
Confirmation Decision under section 96C of the Communications Act 2003

Confirmation Decision served on Telefónica UK Limited
by the Office of Communications (Ofcom) for
contravention of General Condition C3.2 and previous
General Condition 11.1

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

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1. Overview

Ofcom's regulations require every person providing a public electronic communications service, such as mobile services, to provide its customers (existing as well as former) with accurate bills and not to overcharge them.

On 10 July 2019, Ofcom opened an investigation into Telefónica UK Limited (trading as 'O2') following a notification received from the Approval Body for O2's metering and billing system, TUV SUD BABT, advising that O2 had experienced a Category 1 Extraordinary Performance Failure between at least 1 January 2012 and 7 March 2019.

This document explains Ofcom's finding from that investigation that O2 has contravened its regulatory obligations in relation to accurate billing. It also sets out why we consider this to be a serious breach of the regulations and why we have imposed a penalty of £10.5 million on O2.

What we have found – in brief

O2 issued inaccurate termination bills and charged some customers for the same amount twice.

Based on information received as part of our investigation, we have found that O2 has contravened GC 11.1 (and subsequently GC C3.2) by failing to render or make available accurate final bills to be issued to customers after their cancellation of services (i.e. termination bills) and by overcharging a significant number of customers terminating their 'Pay Monthly' services with O2, between at least 26 May 2011 and 15 March 2019. This billing error arose in four different scenarios under which scheduled direct debit payments for customers' last periodic monthly bills were not taken into account by O2 in their final termination bills.

We are satisfied that this was a serious breach of our rules to protect customers. In particular, we consider that the following aggravating factors support our finding that this was a serious breach of our rules and the penalty we impose should reflect those factors:

- (i) the significant duration of O2's contravention;
- (ii) the significant degree of actual and potential harm caused by O2's contravention;
- (iii) the significant scale and scope of O2's contravention;
- (iv) the significant absence of effective governance processes in place to prevent the billing error from occurring in the first instance and to identify the billing error once it occurred; and
- (v) the significant failure by O2's senior management to adequately ensure that the governance process it had put in place for fixing and remedying billing errors was followed or, to the extent that it was followed, it failed in some key respects in both 2011 (when O2 first identified the billing error) and 2019 (when the error was re-identified).

We have imposed a penalty of £10.5 million on O2. This includes a 30% discount applied to the penalty figure of £15 million which we would have otherwise imposed. This discount reflects resource savings achieved by Ofcom as a result of O2 admitting liability and entering into a settlement with Ofcom. Our view is that this penalty is appropriate and proportionate to the contravention. In taking that view, we have had regard to all the evidence referred to in this document, together with our published Penalty Guidelines. We also consider it appropriate that, to the extent it has not already done so, O2 should take steps to ensure it is compliant with GC C3.2 and refund customers affected by the billing error.

Our penalty is also designed to act as a deterrent for future breaches. While we have considered all of the factors in the round, we consider that a significant penalty is also appropriate in order to act as a deterrence against future breaches – as with our previous financial penalties imposed on other providers (including on giffgaff, a wholly owned subsidiary of Telefónica UK Limited) for contraventions of GC 11.1. Our penalty therefore signals to others that any failures to comply with GC C3.2 (and previous GC 11.1) will be taken very seriously by Ofcom. However, unlike the giffgaff case, O2 did not self-report the billing error to Ofcom and no mitigating weight has therefore been given in our penalty assessment for self-reporting.

O2 has taken steps to remedy the breach. O2 made changes to its billing system in March 2019 that resulted in the last known occurrence of the billing error happening on 15 March 2019. O2 has also advised that, where it has been able to identify former customers affected by the billing error, it has issued refunds (issued via cheque) and these refunds were all issued by 1 July 2020. For customers it has not been able to identify, or for refunds that are unclaimed, O2 has advised us that it intends to make a donation to charity.

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

2. Introduction and summary

- 2.1 General Condition ('GC') C3¹ is an important consumer protection provision which sets out the general conditions relating to metering and billing. In particular, GC C3.2 requires every person providing a public electronic communications service ('CPs') to render accurate bills to their customers and only charge them for services actually provided. This provision embodies one of the basic, fundamental exchanges between a CP and its customers – that they are only charged for services they have subscribed to, and that they are charged no more than the amount owed. Prior to 1 October 2018, when GC C3.2 took effect, a substantively similar obligation applied under GC 11.1 and had done so since 25 July 2003.
- 2.2 In addition to GC C3.2, the Metering and Billing Direction² (the '**Direction**') is intended to ensure that CPs with a relevant turnover of £55 million or more have systems and processes in place which are fit for purpose, deliver accurate bills to consumers and ensure that consumers are not overcharged for services. It sets out requirements which include obtaining approval of their metering and billing systems from third-party assessors, known as Approval Bodies and outlines requirements when a performance failure is identified. When issues occur, the Direction sets out requirements for providers to follow to understand how the issue occurred, correct the harm caused and to prevent the issue happening again.
- 2.3 We have in previous cases emphasised that GC11.1 is an important consumer protection provision. This is because (amongst other things) consumers tend to trust that their bills for electronic communications services are accurate. This reflects the fact that CPs, rather than customers, are responsible for ensuring that their billing systems function properly and providing customers with accurate bills. We therefore take compliance with these rules very seriously, particularly where a significant number of customers are potentially affected.
- 2.4 GC C3.2 (and previously GC C11.1) applied at all material times to Telefónica UK Limited (trading as O2), whose registered company number is 01743099 ('**O2**').
- 2.5 This document explains Ofcom's decision to give a confirmation decision (the '**Confirmation Decision**') to O2 under section 96C of the Communications Act 2003 (the '**Act**') in respect of our finding that O2 has contravened its requirements under GC C3.2 (and previously GC 11.1). In particular, this document accompanies that Confirmation Decision by setting out (among other things) the extent to which we have found that O2 has contravened those requirements and our reasons for that finding. The Confirmation Decision itself given to (and served on) O2 is attached at Annex 1.

¹ An unofficial consolidated version of the General Conditions can be found at:

https://www.ofcom.org.uk/data/assets/pdf_file/0021/112692/Consolidated-General-Conditions.pdf

² An unofficial consolidated version of the Ofcom Metering and Billing Direction can be found at:

https://www.ofcom.org.uk/data/assets/pdf_file/0022/116365/Metering-and-Billing-Direction.pdf

- 2.6 The Confirmation Decision sets out the penalty we are imposing on O2 as well as the steps O2 must take to ensure compliance with its obligations and to remedy the consequences of its contravention.
- 2.7 This Confirmation Decision follows our investigation into O2's compliance with GC C3.2 and previous condition GC 11.1. Key steps taken during our investigation (including our previous notification under section 96A of the Act given to O2) are summarised in Annex 2. Based on the information and evidence we have gathered, we are satisfied that O2 has contravened GC 11.1 and C3.2 by failing to render or make available accurate termination bills and by overcharging a significant number of customers, between at least 26 May 2011 and 15 March 2019.
- 2.8 We have imposed a penalty of £10.5 million on O2. The penalty includes a 30% discount applied to the penalty figure of £15 million which we would otherwise have imposed. That discount reflects the resource savings achieved by Ofcom as a result of O2 admitting liability and entering into a settlement with Ofcom.
- 2.9 We consider that this penalty is appropriate and proportionate to the contraventions in respect of which it has been imposed. In taking that view, we have had regard to all the information and evidence referred to in this document, together with our published Penalty Guidelines. The basis for our view as to the amount of the penalty is explained in Section 4.

3. Our findings

Relevant regulatory requirements

- 3.1 GC C3 (formerly GC 11) places obligations on CPs in relation to providing accurate bills and charges, retention of records, and approval of metering and billing systems. Those obligations have applied since 25 July 2003, when they took initial effect.
- 3.2 The text of those obligations (including associated definitions) is set out more fully in the Confirmation Decision attached at Annex 1. We therefore summarise below the most relevant aspects of the GCs that are particularly relevant to our findings.
- 3.3 As at 25 July 2003, GC 11 imposed requirements on ‘Communications Providers’ in respect of metering and billing. GC 11.1 stated:
- “11.1 The Communications Provider shall not render any bill to an End-User in respect of the provision of any Public Electronic Communications Services unless every amount stated in that bill represents and does not exceed the true extent of any such service actually provided to the End-User in question.”*
- 3.4 In that regard, GC 11.9(c) defined “Communications Provider” as “...a person who provides Public Electronic Communications Services;”.
- 3.5 On 15 July 2008, GC 11.1 was modified with regard to the concept of a ‘Bill’.³ The definition of “Bill” was added at GC11.7(c) and stated:
- ““Bill” means the information issued by a Communications Provider to an End-User of the charges levied and due for payment or the information retained by a Communications Provider for the purpose of recording and enabling debits and credits to be applied to an End-User’s account”*
- 3.6 Then, following our comprehensive review of the GCs, the requirements previously set by GC 11.1 were replaced by GC C3.2 which came into force on 1 October 2018. GC C3.2 currently states:
- “Regulated Providers shall not charge an End-User, or render or make available any Bill to an End-User, in respect of the provision of any Public Electronic Communications Services, unless every amount charged and/or stated in the Bill represents and does not exceed the true extent of any such service actually provided to the End-User in question.”*
- 3.7 For the purposes of GC C3.2, the concept of a ‘Bill’ is defined as:

³ See Ofcom’s notification at Annex 2 to Ofcom’s statement entitled ‘The Ofcom Metering and Billing Scheme: This document includes modifications to General Condition 11 on Metering and Billing and the Direction that sets requirements for gaining approval under General Condition 11’, as published on 15 July 2008. (On 23 July 2008, Ofcom corrected a typographical error in that notification, i.e. the date of signature.) See further at: https://www.ofcom.org.uk/consultations-and-statements/category-2/metering_billing

*“Bill” means the information issued, or made available, by a **Communications Provider** to an **End-User** about the charges levied and due for payment or the debits and credits applied to an **End-User’s** account;”*

3.8 In that regard, it should be noted that Ofcom deliberately chose the words debits and credits “applied to an End-User’s account” (rather than those “to be applied” to that account, as it previously read under GC 11.7(c)) in the definition of “Bill”, because we sought to clarify that an end-user is overcharged if the amount charged to them at the end of any billing cycle exceeds their actual usage.⁴ The use of the word “End-User” in the definition of “Bill” was also deliberate to ensure that a CP’s former customers are protected, noting our previous investigation in March 2017 when we found that Plusnet Plc was in breach of GC 11.1 for having billed customers for services they had ceased subscribing to.⁵ We have also explained that any time a customer is overcharged it amounts to a breach of this condition.⁶

Importance of the regulatory requirements

3.9 Ofcom’s principal duty in carrying out our functions is to further the interests of citizens in relation to communications matters and consumers in relevant markets, where appropriate by promoting competition. As noted in Section 2, GC C3.2 (and previously GC 11.1) is an important consumer protection provision which embodies one of the basic, fundamental exchanges between a CP (and indeed, any business) and its customers, namely that they are only charged for services they have subscribed to, and that they are charged no more than the amount owed.

3.10 It is therefore important that consumers can trust that their bills for services provided by their CP are accurate. This reflects the fact that CPs, rather than customers, are responsible for providing accurate bills. We therefore take compliance with these rules very seriously, particularly where a significant number of customers are affected.

Our investigation

3.11 On 12 June 2019, the Approval Body for O2’s metering and billing system, TUV SUD BABT (**‘BABT’**), notified Ofcom that O2 had experienced a Category 1 Extraordinary Performance Failure (**‘EPF’**) between at least 1 January 2012 and 7 March 2019.⁷ In its notification, BABT included a description of the error as provided by O2. It stated that *“[i]n a very specific scenario, the termination bill will take a duplicate payment as part of the final Direct Debit”*

⁴ See paragraph 10.10 of Ofcom’s statement and consultation entitled *‘Review of the General Conditions of Entitlement’*, as published on 19 September 2017.

⁵ Ibid, paragraph 10.11(b).

⁶ Ibid, paragraph 10.11(a). We noted, however, that that in order to ensure that our intervention is targeted at cases where action is needed, we normally open a formal investigation into compliance with the GCs where we have concerns about significant harm to consumers.

⁷ O2 has since confirmed that customers were affected by the Billing Error from at least 5 December 2003 to 15 March 2019.

and had resulted in duplicate payments totalling £959,706.19 affecting 93,259 accounts. BABT also reported to Ofcom that O2 had not classified the incident as an EPF and as such, from the evidence that O2 had provided, it did not follow all the requirements in the timeframes set out in the Direction.

3.12 In light of BABT’s notification to Ofcom, on 10 July 2019, in accordance with our published Enforcement Guidelines,⁸ we opened our formal own-initiative investigation into O2’s compliance with GC C3.2 (and GC 11.1) and the Direction.

3.13 As part of our investigation, we obtained further information and evidence from O2 about the EPF using our statutory information gathering powers. The remainder of this document relies mainly on the information O2 provided to us in response to our information requests. For ease of reference, the table below sets out the requests made under our information gathering powers, O2’s responses, and how they are referred to throughout this document.

Request	Response
First Information Request sent on 1 August 2019 – referred to as the ‘First Notice’	O2 responses received on 5 September 2019 and 3 October 2019 – collectively referred to as the ‘First Response’
Second Information Request sent on 2 October 2019 – referred to as the ‘Second Notice’	O2 responses received on 17 October 2019 and 5 November 2019, corrected by O2 on 7 November 2019 – collectively referred to as the ‘Second Response’
Third Information Request sent on 22 November 2019 – referred to as the ‘Third Notice’	O2 responses received on 26 November 2019, 29 November 2019 and 4 December 2019 – collectively referred to as the ‘Third Response’
Fourth Information Request sent on 6 January 2020 – referred to as the ‘Fourth Notice’	O2 response received on 7 February 2020 – referred to as the ‘Fourth Response’
Fifth Information Request sent on 17 March 2020 – referred to as the ‘Fifth Notice’	O2 response received on 28 April 2020 – referred to as the ‘Fifth Response’ .
Sixth Information Request sent on 22 June 2020 – referred to as the ‘Sixth Notice’	O2 response received on 29 June 2020 – referred to as the ‘Sixth Response’

⁸ Enforcement Guidelines for regulatory investigations, published on 28 June 2017, at:

https://www.ofcom.org.uk/_data/assets/pdf_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf

Seventh Information Request sent on 22 October 2020 – referred to as the ‘ Seventh Notice ’	O2 response received on 6 November 2020 – referred to as the ‘ Seventh Response ’
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- 3.14 In addition to those information requests, on 15 August 2020, Ofcom issued a document to O2 detailing our initial thinking on the factual issues and evidence of the case as we understood it (the ‘**Facts and Evidence Document**’). O2 was given an opportunity to review the Facts and Evidence Document and to provide us with any further facts that it considered Ofcom should be made aware of/take into account in mitigation as part of our investigation. O2 responded to the Facts and Evidence Document on 2 October 2020 (the ‘**Response to the Facts and Evidence Document**’).
- 3.15 Further, O2 supplemented part of its Seventh Response with an email on 4 December 2020 (the ‘**4 December 2020 Response**’).
- 3.16 On 27 January 2021, Ofcom gave a notification under 96A of the Act to O2 setting out our view that we had reasonable grounds for believing that it had contravened GC C3.2 and previous GC 11.1 between at least 26 May 2011 to 15 March 2019. Our other key steps taken during our investigation are summarised in Annex 2.
- 3.17 In light of those steps, we have decided and set out in the Confirmation Decision attached at Annex 1 that we are satisfied that during the period between at least 26 May 2011 and 15 March 2019 (the ‘**Relevant Period**’) O2 contravened GC 11.1 and subsequently GC C3.2. As explained in that Confirmation Decision, the extent of that contravention, and the reasons for Ofcom’s determination, are set out in the remainder of this Section 3 below.
- 3.18 We did, however, decide for administrative reasons to close our investigation into O2’s compliance with the Direction itself, because we considered that, due to other priorities, our resources could be targeted more appropriately elsewhere.

O2 services affected and whether the relevant GCs applied

- 3.19 In our information requests, we asked O2 to confirm each type of Public Electronic Communications Service (‘**PECS**’) affected by its billing error. In those requests, we defined a “Public Electronic Communication Service” as “[a]ny electronic communications service that is provided so as to be available for use by members of the public.” O2 confirmed that the billing error “affected Pay Monthly Mobile e.g. voice, data, SMS services Consumer customers only.”⁹
- 3.20 Accordingly, we have decided that O2’s services affected by its billing error were its ‘Pay Monthly Mobile’ services only. They constitute PECS and therefore services for which both GC C3.2 and GC 11.1 have applied during the Relevant Period. As such, O2 was required to

⁹ Question 9, Annex 1, Second Response.

comply with the relevant requirements set out in those GCs in respect of those services during the Relevant Period in relation to all of its customers affected by its billing error.

O2's billing system

3.21 O2 uses a third party, [X], to run its billing system. We understand that [X] took over the running of O2's billing system in May 2003 and it remains O2's current service provider. At the start of the Relevant Period, the billing system used was Convergys Geneva 5.3. In 2014, this was changed to the Netcracker RBM 6.1 billing system.¹⁰ O2 confirmed that *"the name of the billing software company has changed from Convergys to Netcracker"* but *"the underlying core software has remained the same; so there has not been any significant change in software, either to a completely new platform or vendor."*¹¹

The Relevant Period

3.22 As noted above, [X] took over the running of O2's billing system in May 2003. O2 has explained that the first known occurrence of the billing error took place on *"05/12/2003"*.¹² We are therefore satisfied that the billing error arose on at least 5 December 2003.

3.23 However, due to the way in which the statutory scheme applies in relation to historical contraventions which pre-date the introduction of sections 96A to 96C of the Act on 26 May 2011, Ofcom is only able in O2's case to consider the period of its contravention from 26 May 2011 for the purpose of giving a confirmation decision under section 96C of the Act.

3.24 Sections 94 to 96 of the Act apply in respect of contraventions that occurred before and up to 26 May 2011 (when sections 96A to 96C of the Act came into force). Ofcom can only consider taking enforcement action for any potential pre-26 May 2011 contravention, provided that O2 has not remedied the consequences of such a contravention, such as reimbursing all affected customers.

3.25 Later in this section we explain how the billing error was fixed and that the last known occurrence of the error was on 15 March 2019. Further, O2 had already taken steps and provided written commitments to seek to identify and refund all affected customers, with a 4% uplift.¹³ It has since confirmed that its refund programme was completed on 1 July 2020.¹⁴ O2 also advised Ofcom in a meeting held on 30 September 2019 that, for customers it was unable to identify and refunds that are not claimed, it intends to donate the relevant outstanding amount to charity.

3.26 With the billing error fixed, the completion of its refund programme, and its commitment to donate unclaimed amounts to charity, we are satisfied that O2 will remedy the

¹⁰ Question 6(a), Annex 2, Second Response.

¹¹ O2's response to Paragraph 1.6 in the Annex of its Response to the Facts and Evidence Document.

¹² Question 3, Seventh Response, relating to Scenario A - see 3.35 to 3.38 below.

¹³ Question 12(b)(i), Annex 1, Second Response.

¹⁴ Question 6, Seventh Response.

contravention for the full period during which it occurred. Therefore, we have decided not to give O2 a separate notification under section 94 of the Act in respect of the earlier periods of any contravention up to 26 May 2011.

- 3.27 As such, we are satisfied that the contravention of GC 11.1 and GC C3.2 in relation to the billing error (described below) began on 26 May 2011 in giving the Confirmation Decision attached at Annex 1.
- 3.28 Accordingly, as already noted in paragraph 3.17 above, our decision is that the Relevant Period for O2’s contravention of GC 11.1 and GC C3.2 began on 26 May 2011 and ended on 15 March 2019.
- 3.29 We set out below the facts and evidence that are particularly relevant to our assessment of that contravention. In particular, we deal with the following matters before setting out our decision on O2’s contravention:
- O2’s billing error (including how it was presented on bills, how it was identified and how customers were affected);
 - O2’s processes for identifying errors; and
 - O2’s processes for addressing billing errors.

The Billing Error

Description of the Billing Error

- 3.30 Upon opening our investigation, in light of the description and information notified by O2 to BABT on 4 April 2019, we sought further information from O2 regarding the nature and extent of its billing error.
- 3.31 In its Second Response, O2 stated (amongst other things):
- *“[t]he Termination Bill should take into account any payments made against the outstanding periodic bill prior to the Termination Bill being issued”*;¹⁵
 - *“[t]he error is where the payment for the monthly bill has not been taken into account at the time of payment for final termination bill”*;¹⁶
 - *“there are four scenarios in which the Billing Error could have occurred”*;¹⁷ and
 - *“[t]he overarching principle common to all scenarios, is that, when a termination is requested, any amount unpaid from a previous bill, which is due to be taken by a scheduled pending payment, was not being taken into account at the point payment for the termination bill was taken.”*¹⁸
- 3.32 In our understanding of the evidence, the resulting effect was that, where a payment for the periodic monthly bill was already scheduled to be taken and that payment remained outstanding at the point the termination bill was produced, the amount due was also

¹⁵ Question 5(b), Annex 1, Second Response, as amended by Question 7, Seventh Response.

¹⁶ Question 2, Annex 1, Second Response, as amended by Question 7, Seventh Response.

¹⁷ Question 2, Annex 1, Second Response.

¹⁸ Question 1, Annex 2, Second Response as amended by Question 7, Seventh Response.

included on the final termination bill. As a result, we understand that, where the termination bill was paid, O2 took payment for that same charge twice.

3.33 Following the duplicate payment being taken, O2 has confirmed that “[t]ermination bills have not been reissued”.¹⁹ Our understanding is therefore that the duplicate payment and resultant credit were not reflected in any bill received by affected customers. Further, in our understanding, O2 did not proactively inform all of the affected customers that they were in credit once the termination bill was paid and the payment duplicated.

3.34 We describe below each of the four different scenarios (in chronological order) in which O2’s billing error occurred as confirmed to us by O2. We refer to them collectively as the ‘Billing Error’ throughout this document. For each scenario, we note that, as standard:

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

Scenario A²⁰ – Agent amends date of termination bill production (5 December 2003 to 15 March 2019)

3.35 Scenario A occurred when O2’s agents changed the date of a pending termination bill so that it was generated between the date that a customer’s regular monthly bill²¹ was produced and the date that payment of that monthly bill was taken. Due to an error, because payment for the regular monthly bill had not yet been taken when the termination bill was produced, this ‘outstanding’ amount was also included on the termination bill despite payment already being scheduled. Consequently, the customer ended up paying the same amount twice.

Figure 1: Example of Scenario A pre-2012

Date	Action	Invoice	Payment	Owed by customer
1 January	Regular monthly bill generated. Payment scheduled for 14 days later on 15 January.	£20		£20
7 January	Customer terminated their account. Termination bill automatically scheduled to be generated 14 days later on 22 January (after payment of the			

¹⁹ Question 12(b)(i), Annex 1 Second Response.

²⁰ This scenario is referred to by O2 as Scenario 3 in response to Question 2, Annex 1 Second Response.

²¹ Referred to by O2 as the ‘periodic bill’.

	regular monthly bill was scheduled) but the agent brings this date forward to 14 January (before payment of the regular monthly bill is taken).			
14 January	Termination bill generated and includes: <ul style="list-style-type: none"> • Charges related to termination - £5 • Outstanding monthly charges (already scheduled for payment on 15 January) - £20 Payment for termination bill scheduled for 14 days later on 28 January.	£25		£25
15 January	Payment for regular monthly bill taken.		£20	£5
28 January	Payment for termination bill taken.		£25	-£20

3.36 In April 2012,²² O2 implemented a change to its system intended to fix a different scenario, Scenario B (O2 was unaware of any other scenarios existing at that time). Specifically, the billing system was changed so as to schedule production of the termination bill for the day after the monthly bill payment was due i.e. “*the Periodic Bill date + delay days* [the timeframe for scheduled payment (i.e. 14 days)] + 1”. However, despite this change, Scenario A remained ongoing.

Figure 2: Example of Scenario A post-April 2012

Date	Action	Invoice	Payment	Owed by customer
1 January	Customer terminated their account. Because a regular monthly bill was due for generation within 14 days of this termination, the termination bill was automatically scheduled to be generated 14 days + 1 day after the regular monthly bill was produced (after payment of the regular monthly bill was scheduled) but an agent brought this date forward to 8 January (before payment of the regular monthly bill was taken).			

²² Question 11(b)(iii), Annex 1, Second Response.

2 January	Regular monthly bill generated. Payment scheduled for 14 days later on 16 January.	£20		£20
8 January	Termination bill generated and includes: <ul style="list-style-type: none"> Charges related to termination - £5 Outstanding monthly charges (already scheduled for payment on 16 January) - £20 Payment for termination bill scheduled for 14 days later on 22 January.	£25		£25
16 January	Payment for regular monthly bill taken.		£20	£5
22 January	Payment for termination bill taken.		£25	-£20

3.37 O2 has confirmed that, on 15 January 2019, the monthly record prior to the date the Billing Error was identified, [redacted] O2 agents had access to a system which allowed them to manually override the set billing date.²³

3.38 O2 has confirmed that this scenario occurred from at least 5 December 2003 to 15 March 2019²⁴ when a fix was implemented (see 3.55 and 3.56 below).

Scenario B²⁵ – Terminating within 14 days of the next monthly bill (23 March 2006 - 18 April 2012)

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

Figure 3: Example of Scenario B

Date	Action	Invoice	Payment	Owed by customer
1 January	Customer terminated their account. Termination bill scheduled to be generated 14 days later on 15 January.			

²³ Question 3, Annex 2, Second Response.

²⁴ Question 3, Seventh Response.

²⁵ This scenario is referred to by O2 as Scenario 4 in response to Question 2, Annex 1, Second Response.

7 January	Regular monthly bill generated. Payment scheduled for 14 days later on 22 January.	£20		£20
15 January	Termination bill generated and includes: <ul style="list-style-type: none"> • Charges related to termination - £5 • Outstanding monthly charges (already scheduled for payment on 22 January) - £20 Payment for termination bill scheduled for 14 days later on 29 January.	£25		£25
22 January	Payment for regular monthly bill taken.		£20	£5
29 January	Payment for termination bill taken.		£25	-£20

3.40 On or before 14 November 2011,²⁶ O2 identified Scenario B and implemented a fix in April 2012.²⁷ As noted above, this fix amended the billing system to “ensure that the termination bill is produced after the payment for the periodic bill had been taken.”²⁸ Specifically the billing system was changed so as to schedule production of the termination bill for the day after the monthly bill payment was due i.e. “the Periodic Bill date + delay days [the timeframe for scheduled payment (i.e. 14 days)] + 1”. At the time this fix was implemented, O2 was unaware of any of the other Billing Error scenarios.

3.41 O2 has confirmed that Scenario B occurred from at least 23 March 2006 - 18 April 2012.²⁹ It is unclear to Ofcom why, given that Scenario B had shared characteristics with Scenario A (i.e. they both occurred if the termination bill was generated between the date a monthly bill was produced and payment for that monthly bill was taken), the start date for Scenario B does not mirror that of Scenario A. In this respect, O2 has stated that “[~~we~~] have not been able to provide an explanation or identify why this scenario only emerged on the billing system from 23 March 2006.”³⁰

Scenario C³¹ – Regular monthly bill payment due at the weekend (8 April 2012 - 24 February 2019)

3.42 The change implemented in April 2012, in effect, meant production of the termination bill was rescheduled to take place 15 days after the regular monthly bill was produced and, therefore, after payment of that bill would normally be taken.

²⁶ Annex 36, Second Response.

²⁷ Question 11(b)(iii), Annex 1, Second Response.

²⁸ Question 4(f), Annex 2, Second Response.

²⁹ Question 2(a), Fourth Response.

³⁰ Question 2(a), Fourth Response.

³¹ This scenario is referred to by O2 as Scenario 1 in response to Question 2, Annex 1, Second Response.

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

Figure 4: Example of Scenario C

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

Monday	18 January	Payment for regular monthly bill taken.		£20	£5
Sunday	31 January	Payment for termination bill <u>not</u> taken due to weekend payment rules and rescheduled for Monday 1 February.			
Monday	1 February	Payment for termination bill taken.		£25	-£20

3.44 O2 has confirmed that this scenario occurred from at least 8 April 2012 until 24 February 2019.³²

Scenario D³³ – Terminating service the same weekend that the regular monthly bill was produced on a Saturday (21 April 2012 – 2 February 2019)

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

Figure 5: Example of Scenario D

Day	Date	Action	Invoice	Payment	Owed by customer
Saturday	2 January	Regular monthly bill generated. Payment scheduled for 14 days later on Saturday 16 January.	£20		£20
Sunday	3 January	Customer terminated their account. Termination bill scheduled to be generated 14 days later on Sunday 17 January.			
Saturday	16 January	Payment of regular monthly bill <u>not</u> taken due to weekend payment rules. Payment			

³² Question 1, Seventh Response.

³³ This scenario is referred to by O2 as Scenario 2 in response to Question 2, Annex 1, Second Response.

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

3.46 O2 has confirmed that this scenario occurred from at least 21 April 2012³⁴ to 2 February 2019.³⁵

How the Billing Error was presented on customer termination bills


3.47 As part of our investigation, we requested from O2 samples of termination bills issued to customers affected by the Billing Error.³⁶ Figures 6 and 7 show extracts from two of the sample bills provided.

³⁴ Question 1, Fourth Response.

³⁵ Question 2, Seventh Response.

³⁶ O2 provided a sample of 18 termination bills: 10 from between September 2017 and 2019 (Annex 38 of the First Response) and 8 from prior to September 2017 (Annex 44 of the Second Response).


Figure 6: Extracts from sample termination bill issued on 3 January 2018³⁷




Select bill: 03 Jan 18 → GO

My tariffs - O2 Unlimited 24M 3GB : 03 Jan 18 - 19 Jan 18	-13.25
→ My monthly extras	0.00
<hr/>	
Total before VAT	-13.25
→ VAT	-2.65
<hr/>	
Total new charges	-15.90
→ Balance brought forward	29.00
<hr/>	
Total amount due	£13.10

You have payments outstanding.
Please contact O2 Customer Service or visit www.o2.co.uk immediately to make a payment.

 [Download PDF Bill](#)
To print or view your bill as PDF document you will need a PDF reader.
[This can be downloaded here.](#)



Previous balance - 20 Dec 17	29.00
<hr/>	
Total balance brought forward	£29.00

³⁷ Annex 38 of the First Response.

Figure 7: Extract from sample termination bill issued on 2 June 2013³⁸

At a glance	
My tariffs - Online BlackBerry Bonus 25 24m : 20 May 13 - 18 Jun 13	-21.24
My monthly extras	0.00
<hr/>	
Total before VAT	-21.24
VAT @ 20.00% on -£21.24	-4.24
<hr/>	
Total new charges	-25.48
Previous balance - 19 May 13	26.34
<hr/>	
Total amount due	£0.86
<p>You have payments outstanding. Please contact O2 Customer Service or visit www.o2.co.uk immediately to make a payment.</p>	
<p>This is not a VAT invoice</p>	

Our understanding of the information presented on termination bills

- 3.48 Our understanding from the samples provided by O2, including the extracts detailed in Figures 6 and 7, is that the termination bills issued to customers affected by the Billing Error showed:
- the credits owed back to the customer due to them having cancelled mid-way through a monthly period already billed for;³⁹ and
 - a balance which reflected an amount already scheduled to be taken as payment for the last monthly bill.
- 3.49 For example, in Figure 6 it appears that the customer's last monthly bill charged for services due to be provided between 20 December 2017⁴⁰ to 19 January 2018. Because the customer's service was cancelled on 3 January 2018, the customer no longer owed money for services beyond that date (i.e. 3 January 2018 to 19 January 2018) and the termination bill consequently applied a credit of £15.90 (including VAT) for that period.
- 3.50 However, in addition to detailing that credit, the bill also includes a previous balance of £29 (referred to as 'Balance brought forward')⁴¹ which we understand to be the amount already scheduled to be taken as payment for the last monthly bill and in relation to which a customer would already have been billed. Consequently, the bill references the "Total amount due" as £13.10 when in fact the customer is due a refund for £15.90.

³⁸ Annex 44 of the Second Response.

³⁹ In some instances these credits were offset against debits for any early termination charges.

⁴⁰ As indicated by "Previous balance – 20 Dec 17"

⁴¹ In Figure 7 this amount is referred to as 'Previous balance'.

3.51 Based on our understanding of these and other samples provided, it is apparent that the termination bills did not include any information about the credits that would be applied to customer accounts once the duplicate payments had been taken by O2 and consequently, the total amount indicated as due on the bill was overstated. Given that these bills were termination bills, this also means that the total amount indicated as due did not reflect the actual closing balance for the account.

Identification and fixing of the Billing Error

3.52 We provide below a high-level explanation of when and how O2 identified and subsequently fixed the Billing Error. A more detailed explanation of the processes O2 has in place for preventing and identifying billing errors can be found later in this section.

3.53 O2 has confirmed that it first identified the Billing Error, specifically Scenario B, on or before 14 November 2011. However, O2 has been unable to provide any documents explaining precisely how the error was identified but, based on the change request submitted to fix that scenario,⁴² it appears that this was, at least in part, discovered due to complaints received by O2 (see 3.92 and 3.93 for more detail). Scenario B was subsequently fixed (see 3.40 for an explanation of the fix that was implemented) and the last known occurrence was on 18 April 2012. At that time, O2 was unaware of any other Billing Error scenario.

3.54 On 5 February 2019, following ad-hoc sample analysis of termination fee credits, O2 became aware that the Billing Error may have been ongoing⁴³ and asked [X] to *“investigate root cause and establish if this is a wider issue affecting multiple customers”*.⁴⁴

3.55 In March 2019, following investigation by [X], a script was put in place *“to run prior to the nightly billing run and reschedule any pending requested bills (mainly termination bills but also interim and post termination bills) past the payment due date of the customers most recent bill taking into account whether the due date falls on a weekend. If it does, additional days are added to counter the delayed weekend payment processing. This means that the requested bill is produced to consider all payments that were successfully made via automatically collected payment methods which in turn means that the customer is not incorrectly sent a second payment request for the outstanding amount.”*⁴⁵

3.56 The script included:

“(i) adding additional days to the request to generate a client bill where the previous client bill payment is due on the weekend of the pending bill request;

(ii) adding additional days to the request to generate a client bill where the account terminated during the same weekend as the customer’s previous bill was produced; and

⁴² Annex 36, Second Response.

⁴³ Annex 9, First Response.

⁴⁴ Annex 11, First Response.

⁴⁵ Question 5, Fourth Response.

*(iii) adding additional days to the request where the request to generate a client bill is due prior to the payment date of the previous bill's payment either due to (a) the automated system scheduling or (b) O2's agent intervention."*⁴⁶

- 3.57 In other words, the script identifies where a termination bill is due to generate prior to a monthly bill payment being taken (taking into account where that payment will be delayed due to it falling on a weekend) and adds additional days to the production of the termination bill. This ensures that the monthly payment has already been taken prior to the termination bill being generated and is not duplicated.
- 3.58 On 4 April 2019, O2 notified BABT of the Billing Error, and on 12 June 2019 BABT notified Ofcom that O2 had experienced a Category 1 EPF.
- 3.59 On 10 July 2019, in accordance with our published Enforcement Guidelines, Ofcom opened our investigation into O2, and on 1 August 2019 sent O2 the First Notice. O2 provided its First Response on 5 September 2019. Upon analysing O2's First Response, Ofcom identified that the scenario set out by O2⁴⁷ appeared to differ from an explanation provided by [X], Scenario C, in one of the Annexes provided.⁴⁸ Other Annexes also contained references to Scenario A, which O2 had not detailed.⁴⁹ Ofcom subsequently highlighted these discrepancies to O2 on 17 September 2019 and requested a meeting with both them and [X] to discuss the Billing Error in more detail.
- 3.60 On 27 September 2019, prior to that meeting with Ofcom, O2 sent a note drafted by [X] which set out details of Scenario A, Scenario C, and Scenario D. After discussing the updated information and other aspects of the Billing Error at a meeting on 30 September 2019, Ofcom sent O2 its Second Notice asking it, amongst other questions, to review its First Response and make all necessary revisions to ensure that the information provided to Ofcom was complete and accurate.
- 3.61 On 17 October 2019, O2 provided its Second Response which stated (emphasis added) *"[f]urther to Ofcom's questions to TUK [Telefónica UK Limited, referred to as O2 throughout this document] on 17 September 2019, following TUK's First Response on 5 September 2019, it is now clear from information that has surfaced and clarified in conjunction with [X], that four scenarios have been identified and defined, which would result in the Billing Error occurring"*.⁵⁰
- 3.62 Although detailing all four scenarios, in response to Ofcom's request for documents held by O2 which recorded the root cause, O2's Second Response⁵¹ continued to refer Ofcom to an email sent by [X] of 6 February 2019 that described Scenario C only.⁵² This [X] email

⁴⁶ Question 5, Seventh Response.

⁴⁷ The scenario described by O2 in its First Response and the BABT Notification does not fully correspond with Scenario A, C or D.

⁴⁸ Annex 11, First Response.

⁴⁹ Annex 7 (email from [X] to O2 on 8 March 2019 at 14:37) and Annex 14 (email from [X] to O2 on 20 February 2019 at 11:02), First Response.

⁵⁰ Question 1(a), Annex 1, Second Response.

⁵¹ Question 16(f), Annex 1, Second Response

⁵² Annex 11, First Response

had been sent in response to O2's request on 5 February 2019 (see 3.54), just one day after the Billing Error was identified as ongoing, and before the matter was fixed.

- 3.63 Nevertheless, whilst O2 had not identified all active scenarios of the Billing Error when it implemented the script in March 2019, O2 has confirmed that it was applicable to them all⁵³ and the last occurrence of any scenario was on 15 March 2019.

Customers affected by the Billing Error

- 3.64 To understand the impact of the Billing Error, we asked O2 to provide data on three matters: (i) the amount customers had been overcharged as a result of the Billing Error; (ii) the amount of those overcharges that were paid by customers; and (iii) how much of those payments had been refunded.

- 3.65 O2 provided data⁵⁴ showing that, between 2011 and 15 March 2019, 251,545 customers were overcharged £40,655,667.90 as a result of the Billing Error.⁵⁵ Of those overcharges:

- £2,414,487.65 had been paid by 139,866 customers (an average of £17.26 per customer); and
- £38,247,919.36 had not been paid by 111,682 customers (an average of £342.42 per customer).⁵⁶

Overcharges paid

- 3.66 Of the overcharges that had been paid, O2 advised that:

- 27,818 customers had already been refunded outside of its refund programme for overcharges totalling £1,242,589.02 (an average of £44.66 per customer); and
- 112,048 customers were due to be refunded £1,171,898.63 (an average of £10.45 per customer) as part of its refund programme.

Overcharges refunded outside of O2's refund programme

- 3.67 In respect of the c.£1,240,000 that had already been refunded, we noted that evidence received from O2 had suggested that it:

- i) did not put in place plans to refund affected customers when it first identified the Billing Error in 2011 or implemented a 'fix' in April 2012;⁵⁷ and
- ii) was unaware that the Billing Error had remained ongoing until 5 February 2019.

- 3.68 As a result, it was unclear to Ofcom as to what had initiated the refunds already made to its customers. An email from [redacted] to O2 had previously advised that, in relation to Scenario

⁵³ Question 5, Fourth Response.

⁵⁴ See Annex 3, Annex 4 and Annex 5.

⁵⁵ We note that some of these customers will have been affected prior to 26 May 2011 when the Relevant Period started.

⁵⁶ These figures are from O2's 4 December 2020 Response which explained that the tables detailed in Annex 4 and Annex 5 "were formulated using two slightly different data sets" and so the values and volumes "differ very slightly, by three customers".

⁵⁷ An internal email dated 08 March 2019 14:37 found in Annex 12, First Response states "looks like no refund arrangements were requested after the deployment of that CR [change request]".

C, (emphasis added) “such occurrences are seem [sic] to be **corrected by CSA’s** [Customer Service Agents] themselves by raising refunds, **probably when customer complain** [sic]”.⁵⁸ However, to clarify matters, Ofcom asked O2 to analyse a sample of accounts that had been overcharged in 2018 and subsequently refunded.

- 3.69 In response to that request, O2 informed Ofcom⁵⁹ that of the 40 accounts it had analysed:
- 31 had received refunds as part of O2’s ‘Auto Refund Processing’; and
 - 9 had received refunds following a request from the customer.
- 3.70 Explaining its Auto Refund Processing, O2 advised that “[a] report is generated 30 days [O2 later corrected this to 31 days]⁶⁰ after the termination bill production date” and that “the process from there is manual.” O2 further explained that “[t]he report is reviewed and any account over £20 in credit [reduced to £5 from 1 June 2020]⁶¹ is referred to our partner team, Infosys, to process refunds. The refund issuance can vary but is usually a few days after the report is produced. This will mean that there will be a slight variation in the timescales for refund issuance.”⁶² For accounts that were less than £20 in credit, O2 informed Ofcom that “credits below £20 will be refunded to the customer, on their request”.⁶³
- 3.71 Data provided by O2 on all customers refunded outside of the refund programme showed that 22,448 (c.81.5%) were refunded £1,172,696.08 (c.83% of the total amount refunded) within 4 weeks of payment being taken. However, it also showed that 2,114 customers (c.7.5%) did not receive a refund until more than a year after payment, with 401 of those customers not receiving their refund until more than 5 years had passed. A full breakdown of when these refunds occurred can be found in Annex 6.

Overcharges that were to be refunded as part of O2’s refund programme

- 3.72 In relation to the c.£1,170,000 that was due to be refunded (via cheque) to c.112,000 customers as part of O2’s refund programme, O2 advised that it would provide an additional 4% interest payment as part of those refunds.⁶⁴ It also advised at a meeting held on 30 September 2019 that it would calculate the value of uncashed cheques (after their expiry) and combine it with the amount owed to uncontactable customers and donate the total amount to charity.
- 3.73 Figures provided by O2⁶⁵ show that, of the c.£1,170,000 due for refund as part of its refund programme, c.£1,000,000 (c.86%) had been billed to 99,579 customers prior to 2018 (i.e. more than a year before the Billing Error was reidentified on 5 February 2019). They also show that c.£475,000 (c.40%) of that amount was billed to 48,491 customers prior to 2014

⁵⁸ Annex 11, First Response.

⁵⁹ Question 3, Fifth Response and [redacted]’s email of 12 May 2020 at 16:53.

⁶⁰ Question 3, Sixth Response.

⁶¹ Question 3, Sixth Response.

⁶² Email from [redacted] dated 12 May 2020 at 16:53.

⁶³ Email from [redacted] dated 13 May 2020 at 14:55.

⁶⁴ Question 12(b)(i), Annex 1, Second Response.

⁶⁵ See Annex 3

(i.e. more than 5 years before the Billing Error was reidentified). We do not have a full breakdown showing how those overcharges varied by customer, but O2 did provide a spreadsheet⁶⁶ detailing the initial 93,259 accounts identified as having been impacted by the Billing Error (as referenced in its BAPT Notification).

- 3.74 Of those 93,259 accounts, 49,507 had had a termination bill issued during the Relevant Period. For those accounts billed during the Relevant Period:
- 1,990 (c.4%) had outstanding credits of more than £20, totalling £127,601.49;
 - 342 (c.0.7%) had outstanding credits of £100 or above, totalling £61,584.57;
 - the highest credit owed was for £713.24 and related to a termination bill issued on 28 May 2011.
- 3.75 In relation to why credits above £20 were not refunded as part of O2's Auto Refund Processing, O2 has stated "*[i]n a relatively small number of cases, there could be changes applied to the account after the report was produced on day 31, which took the account into a credit balance greater than £20*".⁶⁷
- 3.76 In relation to when refunds were due to be completed, O2 advised that it aimed "*to complete the refunding process for the remaining customers by the end of March 2020*".⁶⁸ However, on 25 March 2020, O2 sent a letter to Ofcom advising that "*COVID-19 has developed to such a degree that we consider it is no longer appropriate to send out the refund cheques to customers, given the current "lockdown" situation in the UK*".
- 3.77 Subsequently, during a call with Ofcom on 10 June 2020, O2 confirmed that it was resuming its refund process, and in its covering letter to its Sixth Response O2 advised that the process was "*scheduled to complete on Wednesday, 1st July*". It later confirmed that its refund programme completed on 1 July 2020 as planned.⁶⁹ For the avoidance of doubt, the delay to refunds caused by COVID-19 is not something that should affect O2 adversely and we have taken this into account as part of our assessment.
- 3.78 In relation to the general delay in providing refunds, O2 has explained that:
- the refund programme had been placed on hold pending the completion of an existing [redacted] refund programme, with O2 explaining that a system capacity issue meant that "*only 7,000 [later updated to 10,000]⁷⁰ refunds can be run at a time*" and "*should this capacity be increased it would stop all other cheque activity.*";⁷¹ and
 - it subsequently determined that it "*was a better customer experience to consolidate the refund process for customers known to be affected by both [the Billing Error and [redacted]] issues*"⁷²

⁶⁶ Annex 21, First Response.

⁶⁷ Paragraph 24 of O2's Response to the Facts and Evidence Document.

⁶⁸ Question 7, Fourth Response

⁶⁹ Question 6, Seventh Response.

⁷⁰ Question 5, Seventh Response.

⁷¹ Question 12(b)(i), First Response. We note that this explanation was not repeated in O2's Second Response to this same question. However, we understand that it nonetheless remains accurate.

⁷² Question 8(b), Fourth Response.

3.79 O2 has also confirmed that its decision to consolidate refunds “*didn’t affect the address trace process at all as the customer records have not been purged whilst both refund programs are ongoing.*”⁷³

Overcharges not paid

3.80 When explaining why some customers (including those who had already been refunded) were not owed refunds, O2 advised that “[t]hese customers, although initially affected by the Billing error, their account has been in zero balance or in debit and are not due a refund. By way of example, this would include where the final bill payment was not successful; the customer did not pay outstanding charges relating to their account; or the payment was successful but the customer reconnected, the credit balance, was then offset from their next monthly bill.”

3.81 This explanation and the fact O2 was unaware that the Billing Error remained ongoing until 5 February 2019, suggested that the reason c.£38,240,000 had not been paid was not generally a result of pro-active steps taken by O2 to address the error, but rather a result of other factors generally triggered by the customer. However, O2 stated that, based on the information it has “*it seems that a significant majority of these customers were in arrears, were actively disconnected by TUK and there was very little prospect of them paying TUK the money that they owed*”.⁷⁴ O2 further stated that “[<]”.⁷⁵

3.82 O2 subsequently provided data showing that, of the 111,682 customers who had not paid overcharges caused by the Billing Error, 85,225 (c.76%) customers - who owed £35,927,653.38 (an average of £421.56) - had been disconnected by O2 for arrears. The remaining 26,457 (c.24%) customers had not been disconnected for arrears and had been billed £2,320,265.98 (an average of c.£87.70) as a result of the Billing Error.⁷⁶

3.83 The extent of the overcharges and customer refunds are considered in more detail in Section 4 as part of our penalty assessment.

O2’s processes for identifying errors

3.84 Whilst the information provided by O2 shows that it overcharged 251,545 customers a total of £40,655,667.90 during the Relevant Period, and it issued a significant number of refunds as a result of its Auto Refund Processing and customer contact, O2 failed to identify the error for a significant period of time. Further, even when O2 did identify the Billing Error, first in 2011 and later in 2019, it failed to identify all scenarios. We therefore sought information from O2 about the processes it had in place for identifying any billing system errors, especially when they are classified as an Extraordinary Performance Failure in accordance with the Direction.

⁷³ Question 8(b), Fourth Response.

⁷⁴ Paragraph 20 of O2’s Response to the Facts and Evidence Document.

⁷⁵ Paragraph 20 of O2’s Response to the Facts and Evidence Document.

⁷⁶ O2’s 4 December 2020 Response.

- 3.85 In that regard, O2 has explained that “[i]ssues can be identified via a number of channels, investigations by the Revenue Assurance team (as in this specific instance), Customer complaints or specific service affected incidents.”⁷⁷ It also explained that “[i]n some scenarios, issues will be identified by the OBAPM [Ofcom Billing Accuracy Program Manager] whilst collating the monthly Measurement reporting and challenging items identified by the Revenue Assurance team.”⁷⁸ O2 first identified Scenario B of the Billing Error on or before 14 November 2011 and implemented a fix for that scenario in April 2012. As noted above, O2 has been unable to provide documents explaining precisely how the error was identified but, based on the change request submitted to fix that scenario, it appears that this was, at least in part, discovered due to complaints received by O2 (see 3.92 and 3.93 for more detail).
- 3.86 O2 did not identify the existence of other scenarios until it conducted an ad hoc analysis of a “small sample of [termination fee] credits” in February 2019.⁷⁹ It confirmed that this analysis was “not part of any BAU monitoring / process.”⁸⁰ We therefore sought further information on the BAU processes it had in place to prevent and identify billing errors.

System checks and audits

- 3.87 O2’s ‘Combined Risk and Control Framework’,⁸¹ which O2 has advised “has been approved by BABT and should be read in conjunction with the High Level Design (HLD) and Measurement Strategy (MSD) documents”,⁸² sets out the preventative and detective steps it takes to mitigate risks related to its metering and billing system. Amongst other steps, it includes O2 employing an external party to conduct preventative checks to mitigate risks that:
- usage charges are not billed in accordance with the subscription product held;
 - charges are not billed in accordance with Published Tariffs; and
 - customer subscription charges are not billed in accordance with Published Tariffs.
- 3.88 However, when asked about the processes and procedures it had in place to ensure that customers received termination bills that did not exceed the cost of services provided to them, O2 confirmed that it “does not conduct manual or systematic bill checks, checks are made by TUK’s Service Management Team to ensure that Direct Debit files match what CUK has billed, but these would not have spotted this issue as we took payment for the value billed, albeit twice.”⁸³
- 3.89 When Ofcom asked O2 to provide any documents relating to its governance processes to ensure that termination bills provided to its customers were accurate, O2 stated “No

⁷⁷ Question 15, Annex 1, Second Response.

⁷⁸ Question 15, Annex 1, Second Response.

⁷⁹ Question 2(a), Annex 2, Second Response.

⁸⁰ Question 2(a), Annex 2, Second Response.

⁸¹ Annex 6, First Response.

⁸² Question 8, Annex 1, Second Response.

⁸³ Question 7(a), Annex 1, Second Response.

specific documents can be provided related to governance processes. There were no audits performed relating to Termination Bill accuracy.”⁸⁴

- 3.90 In relation to internal audits conducted since 2012, O2 confirmed that the scope may include an assessment of factors such as *“correct customer and tariff set up and correct rate charges”* but that *“this particular scenario relating to the Billing Error has not been previously covered as it is very specific and unlikely to have been assessed as in scope on previous audits.”⁸⁵*

Monitoring complaints

- 3.91 As part of its approach to identifying possible issues, O2 has stated that *“TUK routinely conducts complaints analysis. To facilitate targeted analysis there is a complaints categorisation system in place to assist in identifying trends to establish if there are issues which need to have root cause analysis conducted.”⁸⁶* Its Metering & Billing Management Strategy document also states that *“Trended Customer Complaints data is also reported in the monthly measurement report to allow for the identification of issues relating to Metering and Billing accuracy.”⁸⁷* This was demonstrated in a sample of Total Metering and Billing measurement reports provided by O2.⁸⁸
- 3.92 In that regard, it appears that O2’s identification of Scenario B of the Billing Error on or around 14 November 2011 was, at least in part, a result of complaints received. Indeed, O2 has stated *“The Complaints team have confirmed that the data pre-2012 has been purged and therefore cannot be analysed. However, based on the information present in Annex 36 there is an indication of complaints arising as a result of the Billing Issue prior to 2012 and prompted the change request”⁸⁹*
- 3.93 Further, Annex 36 (which includes a copy of the Change Request Form submitted on 14 November 2011) states *“[t]he current system behaviour represents a poor customer experience around disconnection, and has a negative impact on Customer Satisfaction. This generates 3,800 calls into customer service each month, so the change to fix this would eliminate these calls.”*
- 3.94 In contrast, the Notification Form to BABT relating to O2’s most recent identification of the Billing Error in 2019 asked whether O2 had received any complaints regarding this incident. O2 responded *“[n]ot that we can specifically identify. Our complaints system does not record information at this granular level.”*
- 3.95 O2 later advised that *“TUK has been unable to locate Documents where it was confirmed that no complaints had been received in relation to the Billing Error, or identify what checks*

⁸⁴ Question 7(b), Annex 1, Second Response.

⁸⁵ Question 14, Annex 1, Second Response.

⁸⁶ Question 4, Annex 1, Second Response.

⁸⁷ Annex 27, First Response.

⁸⁸ Annexes 28 to 32, First Response.

⁸⁹ Question 4, Annex 1, Second Response.

*were carried out in relation to the complaints data which would have informed the BABT notification”.*⁹⁰

- 3.96 It also confirmed that *“TUK does not have a specific complaint category that would capture this granular level of issue and would only have been identified if the Complaints team came across it as they sampled complaint data/journeys or had received anecdotal information from wider sources, for example operational areas where examples were provided for investigation.”*⁹¹
- 3.97 An email from [redacted] to O2⁹² stated, in relation to Scenario C, *“[s]uch occurrences are seem [sic] to be corrected by CSA’s [Customer Service Agents] themselves by raising refunds, probably when customer complain [sic]”*. Further, and as noted above, analysis conducted by O2 on 40 accounts⁹³ that were overcharged in 2018 and subsequently refunded showed that 9 of those refunds had been initiated following a customer request. However, following receipt of Ofcom’s draft information notice, O2 carried out complaint analysis from a sample of 4,000 affected customers from February 2018 to February 2019, where it identified one complaint relating to the Billing Error.⁹⁴
- 3.98 The processes O2 had in place for preventing and identifying billing errors are considered further in Section 4 as part of our penalty assessment.

O2’s processes for addressing billing errors

- 3.99 O2 has confirmed that, during the Relevant Period, it had two processes in place for escalating and addressing any identified billing system error, the Billing Issues Forum and the Critical Incident Restoration Process.

The Billing Issues Forum

- 3.100 Regarding its Billing Issues Forum (‘BIF’), O2 stated that *“[t]he purpose of the Forum is to come up with an action plan for fixing/resolving an issue. This will usually involve ensuring that a fix is implemented, raising credits for impacted customers, communicating to impacted customers, and sending out a communication to customer services so that agents know that there is an issue and the action that they need to take.”*⁹⁵
- 3.101 The BIF Terms of Reference⁹⁶ state that it is *“a working group that is brought together whenever a billing issue is identified”* which contains four stages: Discover, Decision, Deliver and Review.
- 3.102 O2 stated that the BIF process is invoked *“when there is an issue that (as a rule) has a financial impact on customers... Generally, any financial impacting issue that is not a PO*

⁹⁰ Question 4, Annex 1, Second Response.

⁹¹ Question 4, Annex 1, Second Response.

⁹² Annex 11, First Response, email sent from [redacted] to O2 on 6 February 2019 at 15:11.

⁹³ Question 3, Fifth Response and [redacted]’s email of 12 May 2020 at 16:53.

⁹⁴ Question 4, Annex 1, Second Response.

⁹⁵ Question 13, Annex 1, Second Response.

⁹⁶ Annex 24, First Response.

(the highest level of incident) will go to the Forum.”⁹⁷ It also explained that when the BIF is invoked, “[a] series of calls is set up per issue and will be held as necessary for that issue e.g. the calls could be daily, weekly or a one off.”

3.103 O2 has confirmed that the BIF *“was not specifically invoked”* in relation to the Billing Error *“although the basic process was followed”*.⁹⁸ O2 provided a number of reasons for this, including:

- *“In order to invoke the BIF it is usual to have all relevant information available”* so that it can *“consider the full issue and make decisions around the actions required based on that information.”*
- *“although we [O2] had the customer data in March 2019, we were also working on the [X] issue at the same time”*.⁹⁹ As it considered that it *“was highly likely that there would be customer termination bills impacted by both issues”*, it decided to deal with both issues at the same time *“to prevent sending the customer two separate refunds”*;
- *“The people who would have been invited to attend the BIF call for the Issue were already on the weekly project calls for [X]... and so were fully up to speed with what was happening with the Issue as progress on both matters was discussed on the calls.”*;
- and
- *“a series of separate calls were held with some BIF members, specifically to discuss the customer communications and Finance sign off for the credits / refunds that were required for the Issue.”¹⁰⁰*

3.104 In relation to the [X] Project Review Board meetings/calls, O2 has provided several documents detailing what was discussed regarding the Billing Error¹⁰¹ and has confirmed that these were attended by up to 21 colleagues including the Head of Competition & Regulatory Affairs and the Head of Internal Control. However, the documents provided related to meetings held after the Billing Error had been fixed and focused on the refund process.¹⁰² O2 also confirmed that there was *“a separate call on 5 June 2019 relating to the Billing Issue”*. Minutes from this call show that that discussion also focused on the refund process.¹⁰³

3.105 As part of our investigation, Ofcom also requested documents and information which, based on its terms of reference, it understands would be compiled as part of the BIF process.

⁹⁷ Question 13, Annex 1, Second Response.

⁹⁸ Question 4a, Third Response.

⁹⁹ [X] provided O2 with information on the number of customers affected and total overcharge on 6 February 2019 and 20 February 2019, based on its understanding of the cause of the Billing Error at the time.

¹⁰⁰ Question 4, Annex 1, Third Response.

¹⁰¹ Annex 48, Fourth Response.

¹⁰² O2 advised that *“[t]he [X] calls were held weekly from April 2019 until October 2019, however the Billing Issue was no longer discussed once the refunds had been completed”* – Question 8(a)(i), Fourth Response.

¹⁰³ Question 8(a)(i), Fourth Response.

Understanding the issue and its impact

- 3.106 The BIF Terms of Reference state that the “Discover” phase (Stage 1) of the BIF process is conducted by O2’s Revenue Assurance and IT teams and involves steps taken to “Validate & understand issue” and “Obtain MIS and quantify impact”.
- 3.107 In relation to validating and understanding the issue, on 17 September 2019, Ofcom highlighted several discrepancies in O2’s First Response around the explanation of how the Billing Error occurred and asked that O2 review its response to ensure that it was accurate and complete (see 3.59 and 3.60). O2’s Second Response stated (emphasis added) “**Further to Ofcom’s questions to TUK on 17 September 2019, following TUK’s First Response on 5 September 2019, it is now clear from information that has surfaced and clarified in conjunction with [X], that four scenarios have been identified and defined, which would result in the Billing Error occurring.**”¹⁰⁴
- 3.108 Prior to this, in response to our request for copies of any documentation O2 held recording its impact analysis, O2 provided to Ofcom several email exchanges between O2 and [X] as well as its notifications to BABT.¹⁰⁵ The information detailed in those documents indicated that the impact was that 93,259 customers paid duplicate payments totalling £959,706.19.
- 3.109 In its Second Response, however, it stated (emphasis added) “*These [annexes] above has [sic] been provided in relation to the identification of Scenario 2 [Scenario C]. TUK notes the revised term “Billing Error” which is expanded to include all four scenarios. TUK is awaiting revised reports to assess the numbers of affected customers for all four scenarios.*”¹⁰⁶
- 3.110 O2 subsequently confirmed¹⁰⁷ that, as a result of the Billing Error:
- 139,866 customers paid overcharges totalling £2,414,487.65 (of which 112,048 customers were owed £1,171,898.63); and
 - 111,682 customers were overcharged, but did not pay, £38,247,919.36.

Root cause analysis

- 3.111 The BIF Terms of Reference state that the “Review” phase (Stage 4) of the BIF process is conducted by the Revenue Assurance team and involves a “Root cause memo” and “Root cause action plans”. The Terms of Reference also state that “[a]fter the issue has been fixed and customer experience protected, IRC [Investigations & Root Cause Team – the owners of the BIF process] will also look at why the issue happened and make sure it doesn’t happen again.”
- 3.112 When asked for the root cause analysis it had conducted into the Billing Error, O2 referred Ofcom to [X]’s email of 6 February 2019.¹⁰⁸ This email was sent one day after the Billing Error was identified as ongoing by O2, and before the matter was fixed. It stated “[t]his

¹⁰⁴ Question 1a, Annex 1, Second Response.

¹⁰⁵ See Annexes 7, 8, 12, 14, 15, 16, 17, 18 and 19.

¹⁰⁶ Question 16(f), Annex 1, Second Response.

¹⁰⁷ Annex 47 of the Fourth Response and Question 1, Fifth Response.

¹⁰⁸ Annex 11, First Response.

issue only impacts customers with a periodic bill date on a Saturday who are terminated and then have a term bill created on a Sunday one day before the payment collection date from the periodic bill”.

- 3.113 It further stated, under the heading ‘Root cause’ *“[n]ow, the problem seems to be here when this periodic bill(account is in TA) is on a Saturday, the way the collection offset for payments works in RBM is, if the 14th day after the bill falls on a weekend, collection_dat would be set to the next Monday. (16th day)... And by the above logic, when the periodic bill happened to be on Saturday, the termination bill request is coming to be on Sunday(as adapter sets it to next_bill_dtm + 14 + 1 days), at that point even though we had the payment exported and marked it as success, its collection date would still be on Monday... So Bill Generator , while generating the termination bill doesn't seem to take account of the payment that was already made by DD and instead raises a duplicate payment request.”*
- 3.114 Whilst the explanation in 3.112 is relevant to both Scenario C and Scenario D, our understanding is that [X]’s above-mentioned reference to the ‘Root cause’ was a reference to Scenario C only.
- 3.115 With regards to a fix, the email stated: *“[f]or the temporary fix, we will get a script to identify the termination bill requests which might raise duplicate payment requests and move them (termination bill requests) to next day, and we would run this on Saturday nights (to stop the termination bills on Sundays as the payments collection date is on Monday) until the permanent fix is deployed to production... And the permanent fix would be in Billing Adapter, to space out the termination bill requests on or after the collection_date (i.e to set the termination bill request to next_bill_dtm + payment_due_days + 2 days) when the previous periodic bill happens to be on a Saturday when account was in 'TA'.”*
- 3.116 Our understanding of that evidence is that, whilst the described temporary and permanent fix was designed to specifically prevent Scenario C (the only scenario identified at that time), it would also have prevented Scenario D from occurring. However, it would not prevent Scenario A from occurring.
- 3.117 Scenario A was first referenced by [X] in another email dated 20 February 2019.¹⁰⁹ That email stated:
- “After running the fix, our billing team noticed there are scenarios where an agent requests the termination bill date to the immediate next date of the disconnection,*
- As a result , If there was a pending payment request already for the account, this would result in taking duplicate payment from the customer for the termination bill.*
- As described previously , the current Billing Adapter logic checks for a pending payment request ,and if that exists , it moves the termination bill request to (next_bill_dtm+ payment_due_days + 1) days.However If agents chooses the termination bill date*

¹⁰⁹ Annex 14, First Response.

themselves while disconnection, that would take preference and the adapter would not do any further checks.

*We suggest that the agents are advised to check if there is a pending payment for the customer **before** requesting the termination bill date for the next immediate days”.*

- 3.118 It appears from that explanation that Scenario A was identified following an observation made after the fix intended to resolve Scenario C had been implemented. It also suggests that the fix for Scenario C was not applicable to Scenario A and a separate fix would be required.¹¹⁰

Critical Incident Restoration Process

- 3.119 O2 advised that the Critical Incident Restoration Process (the ‘**Process**’) *“is also relevant to the escalation and address of billing system errors”* explaining that the *“[t]riggering of the process would be dependent on impact”* and *“an incident would be assessed in line with our [O2’s] priority guidelines”*. O2 also advised that the Process could be triggered at the request of Senior Management *“where there may be regulatory, financial or brand related concerns”*.¹¹¹
- 3.120 Section 2 of the Process document¹¹² explains that *“[i]t is important to understand that there are different levels of severity for incidents in O2. This process applies to incidents classified as high priority or greater”*. It also defines an ‘incident’ as *“any event which is not part of the normal running/ operation of the service and which causes, or may cause, an interruption or a reduction of the quality of the service.”* O2 gave examples of such an incident, referring to issues *“[s]uch as a complete loss of a system, network failure or degradation of a service.”*¹¹³
- 3.121 O2 has confirmed that *“[t]he Process was not invoked in relation to the Billing Error as it was not classed as a PO critical incident as it did not fall within the criteria set out in the guidelines”*.¹¹⁴ In this respect, we note that the Critical Incident Restoration Process document explains that *“Critical Incident failures identified and classified as a PO will be managed under a separate process called PO Incident Management Process.”*
- 3.122 O2 further advised that *“[t]he available data relating to the numbers of customers affected by the Billing Issue would tend to indicate that as a percentile, volumes of customers affected by this issue (based on overall customer numbers) per month were (relatively speaking) low and as such would generically fall below the impact levels typically associated with a Major Incident.”*¹¹⁵

¹¹⁰ A separate system fix was first referenced by [S<] in an email dated 8 March 2019. See Annex 7, First Response.

¹¹¹ Question 13, Annex 1, Second Response.

¹¹² Annex 25, First Response.

¹¹³ Footnote 1, Question 4(b), Third Response.

¹¹⁴ Annex 25, First Response.

¹¹⁵ Question 9, Fourth Response.

Post Incident Reviews

3.123 Separate to the processes discussed above, O2 advised that *“Post Incident Reviews take place to identify the root cause of incidents and how to prevent them from reoccurring to minimise future risk to service.”*¹¹⁶ As noted above, upon requesting any documents recording O2’s root cause analysis, O2 referred Ofcom to an email from [redacted] dated 6 February 2019.¹¹⁷ The ‘Root cause’ explanation in this email describes Scenario C only. It was also sent prior to the fix being implemented. It is therefore unclear whether O2 conducted a Post Incident Review for the Billing Error.

Ofcom’s decision on O2’s contravention

3.124 In light of the facts and evidence set out above, we now turn to our assessment of why we are satisfied that O2 failed to meet the requirements set out in GC 11.1 (and subsequently in GC C3.2) discussed at the beginning of this section, in respect of its customers for Pay Monthly Mobile services affected by the Billing Error. In making our assessment, we have considered O2’s submissions in response to the Facts and Evidence Document on rendering accurate termination bills.

O2’s submissions on rendering accurate termination bills

3.125 O2 submitted in response to the Facts and Evidence Document that it reserved its position on whether or not it had breached GC 11.1 and subsequently GC C3.2.¹¹⁸

3.126 In relation to the regulatory requirement to render or make available accurate termination bills, O2 set out its position as being, in particular, that:

- *“...its bills were (and, indeed, remain) accurate. Each bill recorded (correctly) the closing balance of the previous bill, added (correctly) the debits and credits that were fed into the billing system in that billing period, and, in so doing, arrived (correctly) at a new closing balance.”*¹¹⁹ (**‘1st Point’**)
- *“TUK recognises that, in certain circumstances, a situation could have arisen where direct debit payments, which were triggered by final monthly bills, were taken after termination bills [were produced] and, therefore, not reflected in those termination bills and that direct debit requests prompted by termination bills, were consequently higher.”*¹²⁰ (**‘2nd Point’**)
- *“That fact did not render the termination bills inaccurate. On the contrary, and as we set out above, the termination bills were accurate: they recorded the closing balances of the previous bills, added the credit and debit lines on the basis of the records that*

¹¹⁶ Question 8, Annex 1, Second Response.

¹¹⁷ Annex 11, First Response.

¹¹⁸ O2’s response to Paragraph 1.12 in the Annex of its Response to the Facts and Evidence Document.

¹¹⁹ Paragraph 8 of O2’s Response to the Facts and Evidence Document.

¹²⁰ Paragraph 10 of O2’s Response to the Facts and Evidence Document.

were made available in the relevant billing periods, and generated correct new closing balances.”¹²¹ (**‘3rd Point’**)

- “However, the termination bills generated direct debit requests and, in some cases, payments. TUK acknowledges that, in some circumstances, a direct debit request and payment resulting from a termination bill would not recognise a direct debit payment made by the customer following the final monthly bill, and would have the effect of putting the customer’s account in credit.”¹²² (**‘4th Point’**)
- “...the issue arising in this investigation is not a billing error, but instead the potential for two direct debits to be taken, effectively for the same charges.”¹²³ (**‘5th Point’**)

Our considerations of O2’s submissions

- 3.127 We carefully considered O2’s above-stated position and set out our assessment in our notification under section 96A of the Act given to O2 on 27 January 2021. We explained that we did not see how its 1st Point (see paragraph 3.126 above) provided an answer to the fact that affected customers would not have received an accurate termination bill in the end stating every amount representing and not exceeding the true extent of any service actually provided by O2 to them, as required by GC 11.1 and GC C3.2.
- 3.128 In particular, its 1st Point appeared to us more applicable to periodic (monthly) bills. It did not explain the situation - which O2 appeared to acknowledge in its 2nd and 4th Points - where all affected customers (irrespective of whether some of them are already in debt to O2)¹²⁴ are entitled to an accurate final termination bill showing (among other things) an accurate final closing balance that takes into account all the debits and credits applied to a customer’s account, including the scheduled direct debit payments to be taken by O2 after it had issued its termination bills to affected customers.
- 3.129 In this case, we are satisfied that the evidence shows that credits resulting from duplicate payments - taken, or that were due to be taken, by O2 as part of the final direct debits arising from the Billing Error - were not reflected in the termination bills made available to affected customers. O2 has also confirmed that accurate termination bills were not reissued.¹²⁵ We therefore considered that O2 was wrong in claiming in its 3rd Point that the termination bills were accurate. We also saw no basis for O2’s claim in its 5th Point that the issue arising in this investigation was not a billing error.
- 3.130 For the avoidance of doubt, given that we are concerned with termination bills, we have not focused our investigation on whether the amounts billed by O2 in its closing balances of the termination bills issued to affected customers would have been owed at the precise point those bills were generated. Rather, we have found that the termination bills failed to

¹²¹ Paragraph 11 of O2’s Response to the Facts and Evidence Document.

¹²² Paragraph 12 of O2’s Response to the Facts and Evidence Document.

¹²³ Paragraph 14 of O2’s Response to the Facts and Evidence Document.

¹²⁴ Our understanding of the facts and evidence, including O2’s explanation of how each scenario of the Billing Error occurred, is that all customers affected by the Billing Error, including those who were disconnected by O2 due to arrears, would have had a scheduled pending payment at the point the termination bill was produced.

¹²⁵ Question 12(b)(i), Annex 1 Second Response.

reflect that some of those charges were already scheduled to be taken, would not have been owed at the point payment for the final bill was taken by O2, and would have resulted in the final account being in credit.

O2's failure to render and make available accurate termination bills

- 3.131 We note that the facts and evidence currently before us clearly show that, between at least 5 December 2003 and 15 March 2019, there were four scenarios under which scheduled direct debit payments for affected customers' last periodic monthly bills were not taken into account by O2 in their final termination bills. As a result, where those termination bills were paid, such customers ended up paying for the same service twice.
- 3.132 In that regard, we specifically note O2's own information given in its BABT notification and O2's own confirmations to Ofcom about the accuracy and completeness of the information it gave in that notification, especially where O2 states:
- *"Further to Ofcom's questions to TUK on 17 September 2019, following TUK's First Response on 5 September 2019, it is **now clear from information that has surfaced and clarified in conjunction with [§<], that four scenarios have been identified and defined, which would result in the Billing Error occurring**¹. These are briefly set out below, fuller descriptions and examples are provided in response to question 2. In the Brief Description section of page 1 the BABT notification, the statement illustrates what has now been defined as Scenario 2 [Scenario C] only."*¹²⁶ (emphasis added)
 - *"...The overarching principle common to all scenarios, is that, when a termination is requested, **any amount unpaid from a previous bill, which is due to be taken by a scheduled pending payment, was not being taken into account at the point payment for the termination bill was produced taken**. The fix has been implemented in relation to the overarching issue rather than in relation to each specific scenario as each scenario is a manifestation of the same core issue."*¹²⁷ (emphasis added)
 - *"The termination invoice should take into account payments made against the periodic bill when calculating the final payment. However, in this scenario **payment for the termination invoice includes the value of the periodic bill meaning that we take payment for that bill twice**. This issue is now fixed and we won't see any new instances."*¹²⁸ (emphasis added)
- 3.133 In addition, based on our understanding of the sample termination bills that O2 provided to us, it is apparent that those bills did not include any information about the credits that would be applied to customer accounts once the duplicate payments had been taken by O2, such that the closing balance indicated on the bill was incorrect.
- 3.134 In light of the above, we consider that the requirement in GC 11.1 (and subsequently in GC C3.2) required O2 to state in its termination bills (including those issued to customers who

¹²⁶ Question 1, Annex 1 Second Response.

¹²⁷ Question 1, Annex 2 Second Response, as amended by Question 7, Seventh Response.

¹²⁸ O2's 'Brief Description' in its BABT notification dated 4 April 2019.

were affected by the Billing Error but did not ultimately end up paying)¹²⁹ any credits that would be applied to affected customers' accounts upon payment of amounts that O2 had already billed the customer for and to reflect these in the closing balance. By failing to reflect these credits, taking account of the fact that the definition of a bill specifically requires that bills must take into account (amongst other things) *"the debits and credits applied to an End-User's account"*, we consider that the termination bills rendered by O2 - the final bills issued to those customers affected by the Billing Error - did not represent and exceeded the true extent of the service actually provided.

- 3.135 In this context, we should note that a key purpose of any bill – whatever the goods or service it relates to – is to enable a customer to check whether (or not) the supplier's request for payment is accurate and actually owed. Similarly, a final termination bill should accurately set out what the customer owes or is owed (if anything) in order to settle the account, including any credits. A final bill would serve little (or no) purpose if it did not provide such an accurate account to the customer. In this context, O2's affected customers were not provided with an accurate final termination bill detailing that their accounts were in credit (or would be in credit) taking into account the further scheduled direct debit payments for amounts already billed.

Overcharging by O2

- 3.136 In addition to the above, we have found in this case that it is clear from the evidence that a significant number of customers affected by the Billing Error were, in the end, charged twice by O2 for the same service.¹³⁰ Even if O2 had rendered or made available bills on which every amount stated represented and did not exceed the true extent of the service actually provided (which, for the reasons sets out above, we consider was not the case), we consider that O2 breached the requirement in GC 11.1 (and subsequently in GC C3.2), since those customers were in any event wrongly overcharged. This is because they never actually received the volume of service that corresponded to the amount taken by O2 as a result of the duplicate payments. Consequently, we consider that this means that the amounts charged for the service did not represent and exceeded the true extent of the service actually provided to the end user.
- 3.137 Indeed, O2 appears to acknowledge that customers had been overcharged, for example when it stated in its Response to the Facts and Evidence Document that *"TUK notes that Ofcom has not requested it to provide a full breakdown of how **overcharges** varied"* (emphasis added).¹³¹

¹²⁹ As stated in 3.128, all affected customers (irrespective of whether some of them are already in debt to O2) are entitled to an accurate final termination bill showing (among other things) an accurate final closing balance that takes into account all the debits and credits applied to a customer's account, including the scheduled direct debit payments to be taken by O2 after it had issued its termination bills to affected customers.

¹³⁰ c.140,000 customers paid duplicate payments totalling c.£2,410,000.

¹³¹ O2's response to Paragraph 1.49 in the Annex of its Response to the Facts and Evidence Document.

3.138 We also note that Ofcom has previously stated that any time a customer is overcharged it amounts to a breach of GC C3.2.¹³² We have also found in previous cases (see precedents discussed in paragraph 4.110) that overcharging customers (including taking payment for services and credits not provided/applied, as well as charging customers different rates due to a delay in applying pre-paid bundles) contravened GC 11.1.

Duration of the contravention

3.139 The information provided by O2 indicates that the potential contravention dated back to at least 5 December 2003. However, for the reasons set out in paragraphs 3.22 to 3.29, we have decided that the Relevant Period for O2's contravention began on 26 May 2011 and ended on 15 March 2019 and we make no finding of contravention in respect of that earlier period. Accordingly, Ofcom has decided that O2's contravention lasted for at least 2,851 days (or 7 years, 9 months, 18 days) which is a significant period of non-compliance.

Failures in O2's processes

3.140 We have also found failures in O2's processes described above. In particular, we consider that, whilst O2's systems had (or should have had) the necessary information that O2 needed to identify the issue (including refund data and payment records), its processes were inadequate in ensuring that the Billing Error was identified in a sufficient timeframe, and that the Billing Error (and its consequences) was remedied when it was first identified by O2 on or before 14 November 2011. Our reasons and associated evidence for this finding are set out in Section 4.

Our decision on O2's contravention

3.141 For the reasons set out above, we are satisfied in the Confirmation Decision attached at Annex 1 that O2 has contravened GC 11.1, and subsequently GC C3.2, by failing to render or make available accurate termination bills in respect of its Pay Monthly Mobile services affected by the Billing Error and by overcharging a significant number of those customers.

¹³² Paragraph 10.11(a) of Ofcom's statement and consultation entitled 'Review of the General Conditions of Entitlement', as published on 19 September 2017.

4. Penalty

Summary

- 4.1 We have decided to impose a penalty of £10.5 million on O2 for its contravention of GC C3.2 and previous GC 11.1 in light of our findings discussed in Section 3. The penalty includes a 30% discount reflecting the resource savings achieved by Ofcom as a result of O2 admitting liability and entering into a settlement with Ofcom.
- 4.2 In reaching this view, we have had regard to (among other things) the need to incentivise O2, as well as other CPs, to comply with their regulatory obligations and to our principal duty of furthering the interests of citizens and consumers.
- 4.3 Ofcom's judgement is that this penalty is appropriate and proportionate to the contravention and will have the appropriate deterrent effect on O2 and the wider industry. When setting the particular penalty amount that we believe would achieve that objective, we have considered the relevant factors in the round and have had regard to our Penalty Guidelines. Our reasons for reaching this view are set out fully below.

Consideration of whether to impose a penalty

- 4.4 As noted, Ofcom's principal duty in carrying out our functions is to further the interests of citizens and consumers in relevant markets. In this respect, and as already highlighted, GC C3.2 is an important consumer protection provision which embodies one of the basic, fundamental exchanges between a CP (and indeed, any business) and its customers: that they are only charged for services they have subscribed to, and that they are charged no more than the amount owed. It is therefore important that consumers can trust that their bills for services provided by their CP are accurate. This reflects the fact that CPs, rather than customers, are responsible for providing accurate bills. We therefore take compliance with these rules very seriously, particularly where a significant number of customers are affected.
- 4.5 In our view, O2's contravention of GC C3.2 and previous GC 11.1 was a serious contravention. We consider that a number of factors support that view, including:
- the significant duration of O2's contravention;
 - the significant degree of actual and potential harm caused by O2's contravention;
 - the significant scale and scope of O2's contravention;
 - the significant absence of effective governance processes in place to prevent the billing error from occurring in the first instance and to identify the billing error once it occurred; and
 - the significant failure by O2's senior management to adequately ensure that the governance process it had put in place for fixing and remedying billing errors was followed or, to the extent that it was followed, it failed in some key respects in both

2011 (when O2 first identified the billing error) and 2019 (when the error was re-identified).

- 4.6 Taking everything into account alongside our view on the seriousness of O2's contravention, our view is that a penalty is appropriate and proportionate in this case.

Penalty amount

- 4.7 In considering the level of penalty which should be applied, Ofcom has had regard to its published Penalty Guidelines.

Our Penalty Guidelines and assessment in the round

- 4.8 As set out in our Penalty Guidelines, the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient, having regard to the relevant turnover, to have a material impact on the regulated body so that it is incentivised to bring itself into compliance and avoid recurrences of the contraventions in future. It is also important that the penalty imposed serves to deter the wider industry from contravening regulatory requirements.
- 4.9 Any penalty we set should therefore be sufficiently high to discourage bad conduct and incentivise O2's management to change the conduct of the company, ensure that its processes are effective in identifying errors when they occur, encouraging good practices and a culture of compliance across the organisation.
- 4.10 In that regard, our Penalty Guidelines set out a range of further factors which may be relevant in any particular case and Ofcom has assessed those factors carefully in relation to the circumstances of this case. Ofcom has also considered whether there are any relevant precedents and, if so, the extent to which they should be followed in this case. We have, however, decided the appropriate and proportionate amount of penalty in this case by taking all of those factors into account in the round. We set out below Ofcom's consideration of each of them.

Relevant turnover of O2

- 4.11 Our Penalty Guidelines explain that 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. In so doing, they also make clear that Ofcom will have regard to the size and turnover of the regulated body when considering the deterrent effect of any penalty.
- 4.12 Under section 97 of the Act, the amount of a penalty notified under section 96A may not exceed ten per cent of the turnover of the person's relevant business¹³³ for the relevant

¹³³ Section 97(5) defines "relevant business" as meaning (subject to the provisions of an order under subsection (3) and to subsections (6) and (7)) so much of any business carried on by the [person] as 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

period¹³⁴ as Ofcom determine to be appropriate and proportionate to the contravention in respect of which it is imposed.

- 4.13 In its Sixth Response, O2 stated that its turnover for its relevant business for the year ending with 31 March 2020¹³⁵ was [§<]. The maximum penalty which Ofcom may therefore impose in respect of O2's contravention is [§<].

Seriousness, culpability and harm

Duration of contravention

- 4.14 In considering the amount of any penalty, our Penalty Guidelines lists the duration of the contravention as an example of potentially relevant factors.
- 4.15 As set out in Section 3, O2 has confirmed that the Billing Error lasted from at least 5 December 2003.¹³⁶ However, for the reasons set out in paragraphs 3.22 to 3.29, we have made no formal finding in respect of a contravention prior to 26 May 2011. We have therefore decided that O2's contravention lasted for at least 2,851 days (or 7 years, 9 months, 18 days), beginning on 26 May 2011 and ending on 15 March 2019.
- 4.16 As already explained in Section 3, we consider that this is a significant period of non-compliance. In our assessment of penalty, we also consider that this long duration of non-compliance should be reflected and something we put particular weight towards in setting the penalty amount.

Degree of actual or potential harm caused by the contravention

- 4.17 The degree of harm, whether actual or potential, caused by the contravention is another factor we may take into account in determining the amount of a penalty under our Penalty Guidelines.
- 4.18 We have already explained that GC C3.2 (and previously GC 11.1) is an important consumer protection provision which requires CPs to render or make available accurate bills to their customers, and that this provision embodies one of the most basic, fundamental exchanges between a CP and its customers – that they are only charged for services they have subscribed to, and that they are charged no more than the amount owed. Any

such a network or service; (e) the making available of directory enquiry facilities for use for purposes connected with the use of such a network or service; (f) any business not falling within any of the preceding paragraphs which is carried on in association with any business in respect of which any access-related condition is applied to the person carrying it on.

¹³⁴ Section 97(5) also defines "relevant period", in relation to a contravention by a person of a condition set under section 45, as meaning (a) except in a case falling within paragraph (b) or (c), **the period of one year ending with the 31st March next before the time when notification of the contravention was given under section 94 or 96A**; (b) in the case of a person who at that time has been carrying on that business for a period of less than a year, the period, ending with that time, during which he has been carrying it on; and (c) in the case of a person who at that time has ceased to carry on that business, the period of one year ending with the time when he ceased to carry it on. (emphasis added because this part is the relevant definition for O2's circumstances in this case).

¹³⁵ This is the relevant period for the purposes of calculating the maximum penalty, as defined in section 97(5) of the Act.

¹³⁶ See paragraph 3.22.

contravention of it is therefore potentially serious, particularly where a significant number of customers are affected.

- 4.19 As set out in Section 3, O2 has provided data showing the number of customers affected from across the Relevant Period and the amount they were overcharged.¹³⁷ This information shows that, between 2011 and 15 March 2019, c.250,000 customers were overcharged c.£40,650,000¹³⁸ as a result of the billing error. It also showed that:
- c.112,000 of those customers were due to be refunded c.£1,170,000¹³⁹ (an average of £10.45 per customer) as part of its refund programme, and
 - c.140,000 had been overcharged c.£39,480,000 but were not due a refund.
- 4.20 Of those c.140,000 customers not due a refund, O2 stated that: “[t]hese customers, although initially affected by the Billing error, their account has been in zero balance or in debit and are not due a refund. By way of example, this would include where the final bill payment was not successful; the customer did not pay outstanding charges relating to their account; or the payment was successful but the customer reconnected, the credit balance, was then offset from their next monthly bill.”¹⁴⁰
- 4.21 O2 further explained that:
- c.27,800 of those customers had previously paid c.£1,240,000 in overcharges¹⁴¹ (an average of c.£44.66 per customer) but all except 259 had received a refund outside of its refund programme; and
 - Those remaining 259 customers “did not receive a refund because they either reconnected and the credit balance was reconciled against future bills, or later charges were applied to the account which fully used the credit balance.”¹⁴²
- 4.22 The remaining c.112,200 customers were overcharged c.£38,240,000 (an average of £342.42 per customer) but did not pay those overcharges (see paragraph 4.33 below).

Customers who were refunded outside of the refund programme

- 4.23 The evidence received from O2 suggests that:
- i) it did not put in place plans to refund affected customers when it first identified the Billing Error in 2011 or implemented a ‘fix’ in April 2012;¹⁴³ and
 - ii) was unaware that the Billing Error had remained ongoing until 5 February 2019.
- 4.24 As a result, it was unclear to Ofcom as to what had initiated the refunds referred to in paragraph 4.21 above. An email from [X] to O2 had previously advised that, in relation to Scenario C, (emphasis added) “such occurrences are seem [sic] to be **corrected by CSA’s**

¹³⁷ See Annex 3, Annex 4 and Annex 5.

¹³⁸ We note that some of these customers will have been affected prior to 26 May 2011 when the Relevant Period started.

¹³⁹ See Annex 3.

¹⁴⁰ Question 5(a), Annex 1, Second Response.

¹⁴¹ Question 1, Fifth Response.

¹⁴² Question 1, Fifth Response.

¹⁴³ An internal email dated 08 March 2019 14:37 found in Annex 12, First Response states “looks like no refund arrangements were requested after the deployment of that CR [change request]”.

[Customer Service Agents] *themselves by raising refunds, probably when customer complain* [sic]”.¹⁴⁴ However, to clarify matters, Ofcom asked O2 to analyse a sample of accounts that had been overcharged in 2018 and subsequently refunded.

4.25 In total, O2 provided analysis on 40 accounts¹⁴⁵ and informed Ofcom that:

- 31 had received refunds as part of O2’s ‘Auto Refund Processing’; and
- 9 had received refunds following a request from the customer.

4.26 In relation to the Auto Refund Process, O2 explained that “[a] report is generated 30 days [O2 later corrected this to 31 days]¹⁴⁶ after the termination bill production date” and that “the process from there is manual.” O2 further explained that “[t]he report is reviewed and any account over £20 in credit [reduced to £5 from 1 June 2020]¹⁴⁷ is referred to our partner team, Infosys, to process refunds. The refund issuance can vary but is usually a few days after the report is produced. This will mean that there will be a slight variation in the timescales for refund issuance.”¹⁴⁸ For accounts that were less than £20 in credit, O2 informed Ofcom that “credits below £20 will be refunded to the customer, on their request”.¹⁴⁹

4.27 Data provided by O2 on all customers refunded outside of the refund programme showed that c.22,450 (c.81.5%) were refunded c.£1,175,000 (c.83% of the total amount refunded) within 4 weeks of payment being taken. However, it also showed that c.2,100 customers (c.7.5%) did not receive a refund until more than a year after payment, with c.400 of those customers not receiving their refund until more than 5 years had passed. A full breakdown of when these refunds occurred can be found in Annex 6.

Customers who were due to be refunded as part of O2’s refund programme

4.28 As noted in Section 3, figures provided by O2¹⁵⁰ show that of the c.£1,170,000 that was due to be refunded as part of its refund programme, c.1,000,000 (c.86%) was billed to 99,579 customers prior to 2018 (i.e. more than a year before the Billing Error was reidentified on 5 February 2019). It also shows that c.£475,000 (c.40%) of that amount was billed to 48,491 customers prior to 2014 (i.e. more than 5 years before the Billing Error was reidentified). We do not have a full breakdown of how those overcharges varied by customer, but O2 did provide a spreadsheet¹⁵¹ detailing the initial 93,259 accounts identified as having been impacted by the Billing Error (as referenced in its BAPT Notification).

4.29 Of those 93,259 accounts, 49,507 had had a termination bill issued during the Relevant Period. For those accounts billed during the Relevant Period:

- 1,990 (c.4%) had outstanding credits of more than £20, totalling £127,601.49;

¹⁴⁴ Annex 11, First Response.

¹⁴⁵ Question 3, Fifth Response and [redacted]’s email of 12 May 2020 at 16:53.

¹⁴⁶ Question 3, Sixth Response.

¹⁴⁷ Question 3, Sixth Response.

¹⁴⁸ Email from [redacted] dated 12 May 2020 at 16:53.

¹⁴⁹ Email from [redacted] dated 13 May 2020 at 14:55.

¹⁵⁰ See Annex 3

¹⁵¹ Annex 21, First Response.

- 342 (c.0.7%) had outstanding credits of £100 or above, totalling £61,584.57;
- the highest credit owed was for £713.24 and related to a termination bill issued on 28 May 2011.

- 4.30 In relation to why credits above £20 were not refunded as part of O2's Auto Refund Processing, O2 has stated "*[i]n a relatively small number of cases, there could be changes applied to the account after the report was produced on day 31, which took the account into a credit balance greater than £20*".¹⁵²
- 4.31 In relation to when O2's refund programme was due to complete, O2 had advised Ofcom that it aimed "*to complete the refunding process for the remaining customers by the end of March 2020*",¹⁵³ but this was subsequently delayed due to COVID-19. It later confirmed that refunds were completed on 1 July 2020.¹⁵⁴ Consequently, even without the delay caused by COVID-19 (which does not form part of our assessment), O2's refund schedule meant that some affected customers did not receive their refund for at least a year after O2 fixed the Billing Error on 15 March 2019.
- 4.32 The remedial steps taken by O2, including O2's explanation for the delay in completing its refund programme, are considered in more detail at paragraphs 4.91 to 4.97 below.

Customers who did not pay the overcharges

- 4.33 As noted in paragraph 4.22 above, c.112,200 customers were overcharged c.£38,240,000 (an average of c.£340 per customer) but did not pay those overcharges. The examples O2 provided in paragraph 4.20 above of why some customers were not due a refund suggested that, in some instances, it was a result of steps taken by the customer rather than O2 that meant the charges were not paid. However, O2 further stated that, based on the information it has "*it seems that a significant majority of these customers were in arrears, were actively disconnected by TUK and there was very little prospect of them paying TUK the money that they owed*".¹⁵⁵ It also stated that "[<]".¹⁵⁶
- 4.34 In our view, where a customer was disconnected for non-payment of bills by O2, the potential for financial harm is significantly reduced. In this regard, O2 provided data showing that, of the 111,682 customers who had not paid overcharges caused by the Billing Error, 85,225 (c.76%) customers - who owed £35,927,653.38 (an average of £421.56) - had been disconnected by O2 for arrears.¹⁵⁷
- 4.35 However, that data also showed that a minimum of 26,457 customers (c.24%) had not been disconnected for arrears and had been billed £2,320,265.98 (an average of c.£87.70) as a result of the Billing Error. Whilst the actual harm to these customers turned out to be minimal due to those charges not being paid, this remains a significant amount in

¹⁵² Paragraph 24 of O2's Response to the Facts and Evidence Document.

¹⁵³ Question 7, Fourth Response.

¹⁵⁴ Question 6, Seventh Response.

¹⁵⁵ Paragraph 20 of O2's Response to the Facts and Evidence Document.

¹⁵⁶ Paragraph 20 of O2's Response to the Facts and Evidence Document.

¹⁵⁷ O2's 4 December 2020 Response.

overcharges. We consider that that amount itself shows that a significant amount of potential harm was caused by O2's contravention.

Summary assessment of harm

- 4.36 Our assessment of the degree of harm has considered both actual and potential harm caused by O2's contravention. We summarise below how we have taken such a harm into account as part of our assessment on the penalty amount, based on the evidence discussed above.
- 4.37 Firstly, Ofcom notes that the potential for financial harm may have been significantly reduced for customers who were disconnected by O2 for non-payment of bills.
- 4.38 However, we consider that the risk of potential harm appears to have remained significant for at least 26,457 customers discussed above. Further, the fact that this harm did not materialise for these particular customers appears to have been largely due to their (in)action rather than the actions taken by O2.
- 4.39 We therefore consider that both the number of customers affected (actual and potential) and the amount overcharged (including at least the c.£2,320,000 that was not paid by customers), are significant and something we have put particular weight towards in our assessment of the penalty amount.
- 4.40 Likewise, and notwithstanding the refunds made via O2's auto-refund process, O2's analysis of refunds made outside of its refund programme indicates that a significant number had resulted from customers requesting them, rather than as a result of proactive steps taken by O2.
- 4.41 Further, we consider that the financial harm for some customers has been exacerbated by the time taken by O2 in its handling of refunds. Specifically, we note that:
- O2 did not appear to put in place plans to refund affected customers when it first identified the Billing Error in 2011 or implemented a 'fix' in April 2012;
 - c.2,100 customers who received a refund prior to a fix being implemented did not receive that refund for more than a year after payment had been made;
 - a significant number of customers (99,579) that were due to be refunded as part of O2's refund programme were owed credits from more than a year before the Billing Error was reidentified on 5 February 2019; and
 - despite applying a fix on 15 March 2019, some affected customers were yet to receive a refund under its refund programme more than a year on.

Scale and scope of the contravention

- 4.42 Our Penalty Guidelines make clear that we will consider all the circumstances of the case and that the factors taken into account by Ofcom in each case will vary, depending on what is relevant. While the Penalty Guidelines set out some examples of potentially relevant factors, they are not exhaustive. Based on the circumstances arising in this case in light of the Billing Error, we have identified another factor that should be considered and taken

into account when considering the amount of any penalty. That factor relates to the scale and scope of O2's contravention.

- 4.43 As set out in paragraph 4.19, O2 has provided data showing that, between 2011 and 15 March 2019, c.250,000 customers were overcharged c.£40,650,000¹⁵⁸ as a result of the Billing Error. Whilst we acknowledge above that £38,240,000 of this amount was not paid by c.112,200 customers, and that the potential harm for some of those customers may have been limited due to the circumstances in which termination bills were issued (see paragraph 4.34), this does not mitigate the fact that those customers were issued termination bills that included amounts already scheduled to be taken as part of the regular monthly bill. Further, the steps taken by O2 that limited the potential harm for the latter set of customers were not taken in an effort to correct the Billing Error (of which O2 was fully unaware at the relevant time), but were unrelated steps taken by O2 to address separate issues (e.g. non-payment of bills).
- 4.44 We therefore consider that the total amount of affected customers (c.250,000 customers), together with the total amount that O2 overcharged those customers (c.£40,650,000), is a significant factor in this case. That factor, alongside the duration of the Relevant Period, demonstrates in our view the significant scale and scope of O2's contravention. This is therefore something we put particular weight towards in setting the penalty amount.
- 4.45 We also consider below how the seriousness of the scale and scope of the contravention was exacerbated by O2's handling of the Billing Error.

Preventing, identifying and fixing the Billing Error

- 4.46 Our Penalty Guidelines set out that we may also take into account the following factors as part of our penalty assessment:
- whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention;
 - the extent to which the contravention occurred deliberately or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur; and
 - whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it.
- 4.47 In assessing the above factors, Ofcom recognises that billing errors can and - on occasion - will occur. It is therefore vital that providers not only have effective governance processes in place to try and prevent such errors from occurring in the first instance, but to also identify and fix those errors as soon as possible when they do occur.
- 4.48 It is Ofcom's view that such governance processes should give providers effective oversight of their billing system and equip employees with the necessary tools to ensure that steps are taken as soon as practicable to prevent the same or similar errors from reoccurring. We

¹⁵⁸ We note that some of these customers will have been affected prior to 26 May 2011 when the Relevant Period started.

also expect effective governance processes to be sufficiently documented, with appropriate bottom-up and top-down information flows that ensure that the underlying cause of errors are properly understood (especially where they relate to systems that could impact customers more generally) and followed up with appropriate and effective checks.

Preventing and identifying errors

4.49 Our assessment first considers the processes O2 had in place for preventing and identifying errors.

System checks and audits

4.50 In paragraph 3.87, we note that O2's 'Combined Risk and Control Framework' sets out the preventative and detective steps it takes to mitigate risks related to its metering and billing system. We also acknowledge O2's statement that this process *"has been approved by BABT and should be read in conjunction with the High Level Design (HLD) and Measurement Strategy (MSD) documents"*.¹⁵⁹

4.51 In relation to determining accuracy of termination bills, however, O2 confirmed that it *"does not conduct manual or systematic bill checks, checks are made by TUK's Service Management Team to ensure that Direct Debit files match what CUK has billed, but these would not have spotted this issue as we took payment for the value billed, albeit twice."*¹⁶⁰

4.52 It further explained that *"No specific documents can be provided related to governance processes. There were no audits performed relating to Termination Bill accuracy"* and that *"this particular scenario relating to the Billing Error has not been previously covered as it is very specific and unlikely to have been assessed as in scope on previous audits."*¹⁶¹

4.53 Indeed, O2 has confirmed that the ongoing Billing Error, specifically Scenario C (which occurred from at least 8 April 2012 until 24 February 2019), had only been identified through ad hoc analysis of a *"small sample of [termination fee] credits"* and that this analysis *"is not part of any [business as usual] monitoring / process."*¹⁶²

4.54 The absence of any specific documents relating to O2's governance processes for ensuring termination bill accuracy is an indication that either no governance process giving O2 effective oversight of termination bills generated by its billing system existed or, if one did, it was ineffective and failed to provide such oversight. Further, whilst we acknowledge that the Billing Error may have been caused by a very specific scenario, this scenario would have been known to O2 after it first identified the error in November 2011. It therefore appears that O2 failed to adequately amend its processes following this identification. This latter point is considered further when we assess the steps O2 took to fix the error, below.

4.55 In addition, O2's processes appear to involve inadequate record keeping. For example, aside from a change request form submitted on 14 November 2011, O2 has been unable to

¹⁵⁹ Question 8, Annex 1, Second Response.

¹⁶⁰ Question 7(a), Annex 1, Second Response.

¹⁶¹ Question 7(b), Annex 1, Second Response.

¹⁶² Question 2(a), Annex 2, Second Response.

provide any documentation relating to its first identification of the Billing Error, specifically Scenario B. This includes the absence of any documentation recording:

- the date(s) when O2's employees or other persons working directly or indirectly on O2's behalf first became aware of the Billing Error;¹⁶³
- the date(s) when such employees or persons first made their managers aware of the Billing Error;¹⁶⁴
- the date(s) when O2's senior management were first made aware of the Billing Error;¹⁶⁵
- discussions relating to the technical issue with O2's billing system that caused the Billing Error;¹⁶⁶ and
- discussions engaging [redacted] in relation to the Billing Error.¹⁶⁷

4.56 We recognise that O2's record retention policy may have resulted in some documents being cleansed due to the length of time that has passed since it first identified the Billing Error in 2011. However, we would expect O2 to retain some documentation relevant to its future monitoring of the implemented fix.

4.57 In any event, O2 has confirmed that its billing system held data showing that a significant number of billed overcharges (the final figure being c.£38,240,000) had gone unpaid by its customers. Irrespective of why those overcharges remained unpaid, and even when taking into account the duration of the Relevant Period (7 years, 9 months, 18 days), this is still, on average, a significant amount unpaid each month (c.£410,000). Despite this, O2's processes failed to identify the issue.

Complaints monitoring

4.58 As set out in Section 3, as part of its approach to identifying billing issues, O2 has stated that *"TUK routinely conducts complaints analysis. To facilitate targeted analysis there is a complaints categorisation system in place to assist in identifying trends to establish if there are issues which need to have root cause analysis conducted."*¹⁶⁸ Its Metering & Billing Management Strategy document also states that *"Trended Customer Complaints data is also reported in the monthly measurement report to allow for the identification of issues relating to Metering and Billing accuracy."*¹⁶⁹ This point was demonstrated in a sample of Total Metering and Billing measurement reports provided by O2.¹⁷⁰

4.59 In that regard, it appears that O2's identification of Scenario B of the Billing Error on or around 14 November 2011 was, at least in part, a result of complaints received. Indeed, O2 has stated *"[t]he Complaints team have confirmed that the data pre-2012 has been purged and therefore cannot be analysed. However, based on the information present in Annex 36*

¹⁶³ Question 11(a)(ii), Annex 1, Second Response.

¹⁶⁴ Question 11(a)(iii), Annex 1, Second Response.

¹⁶⁵ Question 11(a)(iv), Annex 1, Second Response.

¹⁶⁶ Question 11(b)(i), Annex 1, Second Response.

¹⁶⁷ Question 11(c), Annex 1, Second Response.

¹⁶⁸ Question 4, Annex 1, Second Response.

¹⁶⁹ Annex 27, First Response.

¹⁷⁰ Annexes 28 to 32, First Response

there is an indication of complaints arising as a result of the Billing Issue prior to 2012 and prompted the change request”¹⁷¹

- 4.60 Further, the Change Request Form submitted by O2 on 14 November 2011¹⁷² stated that *“[t]he current system behaviour represents a poor customer experience around disconnection, and has a negative impact on Customer Satisfaction. This generates 3,800 calls into customer service each month, so the change to fix this would eliminate these calls.”* Whilst that form did not specify that these calls were recorded as complaints, O2 clearly considered their volume and content to be a significant issue that affected customer satisfaction (and it appears that O2 had been able to monitor such calls in a similar way to complaints), we consider that O2 ought to have treated them, in effect, as complaints regardless of its own records labelling.¹⁷³
- 4.61 In relation to its rediscovery of the Billing Error in February 2019, the BABT Notification Form completed by O2 states in response to whether it had received any complaints regarding the incident *“[n]ot that we can specifically identify. Our complaints system does not record information at this granular level.”*
- 4.62 O2 later advised Ofcom that *“TUK has been unable to locate Documents where it was confirmed that no complaints had been received in relation to the Billing Error, or identify what checks were carried out in relation to the complaints data which would have informed the BABT notification”*.¹⁷⁴
- 4.63 However, following receipt of Ofcom’s draft First Notice, O2 carried out complaint analysis from a sample of 4,000 affected customers from February 2018 to February 2019. From that sample, it identified one complaint relating to the Billing Error.¹⁷⁵ It is unclear to Ofcom why complaint numbers in 2018 appear to be so low, especially when the number of calls it received in 2011 suggest a much higher number of complaints despite less customers having been overcharged that year.¹⁷⁶
- 4.64 In addition, an email from [3<] to O2¹⁷⁷ states, in relation to Scenario C (which occurred from at least 8 April 2012 until 24 February 2019), that *“[s]uch occurrences are seem [sic] to be corrected by CSA’s [Customer Service Agents] themselves by raising refunds, probably when customer complain [sic]”*. Further, analysis conducted by O2 on 40 accounts¹⁷⁸ that were overcharged in 2018 and subsequently refunded outside of O2’s refund programme showed that 9 of those refunds had been initiated following a customer request. This

¹⁷¹ Question 4, Annex 1, Second Response.

¹⁷² Annex 36, Second Response

¹⁷³ Given the context in which the calls were made, the form directly alluding to customer dissatisfaction, and those customers likely expecting a resolution (e.g. a refund), Ofcom considers that a significant number of these calls would, in effect, have constituted complaints relevant for monitoring purposes.

¹⁷⁴ Question 4, Annex 1, Second Response.

¹⁷⁵ Question 4, Annex 1, Second Response.

¹⁷⁶ Figures provided by O2 show that 30,544 customers were overcharged in 2011 compared to 39,378 customers in 2018. See Annex 3 and Annex 5.

¹⁷⁷ Annex 11, First Response, email sent from [3<] to O2 on 6 February 2019 at 15:11.

¹⁷⁸ Question 3, Fifth Response and [3<]’s email of 12 May 2020 at 16:53.

suggests that a significant number of the c.27,800 customers refunded outside of O2's refund programme had contacted O2 asking for a refund.

- 4.65 Similarly to our views on the Change Request Form discussed in paragraph 4.60 above, we consider that many customers requesting a refund following the Billing Error occurring were likely to have been dissatisfied that an additional payment had been taken by O2 in the first instance. Again, therefore, we consider that O2 ought to have treated them, in effect, as complaints for monitoring purposes.
- 4.66 Whilst O2 has informed us that it monitors billing complaints as part of its Total Metering and Billing measurement reports, it appears in light of the above that either:
- a significant number of refund requests were not recorded as a complaint;
 - O2's system for monitoring billing complaints was inadequate in terms of identifying issues related to the Billing Error or capturing billing issues raised in complaints made to its customer service agents; or
 - O2 did not perform the level of analysis required to identify issues related to the Billing Error.
- 4.67 In that regard, we also note that O2 advised that *"TUK does not have a specific complaint category that would capture this granular level of issue and would only have been identified if the Complaints team came across it as they sampled complaint data/journeys or had received anecdotal information from wider sources, for example operational areas where examples were provided for investigation."*¹⁷⁹

Fixing the billing error once identified

- 4.68 In Section 3, we have explained how the Billing Error was fixed and that the last known occurrence of the error was on 15 March 2019. However, for the reasons set out in the following paragraphs, we consider that O2 did not take timely and effective action to end the contravention. We consider this point for both the 2011 initial discovery and the subsequent rediscovery in February 2019.

Initial discovery - 2011

- 4.69 As noted, O2 has provided a copy of a change request form it submitted to [S&C] on 14 November 2011.¹⁸⁰ The form referenced the circumstances experienced in Scenario B and requested a change to Geneva (O2's billing system at the time) that would amend the date that termination bills were produced in relation to a customer's periodic bill. The form further explained that Scenario B *"generates 3,800 calls into customer service each month, so the change to fix this would eliminate these calls"* and provide O2 with an annual benefit of *"£130k"*.

¹⁷⁹ Question 4, Annex 1, Second Response.

¹⁸⁰ Annex 36, Second Response.

- 4.70 We have received no other information in relation to the original discovery of the Billing Error in 2011, but O2 has confirmed that the last known occurrence of Scenario B was more than 5 months later on 18 April 2012.¹⁸¹
- 4.71 Based on the information available to us (such as the volume of monthly calls generated by Scenario B, the annual benefit of eliminating those calls, and that the error was a systematic one that could have affected any customer), it is apparent to us that O2 was, or at least should have been, aware that Scenario B was a significant billing issue that would have fallen within the remit of the BIF, *“a working group that is brought together whenever a billing issue is identified”*.¹⁸²
- 4.72 However, despite the availability of the BIF process and its steps to test any fix, apply credits/debits, conduct root cause analysis, and have the IRC *“look at why the issue happened and make sure it doesn’t happen again”*, evidence shows that O2 did not:
- i) identify and resolve the other existing scenario (Scenario A);
 - ii) identify that the implemented fix created two new scenarios (Scenario C and Scenario D) and resolve them;
 - iii) arrange refunds for affected consumers; or
 - iv) implement adequate monitoring, such as complaints monitoring or termination bill checks, as part of its risk management process to ensure that the issue did not reoccur/remains ongoing.
- 4.73 Against that background, it is apparent to us that the BIF process was either not followed at all or, to the extent it was deployed, it was ineffective in identifying and rectifying the Billing Error. Consequently, the contravention continued for another 7 years, affecting a further c.220,000 customers. We therefore consider that the steps O2 took upon initially identifying the Billing Error were neither timely or effective in ending the contravention and fell well below the standards we would expect from a large, well-resourced CP such as O2, mindful of its regulatory obligations.
- 4.74 In that regard, we note that it is not only the responsibility of senior management to ensure that adequate governance processes are put in place, but it is also responsible for ensuring that such processes are being followed. The failure of O2 to adequately follow its own governance processes, or to put in place a governance process to exercise effective oversight, and the resulting consequences of that failure are therefore a significant aggravating factor that should be taken into account as part of the penalty assessment.

Re-discovery – February 2019

- 4.75 Whilst it does not appear to have had any significant impact on the time taken to fix each scenario, we note that, upon identifying the ongoing Billing Error on 5 February 2019, O2 again did not appear to take the necessary steps to ensure that all scenarios were

¹⁸¹ Question 2(a), Fourth Response.

¹⁸² Annex 24, First Response.

successfully identified. In failing to take such steps, O2 again risked allowing the Billing Error to continue.

- 4.76 Indeed, O2 only identified and understood all of the four scenarios after Ofcom had highlighted some conflicting information found in the evidence O2 had provided to Ofcom. In that respect, whilst we acknowledge that O2 has stated that it followed the same basic process as its BIF when it identified the ongoing Billing Error, it again does not appear that it conducted an effective and comprehensive post-incident review. Indeed, on the evidence we have requested from O2 and presently before us, the root cause analysis provided by O2 consisted solely of an email received the day after the ongoing issue was identified, and the 'Root cause' described in that email only detailed Scenario C. Further, O2's failure to identify all scenarios meant that the impact analysis it had conducted was incomplete and had failed to identify all affected customers.
- 4.77 Had the BIF process been followed effectively, Ofcom's expectation is that a more complete and comprehensive assessment to understand and validate the Billing Error would have been conducted as part of the 'Discover' phase, and a more complete and comprehensive post-incident review/root cause analysis would have been conducted as part of the 'Review' phase. Had this happened, O2 would have been in a better position to identify each of the Billing Error scenarios sooner and to fully understand the implications. We again make the point that it is not only the responsibility of senior management to ensure that adequate governance processes are put in place, but it is also responsible for ensuring that such processes are followed.
- 4.78 Notwithstanding the above, we acknowledge that O2 started to take substantive and concerted action to correct the Billing Error in February 2019, and it took 39 days from the date that O2 identified the possibility of an ongoing Billing Error (5 February 2019) to the last known occurrence of any scenario taking place (15 March 2019). We also acknowledge that the last known occurrence took place just 4 days after senior management¹⁸³ were made aware that the Billing Error remained ongoing on 11 March 2019 following this re-discovery.¹⁸⁴

Changes introduced to minimise future risk

- 4.79 In light of the Billing Error, O2 has confirmed to Ofcom that it has made several changes to its processes for identifying and fixing billing errors. We explain those changes below.

A new team focused on reducing billing issues¹⁸⁵

- 4.80 O2 has informed Ofcom that *"[i]n order to enhance TUK's capability around consumer billing, an additional team has been formed and resourcing specifically focused on reducing the value and volume of billing issues, by enhancing our processes and introducing*

¹⁸³ O2 has defined senior management staff as being O2's Senior Leadership Team who report to the Executive Committee, in this case the Director of Business Assurance.

¹⁸⁴ Question 11aiv, Annex 1, Second Response refers to an email (Annex 10 of the First Response) sent by the Head of Risk and Internal Control to the Director of Business Assurance.

¹⁸⁵ Question 5, Annex 1, Third Response.

additional controls.” As part of this, O2 has recruited “[<]” whose role will be to “[<]”. O2 has also confirmed that there will be two further positions.

Senior Stakeholder Billing Forum¹⁸⁶

- 4.81 Building on the BIF, O2 has introduced a ‘Senior Stakeholder Billing Forum’ comprising of senior stakeholders with *“the remit to further enhance the control environment.”* O2 explained that *“[t]he purpose of the forum is to raise visibility of any identified billing issues and to focus resources appropriately to resolve issues, protect customers and reimburse any errors of over payments in an efficient manner”*. It will also report regularly to the Assurance Forum which *“assists with governance oversight and reports directly to the Board of Directors and the Operating Committee”*.

Complaints Monitoring¹⁸⁷

- 4.82 O2 has advised that within its Complaints Team it has reassessed its complaint categorisation and governance. Complaint handlers *“will be steered to be more pointed in allocating the category and reason for the complaint”* which will enable the *“Root Cause Analysis team to identify complaint trends more easily and focus prioritisation.”* O2 also now reports complaint categorisation accuracy to BABT on a monthly basis and intends to enhance its complaints management tool to *“supplement and support the identification of the primary root cause”*.

Root Cause Analysis Team¹⁸⁸

- 4.83 O2 has advised that its Root Cause Analysis Team has established a relationship with the BIF to *“allow a more collaborative approach of billing issue awareness and alignment of additional insight.”*

The Managed Medium Process¹⁸⁹

- 4.84 O2 advised that the *“Managed Medium process was formalised on the 1 October 2019”* and it *“broadly mirrors the Critical Incident Restoration Process”*. It was introduced due to the Major Incident Management (MIM) *“managing a number of incidents which don’t meet the scope of our [O2’s] HPI and CPI priority categorisation, yet still need active management by MIM to minimise the risk and impact associated with these type of incidents.”*
- 4.85 O2 explained that, whilst the Billing Error *“did not meet the criteria for a PO incident set out in the Critical Incident Restoration Process”* based on the information now available, it would, if it occurred now, *“likely fall within the Managed Medium incident process rather than the Critical Incident Restoration Process.”*

¹⁸⁶ Question 5, Annex 1, Third Response.

¹⁸⁷ Question 5, Annex 1, Third Response.

¹⁸⁸ Question 5, Annex 1, Third Response.

¹⁸⁹ Question 9, Fourth Response.

External review¹⁹⁰

- 4.86 O2 has advised that in early 2020 it “*commissioned a Billing Accuracy review to be undertaken by an external auditor.*” A number of recommendations were made as part of this review and a “*project which will seek to deliver the recommended improvements has commenced*”. The project is expected to deliver:
- clear ownership and accountability for Billing Accuracy;
 - increased cross-functional awareness and understanding of Billing Accuracy;
 - detailed on-going evaluation of the strength and adequacy of Billing Assurance & Controls;
 - streamlined information flows facilitating efficient decision making;
 - increased confidence in reporting on revenue coverage; and
 - ability to define and measure Billing Accuracy.
- 4.87 O2 has advised that the anticipated timeframe for delivering these outcomes is approximately 9 months.

Assessment

- 4.88 We welcome the changes that O2 has made since the Billing Error was resolved. However, we are also mindful that, had it implemented some of these changes sooner - when it first identified the Billing Error in 2011 for example - then it would likely have led to the continued contravention being identified and resolved much sooner.
- 4.89 Further, having assessed all of the information available and detailed above, our view is that, at the time of the contravention:
- O2 did not have effective governance processes in place to prevent the Billing Error from occurring in the first instance, nor did it have effective governance processes/monitoring in place for identifying the error once it occurred;
 - its senior management failed to adequately ensure that the governance process it had put in place for fixing and remedying billing errors was followed or, to the extent that it was followed, it failed in the following key respects:
 - in 2011, the steps O2 took to rectify the contravention were neither timely or effective in ending the contravention, and fell well below those expected to be taken by someone else in O2’s circumstances; and
 - in 2019, the steps O2 took to rectify the contravention failed to provide a complete understanding, root cause analysis and impact assessment of the Billing Error, which risked (among other things) the contravention continuing for even longer than the length of time we have found O2 in contravention.
- 4.90 We consider that those are significant and cumulative aggravating factors in this case which should be taken into account as part of the penalty assessment.

¹⁹⁰ Paragraph 34 of O2’s Response to the Facts and Evidence Document.

Remedial steps taken by O2

- 4.91 Another factor we may take into account as part of our Penalty Guidelines is any steps taken for remedying the consequences of the contravention.
- 4.92 As noted, O2 resolved the Billing Error with the last occurrence happening on 15 March 2019. Further, it explained that it aimed *“to complete the refunding process for the remaining customers by the end of March 2020”*,¹⁹¹ and that it would provide an additional 4% interest payment as part of those refunds.¹⁹² Due to delays caused by COVID-19,¹⁹³ O2 later advised that refunds were *“scheduled to complete on Wednesday, 1st July [2020]”*¹⁹⁴ and has since confirmed that this was completed as planned.¹⁹⁵ For the avoidance of doubt, the delays caused by COVID-19 do not form part of our assessment.
- 4.93 In relation to the general delay in providing refunds, O2 has explained that:
- the refund programme had been placed on hold pending the completion of an existing [redacted] refund programme, with O2 explaining that system capacity issues means that *“only 7,000 refunds [later updated to be 10,000]¹⁹⁶ can be run at a time”* and *“should this capacity be increased it would stop all other cheque activity.”*¹⁹⁷ and
 - it subsequently determined that it *“was a better customer experience to consolidate the refund process for customers known to be affected by both [the Billing Error and [redacted]] issues”*¹⁹⁸
- 4.94 O2 has also confirmed that its decision to consolidate refunds *“didn’t affect the address trace process at all as the customer records have not been purged whilst both refund programs are ongoing.”*¹⁹⁹
- 4.95 In addition to refunds, at a meeting held on 30 September 2019, O2 stated that, after their expiry, it will calculate the value of uncashed cheques and combine it with the amount owed to uncontactable customers and donate the total amount to charity. This aligns with 4.8.3(b) of the Ofcom Metering and Billing Direction which states that, where significant EPFs are identified *“[t]he CP shall ensure that End-Users are not financially disadvantaged, but where individual End-Users cannot be identified, the CP shall derive no financial benefit from the failure, either by donating an equivalent sum to charity or by an adjustment of tariffs”*.
- 4.96 We welcome O2’s plans to remedy the consequences of the Billing Error and consider that this will help mitigate some of the harm caused by the contravention. However, as noted in

¹⁹¹ Question 7, Fourth Response

¹⁹² Question 12(b)(i), Annex 1, Second Response.

¹⁹³ On 25 March 2020, O2 sent a letter to Ofcom advising that *“COVID-19 has developed to such a degree that we consider it is no longer appropriate to send out the refund cheques to customers, given the current “lockdown” situation in the UK”*.

¹⁹⁴ Covering letter to its Sixth Response.

¹⁹⁵ Question 6, Seventh Response.

¹⁹⁶ Question 5, Seventh Response.

¹⁹⁷ Question 12(b)(i), First Response. We note that this explanation was not repeated in O2’s Second Response to this same question. However, we understand that it nonetheless remains accurate.

¹⁹⁸ Question 8(b), Fourth Response.

¹⁹⁹ Question 8(b), Fourth Response.

paragraph 4.41, we also consider that O2's handling of refunds has exacerbated the harm caused. Specifically, we note that:

- there is no evidence that O2 put in place plans to refund affected customers when it first identified the Billing Error in 2011 or implemented a 'fix' in April 2012²⁰⁰ – not only will this have significantly delayed some customers from getting a refund, but it will also have likely resulted in some customers being denied a refund entirely due to records no longer being available;²⁰¹ and
- despite applying a fix on 15 March 2019, some affected customers had to wait at least another year to receive a refund under its refund programme.

4.97 As a result, whilst we have given some mitigating weight to the steps O2 has taken to remedy the consequences of the contravention, we have also taken into account that its handling of refunds has prolonged the harm caused.

Deterrence

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

4.99 Any penalty we set should therefore be sufficiently high to discourage bad conduct and incentivise O2's management to change the conduct of the company, encouraging good practices and a culture of compliance across the organisation. The level of the penalty should ensure that O2's senior management, and senior management across the wider industry, recognise that it is not more profitable for it to break the law and pay the consequences, than to comply in the first place. It should make clear that it is not worth taking the risk of non-compliance because it will cost the company to do so.

4.100 Further, Ofcom has imposed a number of financial penalties on CPs for previous contraventions of GC 11.1 (some of which are discussed in more detail in paragraphs 4.109 to 4.113 below) including a penalty of £1.5 million on TalkTalk Telecom Limited and £1.5 million on Tiscali UK Limited in 2011; a penalty of £3.7 million²⁰² on Vodafone in 2016; a penalty of £2.7 million on EE in 2017; and a penalty of £880,000 on Plusnet in 2017. However, none of these penalties appear to have had an appropriate deterrent effect on O2.

²⁰⁰ As per footnote 143, an internal email dated 08 March 2019 14:37 found in Annex 12 states "looks like no refund arrangements were requested after the deployment of that CR [change request]".

²⁰¹ An internal email dated 11 July 2019 15:05 found in Annex 48 of the Fourth Response states, when discussing whether to reference the year the refund relates to (emphasis added) "[i]f so I'll need to add a line into our Reactive Press Q&As that explains why we would still have former customer's details on our records so many years later (**from 2012-2019 this is all fine and in line with Data Protection**)."

²⁰² This penalty also included a penalty for a contravention of GC 23.2(a).

- 4.101 On 30 July 2019, we also imposed a penalty of £1.4 million (after settlement) on giffgaff for a contravention of GC11.1. Whilst we note that giffgaff is a wholly owned subsidiary of Telefónica UK Limited and Telefónica UK Limited’s Director of Regulatory Affairs was involved in that investigation, we also note that the deterrent effect of this decision will have been minimised due to it being issued after the ongoing Billing Error was identified.
- 4.102 Accordingly, we consider that a significant penalty in O2’s case is also appropriate in order to secure the objective of deterrence in light of those precedents (including our previous penalty imposed on giffgaff). Therefore, our view is that the penalty we impose on O2 should be at a level which also signals to others that any failures to comply with GC C3.2 (and previous GC 11.1) will be taken very seriously by Ofcom. We have in previous cases emphasised that these regulatory requirements provide important consumer protection.

Financial gain

- 4.103 Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention is another factor set out in our Penalty Guidelines. We have therefore considered whether in failing to comply with GC C3.2 (and previous GC 11.1) O2 raised any additional revenue or saved any costs.
- 4.104 As noted, between 26 May 2011 and 15 March 2019 O2 overcharged c.250,000 customers c.£40,650,000. Of those overcharges:
- c.£2,410,000 was paid to O2 by its customers;
 - c.£1,240,000 of that amount had been refunded (or reconciled against future bills for customers who reconnected with O2) outside of its refund programme; and
 - c.£1,170,000 was refunded as part of its refund programme.
- 4.105 We recognise that a significant proportion of refunds made outside of its refund programme (c.83%) occurred within 4 weeks of payment being received, meaning that this financial gain was short-lived. However, there remains a significant amount where financial gain occurred over a much longer period.
- 4.106 In this regard, Ofcom notes that:
- upon first identifying the breach in 2011, evidence suggests that O2 did not actively refund customers and it therefore continued to benefit from money that was not rightfully its own for longer than necessary;²⁰³
 - O2’s Auto Refund Process only automatically referred outstanding credits of £20 or more (now £5 or more) for proactive refunding meaning that, unless a customer with a credit below £20 actively requested a refund, O2 further benefitted from money that was not rightfully its own and for longer than necessary;
 - Of the amount that O2 refunded outside of its refund programme, c.£87,500 took more than 12 months to refund;

²⁰³ As per footnote 143, an internal email dated 08 March 2019 14:37 found in Annex 12 states “looks like no refund arrangements were requested after the deployment of that CR [change request]”.

- Of those customers that were due to be refunded as part of O2's refund programme, a significant number (at least 44,451) were owed credits from more than a year before the Billing Error was reidentified on 5 February 2019, and a significant number of those (at least 11,297) were owed credits from before O2 implemented its first 'fix' on 18 April 2012; and
- its refund programme (refunding c.£1,170,000) was only estimated to be completed by the end of March 2020, almost a year after the Billing Error was fixed.²⁰⁴ It therefore continued to benefit from some of the overcharges during that time.

4.107 Notwithstanding the above, we have taken into account, and give some weight to, the fact that the majority of overcharges were not due a refund. We have also taken into account:

- that O2's refund programme completed on 1 July 2020 and it intended to provide a 4% uplift;
- O2's stated commitment to donate the total of uncashed refunds/refunds owed to uncontactable customers to charity; and
- that the estimated cost of sending refunds via cheque with an accompanying letter was c.£150,000.²⁰⁵

4.108 We welcome that O2 has completed its refund programme and acknowledge that these refunds will have eliminated the financial gain O2 benefitted from as a result of the contravention. However, our Penalty Guidelines state that the level of penalty should be high enough that the management recognises that it is not more profitable for a business to break the law and pay the consequences, than it is to comply with the law in the first instance. In that regard, we have taken into account as part of our penalty assessment that for a period of time O2 gained financially from the breach and, in some instances, that gain occurred over a longer period of time than was necessary. We note that O2 has advised that system restrictions meant it was only possible to process 10,000 refunds per day²⁰⁶ but, while it is for O2 to design its systems in the manner it considers appropriate, we consider that any limitations in those systems for refunds cannot excuse O2 from making refunds more promptly.

Precedents

4.109 As set out in our Penalty Guidelines, Ofcom will have regard to any relevant precedents set by previous cases, where they are relevant, but we will not regard the amounts of previously imposed penalties as placing upper thresholds on the amount of any penalty.

4.110 Since the Relevant Period began on 26 May 2011, Ofcom has issued five decisions finding CPs in contravention of GC 11.1. In determining the penalty in this case, we have had particular regard to the following cases:

²⁰⁴ As noted, we recognise that O2 delayed these refunds due to COVID-19. We have not taken this added delay into account as part of our assessment.

²⁰⁵ Internal email sent on 10 July 2019 at 15:52, Annex 48, Fourth Response.

²⁰⁶ Question 5, Seventh Response.

- a) In August 2011, Ofcom imposed penalties totalling £3 million on TalkTalk Group after its subsidiary companies, TalkTalk and Tiscali, were found to have billed 62,055 customers at least c.£1,750,000 for services they had not provided (in particular, for cancelled services).²⁰⁷ The investigation concluded that TalkTalk Group had taken significant steps to remedy the consequences of its breach but had not taken the steps Ofcom considered appropriate for complying with GC11.1.
- b) In 2016, Ofcom imposed a penalty of £3.7m on Vodafone²⁰⁸ for contravening GC 11.1. Vodafone charged approximately 10,500 customers around £150,000 for pay as you go credits to their accounts which they did not receive as a result of problems with its processes for closing dormant pay as you go accounts. In this case, there was evidence that its staff were aware of the problems in its billing system but did not take prompt and effective steps to rectify the problem until Ofcom and a national newspaper contacted Vodafone about the matter.
- c) In January 2017,²⁰⁹ Ofcom imposed a penalty of £2.7m on EE for contravening GC 11.1. EE overcharged at least 39,000 customers approximately £245,000 as a result of failings in its billing system for calls to its customer services number. EE did not self-report this error although it did take proactive steps to end and remedy the contraventions prior to Ofcom opening its investigation.
- d) In March 2017, Ofcom imposed a penalty of £880,000 on Plusnet in March 2017 for contravening GC 11.1. Plusnet continued to bill 1,025 customers who had cancelled either their landline or broadband services and overcharged them over £500,000 in total. Plusnet did not self-report this error although on discovering it, and prior to Ofcom opening its investigation, it took a number of proactive positive steps to address its mistake.²¹⁰
- e) On 30 July 2019,²¹¹ Ofcom imposed a penalty of £1.4 million (after settlement) on giffgaff (a wholly owned subsidiary of Telefónica UK Limited) for contravening GC 11.1 by overcharging around 2.6 million customers up to almost £2.9 million over a 7-8 year period as a result of its billing error. It was noted that the penalty would have been significantly higher had giffgaff not self-reported the contravention, co-operated closely with our investigation and proactively taken steps to remedy the contravention following discovery of the issue, including implementing a comprehensive refund plan.

²⁰⁷

https://webarchive.nationalarchives.gov.uk/20160704060940/http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01051/ - see paragraph 4.94 of the Confirmation Decision for overcharge amount.

²⁰⁸ https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01160.

²⁰⁹ https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01174.

²¹⁰ Including a discount that took into account Plusnet's co-operation in settling the relevant case:

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

²¹¹ https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01230.

- 4.111 Whilst the billing errors in each of these cases differ from the Billing Error considered by this investigation, two of those cases related to contraventions stemming from the cancellation process, and they all included an element of overcharging.
- 4.112 In respect of the giffgaff case, we note several similarities²¹² with this O2 case in that:
- the contravention period was similar to the Relevant Period,
 - we concluded that giffgaff had failed to take appropriate steps to prevent the Billing Error; and
 - we concluded that giffgaff missed opportunities to identify, escalate and remedy the Billing Error.
- 4.113 Whilst the total overcharges paid by giffgaff customers were estimated to be higher than in this case (c.£2.9 million²¹³ for giffgaff compared to c.£2.4 million for O2), the average overcharge paid by O2 customers was significantly higher.²¹⁴ We also note that:
- in addition to the overcharges paid by its customers in this case, there was additional potential harm totalling at least c.£2,140,000 in O2's case;
 - we have found that the scale and scope of O2's contravention was significant (see paragraph 4.44);
 - our giffgaff decision made clear²¹⁵ that the giffgaff penalty would have been significantly higher had it, amongst other factors, not:
 - self-reported the billing error shortly after it became aware of it - something O2 did not do (see paragraph 4.121); and
 - taken proactive steps to remedy the contravention, including implementing a comprehensive refund plan – in contrast, our view is that O2's handling of refunds exacerbated the harm caused (see paragraph 4.96).

History of contraventions

- 4.114 Our Penalty Guidelines also state that we may consider whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties).
- 4.115 As regards to Telefónica UK Limited, Ofcom has previously opened several investigations into O2, but only confirmed a breach regarding one of those.²¹⁶ Specifically, on 22 March 2019, we concluded that O2 had contravened the requirements of a statutory information

²¹² See paragraph 4.7 of the giffgaff Decision.

²¹³ We note that the estimated overcharges by giffgaff was the 'worst case scenario'.

²¹⁴ Paragraph 4.22 of the giffgaff Decision states "*less than 5% of customers that were affected by the Billing Error were overcharged more than £5.00*". For this O2 case, a total of £2,414,487.65 in overcharges was paid by 139,866 customers (see 3.53) making the average overcharge paid by O2 customers £17.26.

²¹⁵ See paragraph 4.62 of the giffgaff Decision.

²¹⁶ In 2004 and 2005, Ofcom opened three separate investigations in to O2 regarding the fairness of its contract terms, closing each of those without making a finding as to whether a breach had occurred, and on 1 November 2019, we concluded that O2 had not contravened its obligations following a network outage experienced on 6 December 2018.

request by failing to provide accurate and complete answers to our questions.²¹⁷ We imposed a penalty of £75,000 upon O2 for the contravention.

- 4.116 When considering the extent that this contravention should be taken into account as part of this investigation, we note that the decision was issued after O2 had fixed the Billing Error, minimising to an extent the opportunity for it to act as a deterrent. We also consider that it is much more relevant to Ofcom's separate investigation examining whether there are reasonable grounds for believing that O2 failed to comply with its obligations under section 135.²¹⁸ We have therefore decided not to take it into account when considering the level of any penalty relating to this investigation.
- 4.117 For the same reasons, we have not taken into account Ofcom's decision issued to giffgaff (a wholly owned subsidiary of Telefónica UK Limited) on 30 July 2019 regarding its compliance with information requirements under section 135 of the Communications Act 2003.²¹⁹
- 4.118 We have, however, taken into account as part of our penalty assessment the above-mentioned giffgaff billing investigation in which we confirmed that it had contravened GC11.1 and issued a penalty of £1.4 million (after settlement), noting our consideration that there are several similarities with this case and that giffgaff is *"the MVNO (Mobile Virtual Operator) under which O2 operates in the UK."*²²⁰

The extent of O2's co-operation with Ofcom's investigation

- 4.119 The extent to which the regulated body in breach has cooperated with our investigation is another factor in our Penalty Guidelines.
- 4.120 Where a significant billing error (such as an EPF) occurs, Ofcom considers it important that CPs bring this to Ofcom's attention along with the steps they intend to take to remedy the matter, allowing Ofcom to investigate as appropriate.
- 4.121 The general importance of self-reporting is an issue that was discussed during Ofcom's investigation into giffgaff's compliance with GC11.1 (see paragraph 4.110). As we have already noted, giffgaff is a wholly owned subsidiary of Telefónica UK Limited and Telefónica's Director of Regulatory Affairs was engaged throughout the giffgaff investigation which overlapped with O2's discovery of the ongoing Billing Error. Despite this, O2 did not self-report the Billing Error to Ofcom, and it was in fact BABT who notified Ofcom on 12 June 2019. As a result, unlike the giffgaff case, it has not been relevant in this case to give any mitigating weight in our penalty assessment for self-reporting.

²¹⁷ https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01236

²¹⁸ https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_1252

²¹⁹ https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01230

²²⁰ 1.6.4 (page 211) of Telefónica's 'Consolidated financial statements (consolidated annual accounts) and consolidated management report for 2019': <https://www.telefonica.com/documents/162467/141705152/Consolidated-Annual-Accounts-2019.pdf/2532d380-3cfd-5d90-d0d8-a475f7a4251f>

- 4.122 It is important that CPs take compliance with their regulatory responsibilities seriously and that, when things go wrong, they recognise this and act quickly and responsibly to remedy any harm that has been caused and allow Ofcom to investigate as appropriate.
- 4.123 Separate to the self-reporting issue discussed above, we have concerns about some information provided by O2 in response to our statutory information notices issued during the course of our investigation.
- 4.124 On 13 December 2019, we opened a separate investigation that will examine whether there are reasonable grounds for believing that O2 failed to comply with its obligations under section 135, namely whether O2's responses to our information notices in relation to this investigation were complete, accurate and on time. We have not therefore taken those specific matters that are the subject of this separate investigation into account when determining the penalty for O2's contravention of GC C3.2 and previous GC 11.1.

Ofcom's decision on the penalty amount

- 4.125 Considering all of the factors discussed above in the round, Ofcom considers this to be a serious breach and we have decided to impose a penalty of £10.5 million on O2. This includes a 30% discount applied to the penalty of £15 million which we would otherwise have set. That discount reflects resource savings achieved by Ofcom as a result of O2 admitting liability and entering into a settlement with Ofcom.
- 4.126 Ofcom's view is that this level of penalty is appropriate and proportionate to the contravention in respect of which it has been imposed. Our objectives in determining the amount of that penalty are, in particular:
- a) to impose an appropriate and proportionate sanction that reflects:
 - i) the significant duration of O2's contravention;
 - ii) the significant degree of actual and potential harm caused by O2's contravention;
 - iii) the significant scale and scope of O2's contravention;
 - iv) the significant absence of effective governance processes in place to prevent the billing error from occurring in the first instance and to identify the billing error once it occurred; and
 - v) the significant failure by O2's senior management to adequately ensure that the governance process it had put in place for fixing and remedying billing errors was followed or, to the extent that it was followed, it failed in some key respects in both 2011 (when O2 first identified the billing error) and 2019 (when the error was re-identified).
 - b) to deter O2 and others from contravening, in particular, GC C3.2 again.
- 4.127 Having regard to O2's turnover, our view is that a penalty of £10.5 million will secure those objectives in a proportionate way. It appropriately reflects each of the factors described in

more detail above, whilst not exceeding the maximum penalty Ofcom may impose in O2's case.

- 4.128 O2 must pay that penalty to Ofcom by no later than 4 weeks from receipt of the Confirmation Decision attached in Annex 1.

5. Remedial steps required of O2

- 5.1 In addition to imposing a penalty, Ofcom has decided that, to the extent they have not already been taken, O2 must take the following steps to comply with GC C3.2 and remedy the consequences of the contravention:²²¹
- i. ensure that its termination bills are accurate, in particular by showing accurately O2's charges levied and due for payment or the debits and credits applied to customers' accounts;
 - ii. keep its updated monitoring and risk management processes and governance systems under review and update them regularly as appropriate, to mitigate the risk that a similar Billing Error arises in the future and is not identified;
 - iii. identify and provide appropriate refunds to all customers who were overcharged as a result of the Billing Error;
 - iv. ensure that it does not benefit from the contravention by donating the total amount of unclaimed refunds and refunds owed to unidentifiable customers to an independent charity; and
 - v. allow affected customers who it has been unable to identify due to the absence of records to approach them with proof that they were overcharged as a result of the Billing Error and claim a refund.
- 5.2 The step required by paragraphs 5.1(i) and (ii) above must be taken immediately by O2 upon receipt of the Confirmation Decision attached in Annex 1.
- 5.3 The steps required by paragraphs 5.1(iii) to (v) must be taken within 1 month of O2 receiving the Confirmation Decision, with O2 providing written confirmation of the actions it has taken.

²²¹ The reference to 'remedying the consequences of a contravention' include references to paying an amount to a person (a) by way of compensation for loss or damage suffered by that person; or (b) in respect of annoyance, inconvenience or anxiety to which he has been put: see section 151(7) of the Act.

A1. Confirmation Decision to Telefónica UK Limited (trading as “O2”) of contravention of General Condition C3.2 and previous General Condition 11.1 under Section 96C of the Communications Act 2003

Section 96C of the Communications Act 2003

A1.1 Section 96C of the Communications Act 2003 (the “**Act**”) allows the Office of Communications (“**Ofcom**”) to issue a decision (a “**Confirmation Decision**”) confirming the imposition of requirements on a person where that person has been given a notification under section 96A of the Act, Ofcom has allowed that person an opportunity to make representations about the matters notified, and the period allowed for the making of representations has expired. However, Ofcom may not give a Confirmation Decision to a person unless, having considered any representations, it is satisfied that the person has, in one or more of the respects notified, been in contravention of a condition specified in the notification under section 96A.

A1.2 A Confirmation Decision:

- a) must be given to the person without delay;
- b) must include the reasons for the decision;
- c) may require immediate action by the person to comply with the requirements of a kind mentioned in section 96A(2)(d) of the Act,²²² 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.

The General Conditions of Entitlement

A1.3 Under the regulatory regime set out in the Act, communications providers do not require a licence to operate in the United Kingdom, but they can be made subject to conditions of

²²² Such requirements include the steps that Ofcom thinks should be taken by the person in order to remedy the consequences of a contravention of a condition.

general application. The General Conditions of Entitlement are the regulatory conditions that all providers of electronic communications networks and services of a particular description specified for the respective General Conditions must comply with if they want to provide their services in the United Kingdom.

- A1.4 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. Section 408 of the Act sets out transitional provisions that applied to (among other things) functions carried out by the Director General of Telecommunications (“**DGT**”) prior to Ofcom’s inception.
- A1.5 On 22 July 2003, the DGT issued a notification in accordance with section 48(1) of the Act setting the general conditions set out in the Schedule to his notification (the “**2003 Notification**”), pursuant to his transitional powers. They took effect from 25 July 2003. Under the Act’s transitional provisions, after the end of the transitional period, the 2003 Notification had effect as if it had been done by or in relation to Ofcom.
- A1.6 The General Conditions were amended from time to time between 2003 and 2018 and, on 1 October 2018, a new set of General Conditions came into effect.²²³

General Condition C3.2 (previously General Condition 11.1)

- A1.7 General Conditions 11.1 under the 2003 Notification required that—

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

- A1.8 For that purpose, the following definitions (among others) applied—

- “Communications Provider” means ²²⁴ a person who provides Public Electronic Communications Services;
- “End-User”, in relation to a Public Electronic Communications Service, means²²⁵ (a) a person who, otherwise than as a Communications Provider is a Customer of the provider of that service; (b) a person who makes use of the service otherwise than as a Communications Provider; or (a) a person who may be authorised, by a person falling within paragraph (a), so to make use of the service;
- “Public Electronic Communications Service” means²²⁶ any Electronic Communications Service that is provided so as to be available for use by members of the public.

²²³ <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/general-conditions-of-entitlement>

²²⁴ See General Condition 11.9(c) under the 2003 Notification.

²²⁵ See paragraph 1 of Part 1 of the 2003 Notification.

²²⁶ *Ibid.*

A1.9 On 15 July 2008, Ofcom issued a notification²²⁷ in accordance with section 48(1) of the Act making modifications to General Condition 11 on Metering and Billing as set out in the Schedule to that notification. Those modifications took effect on the date of the publication of that notification. Ofcom’s only modification in relation to General Condition 11.1 was a reference to a new concept of a “Bill”, as follows—

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

A1.10 Under that notification, the concept of a “Bill” was defined as meaning²²⁸ *“the information issued by a Communications Provider to an End-User of the charges levied and due for payment or the information retained by a Communications Provider for the purpose of recording and enabling debits and credits to be applied to an End-User’s account”*.

A1.11 With effect from 1 October 2018, General Condition 11.1 was replaced by General Condition C3.2, which requires in relation to accurate billing that—

“Regulated Providers shall not charge an End-User or render or make available any Bill to an End-User, in respect of the provision of any Public Electronic Communications Services, unless every amount charged and/or stated in the Bill represents and does not exceed the true extent of any such service actually provided to the End-User in question.”

A1.12 For that purpose, the following definitions (among others) apply—

- ‘**Bill**’ means²²⁹ the information issued, or made available, by a **Communications Provider** to an **End-User** about the charges levied and due for payment or the debits and credits applied to an **End-User’s** account;
- ‘**End-User**’, in relation to a **Public Electronic Communications Service**, means²³⁰: (a) a person who, otherwise than as a **Communications Provider**, is a **Customer** of the provider of that service; (b) a person who makes use of the service otherwise than as a **Communications Provider**; or (c) a person who may be authorised, by a person falling within paragraph (a), so to make use of the service;
- ‘**Public Electronic Communications Service**’ means²³¹ any **Electronic Communications Service** that is provided so as to be available for use by members of the public; and

²²⁷ The notification was published in Annex 2 to Ofcom’s statement entitled ‘*The Ofcom Metering and Billing Scheme*’ as published on 15 July 2008. On 23 July 2008, issued a correction stating that the date of the signature in the notification (i.e. 15 July 2007) was incorrect and that the correct date was 15 July 2008, i.e. the same date as the publication of Ofcom’s statement itself.

²²⁸ See General Condition 11.7(c) as per the new numbering in the notification of 15 July 2008.

²²⁹ See section entitled ‘Definitions’ for the new General Conditions.

²³⁰ *Ibid.*

²³¹ *Ibid.*

- Conditions C3.2 and C3.3 apply²³² to any person who provides a Public Electronic Communications Service and each person to whom a provision applies is a ‘**Regulated Provider**’ for the purposes of that provision;

A1.13 Accordingly, General Condition 11.1 (and subsequently General Condition C3.2, with effect from 1 October 2018, in similar terms) applied at all material times for the purposes of this Notification.

Subject of this Confirmation Decision

A1.14 This Confirmation Decision is addressed to Telefónica UK Limited (trading as “O2”), whose registered company number is 01743099. O2’s registered office is 260 Bath Road, Slough, Berkshire, SL1 4DX.

Ofcom’s previous Notification given to O2 under section 96A of the Act

A1.15 On 27 January 2021, Ofcom gave a notification under section 96A of the Act (the “**Section 96A Notification**”) to O2, as Ofcom had reasonable grounds for believing that during the period between at least 26 May 2011 to 15 March 2019 (the “**Relevant Period**”) O2 contravened General Condition 11.1 and subsequently General Condition C3.2.

A1.16 The Section 96A Notification also specified the penalty that Ofcom was minded to impose on O2 in respect of its contraventions of General Condition 11.1 and subsequently General Condition C3.2. It further specified the steps that Ofcom thought should be taken by O2 in order to comply with General Condition C3.2 and remedy the consequences of the contravention.

A1.17 The Section 96A Notification allowed O2 the opportunity to make representations to Ofcom about the matters set out in the Section 96A Notification.

Confirmation Decision given to O2 under section 96C of the Act

A1.18 On 3 February 2021, in a letter to Ofcom, O2 confirmed that it waived its rights to make representations about the matters notified and admitted liability for the contravention. The period for O2 to make representations has therefore expired.

A1.19 Accordingly, Ofcom is hereby satisfied that O2 has contravened General Condition 11.1 and subsequently General Condition C3.2 for the Relevant Period, it being a ‘Communications Provider’ on whom General Condition 11.1 applied as well as a ‘Regulated Provider’ on whom General Condition C3.2 currently applies. O2 did so by failing to render or make available accurate termination bills in respect of its Pay Monthly Mobile services affected by the Billing Error and by overcharging a significant number of those customers.

²³² See General Condition C3.1(a).

A1.20 Ofcom has therefore decided to give O2 this Confirmation Decision confirming its contravention of General Condition 11.1 and subsequent General Condition C3.2.

A1.21 The extent of O2's contravention and the reasons for Ofcom's decision are set out in the explanatory statement to which this Confirmation Decision is annexed.

Steps that should be taken by O2

A1.22 In order to comply with General Condition C3.2 going forwards, Ofcom considers that O2 must, to the extent it does not already do so, take such steps as are necessary for ensuring that its—

- termination bills are accurate, in particular by showing accurately O2's charges levied and due for payment or the debits and credits applied to customers' accounts; and
- updated monitoring and risk management processes and governance systems are kept under review and updated regularly as appropriate, to mitigate the risk that a similar Billing Error arises in the future and is not identified.

A1.23 In order to remedy the consequences of the contravention, Ofcom considers that, to the extent it has not already done so, O2 must—

- identify and provide appropriate refunds to all customers who were overcharged as a result of the Billing Error;
- ensure that it does not benefit from the contravention by donating the total amount of unclaimed refunds and refunds owed to unidentifiable customers to an independent charity; and
- allow affected customers who it has been unable to identify due to the absence of records to approach them with proof that they were overcharged as a result of the Billing Error and claim a refund.

A1.24 The step required by paragraph A1.22 above must be taken by O2 immediately upon its receipt of this Confirmation Decision.

A1.25 The steps required by paragraph A1.23 above must be taken by O2 within 1 month of its receipt of this Confirmation Decision, with O2 providing to Ofcom its written confirmation of the actions it has taken.

Penalty

A1.26 Ofcom has decided that O2 must pay a penalty of **£10.5 million** in respect of its contravention of General Condition 11.1, and subsequently General Condition C3.2, during the Relevant Period. This includes a 30% discount to the penalty Ofcom would otherwise have imposed, as a result of O2 admitting liability and entering into a settlement with Ofcom.

A1.27 O2 has until **12 March 2021** to pay Ofcom the penalty. If not paid by that deadline, it can be recovered by Ofcom accordingly.²³³

Interpretation

A1.28 Except insofar as the context otherwise requires, words or expressions used in this Confirmation Decision have the meaning assigned to them in this Confirmation Decision and otherwise any word or expression shall have the same meaning as it has been ascribed for the purposes of General Conditions or the Act.

Signed by



Gaucho Rasmussen

Director of Investigations and Enforcement

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

12 February 2021

²³³ Section 96C(7)(b) of the Act.

A2. Ofcom's investigation

The decision to investigate

- A2.1 On 12 June 2019, the Approval Body for O2's metering and billing system, TUV SUD BABT ('BABT'), notified Ofcom that O2 had experienced a Category 1 Extraordinary Performance Failure ('EPF') between at least 1 January 2012 and 7 March 2019. It reported that this EPF had meant that *"[i]n a very specific scenario, the termination bill will take a duplicate payment as part of the final Direct Debit"* and had resulted in duplicate payments totalling £959,706.19 affecting 93,259 accounts.
- A2.2 Due to the duration of the breach and the amount of money and consumers involved, on 10 July 2019, in accordance with our published Enforcement Guidelines, Ofcom opened a formal own-initiative investigation into O2's compliance with GC C3.2 and the Direction.

Information gathering

Information requests and other information from O2

- A2.3 During the investigation, we issued seven formal notices to O2 under section 135 of the Act, requiring it to provide information to us.

First information notice

- A2.4 The information notice issued to O2 on 1 August 2019 ('**First Notice**') required it to confirm the accuracy of its notification to BABT regarding the Billing Error, how and when the Billing Error was identified, the accuracy of bills received by customers, the processes it had in place to ensure that its metering and billing was accurate, remedial steps it had taken, and its Relevant Turnover.
- A2.5 O2 responded to the First Notice on 5 September 2019 and 3 October 2019 ('**First Response**').

Meeting with O2 and [X]

- A2.6 On 30 September 2019, Ofcom met with O2 and [X] to discuss inconsistencies identified in O2's First Response in the description of the Billing Error. Specifically, O2's description and [X]'s description (detailed in an Annex) did not appear to match.

Second information notice

- A2.7 Following the meeting with O2 and [X], we issued a second information notice to O2 on 2 October 2019 ('**Second Notice**'). The Second Notice sought additional information for the purposes of the investigation and required O2 to make corrections, as appropriate, to the information provided in its First Response. In regard to new information, the Second Notice required O2 to provide further information that would develop Ofcom's understanding of

each Billing Error scenario and provide details of the number of customers affected and the amounts they were overcharged.

- A2.8 O2 responded to the Second Notice on 17 October 2019 and 5 November 2019 (**'Second Response'**).

Third information notice

- A2.9 We issued a third information notice to O2 on 22 November 2019 (**'Third Notice'**) requiring it to provide its general risk management policies, resubmit a previously submitted Annex in an accessible format, resubmit its Relevant Turnover in a readable format, and explain whether its Billing Issues Forum (**'BIF'**) or its Critical Incident Restoration Process (**'Process'**) had been invoked for the Billing Error.

- A2.10 O2 responded to the Third Notice on 29 November 2019 and 4 December 2019 (**'Third Response'**).

Fourth information notice

- A2.11 We issued a fourth information notice to O2 on 6 January 2020 (**'Fourth Notice'**) requiring it to clarify various inconsistencies identified in previous responses, provide overcharging figures for customers who were not due a refund, detail the fixes that were put in place to resolve some of the scenarios, confirm when it expected to complete refunds, provide documents detailing discussions about the Billing Error during calls/meetings about an [X] issue that were attended by BIF members, and further details about the Process.

- A2.12 O2 responded to the Fourth Notice on 7 February 2020 (**'Fourth Response'**).

Fifth information notice

- A2.13 We issued a fifth information notice to O2 on 17 March 2020 (**'Fifth Notice'**) requiring it to provide further information about the customers it had overcharged but whom it had referred to as 'not due a refund'. The required information included the number of customers who paid overcharges but had received a refund, the amount they had paid, the amount they had been refunded, what had triggered the refund to be made, and the timescales for providing those refunds.

- A2.14 On 30 March 2020, Ofcom wrote to O2 advising that the notice had been suspended to enable O2 to focus on business-critical matters as a result of COVID-19. Despite that suspension, O2 responded to the Fifth Notice on the original deadline of 28 April 2020 (**'Fifth Response'**).

Sixth information notice

- A2.15 We issued a sixth information notice to O2 on 22 June 2020 (**'Sixth Notice'**) requiring it to provide its Relevant Turnover for the 2019/20 financial year and confirm the accuracy of informal clarifications provided in relation to its Fifth Response.

- A2.16 O2 responded to the Sixth Notice on 29 June 2020 (**'Sixth Response'**).

Facts and Evidence Document

- A2.17 On 15 August 2020, Ofcom issued a document to O2 detailing its initial thinking on the factual issues and evidence of the case as we understood it (the '**Facts and Evidence Document**'). O2 was given an opportunity to review the document and to provide any further facts that it considered Ofcom should be made aware of/take into account in mitigation as part of our investigation.
- A2.18 O2 responded to the Facts and Evidence Document on 2 October 2020 (the '**Response to the Facts and Evidence Document**').

Seventh information notice and the 4 December 2020 Response

- A2.19 We issued a seventh information notice to O2 on 22 October 2020 ('**Seventh Notice**') requiring it to confirm the information relied upon in its Response to the Facts and Evidence Document.
- A2.20 The original deadline for responding to the Seventh Notice was 30 October 2020. On 23 October 2020, O2 informed Ofcom that it would be unable to provide some of the requested information by the required deadline and requested several extensions. In particular, O2 explained that some key team members were on leave and it was reliant on [X] to provide certain information, including information regarding the number of customers who had been disconnected due to arrears and not paid overcharges caused by the Billing Error.
- A2.21 On 26 October 2020 Ofcom emailed O2 granting a short deadline extension to 6 November 2020. It also requested a meeting with O2 to discuss the background to its various extension requests. Ofcom met with O2 on 2 November 2020 and explained that the Seventh Notice sought to understand the information it had relied upon when forming its Response to the Facts and Evidence Document and Ofcom therefore expected O2 to have that information already in its possession.
- A2.22 O2 responded to the Seventh Notice on 6 November 2020 ('**Seventh Response**') detailing the information it had relied upon when forming its Response to the Facts and Evidence Document.
- A2.23 On 4 December 2020, O2 provided complete supplementary information it had obtained from [X] regarding the number of customers disconnected due to arrears (the '**4 December 2020 Response**').

Ofcom's provisional notification and the settlement procedure

- A2.24 On 27 January 2021, Ofcom gave a notification under section 96A of the Act (the '**Section 96A Notification**') to O2 setting out our view for having reasonable grounds to believe that it had contravened GC C3.2 and previous GC 11.1 between at least 26 May 2011 to 15 March 2019. This was because, in Ofcom's provisional view, O2 had failed to render or make available accurate termination bills in respect of its Pay Monthly Mobile services affected by the Billing Error and by overcharging a significant number of those customers.

A2.25 On 3 February 2021, O2 wrote to Ofcom as part of the voluntary settlement procedure it had entered into with Ofcom:

- a) admitting it had contravened GC C3.2 and previous GC 11.1 as set out in the Section 96A Notification;
- b) waiving its rights to submit representations; and
- c) confirming its recognition that the penalty imposed by Ofcom in respect of the contravention would be reduced because of its admissions.

A3. Customers affected - refunds as part of refund programme²³⁴

Year	Scenario A	Scenario B	Scenario C	Scenario D	Total per year	Refund value
2011 ²³⁵	223	19,428	-	-	19,651	£ 130,799.88
2012	1,020	5,825	8,137	459	15,441	£ 170,555.59
2013	1,205	-	11,397	797	13,399	£ 176,867.60
2014	1,816	-	11,483	731	14,030	£ 147,810.95
2015	1,128	-	11,333	704	13,165	£ 125,302.70
2016	1,561	-	10,075	579	12,215	£ 114,235.60
2017	1,336	-	9,656	686	11,678	£ 141,274.04
2018	1,742	-	8,967	977	11,686	£ 155,332.64
2019	148	-	614	21	783	£ 9,719.63
Grand total	10,179	25,253	71,662	4,954	112,048	£ 1,171,898.63

²³⁴ Figures provided in Annex 47, Fourth Response.

²³⁵ We note that some of these customers will have been affected prior to 26 May 2011 when the Relevant Period started.

A4. Customers affected - refunds outside of the refund programme²³⁶

Year	No of customers who paid the amount overcharged	Amount those customers paid to O2 relating to overcharges	No of customers who received a refund of overcharges	Amount refunded to customers as a result of overcharges
2011 ²³⁷	351	£20,666.92	326	£23,624.26
2012	853	£56,731.77	828	£58,611.03
2013	1,267	£53,976.39	1,241	£58,474.00
2014	4,850	£112,921.87	4,823	£122,219.58
2015	1,316	£38,884.59	1,291	£58,135.42
2016	2,954	£138,322.59	2,928	£166,468.63
2017	8,202	£411,732.77	8,182	£474,259.12
2018	7,229	£365,258.46	7,152	£397,289.46
2019	796	£44,093.66	788	£48,323.51
Grand total	27,818	£1,242,589.02	27,559	£1,407,405.01

²³⁶ Figures provided in Question 1, Fifth Response.

²³⁷ We note that some of these customers will have been affected prior to 26 May 2011 when the Relevant Period started.

A5. Customers affected - refunds not due (total)^{238 239}

Year	Scenario A	Scenario B	Scenario C	Scenario D	Total per year	Overcharge value
2011 ²⁴⁰	215	10,688	-	-	10,903	£ 5,501,149.82
2012	909	3,289	5,521	170	9,889	£ 4,376,812.59
2013	883	-	7,930	171	8,984	£ 3,459,419.47
2014	5,129	-	11,574	205	16,908	£ 4,267,887.77
2015	515	-	11,854	113	12,482	£ 4,396,742.28
2016	1,847	-	16,836	504	19,187	£ 5,099,422.43
2017	3,068	-	26,823	1,264	31,155	£ 7,058,012.72
2018	3,031	-	23,502	1,159	27,692	£ 4,961,721.14
2019	402	-	1,851	44	2,297	£ 362,601.05
Grand total	15,999	13,977	105,891	3,630	139,497	£ 39,483,769.27

²³⁸ Figures provided in Annex 47, Fourth Response.

²³⁹ Figures include customers who paid overcharges but were subsequently refunded outside of the refund programme – see Annex 4

²⁴⁰ We note that some of these customers will have been affected prior to 26 May 2011 when the Relevant Period started.

A6. Time taken to refund customers^{241 242}

Timeframe for refund	No of customers refunded	Amount refunded ²⁴³	Cumulative no. of customers refunded	Cumulative % of total customers refunded	Cumulative amount refunded	Cumulative % of total refund
1 week	1,071	£67,070.71	1,071	3.9%	£67,070.71	4.8%
2 weeks	3,425	£231,925.96	4,496	16.3%	£298,996.67	21.2%
3 weeks	14,764	£694,677.23	19,260	69.9%	£993,673.90	70.6%
4 weeks	3,188	£179,022.18	22,448	81.5%	£1,172,696.08	83.3%
4 weeks to 2 months	1,647	£76,249.78	24,095	87.4%	£1,248,945.86	88.7%
2 - 3 months	146	£8,210.93	24,241	88.0%	£1,257,156.79	89.3%
3 - 4 months	10	£272.69	24,251	88.0%	£1,257,429.48	89.3%
4 - 5 months	225	£15,538.57	24,476	88.8%	£1,272,968.05	90.4%
5 - 6 months	160	£6,820.44	24,636	89.4%	£1,279,788.49	90.9%
6 - 7 months	199	£5,690.45	24,835	90.1%	£1,285,478.94	91.3%
7 - 8 months	99	£7,831.08	24,934	90.5%	£1,293,310.02	91.9%
8 - 9 months	95	£5,375.61	25,029	90.8%	£1,298,685.63	92.3%
9 - 10 months	158	£8,852.47	25,187	91.4%	£1,307,538.10	92.9%
10 - 11 months	112	£3,688.45	25,299	91.8%	£1,311,226.55	93.2%
11 - 12 month	146	£8,617.71	25,445	92.3%	£1,319,844.26	93.8%
1 - 2 years	750	£43,725.00	26,195	95.1%	£1,363,569.26	96.9%
2 - 3 years	604	£22,243.98	26,799	97.2%	£1,385,813.24	98.5%
3 - 4 years	156	£7,625.42	26,955	97.8%	£1,393,438.66	99.0%

²⁴¹ Figures in the columns 'No of customers refunded' and 'Amount refunded' are taken from Question 2a and 2b, Fifth Response, whereas the figures in other columns have been calculated by Ofcom using those figures.

²⁴² Figures relate to customers who paid overcharges but were subsequently refunded outside of the refund programme. Figures exclude customers refunded as part of O2's refund programme.

²⁴³ O2 explained in Question 1 of the Fifth Response that "[i]n relation to the discrepancy of the amount refunded [in relation to the amount overcharged – see Annex 4] this can be attributed to additional credits being raised on accounts e.g. goodwill credits, which increased the amount to be refunded".

4 - 5 years	203	£4,597.99	27,158	98.5%	£1,398,036.65	99.3%
Over 5 years	401	£9,368.36	27,559	100.0%	£1,407,405.01	100.0%
Total	27,559	£1,407,405.01				