)(d), require a person to pay the penalty specified in the section 96A Notification, or to pay such other lesser penalty as Ofcom considers appropriate in light of that person's representations or the steps that person has taken to either comply with the condition and/or remedy the consequences of the contravention. Where a penalty is specified in a Confirmation Decision, the person on whom it is imposed must, under section 96C(7), pay the required sum.

7.6 Again, Ofcom has carefully considered all Supatel's representations of 25 April 2013. We note, in particular, for present purposes that, amongst them, Supatel has submitted that it was not made aware of the level of complaints that had been received by Ofcom's CCT and which prompted the investigation. Supatel states that only three CCT complaints were notified to it in respect of timetalk prior to the Relevant Period and the number of complaints notified to it in October was eight. Supatel has questioned whether the imposition of a penalty in its case is in accordance with Ofcom's duties under section 3(3) of the Act and, in particular,

whether the imposition of a penalty is necessary in light of the steps that Supatel has taken.

- 7.7 Following consideration of Supatel's representations, and for all the reasons that follow, we are still of the view that Supatel's level of non-compliance with GC24.3(d) during the Relevant Period was serious. Its nature and extent – the number of cases, and the repeated placing of transfer orders in them, often until a transfer completed successfully, considered alongside the point that it lacked proper procedures for processing transfer orders in accordance with GC24 until November 2012 at the earliest, tend to suggest the contravention had systemic aspects.
- 7.8 Further, the imposition of a penalty is consistent with our duties under section 3(3) of the Act. Our proposal, and now our decision, to impose a penalty, and the factors which we have taken into account in setting the quantum, were set out fully in the Notification and are now set out fully in this Explanatory Statement in a manner that is transparent and accountable. Ofcom is satisfied, again for the reasons we explain, that the level of penalty imposed is proportionate to the seriousness of the contravention, appropriately targeted at a case where intervention is needed, and is consistent with Ofcom's published Penalty Guidelines and the similar case precedents.
- 7.9 Ofcom considers that it is necessary and appropriate to impose a penalty on Supatel so as to give it and other CPs sufficient incentive to comply with GC24 and deter non-compliance, thereby protecting and furthering the interests of citizens and consumers by helping to foster widespread adherence with legislation and regulatory principles. This accords with the central objective of our Penalty Guidelines, which is deterrence.
- 7.10 In the present case, for the reasons set out in paragraphs 7.58 to 7.62, Ofcom has determined 30 November 2012 to be the end date of the contravention. The contravention is therefore not a "*continuing contravention*" for the purposes of section 96B and therefore Ofcom does not impose a daily penalty on Supatel.
- 7.11 Accordingly, Ofcom confirms its decision to impose a fixed penalty only. The basis which Ofcom has decided to set the amount of that penalty is set out below.

Determination of the amount of penalty

- 7.12 The amount of the penalty Ofcom imposes on Supatel is £60,000.

Turnovers for relevant business

- 7.13 The maximum amount of the fixed penalty Ofcom may impose on Supatel is ten per cent of its turnover for its relevant business⁶² for the period between 1 April 2011 to 31 March 2012. That is the "relevant period" as defined in section 97(5) of the Act given that the Notification was issued on 27 March 2013.
- 7.14 As set out in section 4, the First Information Request required Supatel to provide details of the turnover of Supatel's relevant business for the period 1 April 2011 to 31 March 2012. In response, and as confirmed in its Second Response, Supatel stated that its relevant turnover for the period 1 April 2011 to 31 March 2012 was [X]. Therefore, Ofcom may impose a penalty on Supatel of a maximum of ten percent of that figure, [X].

⁶² See paragraph 3.16.

The penalty guidelines and relevant factors

- 7.15 The particular factors we have considered in our determination of the penalty, including those in the Penalty Guidelines, are set out below.
- 7.16 Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty.
- 7.17 The particular factors we have considered are:
- a) our duties under section 3(3) of the Act, to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed;
 - b) the central objective of imposing a penalty which, as stated in the Penalty Guidelines, is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement;
 - c) the following factors which appear to us to be relevant in determining an appropriate penalty that is proportionate to the contravention in respect of which it is being imposed:
 - i) the size and seriousness of Supatel's contravention;
 - ii) the degree of harm, actual or potential, caused by that contravention;
 - iii) the duration of the contravention;
 - iv) any gain (financial or otherwise) made by Supatel as a result of the contravention;
 - v) whether Supatel has a history of contraventions;
 - vi) whether, in all the circumstances, Supatel took appropriate steps to prevent the contravention;
 - vii) any steps Supatel has taken for remedying the consequences of the contravention;
 - viii) the extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, it was occurring or would occur;
 - ix) the extent to which Supatel has co-operated with the Investigation;
 - x) the extent to which earlier cases set a precedent for any penalty that might be imposed on Supatel; and
 - xi) the extent to which the level of penalty is proportionate, taking into account Supatel's size and turnover.

We have also had regard to the need for transparency in applying our Penalty Guidelines, particularly as regards the weighting of the factors considered in taking

our proposed approach. We have carefully considered Supatel's representations of 25 April as far as they relate to any of the foregoing matters.

Deterrence

- 7.18 Deterrence is one key consideration in our determination of the appropriate amount of any penalty. Another consideration, particularly in light of the requirement of proportionality, is the need for the penalty to reflect the size and seriousness of the contravention and Supatel's culpability in that contravention. Ofcom is mindful of the need to strike a fair balance between those considerations.
- 7.19 In this regard, Ofcom considers that, whilst, there should be a relationship between the size and seriousness of Supatel's contravention and the amount of the penalty, this is not necessarily a linear relationship. Some factors weigh more heavily than others in Ofcom's determination.
- 7.20 These points go to ensuring that any amount imposed:
- a) both appropriately and proportionately penalises Supatel's contravention notified to it in this Confirmation Decision; and
 - b) creates an appropriate and proportionate deterrent effect for both Supatel and other CPs providing (or using) an electronic communications network or an electronic communications service.
- 7.21 Applying those points here, we take into account that the GCs set out rules designed to protect consumers in the electronic communications sector. In particular, GC24 is designed to ensure that consumers, particularly Domestic and Small Business Customers, are protected from mis-selling, including slamming.
- 7.22 The rules set out in GC24 are important. Consumers making informed choices in response to the offers of competing CPs are central aspects of a well-functioning market. Mis-selling of Fixed-Line Telecommunications Services runs counter to this, may undermine both the development of competition and consumers' trust in the industry and can result in harm and distress to consumers.
- 7.23 In the particular case of slamming, which Ofcom considers as the most extreme form of mis-selling, this gives rise to serious consumer harm as it can result in consumers being transferred to a CP that they do not know and/or did not wish to transfer to. The result of this is likely to be inconvenience, stress and/or anxiety for those Customers as well as, in some cases, financial detriment, where they may be required to pay an ETC to their previous CP or be charged at a higher rate by the slamming CP. This is compounded where the particular form of the slamming activity is persistent and repeated.
- 7.24 Ofcom considers that this type of conduct is contrary to our policy objectives and aims. In particular, that consumers should be protected from inappropriate and unacceptable behaviour that may undermine confidence in the market, as well as cause direct harm to individuals.
- 7.25 It is therefore important to set a penalty that deters non-compliance with the relevant rules, in light of the contravention Ofcom has found to have occurred. Our view in the Notification was that the penalty should be non-trivial, in reflection of the importance of the rule and the extent to which Supatel has breached it.

- 7.26 In its representations of 25 April 2013, Supatel has submitted that a penalty is not required to deter it from further contraventions. This is because *“It has already acted to take measures aimed at ensuring that this does not happen again. [Supatel] has also been through the process and, put bluntly, it does not wish to go through it again. It has also suffered from adverse publicity that arises from investigations of this type.”* Supatel further submits that if Ofcom was minded to reduce any penalty it decided to impose on Supatel, it would not *“be appropriate, particularly given Supatel’s size, to negate any reduction by reason of Ofcom’s desire to deter other Communications Providers.”*
- 7.27 It is not apparent to Ofcom that the factors Supatel sets out are exceptional from other circumstances in which we would impose a penalty for a contravention of regulatory rules and regulations. On the contrary, these factors all appear to Ofcom to be a natural consequence of any investigation Ofcom conducts and any penalty we impose. If we were to consider these factors as a reason not to impose a penalty on a CP then it is difficult to imagine circumstances in which we would ever impose a penalty. Further, and in any event, we have taken into account the extent to which the penalty itself, in addition to the cautionary effect of Ofcom’s action, is necessary for deterrent purposes. We are not imposing a penalty we consider more than necessary to secure that effect.
- 7.28 For the reasons set out above, we do not consider that Supatel’s representations in relation to deterrence alter the level of the penalty that Ofcom was minded to impose in the Notification. The further factors that are relevant to our consideration of the penalty, and its proportionality to Supatel’s contravention of GC24.3(d) for which it is imposed, are set out below as follows.

Size and seriousness of Supatel’s contravention of GC24.3(d)

- 7.29 In this particular case, Ofcom has made a finding that Supatel repeatedly placed transfer orders for Customers’ lines without their express knowledge and/or consent in respect of 83 CLIs in the Relevant Period. That, in Ofcom’s view, represents a significantly serious commission of what is, in any event, a serious contravention.
- 7.30 When assessing the size and seriousness we have taken into account the following factors, each of which contributes to our view that the size and seriousness of the contravention, and any corresponding penalty, are (or should be) significantly more than trivial:
- The 83 corroborated complaints in October 2012 and November 2012, as well as being significant in themselves, represent 2.39% (83 of a total of 3,470 transfer orders timetalk placed in that period).
 - By way of one comparison, the CP attracting the most complaints to Ofcom about mis-selling (which could include, but is not limited to slamming) in October 2012 and November 2012 was the subject of [X] such complaints and placed circa [X] transfer orders in that period. Even if all those involved slamming and were fully justified, this would have represented only 0.25% of the transfer orders it placed. This indicates that timetalk’s relative performance is 10 times worse than the CP with the most complaints against it for the Relevant Period.
 - By way of another, timetalk’s overall Customer base in November 2012 was [X], meaning the repeated transfers without consent in respect of 83 CLIs represents [X] of that base, whereas for the most complained of CP, the [X]

complaints it drew represent [X] of its Customer base of approximately [X]. This indicates that timetalk's relative performance is 2,513 times worse than the CP with the most complaints against it for the Relevant Period.

- 7.31 On those bases, Ofcom considers that timetalk's contravention of GC24.3(d) is both serious and relatively large in scale, considering the size of its customer base, the number of transfer orders it placed and the position of a comparator CP. This is material in determining the level of any penalty to be imposed. This is because the contravention is more likely to have a negative impact on a relatively higher proportion of Customers. Accordingly, Ofcom's view in the Notification was that the scale and seriousness of the contravention tends to support a higher penalty.
- 7.32 In its representations of 25 April 2013, Supatel accepts as serious those instances where the initial transfer order was placed in contravention of GC24.3 and subsequent transfer orders were then placed without the express knowledge or consent of the Customer. Supatel submits that the situation is less serious, however, where the initial transfer order has been placed legitimately, but subsequently cancelled by the Customer without contacting the Gaining CP, and the Gaining CP then places a further transfer order without contacting the Customer again.
- 7.33 Supatel further submits that the seriousness of the contravention must be considered in actual rather than relative terms. Supatel does not argue that the 83 corroborated complaints is not high in relative terms or that the number of CCT complaints was not high in terms of transfer activity. It does, however, submit that the actual negative impact on the public was small.
- 7.34 Based on 83 reported corroborated complaints during the Relevant Period, Supatel submits that the proposed penalty represents £747 per complaint. By comparison, Supatel has referred to Ofcom's investigation into metering and billing activities undertaken by Tiscali UK Limited and Talk Talk Telecom Limited ("the First Talk Talk case"⁶³) where we imposed a penalty of £3,037,120.00. The number of Customers affected in that case numbered approximately 62,055 where, by Supatel's calculations, the aggregated penalty imposed on the CP equated to £48.94 per individual. This is more than 15 times less than the penalty per customer which Ofcom is proposing to impose on Supatel. In Supatel's submission, the level of any penalty should properly reflect the actual number of affected customers, rather than the proportion of affected Customers by reference to the size of the CP's Customer base.
- 7.35 Finally, Supatel makes the point that in the First Talk Talk case, and in further investigations conducted by Ofcom into Just Telecommunications and Telephonics,⁶⁴ the CPs were given an opportunity to rectify the alleged contraventions but failed to do so. Although Supatel acknowledges that the enforcement regime has since changed, it makes the point that under that regime, no fine would have been imposed on Supatel, *"having remedied the contravention prior to being made aware of it."*

⁶³ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01051/

⁶⁴ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_857/ and http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/CW_998/.

- 7.36 Having given these representations due consideration, Ofcom does not agree with them.
- 7.37 In relation to Supatel's first point, Ofcom does not accept that slamming is less serious when the initial transfer order has been placed legitimately and the customer subsequently cancels that order, other than by contacting the Gaining CP directly. The wording of GC24.3 certainly makes no distinction as to the relative seriousness of slamming, dependent on how such incidents arise. Nor would it make any sense for GC24 to differentiate in this way, where a Customer may not always know who the Gaining CP actually is. The harm is the same: the transfer of a Customer from one CP to another without the Customer choosing to make that transfer.
- 7.38 It is relevant, as we have done, to consider the size and seriousness of a contravention in both actual and relative terms. In our decision, for the reasons set out in the paragraphs above, the contravention is not insignificant on either count.
- 7.39 We agree a consideration of the actual or absolute size of a contravention is relevant. It is self-evident that the smaller it is in actual terms, the fewer consumers in total are harmed by it.
- 7.40 However, it cannot be the case that a CP can be penalised only for the absolute number of cases in which it contravenes a GC. A relevant group to consider is not simply all consumers at large. It is those who are, or could be, affected by the conduct in question. Here, principally, those in respect of whom transfer orders were placed.
- 7.41 That relative measurement gives an indication of how many opportunities for mistakes or wrongdoing the relevant CP took. Were that not so, CPs of all sizes, and regardless of the number of cases in which they complied fully with relevant rules, would be liable to be penalised in a similar way. That, again, appears self-evidently incorrect.
- 7.42 With respect to calculating the appropriate level of the penalty, it is, in Ofcom's view, wholly artificial and overly mechanistic to attempt to do so on a "penalty per customer" basis (which is what Supatel appears to imply). In determining the size of a penalty, Ofcom considers all the relevant factors in the round. The size of the contravention is just one of the factors that we consider alongside the other relevant factors.
- 7.43 As to Supatel's submission that the outcome of this matter may have been different had the legislative provisions applicable before 26 May 2011 still been in place, it is irrelevant. As set out in section 3, the legislative framework changed from that date. Ofcom must apply, and Supatel must comply, with that framework. Speculation, which is all it could be, as to the position under the previous provisions cannot be helpful in calculating a penalty under the present ones.
- 7.44 For the reasons set out above, we do not consider that Supatel's representations on size and seriousness of the contravention alter the level of the penalty that Ofcom was minded to impose in the Notification.

Degree of harm, actual or potential, caused by the contravention

- 7.45 We have given the following consideration in this case to the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants.
- 7.46 In doing so, we have considered that, in its representations of 25 April 2013, Supatel accepts that both financial and indirect harm has been caused to Customers. Supatel submits, however, that the actual number of affected Customers is *“relatively small”*. It further submits that *“the proposed penalty equates to approximately 50 times the average financial loss sustained by Customers who have been slammed.”* In relation to financial harm, Supatel submits that in most cases, Customers suffered no or limited harm, and that in the specific case of [Customer five], she has been fully compensated. Supatel did not seek to challenge Ofcom’s view with respect to the indirect harm caused to Customers. We have had regard to those submissions as follows.
- 7.47 As described above, slamming is the most extreme form of mis-selling and is liable to cause significant consumer harm, including distress, anxiety, time and effort trying to resolve the situation and financial harm. Further, Ofcom considers that this harm is compounded where consumers are actually transferred between CPs as a result of a slamming attempt and/or CPs are engaging in repeated attempts to transfer Customer’s without their express knowledge and/or consent.
- 7.48 In this regard, research previously commissioned by Ofcom on the effects of slamming found the following:⁶⁵
- 17% of consumers incurred some financial loss due to slamming, with an average of £6 per consumer, but ranging up to £70⁶⁶;
 - the average time spent by consumers dealing with the issue was 87 minutes, with a range of 15 minutes up to 10 hours; and
 - the average value of a household’s time to deal with slamming is £5.97 per hour assuming that this is dealt with in their leisure time and not working hours.
- 7.49 This research is only based on single instances of attempted slamming. One can reasonably expect that the degree and seriousness of harm caused in cases of repeated slamming attempts to be greater than that identified in the research.
- 7.50 In this particular case, of the 192 CLIs where Openreach provided transfer information, 87 in total (45%), and 83 in the Relevant Period, showed that transfer orders were repeatedly placed by timetalk. The number of repeated transfer orders placed by timetalk varied between CLIs, but the range was between two and six transfer orders for each. This would be consistent with an increased level of annoyance, inconvenience and time spent by Customers dealing with these transfer

⁶⁵ This is more fully described in Ofcom’s consultation document, Strategic Review of Consumer Switching, published on 10 September 2010 at <http://stakeholders.ofcom.org.uk/binaries/consultations/switching-fixed-voice-broadband/summary/condoc.pdf> (paragraphs A8.6-A8.26). The research was commissioned with the purpose of undertaking quantitative research to identify the incidence of mis-selling and slamming and to assess the financial impact on consumers of this. The research was based on a telephone survey of 2014 consumers.

⁶⁶ 11% of consumers were not sure or could not remember if they suffered any financial loss.

orders due to the fact each individual transfer order is likely to require some additional time and effort spent by the Customers in dealing with the issue.

7.51 In total, 59 of the 87 CLIs, and 56 of the 83 in the Relevant Period, were actually transferred to timetalk. Based on the questionnaires that Ofcom received there were varying levels of harm experienced by each Customer, including:

- 13 cases where the Customer experienced a loss of phone and broadband services;
- 17 cases where the Customer described actual or potential harm either through ETCs, payments made to Supatel or other associated costs with resolving the issue such as expensive mobile phone bills;
- 20 cases where the Customer experienced stress and anxiety⁶⁷, particularly in the case of vulnerable consumers; and
- 21 cases where the Customer described general inconvenience of the time and effort spent trying to resolve the situation with timetalk or their existing CP.

7.52 Ofcom, the above notwithstanding, agrees to some extent with Supatel's representation that the amount of direct financial harm arising out of the contravention was limited. In the Notification, we placed limited reliance on this specific point. We continue to do so in this Confirmation Decision.

7.53 However, and as set out in the Notification, our assessment of the individual questionnaire responses revealed a high degree of actual consumer harm in the cases to which those questionnaires referred, including examples of distress, anxiety, financial harm, and inconvenience through time spent trying to resolve the situation. Those examples included:

- [Customer one's] comments about the "*stress and worry*" as a result of this experience. She also states: "*I had to stop all future requests with the bank and put a block on the account.*" [Customer one] also said she received two calls at the start of November 2012 from a timetalk customer service agent who demanded a £99 payment to cover a cancellation fee. This was eventually waived.
- [Customer four] stated that he was contacted by timetalk following the cancellation of these orders: "*They said the switch was imminent and that if I cancelled the contract I would have to pay £250.*" [Customer four] advised this resulted in "*a heated discussion with the representative about taking money off me.*" This charge was later waived by a timetalk manager.
- [Customer two] stated "*this was most distressive as I am suffering from lung cancer*" and describes being concerned about "*the amount of money he would have to pay his own company.*" The seriousness of harm in this case may have been exacerbated by the vulnerable nature of the Customer involved.

⁶⁷ Details of individual responses to the questionnaires which describe some of the inconvenience, stress, and anxiety caused by timetalk can be found at Annex 9.

- [Customer three] described: *“loss of time, telephone costs and peace of mind”* as well as the experience being *“very stressful.”*
- [Customer five] stated that she suffered financial harm when timetalk: *“removed from my bank account the sum of £50.37 as a first payment.”* In addition to this, [Customer five] was required to pay a disconnection charge of £168 to her existing CP for a transfer that: *“we did not ask for, we did not require and certainly did not want.”* [Customer five] was never reimbursed for these charges: *“It was a case of paying the fee or being blacklisted”*. [Customer five] also advised that she experienced the loss of her telephone service in that she had *“no internet over Christmas or New Year and could not e-mail or Skype family and friends who live abroad.”* She also described feelings of stress and frustration and had a *“lasting memory of hassle after being away celebrating our 30th wedding anniversary.”*
- [Customer six] stated *“I was without internet for over a month... my son is currently studying an ATL course...with no internet he was behind on his studies and wasted £160.”*
- [Customer seven] stated *“I used my mobile phone and ended up with a big telephone bill.”*

7.54 As we made clear in the Notification, and now confirm in this Confirmation Decision, Ofcom places weight on this evidence of harm in the questionnaires. It is indicative of a high degree of harm of the kinds described (if not direct financial harm). Supatel’s representations of 25 April 2013 do not address this harm beyond a reference to compensating one of the complainants, [Customer five] (and we take the question of remedial steps into account in paragraphs 7.101-7.123 below).

7.55 Also relevant, as described earlier, is what Ofcom considers the indirect harm caused by slamming. This is especially so in a situation where a Customer is slammed by a CP and is not restored to their original CP.⁶⁸ This may be driven by consumers not wanting to spend too much time trying to resolve the issue or due to the possibility of having to pay an ETC if they try and move away from the slamming CP. This implies that slamming has not only a negative impact on consumers’ experiences, but also on the competitive process. That is, it may allow inefficient firms unfairly to win customers from more efficient competitors and stay in the market. In other words, slamming is inimical, and harmful, to the free choice and fair competition that should characterise a well-functioning market. Supatel’s representations do not dispute these points.

7.56 For all the above reasons, Ofcom’s view, which we now confirm, is that timetalk’s contravention of GC24.3(d) has given rise to a high degree of harm, both direct and indirect, of the kinds described. This is a factor adding to the amount of the penalty. For the reasons set out, we do not consider that Supatel’s representations as to the harm caused alter the level of the penalty that Ofcom was minded to impose in the Notification.

⁶⁸ Slamming research commissioned by Ofcom shows that an average of 44% of consumers who had been slammed were not restored to their original CP.

<http://stakeholders.ofcom.org.uk/binaries/consultations/switching-fixed-voice-broadband/annexes/slamming2011.pdf>

The duration of the contravention

- 7.57 Ofcom started receiving complaints about timetalk's conduct in August 2012. By October 2012, we were sufficiently concerned at the level and nature of these complaints that we decided to open a formal Investigation into timetalk's sales and marketing of its Fixed-Line Telecommunications Services.
- 7.58 For the purpose of the Investigation, we have considered timetalk's activities over the period 1 July 2012 to the date of the Notification (27 March 2013). That start date was selected because we considered that the first complaints received in August 2012 were likely to have resulted from sales and marketing activity in or around the previous month.
- 7.59 However, following our analysis of the complaints and other information received during the Investigation, Ofcom's determination is that we are satisfied Supatel contravened GC24.3(d) for a period of two months, from 1 October 2012 to 30 November 2012. This is on the basis of our analysis of all the evidence, as set out in section 6 above, which demonstrates that timetalk's practice of repeatedly placing transfer orders for Customer's lines occurred principally in this period.
- 7.60 Accordingly, when determining the level of penalty we are imposing, Ofcom takes into account that the contravention was for a limited time and is not continuing.
- 7.61 In its representations of 25 April 2013, Supatel indicates that, on the basis of its own investigations, the period during which the contraventions were taking place may be shorter than the Relevant Period. This submission is based on the high number of Cancel Others that were being applied over the course of a three week period, from early/mid October to late October/early November 2012.
- 7.62 Ofcom has considered Supatel's representations on this point but does not agree that the duration of the contravention was for a period less than the Relevant Period. Figure 7.1 below shows the dates where repeat transfer orders were placed by Supatel for the 83 corroborated complaints. As it stands, these occurred throughout the Relevant Period.

Figure 7.1 Dates of repeat transfer orders placed by Supatel

October	Repeat transfer orders	November	Repeat transfer orders
01/10/2012	10	01/11/2012	0
02/10/2012	6	02/11/2012	0
03/10/2012	0	03/11/2012	0
04/10/2012	6	04/11/2012	0
05/10/2012	5	05/11/2012	2
06/10/2012	0	06/11/2012	0
07/10/2012	1	07/11/2012	12
08/10/2012	1	08/11/2012	2
09/10/2012	1	09/11/2012	4
10/10/2012	0	10/11/2012	3
11/10/2012	2	11/11/2012	0
12/10/2012	2	12/11/2012	1
13/10/2012	3	13/11/2012	0

14/10/2012	0	14/11/2012	2
15/10/2012	6	15/11/2012	3
16/10/2012	9	16/11/2012	4
17/10/2012	11	17/11/2012	0
18/10/2012	5	18/11/2012	0
19/10/2012	3	19/11/2012	3
20/10/2012	0	20/11/2012	5
21/10/2012	1	21/11/2012	1
22/10/2012	4	22/11/2012	0
23/10/2012	5	23/11/2012	0
24/10/2012	9	24/11/2012	0
25/10/2012	0	25/11/2012	0
26/10/2012	0	26/11/2012	0
27/10/2012	0	27/11/2012	0
28/10/2012	0	28/11/2012	0
29/10/2012	17	29/11/2012	1
30/10/2012	9	30/11/2012	0
31/10/2012	5		

Any gain (financial or otherwise) made by Supatel as a result of the contravention

- 7.63 It is not possible for Ofcom accurately to quantify the financial gain made by Supatel as a result of the contravention. The responses to the questionnaires suggest that, in some cases, Customers had small denominations taken from their account (amounting to less than £1 in most instances) and that where more substantial sums of money were paid to timetalk, these were refunded to Customers who transferred away from it. However, most Customers indicated that no financial payments were made to timetalk.
- 7.64 Also of relevance, however, is the volume of those Customers who cancelled timetalk's transfer orders but were subsequently transferred across to it anyway, when it placed further transfer orders. There were 56 Customers in respect of whom the transfers were completed during the Relevant Period. The information Ofcom obtained from Openreach appeared to show that of these 56 Customers, 15 have remained timetalk Customers as a result of a repeated transfer order without their express knowledge and/or consent during the Relevant Period. This suggests Supatel is likely to have made financial gains from these Customers as a direct result of their contravention.
- 7.65 In particular, according to pricing information available on its website, Supatel's cheapest timetalk service for residential is £13.80 per month⁶⁹. Even on the basis of 15 Customers subscribing to this package, that would provide Supatel with a financial gain it would not otherwise have made of £207 per month.
- 7.66 Ofcom has also had regard to the following point. As set out above at footnote 68, research commissioned by Ofcom found that an average of 44% of consumers who had been slammed were not restored to their original CP. Again, this reflects the

⁶⁹ This assumes that the Customer has not made any chargeable calls using Supatel's services and that the Customer is paying monthly rather than having paid the cheaper rate of £9.99 per month which is payable up front at the start of the contract, totalling £119.88.

slamming CP's opportunity for financial gain by obtaining a Customer it would not have obtained if it had acted compliantly with GC24 rules. It is a point Ofcom considers should be reflected in a penalty having the appropriate deterrent effect.

- 7.67 In these connections, we have taken into account the following points Supatel made in its representations of 25 April 2013. First, Supatel accepts that financial gains will have been made in relation to the 15 Customers who have remained with them, at least in terms of turnover. Supatel submits, however, that on the assumption that those Customers will remain with them for the fixed period of their contracts, the increase in turnover represented by those customers would amount to less than £5,000. Even assuming a margin of 100% between its wholesale prices and its retail prices, Supatel states that its gross profit before overheads would not exceed £2,500 in respect of those Customers. In Supatel's submission, *"the actual profit derived from these transfers is in reality nominal and is materially outweighed by costs that have been incurred by Supatel as a result of remedying the [c]ontravention, before the imposition of any penalty."*
- 7.68 Secondly, Supatel notes the research referred to in paragraph 7.48. It states, however, that *"it would appear from the actual information available that the level is lower than the stated 44% and is nearer 26%"*. It is not entirely clear from Supatel's representations what is meant by the "actual information available". However, Supatel appears to be referring to its specific case, where 15 out of a total of 56 Customers equates to 26%.
- 7.69 In Supatel's submission, in light of these points, is that it has not made any financial gains as a result of the Contravention and that, at least as it is concerned, slamming does not present any opportunity for financial gain.
- 7.70 Ofcom fundamentally disagrees with Supatel's assertion that slamming does not present any opportunity for financial gain. The primary purpose of slamming is to transfer a Customer's phone services without their express knowledge and/or consent so that the Gaining CP can then bill that Customer for services provided. The steps Supatel has taken to remedy the contravention are considered separately later in this Confirmation Decision. That the costs of those steps have outweighed the financial gain from slamming are, however, not relevant to this particular aspect of the penalty calculation.
- 7.71 It is also Ofcom's view that, when considering any financial gain made by Supatel as a result of the contravention, it is appropriate to do so in the context of the gains Supatel has directly made from Customers and not, as Supatel submits, the actual profit it has made, including after it has taken steps to remedy the contravention. Its profit margins may well be low. It would have accrued less income still had the slamming not occurred.
- 7.72 The above notwithstanding, however, as set out in the Notification and Supatel's representations of 25 April 2013, Ofcom has noted that where sums of money were paid to Supatel, these were refunded to slammed Customers who transferred away from it. In addition, we also note that most Customers indicated that no financial payments were made to Supatel. Ofcom agrees with Supatel that these factors should be taken into consideration when determining the level of penalty. We had already done so in the Notification (see paragraphs 7.40 and 7.44 of the Notification).
- 7.73 Accordingly, Ofcom remains of the view that, in determining the level of the penalty, Supatel's likely financial gain from contravening GC24.3(d), and the need to deter

other CPs from pursuing an opportunity for financial gain, are factors adding (albeit to a limited extent given the evidence in this case) to the level of penalty. Supatel's representations on the gains (financial or otherwise) made by Supatel as a result of the contravention do not alter the level of the penalty that Ofcom was minded to impose in the Notification.

Whether Supatel has a history of contraventions

- 7.74 Supatel does not have a history of contraventions of the GCs which have been notified to it under section 96A of the Act. Accordingly, save to the extent that we take into account our previous dealings with it, as set out in the Notification and now in this document, this is not an aggravating factor in this case that Ofcom considers should be reflected in an increased penalty.
- 7.75 In its representations of 25 April 2013, Supatel has submitted that the absence of prior contraventions should be taken into account by Ofcom as a mitigating factor, tending to reduce any penalty imposed. Ofcom considers that we have given proper weight to this factor. We note that our Penalty Guidelines indicate “...*repeated contraventions may lead to significantly increased penalties.*” The fact that Supatel may not have previously contravened GC24.3(d) (or, for that matter, any of the other GCs) does not alter the fact that it has done so on this occasion.

Whether in all the circumstances Supatel took appropriate steps to prevent the contravention

- 7.76 Ofcom's overall assessment is that Supatel did take some appropriate steps to prevent their notified contravention of GC24.3(d), but that the efficacy of some of these was limited. Accordingly, we give it some credit for these steps in our calculation of the penalty as follows.
- 7.77 As we set out in the Notification, CPs' compliance with GC24 is a fundamental and ongoing obligation. Compliance with GC24 is the responsibility of each individual CP and is fully within their control. It is important that Supatel, and other CPs, have systems and processes in place for compliance as part of the ordinary course of their business. With respect specifically to Supatel, it is Ofcom's view that it knew, or ought to have known, of the requirements of GC24, and accordingly should have put in place adequate controls to prevent slamming (and, particularly, repeated attempts to slam). This is particularly so in light of the following.
- 7.78 Following complaints against Supanet, a trading name of Supatel, in August 2011, Ofcom telephoned Supanet to discuss GC24 and Supanet's obligations under it. The same day, a letter was sent via email to Supanet setting out: the key requirements of GC24; details of Ofcom's GC24 monitoring and enforcement programme; a link to the text of GC24 and the accompanying guidance notes; and a link to the statement which led to GC24 being implemented (a copy of this letter can be found at Annex 10).
- 7.79 In November 2011, there was an increase in Ofcom's CCT slamming complaints against Supanet. At that time, Ofcom contacted Supanet to discuss this issue and raised concerns with regard to Supanet's compliance with GC24. Supanet responded by letter on 29 November 2011 acknowledging the issue and the fact

that it too had received a number of complaints concerning the conduct (see Annex 11).⁷⁰

- 7.80 Supatel was, therefore, or ought to have been, aware of the requirements of GC24. It was, or should have been, in a position, when creating its new timetalk brand, to ensure that adequate policies, processes, and procedures were in place to achieve compliance with those requirements.
- 7.81 In addition to the above, in the Notification, Ofcom relied in forming its provisional view on that point that from Supatel's First Response and its letter of 24 January 2013, Supatel appeared until November 2012 (at the earliest) to have no documented processes or procedures in place to assist its staff and agents in ensuring they were aware of the requirements of GC24 and were compliant with it. In fact, there did not appear to be any evidence provided that demonstrated the sales staff for timetalk were even aware of GC24.⁷¹ In addition, Supatel had stated that there was no formal policy in existence until November 2012 to monitor and audit its processes, staff, and agents' compliance with GC24.
- 7.82 Also relevant was that, in its letter of 24 January 2013, Supatel stated that sales of timetalks' Fixed-Line Telecommunications Services exceeded expectations and that to meet the demand additional agents were placed on the campaign in August 2012. In its letter, Supatel confirmed that these agents did not have the same level of training and/or experience as the initial agents on relevant policies and procedures. Supatel further stated that when these deficiencies were identified in October 2012, a decision was taken to suspend all sales of timetalk's Fixed-Line Telecommunications Services until 9 January 2013 when it was confident it would be compliant with GC24.
- 7.83 In this letter, Supatel set out the issues it had identified and the steps it was taking to ensure that these issues were no longer occurring. It also provided some further information in its Second Response regarding the detail of the actions it was taking to ensure timetalk complied with GC24.
- 7.84 Despite the steps taken by Supatel, Ofcom still had significant concerns as to whether or not these were sufficient to prevent contravention of GC24. For example, Supatel stated it suspended all sales and marketing of timetalk's Fixed-Line Telecommunications Services in October 2012 and up until 9 January 2013. However, the Openreach information Ofcom obtained showed that timetalk placed a total of 2,224 transfer orders in October 2012, 1,246 in November 2012, and 578 in December 2012⁷².
- 7.85 It was (and is) not clear whether these orders were the result of further sales and marketing activity during the period in question, or whether they were subsequent transfer orders for orders already placed prior to October 2012 but which were

⁷⁰ This letter was signed by [§<], Director of Operations/Customer Service. In Supatel's response to the Second Final Request, [§<] was identified as being involved in the project to review timetalk's sales and marketing of its Fixed-Line Telecommunications Services.

⁷¹ Ofcom would have expected to see documents with training material and scripts setting out the requirements of GC24 and how a sale should be conducted in accordance with GC24.

⁷² In its representations of 25 April 2013, Supatel clarifies that the decision was made to suspend call centre sales activity. At the time of the suspension, Supatel states that it became aware there was a significant back-log of orders in the system as well as potential customers who had already been contacted prior to suspension of activities, who subsequently decided that they wished to proceed. Supatel submits that this explains why there is not a reduction to zero transfer orders in November, but instead a clear reduction from the October peak through November and December.

cancelled by the Customer. Irrespective, in order for Supatel to prevent the contravention, it should not have been repeatedly placing transfer orders for Customers, who had previously cancelled the initial (or previous) order, without their express knowledge and/or consent. The evidence in section 6, including the Openreach information, suggested the steps taken by timetalk were not appropriate to prevent the contravention during the Relevant Period.

- 7.86 Accordingly, in the Notification we set out our provisional view that Ofcom did not consider that, in all the circumstances, Supatel had taken the appropriate steps to prevent the contravention. Indeed, our view was that Supatel only took steps to prevent the contravention following the opening of the Investigation. This was a significant factor tending to increase the proposed penalty. We indicated that it would in itself bring that penalty closer to the middle of the possible range. We recognised, however, that once Ofcom informed Supatel of our concerns, steps were taken to prevent future harm and there is no evidence of a continuing contravention from December 2012 until the date of the Notification (27 March 2013).
- 7.87 In its representations of 25 April 2013, Supatel made submissions about the above. Supatel stated that *“in terms of the [c]ontravention, there were in place both prior to and during the Relevant Period procedures to prevent repeat orders being placed without the consent or knowledge of the Customer.”* Supatel refers, in particular, to the information provided to Ofcom in its First Response, where it provided flow diagrams for the periods 1 July 2012 – 19 November 2012; 20 November 2012 – 12 December 2012; and 12 December 2012 to 2 January 2013 (being the date of the response).
- 7.88 In Supatel’s submission, these flow diagrams showed that, in the event a transfer order is cancelled, the account is passed from order management to the sales team to make contact with the Customer before a further transfer order can be placed. Ofcom also notes Supatel’s representations that, in or about early October 2012, its procedures for cancelling orders and placing new ones were changed, so that instead of the order being cancelled, it would remain live on the system whilst the customer account was passed back to the sales team to make contact with the Customer.
- 7.89 Supatel accepts that, the sales and induction materials it provided Ofcom in its First Response were *“perhaps not as technical in terms of regulatory compliance as [they] could have been”*, but that this has now been addressed. In any event, Supatel contended that the training material addressed the *“information requirements in terms of sales scripts”* and that *“[t]rainers would also have explained the regulatory background regarding those requirements”*.
- 7.90 In Supatel’s submission, *“all agents were made aware of the mis-selling prohibition”* and the copies of the commission schemes provided to Ofcom in its First Response make clear that mis-selling will result in disciplinary action being taken, as well as commission being withdrawn. According to Supatel, sales managers explained to the agents what constituted mis-selling (including slamming) and agents were required to sign commission schemes to indicate their acceptance of these terms. While Supatel accepted that there were shortcomings in the documenting of its policies and procedures (and confirms that it had not finalised its policies until approximately 16 December 2012), it stated that this is different from there being no policies or procedures in place at all.

- 7.91 Further, Supatel stated that *“whilst [it] has candidly accepted that it did not have a formal monitoring and auditing policy in place during the Relevant Period, that did not mean, nor was it intended to mean, that no monitoring or auditing were undertaken.”* In Supatel’s submission, it was precisely this monitoring and auditing that alerted Supatel to the issues that it was able to share with Ofcom in its letter of 24 January 2013.
- 7.92 Supatel contended that it did not act reactively, following Ofcom’s notification that it intended to open an investigation. To the contrary, Supatel stated that it became aware of the issues prior to its contact with Ofcom and that it took proactive steps to address these. In particular, in late October/early November 2012, Supatel undertook a review into the transfer process following which its policies were improved and documented (with specific reference to GC24); developments were made to its existing systems to ensure compliance with GC24; a comprehensive training programme was developed; and improvements were made to its auditing and monitoring programmes to ensure compliance with GC24.
- 7.93 It is Supatel’s submission that its processes were, therefore, *“designed and intended to prevent the [c]ontravention”*.
- 7.94 Having considered these representations, Ofcom accepts that Supatel sought to take steps to comply with GC24 *prior* to being advised by us that we were opening the Investigation on 13 November 2012. Specifically, Supatel’s own internal review into the high level of Cancel Others undertaken in late October 2012 which was subsequently followed by the suspension of all sales and marketing of timetalks products. We also accept that Supatel at least commenced the steps described in paragraph 7.92 above before the Investigation was opened. Further, Ofcom notes that following the opening of the Investigation, only 19 (out of 164) repeat transfer orders were made. This tends to suggest that the steps taken by Supatel prior to that point had some effect in limiting, if not preventing, the contravention.
- 7.95 There remains, nonetheless, evidence that these steps were not wholly effective. First, we note again that despite suspending sales activity in October 2012, Supatel placed almost 3,500 transfer orders during the Relevant Period, including those relating to the 83 CLIs in respect of which Ofcom is satisfied Supatel contravened GC24.3.
- 7.96 Second, we acknowledge that Supatel provided us with the flow diagrams and other documentation referred to above in connection with its First Response. We remain of the view, however, that, on the face of the documents themselves, the processes they depict were insufficient to ensure Supatel’s staff and agents were aware of the importance of GC24 and of the obligations created by it. They were similarly inadequate to ensure compliance in practice. These points seem to be borne out by the fact that, according to Supatel’s representations its, *“... processes were on occasions overridden...”* by its agents.
- 7.97 Third, we note again that in paragraph 5.16 of its representations Supatel said it, believes:
- “... the repeated placing of transfer orders arose due to a combination of reasons: mistakes in order management; a failure to adhere to the transfer procedure in place; a general perception amongst call centre personnel Cancel Other was being used inappropriately; the belief that if Cancel Other had been used inappropriately, then there was no requirement to contact the Customer [again*

before placing a further order]; confusion caused by the incorrect use of Cancel Other; temporary staff; and pressure of work.”

Each of these is consistent with the incorrect placing of repeat transfer orders as a result of a lack of general understanding and training on the part of Supatel's agents, and with the failure of policies and procedures to prevent that conduct occurring.

- 7.98 Fourth, we accept Supatel's assertion that it undertook monitoring and auditing of its sales processes. The contravention of GC24.3(d) that we are satisfied nonetheless occurred is indicative that the relevant processes were ineffective.
- 7.99 In light of all these different factors, and the significance Ofcom attached in the Notification to Supatel's failure to take appropriate steps to prevent the contravention, Ofcom has revised its view of the impact of this factor on the calculation of the penalty. We remain of the view that, for the reasons given, Supatel did not take all the appropriate steps to prevent the contravention. It did, however, take some steps to that end on a pro-active basis prior to the opening of the Investigation. Ofcom accepts these had some effect in limiting, if not preventing, the contravention.
- 7.100 On those bases, Ofcom considers that, in the assessment of the penalty, Supatel should be given additional credit for those steps. Ofcom accordingly weighs this factor less heavily in our calculation. Specifically, taking all the relevant points carefully into consideration in the context of our overall assessment of the penalty, we think it is appropriate to reduce the penalty from the proposed level on this account.

Whether in all the circumstances Supatel took appropriate steps taken for remedying the consequences of the contravention

- 7.101 Supatel has outlined to Ofcom the following steps it has taken to remedy its contravention of GC24.3. Ofcom's assessment of those steps and their effect on the penalty to be imposed is also set out below.
- 7.102 First, in order to address the issues identified in its letter of 24 January 2013, Supatel stated that it had started to review proactively historic sales of timetalk's Fixed-Line Telecommunications Services for the period August 2012 until November 2012. This process involved contacting Customers to confirm they were happy with the service and the manner in which they were sold it.
- 7.103 Supatel said that, where a Customer raised a complaint, it would consider whether or not there had been a contravention of GC24.3 (or GC24.6). Where it appeared there may have been, the Customer would be released from their contract without an ETC. In particular, Supatel said it had involved in this process the Customers in respect of the 95 CLIs identified in Annex 2 of the First Information Request.
- 7.104 In its letter of 24 January 2013 Supatel said that timetalk had placed transfer orders for 72 of 95 CLIs identified in the First Information Request.⁷³ It said that, of these, 35 of the orders were cancelled before going live and none of the Customers were charged. Of the 37 orders that went live, Supatel said 24 Customers had

⁷³ Timetalk's letter states there were only 90 CLIs. When reviewing these CLIs against the information provided by Openreach, it was clear that at least 87 of these CLIs had transfer orders placed by timetalk.

transferred their services to another CP and no ETCs were charged to them. It also said attempts had been made to contact the remaining Customers and those who had been contacted were happy to continue their service and stay with timetalk.

- 7.105 Second, in Supatel's response to the Second Information Request, it provided a script its agents were using to contact all Customers who transferred to timetalk between July 2012 and November 2012. This script is included at Annex 5. Supatel identified that there were 1,526 Customers involved in its sales and marketing campaign between July 2012 and November 2012. By 19 February 2013, Supatel had attempted to contact 1,479 of them, and made that contact with 690 of them.
- 7.106 Supatel has said that, of the 690 Customers contacted, 224 stated that they had experienced dis-satisfaction, with 171 saying this was related to the sales process (some of whom at least, in all the circumstances, Ofcom considers it reasonable to assume would have had concerns about slamming). Of these 171 Customers, by 19 February 2013, Supatel had contacted and resolved the Customers issue in 17 cases.
- 7.107 While we agreed in the Notification that these steps were likely to bring Supatel closer to remedying relevant matters, Ofcom had the following concerns about the adequacy of the remedial steps.
- 7.108 One concern was that the limited action Supatel had taken left a further 154 Customers, who had expressed dis-satisfaction with timetalk's sales process, still to have their issue(s) resolved. These were in addition to the 836 Customers Supatel had so far been unable to contact.
- 7.109 In addition, Ofcom had concerns relating to the script being used by Supatel when contacting the relevant Customers by telephone (a document entitled "*Customer Satisfaction Survey – Script*" (Annex 5) was provided in Supatel's Second Response). In particular:
- the script's opening statement does not make it explicitly clear to Customers what the purpose of the call is;
 - there are no questions in the script that specifically ascertain whether or not the Customer may have been slammed;
 - questions have been included about the quality of the service rather than simply focusing on whether a contravention of GC24.3(d) had occurred;
 - we consider that it is unlikely that Customers would be clear that the reason they were being contacted was to establish whether or not slamming has occurred;
 - it is similarly unlikely from the script that the Customer would be made aware explicitly that they might have the option to cancel the contract without paying an ETC; and
 - in light of the foregoing points, the script's contents make it more likely that any Customer who is contacted will assume it is simply a survey conducted by timetalk to determine customer satisfaction levels.
- 7.110 Ofcom was also concerned that the process Supatel had followed, in order to determine if a contravention of GC24.3(d) has occurred, was unnecessarily

prolonged. It did not allow for a decision to be made, in the initial call from Supatel, as to whether a Customer would be entitled to cancel the contract without paying an ETC. Instead, the Customer had to express dis-satisfaction and then wait to receive a follow up call from a customer service agent. Only once that agent had made a decision would the case be sent to Supatel's escalation team for action. Given the obvious and serious breach of GC 24.3(d) involved in slamming, it appeared to us that that the prolonged process was inappropriate to adequately remedy the consequences of the contravention.

- 7.111 Supatel appeared, therefore, to have taken some steps to remedy the consequences of its contravention of GC24.3(d). While Ofcom welcomed this, we nevertheless had serious reservations as to their effectiveness. Accordingly, we treated those steps as mitigating to some extent the size of the penalty we are imposing, but not as much as we might had those steps been more effective.
- 7.112 In its representations of 25 April 2013, Supatel re-iterated that, on receipt of the 95 CLIs referred to in Annex 2 to the First Information Request, it made a decision proactively to contact the relevant customers. It contended that, *"Ofcom appears to accept that appropriate steps have been taken in respect of Annex 2 customers."*
- 7.113 Supatel also stated that, in relation to the script used for contacting Customers, all agents engaged in this task were appropriately briefed as to the purpose of contacting those Customers. Further, Supatel submitted that its agents knew that they were required to identify any Customer where there was a suggestion of a contravention of GC24.3. Supatel disagreed with Ofcom that, if contacted in this way, a Customer would not indicate that he or she had been slammed, if this was in fact the Customer's experience.
- 7.114 Supatel further stated that it has now been able to contact 74% of Customers who expressed dissatisfaction with the sales process.⁷⁴ Of those contacted, 8% made claims that suggested potential contraventions of GC24.3 and all of those customers have been given the option of migrating away without any ETCs. Of those Customers, 70% have now migrated away and no ETC has been applied. Supatel said 91% of Customers contacted did not suggest that there had been a contravention of GC24.3 but raised unrelated issues.
- 7.115 On the bases above, Supatel contended that it should be given greater credit for the remedial steps it had taken. Having given due consideration to Supatel's representations, our conclusions are as follows.
- 7.116 Ofcom acknowledges that our consideration of the remedial steps taken by Supatel must relate to the steps it has taken in respect of the 83 cases that comprise the contravention (the corroborated complaints). This should be reflected in our assessment of the penalty. This tends towards a reduction in the penalty proposed in the Notification.
- 7.117 As we indicate, Supatel has submitted that it has remedied matters in respect of the CLIs identified in Annex 2 of the First Information Request. On that basis, Ofcom takes the view, in the absence of any evidence to the contrary, that any of the 83 cases included in that Annex 2 will have been remedied. Our particular focus is therefore on any of those 83 cases which were not included in that Annex and the Customers' lines in relation to which were transferred to timetalk.

⁷⁴ Although we note it did not provide an update on how many Customers in the campaign (as set out in paragraph 7.105-7.106) it had managed to contact, nor how many overall were dissatisfied.

- 7.118 48 of these 83 cases were not included in the relevant Annex. Of those 48, 41 relate to Customers' lines transferred to timetalk at some point. These 41 cases are, therefore, those where Supatel was in a position to take specific remedial steps to remedy the consequences of its contravention.
- 7.119 Ofcom considers that our assessment of the remedial steps taken by Supatel to remedy the consequences of the contravention should include whether:
- the Customers in respect of these 41 corroborated complaints have been allowed by Supatel to transfer to a new CP without incurring any ETCs or disconnection fees;
 - compensation has been paid by Supatel to these 41 Customers for any costs incurred from their previous CP as a result of Supatel's contravention, costs associated with transferring away from Supatel to a new CP, or costs incurred from Supatel for use of its products and services which were more than what would have been paid by the Customer to their previous CP; and
 - compensation has been paid by Supatel to any of these 41 Customers where they have expressed any annoyance, inconvenience or anxiety as a result of Supatel's contravention.
- 7.120 In these connections, Ofcom makes the following observations and reaches the following decision.
- 7.121 First, there is further evidence Supatel has taken steps to remedy instances of non-compliance with GC24. On the basis of what Supatel has told Ofcom about the extent of those steps, they are likely to include remedial steps in a number of the 83 cases falling within the contravention (and a number of the 41 cases referred to above, in particular).
- 7.122 Second, the above notwithstanding, Ofcom notes that, despite being given the opportunity to do so, Supatel has not provided specific information confirming the remedial steps in each of the relevant cases (nor confirming that such steps have been taken in all those cases). It is, therefore, not entirely clear that such steps have been taken in all the relevant cases. We also retain our doubts, on the basis of its contents, about the suitability and efficacy of the call script Supatel is using as part of the remedial process.
- 7.123 As we indicated in the Notification, Ofcom had given Supatel credit in our calculation of the proposed penalty for the remedial steps it had taken. We also indicated, however, the limitations on that credit. In light of the above, however, and in particular Supatel's representations as to the further steps it has now taken, we agree that credit should be increased (albeit limited by the points in the preceding paragraph). On that basis, again taking all the relevant points carefully into consideration in the context of our overall assessment of the penalty, we have decided that it is appropriate to reduce the penalty.

The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur

- 7.124 Ofcom considers the following factors to indicate that Supatel's senior management knew, or ought to have been aware, of the requirements of GC24. Likewise, to be consistent with a degree of recklessness as to the contraventions that occurred.

- 7.125 First, there was the correspondence with Supatel described above in relation to possible slamming by its Supanet brand. This correspondence was signed by [§<], Supatel's Director of Operations/Customer Service. [§<] was also identified in Supatel's response to the Second Information Request as being involved in the project to review timetalk's sales and marketing activity.
- 7.126 Moreover, Supatel's letter of 24 January 2013 stated that in October 2012 it had become aware of certain issues with the sales and marketing of its Fixed-Line Telecommunications Services. In its response to the Second Information Request, meanwhile, Supatel stated that there was regular contact, during October 2012 and January 2013, between its in-house legal advisor and the management of Total Care (its customer service agents) and Supatel (and which involved Supatel's Managing Director).
- 7.127 Additionally, it is normal practice within an organisation that senior management are ultimately responsible for, will often be involved in the construction of, and have sign-off on, essential policies, procedures and training. This is, or should particularly be, so in respect of fundamental requirements like regulatory rules. That Supatel's contravention of GC24.3(d) occurred in the absence of any policies and procedures to stop it occurring, and notwithstanding the knowledge its senior management had or ought to have had, tends to suggest a recklessness as to that contravention.
- 7.128 Each of these matters, in our view, are factors increasing the penalty imposed.
- 7.129 In its representations of 25 April 2013, Supatel submitted that it did not act recklessly as, in its view, is implied in paragraph 7.71 of the Notification. It said it had clear procedures in place for dealing with instances where Cancel Other was used. This was designed to prevent contraventions from occurring. Senior management in both Supatel and Total Care and Support became aware of the sharp increase in Cancel Other towards the end of October 2012 and had no prior knowledge of the contravention before then. Once they became aware of the issue, steps were taken to address it.
- 7.130 Having considered Supatel's representations, Ofcom acknowledges that Supatel may have had processes in place for dealing with instances where Cancel Other was used. However, as set out earlier in this document, those procedures were insufficient. That insufficiency, in all the circumstances described above, is consistent with a degree of recklessness as to the contravention on the part of senior management.
- 7.131 Accordingly, we continue to take this factor into account in the calculation of the penalty.

Co-operation with Ofcom's investigation

- 7.132 Ofcom's Penalty Guidelines say, *"Ofcom may increase the penalty where the regulated body in breach has failed to cooperate fully with our investigation"*.
- 7.133 Ofcom does not consider there has been a lack of co-operation in this case that might otherwise serve as an aggravating factor in this matter and to increase the amount of penalty imposed.
- 7.134 Supatel noted Ofcom's view but did not make representations on this point.

Precedents

- 7.135 Ofcom's published Penalty Guidelines also indicate that we will, in considering any penalty, have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and the context of each case.
- 7.136 There are previous cases in which Ofcom has imposed a penalty for contraventions of other GCs, namely: a) the Axis Telecom case (the "Axis" case)⁷⁵ (GC24.14, GC24.15, and GC24.18); b) the First Talk Talk case⁷⁶ (GC11.1); c) the Telephonics Integrated Telephony Limited case (the "Telephonics case")⁷⁷ (GC1.2); and d) the Just Telecoms UK Limited case (the "Just Telecoms case")⁷⁸ (GC14.3). To the extent relevant, these are considered further below.
- 7.137 Although the Axis case also involved contraventions of GC24, the conduct in question in that case was not factually similar or analogous in terms of scale and seriousness to the present case. The Axis case focused on the Cancel Other elements of GC24, relating to circumstances where the Losing CP prevents a Customer from transferring to a different CP. In addition, the Axis case focused only on its policies and procedures when using the Cancel Other process. There was limited evidence of actual consumer harm, through complaints to Ofcom's CCT, although we did recognise the potential for consumer harm (albeit limited) due to these policies and procedures.
- 7.138 The Axis case does, however, provide an indication of the way in which relevant factors are taken into account when applying Ofcom's current Penalty Guidelines. Ofcom has therefore had regard to the way in which those factors were applied.⁷⁹ Where relevant and comparable, we have applied them in a similar way in the present case.
- 7.139 In particular, points of similarity between the Axis case and the present case include the facts that: a) they are both in relation to contraventions of GC24, although the nature of the contravention in the present case is different to, and more egregious than, that in the Axis case; b) in both cases senior management had knowledge, or ought to have had knowledge, relevant to the contravention; c) the duration of the contravention was limited; d) the annual turnover of both companies are relatively comparable; e) Ofcom was unable precisely to quantify the actual financial gain (if any) made by the offending CP in either case, although there was at least the potential for such gain; and f) both companies co-operated with Ofcom's Investigation.
- 7.140 The points of difference are that: a) there is evidence of a higher degree of direct consumer harm in the present case, and Supatel's contravention is more egregious in nature; b) the scale of Supatel's contravention is greater, with evidence of a

⁷⁵ http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01045/axis.pdf

⁷⁶ See http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01051/

⁷⁷ See: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/CW_998/

⁷⁸ See: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_857/

⁷⁹ When setting the penalty of £30,000 in the Axis case, Ofcom had regard to the way in which factors were applied in the TalkTalk case. For the purpose of setting a penalty in this investigation, the Axis case is far more comparable than the TalkTalk case and the primary comparisons are drawn from this.

relatively high number of timetalk customers being affected by it; and c) Supatel has no history of prior contraventions notified to it under the Act, whereas Axis had previously been issued with a Notification for breaches of GC24⁸⁰.

- 7.141 The Telephonics case and the Just Telecomms case provide an indication of the factors that were taken into account when determining the amount of the penalty under Ofcom's previous Penalty Guidelines. Due to the specific circumstances in both cases (for example, both cases involved either an intentional and planned practice of deceiving customers (in the Just Telecomms case) or actively and knowingly preventing customers from transferring to other CPs (in the Telephonics case) and the fact that senior management were not only involved in the contravening behaviour, but actively encouraged it), the penalties were set at the maximum ten per cent of turnover. Therefore, Ofcom considers the penalties in these cases can be distinguished from any penalty we impose on Supatel (which we propose should be significantly lower).
- 7.142 Under section 130 of the Act, Ofcom can also impose penalties on companies for persistently mis-using an electronic communications network or service. Although Ofcom has imposed penalties for persistent mis-use, Ofcom does not consider that cases concerning persistent misuse provide relevant precedents in the present case. This is because the cases concern different conduct and different provisions of the Act. The maximum penalty that might be imposed for persistently mis-using an electronic communications network or service is also much higher than in the present case.⁸¹
- 7.143 Pursuant to the Act, the Broadcasting Acts and the Broadcasting Code ("the Code"), Ofcom has the power to impose sanctions, including penalties, on broadcasters for deliberate, serious or repeated breaches of the Code. Significant fines have been imposed in relation to breaches of the Code. Again, however, the broadcasting cases concern different conduct and provisions of the Act, as well as other Acts. Ofcom therefore considers they do not provide relevant precedents for the present case.
- 7.144 In its representations, Supatel made submissions to the following effect. It reiterated its contention that contraventions should be considered in actual or absolute terms (total numbers of consumers affected), rather than relative terms (affected consumers as a proportion of the relevant CP's customer base). It submitted that, otherwise, smaller CPs are liable to heavier punishments for regulatory contraventions than larger CPs whose contraventions affect more consumers.
- 7.145 Supatel relied in support on enforcement cases Ofcom had brought against Talk Talk (under GCs 11 and 24). The contention was that Ofcom was acting inconsistently with these cases which, in absolute terms involved much bigger contraventions. Of the former case, for example, Supatel said:

"In the Talk Talk Case over 62,000 customers were affected over an extended period. The size and, therefore, seriousness of the Talk Talk contravention was over 700 times greater than in this case, lasted for an extended period and involved financial harm being caused to Customer. Whilst it is acknowledged that

⁸⁰ This Notification was made under section 94 of the Act, which is the predecessor to section 96A.

⁸¹ The maximum penalty that can be imposed in the case of persistently mis-using an electronic communications network or service is £2,000,000.

harm has been caused to Customers as a result of the Contravention it was on a completely different scale to that which occurred in the Talk Talk Case.”

- 7.146 Ofcom has carefully considered, but does not accept, these submissions. As we set out in paragraphs 7.30 and 7.31 above, both the actual and relative sizes of a contravention are relevant. Supatel’s contravention was not insignificant on either count, and we considered both in this case. In absolute terms, for example, during the Relevant Period Supatel generated the second largest volume of complaints (126) to Ofcom (only [3<] fewer than the CP generating the most complaints).
- 7.147 Moreover, the calculation of a penalty is a matter of considering all the relevant factors in the particular case in the round, to determine a penalty that is appropriate and proportionate in terms of punitive and deterrent effects in that case. That is what Ofcom has done in this case, for all the reasons set out in this Confirmation Decision, as we did in the cases involving Talk Talk. It is notable, in that light, that Ofcom imposed a penalty of £3,037,120 on Talk Talk for contravention of GC 11, and now imposes a penalty of £60,000 on Supatel. That reflects the different order of magnitude of the two cases.

Proportionality

- 7.148 In addition to the specific factors set out in the Notification, Supatel has also made representations in relation to the general proportionality of any penalty that Ofcom was minded to impose. We set out and consider those representations below, to the extent that the points made have not otherwise been made in relation to assessing proportionality for each of the factors set out above.
- 7.149 Supatel has submitted that it is a small CP with limited financial resources and profit margins that are likely to be significantly less than those achieved by its larger competitors. Supatel further submitted that is unlikely to take advantage of significant economies of scale in the same way as other larger CPs, where its acquisition costs and overheads are likely to be greater per customer. On that basis, Supatel submitted that “...a penalty based on turnover is likely to be proportionately more penal in the case of Supatel than if imposed on a larger Communications Provider operating with a greater margin and making significant profits.” Finally, Supatel made the point that since acquiring the customer base of Supanet, which had operated at a loss for a number of years, Supatel has reduced the level of losses but is yet to achieve a break even position.
- 7.150 Ofcom has given careful consideration to these representations. As set out in paragraph 3.16 of this Confirmation Decision, section 97(1) of the Act states that:
- “The amount of a penalty imposed under section 96 or notified under section 96A (other than a penalty falling within section 96B(4)) is to be such amount not exceeding ten per cent of the turnover of the person's relevant business for the relevant period as OFCOM determine to be—*
- (a) appropriate; and*
- (b) proportionate to the contravention in respect of which it is imposed.”*
- 7.151 It is clear that the penalty is not based on a formulaic assessment of a CPs relevant annual turnover; rather the Act only states that the penalty should not exceed ten percent of the CPs relevant annual turnover and should be appropriate and proportionate.

- 7.152 Ofcom considers that we have properly and fairly considered all the relevant factors in this case, to produce a penalty that is both appropriate and proportionate to the contravention of which it is imposed and which will have an appropriate deterrent effect. The level of penalty meets the first threshold of being no more than ten percent of Supatel's annual relevant turnover. It is, in fact, well below that, at only [X].
- 7.153 With regard to being appropriate and proportionate, Ofcom has taken into account all of the relevant factors in this case, in line with our Penalty Guidelines, and considers that it is appropriate to impose a penalty on Supatel in respect of the contravention. With regard to proportionality, Ofcom has considered previous cases in which we have imposed a penalty on a CP and compared the relevant factors in those cases, in particular the size and seriousness of the contravention, and the level of penalty imposed, both in terms of actual size and in relative terms when compared to annual turnover.
- 7.154 As to the final point in the preceding paragraph, we have, as we said in the Notification and return to in the conclusions below, considered both the size of the penalty needed to secure an appropriate deterrent effect, the resources available to Supatel to pay it and the impact of the penalty on it. Our overall regulatory judgment, considering all the relevant factors in the round, as set out in this Confirmation Decision, is that the penalty we have decided to impose is appropriate to meet the relevant aims and statutory requirements.
- 7.155 Accordingly, we do not consider that Supatel's representations in relation to proportionality alter the level of the penalty Ofcom was minded to impose in the Notification.

Ofcom's conclusions on the penalty amount

- 7.156 Having considered all the above in the round, Ofcom has decided to impose a penalty on Supatel in relation to its contravention of GC24.3(d) during the Relevant Period. In the Notification the level of the penalty we were minded to impose on Supatel was £65,000. However, in light of our careful consideration of Supatel's representations, and all the steps it has taken to comply with (and prevent the occurrence of a contravention of) GC24.3 and to remedy its contravention, we have now reduced that amount. We impose a penalty of £60,000. That is based on our overall assessment of the contravention and the factors relevant to the penalty, as set out in this document and summarised below, and in particular giving Supatel additional credit for the steps relating to compliance (and preventing occurrence of the contravention) and remedy.
- 7.157 Ofcom's view is that this level of penalty is appropriate and proportionate to the contravention in respect of which it is imposed. Ofcom's objectives in setting a penalty, and in imposing this penalty, are:
- to impose an appropriate and proportionate sanction that reflects the seriousness of Supatel's contravention of GC24.3(d) and its culpability in that contravention; and
 - to provide a deterrent to Supatel and other CPs contravening the GCs, and GC24 in particular (and securing compliance with them, and it).

- 7.158 Ofcom considers that imposing a penalty of £60,000 secures these objectives and does so in a proportionate way. It reflects each of the factors described in more detail above.
- 7.159 In particular, each of the following which tend to add to the penalty and, in our view, mean it should be more than trivial and not right at the bottom end of the possible range:
- the large (in relative terms) size and seriousness of Supatel's contravention ;
 - our assessment of the harm attached to that contravention;
 - Supatel's lack of effective documented policies and procedures for training on, securing, monitoring and auditing compliance with GC24;
 - the degree of relevant knowledge, responsibility and recklessness on the part of Supatel's senior management; and
 - Supatel's failure to take adequate appropriate steps in all circumstances to prevent the contravention from occurring.
- 7.160 The amount of the imposed penalty is, nonetheless, more limited than it might otherwise have been since Ofcom has also taken full account of the points that:
- the contravention was of relatively short duration;
 - Supatel did take some steps to prevent the contravention occurring;
 - Supatel took some steps to secure compliance with GC24 and has taken some to remedy the consequences of its contravention;
 - Supatel has no history of notified contraventions of the GCs; and
 - Supatel co-operated with our investigation.
- 7.161 Ofcom's overall assessment, therefore, is that imposing a penalty towards the lower end of the relevant scale is appropriate and proportionate. In that connection, we note that the most significant contravention of the GCs could attract a penalty of no more than ten per cent of a CP's relevant turnover for a particular year. Supatel's relevant turnover for the relevant period of 1 April 2011 to 31 March 2012, was [X], making the maximum penalty in this case, [X]. The imposed penalty, reflecting the size and seriousness of Supatel's contravention, the aim of deterrence and the relevant aggravating and mitigating factors, is both within that limit and, to the extent the maximum penalty provides a relevant scale, at the appropriate point on it.
- 7.162 We also consider the penalty we are imposing is proportionate having regard to Supatel's size and relevant turnover. In particular, we have considered what we believe to be a sufficiently high penalty to impress upon Supatel the seriousness of the contravention and incentivise compliance with GC24, while being mindful of the resources that are likely to be available to it in meeting this penalty.

Section 8

Conclusions and action required by Supatel Limited

Contraventions of General Condition 24

- 8.1 On the basis of the evidence and reasoning contained in this Explanatory Statement, Ofcom confirms its view in the Notification. That is, we are satisfied that during the Relevant Period, Supatel has contravened GC24, specifically the provisions relating to not engaging in slamming activity under GC24.3(d), by repeatedly placing transfer orders for Customers' Fixed-Line Telecommunications Services without those Customers' express knowledge and/or consent. It has done so to the extent set out in this document.

Steps that must be taken by Supatel

- 8.2 Whilst taking full account of the steps it has taken in these regards, the steps which Ofcom confirms must be taken by Supatel to comply with the requirements of GC24, and GC24.3(d) in particular, are:
- i) to have in place processes to ensure that Supatel, trading as timetalk, is only placing transfer orders where the Customer has express knowledge and/or has given consent to a transfer order being placed;
 - ii) to fully document policies and procedures in relation to ensuring compliance with GC24, including an effective quality assurance process to monitor the compliance by Supatel's, trading as timetalk, agents (both its own staff and those it contracts with) who are placing transfer orders for Fixed-Line Telecommunications Services; and
 - iii) to provide appropriate training to all Supatel's, trading as timetalk, agents (both its own staff and those it contracts with) who are engaged in placing transfer orders for all Supatel's, trading as timetalk, Fixed-Line Telecommunications Services in order to ensure compliance with GC24.
- 8.3 Again taking full account of the steps it has taken in these regards, the steps which Ofcom confirms must be taken by Supatel to remedy the consequences arising from its contravention of GC24.3(d) include but are not limited to:
- allowing the 83 Customers to whom the contravention relates, to cease their contract with Supatel, trading as timetalk, regardless of the length of contract served, with no requirement to pay an Early Termination Charge ("ETC") or disconnection fee and no requirement to pay any charges for services other than those the Customer has used. Where the Customer chooses to return to their previous CP, this would include compensation for any charges the Customer may incur in the process of returning to their previous CP; and
 - where these Customers who may otherwise have fallen into the above category but who have already returned to their previous CP, and have incurred charges in doing so, Supatel, trading as timetalk, should compensate them for those charges.

Penalty

- 8.4 For the reasons set out in this document, Ofcom confirms that a penalty of £60,000 be imposed on Supatel in respect of its contravention of GC24.3(d) during the Relevant Period.
- 8.5 Supatel has until 5.00pm on Thursday 4 July 2013 to comply with the requirements imposed by this Confirmation Decision.
- 8.6 Supatel has until 5.00pm on Monday 22 July 2013 to pay Ofcom the penalty of £60,000.

Annex

List of Annexes

Annex 1	GC24 + Guidelines
Annex 2	First Information Request sent to Supatel
Annex 3	First Response from Supatel
Annex 4	Second Information Request sent to Supatel
Annex 5	Second Response from Supatel
Annex 6	Supatel's representations
Annex 7	Information Request sent to Openreach
Annex 8	Response from Openreach
Annex 9	Copies of responses to timetalk Customer questionnaires (inc. supporting documentation)
Annex 10	Letter from Ofcom to Supanet concerning compliance with GC24
Annex 11	Letter from Supanet to Ofcom concerning slamming complaints against Supanet
Annex 12	The section 96A Notification