
Confirmation Decision under section 96C of the Communications Act 2003

Confirmation Decision served on giffgaff Limited
(giffgaff) by the Office of Communications (Ofcom) for
contravention of General Condition 11.1

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

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1. Overview

- 1.1 Ofcom has set a number of General Conditions (“GCs”) to protect consumers, which Communications Providers (“CPs”) must comply with in order to further consumers’ interests and protect them from poor practices.
- 1.2 Ofcom has found that giffgaff Limited (“giffgaff”) contravened what was at the time GC 11.1.¹ This rule requires CPs to accurately bill customers for their use of communication services.
- 1.3 giffgaff is a mobile operator that offers pre-paid bundles of voice minutes, SMS (texts) and data known as “goodybags”. Customers can also purchase pre-paid top-up credit.
- 1.4 We have found that giffgaff contravened GC 11.1 by overcharging customers who purchased a goodybag while using pre-paid credit to consume data or while on a voice call. The purchase of a goodybag should have made any subsequent data use or voice call free. However, giffgaff did not immediately apply the goodybag that the customer had purchased to their account. As a result, a customer’s pre-paid credit continued to be used to pay for data use or a voice call when it should have been free as a result of the purchase of the goodybag.
- 1.5 giffgaff has estimated that around 2.6 million customers were overcharged up to almost £2.9 million over a 7 – 8 year period as a result of its billing error.
- 1.6 GC 11.1 is an important consumer protection provision because it ensures consumers receive the services they pay for and are charged correctly for them. In light of the seriousness of this case, including the failings we have found, Ofcom has imposed a significant penalty of £1.4 million on giffgaff, to deter it and other CPs from further contraventions of regulatory rules, in particular those relating to billing. This includes a 30% discount applied to the penalty figure of £2 million we would otherwise have imposed, as a result of giffgaff admitting liability and entering into a settlement with Ofcom.
- 1.7 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. 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. Notwithstanding the failings we have found in this case, we strongly encourage CPs to take note of giffgaff’s conduct in this respect.

¹ Ofcom amended the GCs with effect from 1 October 2018. GC 11.1 applies until that date. As from that date, GC 11.1 is contained in GC C3.2 and references to GC 11.1 should be read accordingly.

2. Introduction

- 2.1 giffgaff offers a selection of pre-paid bundles for its voice, SMS (texts) and data services to its customers, which are known as “goodybags”. Customers can also purchase pre-paid top-up credit. This Confirmation Decision (the “Confirmation Decision”) issued under section 96C of the Communications Act 2003 (the “Act”) confirms and explains Ofcom’s finding that giffgaff contravened GC 11.1 in relation to goodybags for its data and voice services.
- 2.2 GC 11 is an important consumer protection provision which sets out the general conditions relating to metering and billing. In particular, GC 11.1 requires CPs to render accurate bills to their customers. 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 the agreed amount. It is also an important consumer protection provision because, amongst other reasons, 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 avoiding errors in their billing systems and providing customers with accurate bills.
- 2.3 We have investigated giffgaff’s compliance with GC 11.1, as set out in Annex A2.
- 2.4 Based on the information and evidence we have gathered, we are satisfied that giffgaff contravened GC 11.1 between 26 May 2011 to 14 February 2019 (the “Relevant Period”) as follows: (i) from 26 May 2011 to 15 June 2018 in relation to its data services; and (ii) from 26 May 2011 to 14 February 2019 in relation to its voice services.²
- 2.5 This is because where a customer purchased a goodybag while using pre-paid credit to consume data or while on a voice call,³ their pre-paid credit continued to be used to pay for data use or a voice call. Such data use or voice call should have been free from the point the customer successfully purchased a goodybag. However, giffgaff did not immediately apply the goodybag that the customer had purchased to their account as the customer would have expected or as giffgaff had intended. Instead, giffgaff only applied the goodybag to a customer’s account when they started a new data session (for example, by turning their phone off and then back on or by switching it in and out of airplane mode) or ended the voice call they were on.
- 2.6 As a result, customers were provided with account balance information which did not accurately reflect the goodybag for which they had paid and the services that giffgaff had provided to them.
- 2.7 We refer below to the data error as the “Data Billing Error” and the voice error as the “Voice Billing Error” and refer to both collectively as the “Billing Error”.

² See paragraphs 3.55 to 3.61 for further information on the duration of the contravention.

³ For example, a customer may use a computer to purchase a goodybag while on a voice call.

- 2.8 giffgaff remedied the Data Billing Error by making a change to its billing and charging system on 15 June 2018. There was no technical fix for the Voice Billing Error and giffgaff remedied this by amending its terms and conditions on 14 February 2019.⁴
- 2.9 The evidence and information provided by giffgaff suggests that around 2.6 million customers were overcharged up to almost £2.9 million over a 7 – 8 year period as a result of the Billing Error. giffgaff has refunded approximately £2.1 million to customers as a result of the Billing Error although it is not possible for giffgaff to identify and therefore refund around 1.4 million customers due to the time that has passed. As a result, giffgaff has donated approximately £752,000 to charity.
- 2.10 As explained in more detail in Section 4 below, we have found that giffgaff failed to take appropriate steps to prevent the Billing Error, its senior management should have been aware of the Billing Error much earlier and giffgaff missed opportunities to identify, escalate and remedy the Billing Error.
- 2.11 In our view, this was a serious contravention and there is a need to impose a penalty on giffgaff that has a strong deterrent effect on both giffgaff and industry more widely. We have therefore decided to impose a penalty of £1.4 million.
- 2.12 Our regulatory judgment is that this penalty would be appropriate and proportionate to the contravention in respect of which it is being imposed. In taking that decision, we have had regard to all the evidence referred to in Sections 3 and 4 of this document, together with our published Penalty Guidelines.
- 2.13 The penalty would have been significantly higher but for giffgaff self-reporting the Billing Error shortly after it became aware, closely co-operating with our investigation, and taking proactive steps to remedy the contravention, including implementing a comprehensive refund plan soon after it had identified the Billing Error. The penalty also includes a 30% discount applied to the penalty figure of £2 million we would otherwise have imposed, as a result of giffgaff admitting liability and entering into a settlement with Ofcom.
- 2.14 The basis for our decision as to the amount of the penalty is explained further in Section 4 below.
- 2.15 In light of all these matters, and on the basis of the evidence and reasoning contained in this document, we have issued this Confirmation Decision. It sets out the penalty we are imposing on giffgaff as well as the action we are requiring giffgaff to take to ensure it complies with the General Conditions relating to billing going forward.
- 2.16 Ofcom has also issued a Confirmation Decision to giffgaff under section 139A of the Act on 30 July 2019, which confirms and explains our finding that giffgaff provided inaccurate information in response to two information requests issued under section 135 of the Act relating to the cause and duration of the Billing Error, in contravention of its obligations under section 135 of the Act.

⁴ See paragraphs 3.49 to 3.54.

3. Contravention of GC 11.1

The Regulatory Framework

- 3.1 giffgaff is a provider of electronic communications services which, like all CPs that offer services consisting of the provision of electronic communications networks or services, is subject to a number of GCs which have been imposed by Ofcom under sections 45 to 55 of the Act.⁵
- 3.2 GC 11 sets out general conditions relating to metering and billing. In particular, GC 11.1 requires CPs to render accurate bills to their customers. GC 11.1 states:
- “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.”*
- 3.3 As stated above, GC 11.1 is an important consumer protection provision which reflects the fundamental premise that consumers should be billed accurately and that they should only be billed for services that have actually been provided to them.⁶
- 3.4 The definition of “Bill” in GC 11 includes *“information retained by a Communications Provider for the purpose of recording and enabling debits and credits to be applied to an End-Users account”*. Account balance information provided to customers relating to the amount of pre-paid credit remaining therefore also falls within the scope of GC 11.1.
- 3.5 We note that GC 11 also requires CPs with a turnover of more than £40 million a year⁷ from providing landline and mobile voice services to comply with the Metering and Billing Direction (the “Direction”),⁸ which is intended to ensure that CPs’ systems deliver accurate bills to consumers. In this respect, we note that Principal 4 of the Direction states: *“The CP shall have systems and processes that accurately record usage by End-Users and enable charging at the correct tariffs.”*

Investigation

- 3.6 On 28 June 2018, giffgaff self-reported the Data Billing Error to Ofcom. Following further correspondence, Ofcom opened a formal own-initiative investigation, in accordance with

⁵ General Conditions of Entitlement, <http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/general-conditions/>.

⁶ Moreover, Ofcom’s Statement on Modification of General Condition 11 in respect of the Metering and Billing Direction dated 30 September 2014, stated *“GC11 imposes a requirement for billing accuracy on all providers of public electronic communications services. GC 11.1 states ...”* and GC C3.2 (which is the equivalent of GC 11.1 in the GCs effective from 1 October 2018) falls under the heading “Accurate billing”.

⁷ From 1 April 2019, this figure was increased to £55 million.

⁸ The Direction was first issued by Ofcom on 31 July 2014. It has been amended a number of times since and an unofficial consolidated version is available here (under C3 Billing requirements): <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/general-conditions-of-entitlement>.

our published Enforcement Guidelines, into giffgaff's compliance with GC 11.1 (the "Investigation").⁹

- 3.7 As part of that, we obtained further information and evidence from giffgaff about the Billing Error using our statutory information gathering powers.
- 3.8 The Investigation is described in more detail in Annex A2.
- 3.9 The following paragraphs of this Confirmation Decision rely on the information giffgaff provided to us.¹⁰

giffgaff's goodybags

- 3.10 giffgaff offers (i) monthly sim-only plans, which are pre-paid bundles of voice minutes, SMS (texts) and data in the form of "goodybags";¹¹ and (ii) pre-paid credit which can be used for calls, texts and data.¹² giffgaff refers to its customers as "members"¹³ and the amount of pre-paid credit a customer has remaining is referred to as a member's "airtime balance" or "airtime credit".
- 3.11 Goodybags contain a fixed number of minutes, SMS and/or data which last for a month following a successful purchase. Goodybag allowance and pre-paid credit are separate items. If a customer uses all their goodybag allowance before it expires, pre-paid credit from the customer's airtime balance will be used to pay for voice calls, SMS or data use. Customers can also purchase "queued" and "recurring" goodybags. A queued goodybag is when a customer purchases another goodybag early (i.e. before the expiry of their current goodybag) so that it kicks-in when their current goodybag expires.¹⁴ A recurring goodybag is when a customer has elected to automatically purchase the same goodybag every month, meaning they benefit from a recurring bundle of minutes, SMS and/or data each month when the previous goodybag expires.¹⁵ Following the successful purchase of a goodybag, an automated email confirmation is sent to the customer confirming the successful purchase of the goodybag.
- 3.12 Goodybags are referred to as Bundles¹⁶ in giffgaff's terms and conditions ("T&Cs"). giffgaff's T&Cs that were applicable during the Relevant Period stated that a goodybag, including free voice minutes and data, would start as soon as a customer had successfully purchased a goodybag i.e. voice calls and data use would be free from the point of purchase. Clause 6.2 read as follows:

⁹ https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01230.

¹⁰ The evidence relied upon is taken principally from giffgaff's responses to the First, Second, Third and Fourth Notices, as well as other engagement with giffgaff, including emails and written submissions. See Annex A2.

¹¹ Goodybags are defined in giffgaff's terms and conditions as "a Bundle, including minutes, texts and data".

¹² August Letter.

¹³ For ease of reference, we generally refer to giffgaff's members as customers throughout this Confirmation Decision.

¹⁴ See: <https://community.giffgaff.com/t5/Solve-your-questions/Guide-to-queued-goodybags/ta-p/3513321>.

¹⁵ See: <https://community.giffgaff.com/t5/Using-giffgaff/Recurring-goodybags-guide/ta-p/4753858>.

¹⁶ Bundles are defined in giffgaff's T&Cs as "a certain Service allowance for use in conjunction with a SIM Card and a mobile phone device as may change from time to time and as described on giffgaff.com".

"6. Bundles...

6.2 A Bundle lasts for a month, starting from the moment you successfully make your purchase (i.e. the day of purchase counts as one full day, regardless of the time of purchase, and is included in the monthly period) and the Bundle is allocated to your Account."

giffgaff's organisational structure and escalation procedures

giffgaff's billing and charging system

- 3.13 giffgaff is a mobile operator and a wholly owned subsidiary of Telefonica UK Limited ("Telefonica"), a mobile network operator trading under the O2 brand. giffgaff uses O2's network to provide mobile services to its customers.
- 3.14 Whilst giffgaff utilises O2's core network, giffgaff owns its pre-pay billing and charging system which operates on [redacted].¹⁷ [redacted].¹⁸ [redacted].¹⁹

giffgaff's customer support function

- 3.15 giffgaff's services are advertised on its website as "*the mobile network run by you*". It has no call centre and its customer support function largely relies on its own customers (known as "members"). Members respond to online customer queries through community discussions and other posts and have also created an online "Knowledge Base" as a source of help and support for customers.²⁰
- 3.16 However, there are some things that members cannot answer including questions about account details, payment queries and payment details.²¹ For these issues, giffgaff has "member service agents", who, since giffgaff's inception in 2009, have been provided by [redacted], a third-party outsourcing provider. giffgaff relies on [redacted] to provide "front line" support to giffgaff's customers and giffgaff generally only becomes involved in customer issues when they are escalated in the specific circumstances outlined below.
- 3.17 giffgaff's processes relating to the escalation of cases and complaints are not written down in any internal documentation. The summary below is based on Ofcom's understanding of giffgaff's processes from giffgaff's responses to statutory information requests (as well as a flowchart giffgaff provided in response to a request from Ofcom to clarify how its escalation procedures are intended to operate).

Escalation of cases and complaints raised with [redacted]

- 3.18 giffgaff has explained that where a customer raises a case (i.e. a general query or complaint) with [redacted], the [redacted] agent will first consider if they have enough information to

¹⁷ Second Response, Question 7(i).

¹⁸ First Response, Question 4(i).

¹⁹ Second Response, Question 7(i).

²⁰ See: <https://community.giffgaff.com/>.

²¹ See: <https://www.giffgaff.com/support/>.

identify the issue. If they do, they will provide generic non-customer specific advice and ask a number of security questions to confirm the customer's identity. Once the customer's identity is confirmed, the [X] agent will use giffgaff's troubleshooting steps contained in its agent knowledge base to try and resolve the issue. The agent can also contact giffgaff's email and SMS communications team to request information regarding the history of communications sent to and from specific customers to help resolve the issue.²²

3.19 giffgaff has explained that if a [X] agent is unable to resolve a case or if the knowledge base advises the agent to escalate the issue within [X] then the agent is expected to escalate the case. giffgaff has explained that the [X] agent the case has been escalated to then has a number of options, including the following:²³

- a) Escalation to [X]: The [X] agent could raise a case on "[X]" if the issue is of a technical nature (e.g. a billing query) which the agent thinks [X] should be able to resolve. [X] is a case management tool that is owned and managed by [X] that allows [X] agents to log and transfer cases to [X] for analysis and resolution under various categories such as "Charging System Issue". [X] will investigate the issue and respond to the [X] agent via [X]. The [X] agent will then update the customer based on the response from [X] and, if appropriate, close the case. The Incident Manager in [X] is responsible for monitoring the cases raised on [X] and if a significant and persistent number of similar cases are being raised on [X], [X] could also raise the issue as a Major Incident, in which case giffgaff's Major Incident Process, described in more detail below, would be followed.
- b) Escalation to giffgaff's Service Operations team: At the same time as sending the case to [X] via [X], the [X] agent could escalate it into giffgaff's Service Operations team ("Service Ops"). "Service Ops is the centralised escalations team within giffgaff that manage updates on internal and external incidents, defects, changes and daily software deployments that affect the business." [X]. However, "[X] and Service Ops are in very regular dialogue and Service Ops often investigate issues [X]." A [X] agent queue manager monitors incoming cases in real-time and if the escalations team notices or are alerted to a volume of incoming cases in a specific queue, they will open some of these on an ad-hoc basis to see if they are related or reflect a trend of similar issues. If they are, [X] will contact Service Ops. Depending on the issue, Service Ops may escalate the issue to [X].
- c) Escalation to giffgaff's Technical Operations team: The [X] agent could send the case to the giffgaff technical operations team (known as "Tech Ops") for further investigation using a case management tool managed by giffgaff called Request Tracker.²⁴

²² Second Response, Questions 6 and 14.

²³ First Response, Question 3(c); Second Response, Questions 6, 7, 8 and 14(vii); and Third Response, Questions 2(i) and 9(iii).

²⁴ Since December 2018, this tool has been known as [X] - Third Response, Question 2(i); Second Response, Question 6.

d) Escalation as a Major Incident: The [X] agent could raise the issue as a Major Incident, in which case giffgaff's Major Incident Process, described in more detail below, would be followed.

3.20 If a customer is not happy with the response from a [X] agent, it can raise a complaint directly with giffgaff by sending an email to giffgaff at complaints@giffgaff.com or by contacting giffgaff by post or telephone.²⁵

giffgaff's Major Incident Process

3.21 The Major Incident Process is a two-page document which giffgaff has explained was produced by Service Ops and [X] and is the main reference document in relation to escalations for [X] agents. giffgaff has confirmed that it sets out the procedure for escalating any issues, not just billing system errors. The issue will be classified under one of the heads identified in the document ([X], MVNO, Portal Ops or Out of Hours)²⁶ and then formally raised by following the steps set out in the document. giffgaff has explained that Tech Ops will always be involved in the Major Incident Process and Service Ops would always be kept informed.²⁷

3.22 The Major Incident Process applies to what are referred to as P1 and P2 incidents which are defined in Schedule 4 of Telefonica's contract with [X] (the "[X] Contract") as follows:²⁸

a) [X]

b) [X]

3.23 Schedule 4 of the [X] Contract states that:

"The Priority Level of an Incident will be determined depending on the category of Operating Services affected, and the impact on the Operating Services."

3.24 [X] and [X] are expected to determine the priority level, which will determine the way in which an issue is escalated, in accordance with the required response and resolution times for each incident level as set out in Schedule 4 of the [X] Contract.

3.25 If an incident is categorised as P1, giffgaff has explained that it invokes an SMS Communications Tool called "Text Magic" to notify key stakeholders and keep them informed.²⁹

²⁵ See: <https://www.giffgaff.com/support/complaints/complaints-code>.

²⁶ giffgaff has confirmed that issues relating directly to giffgaff would be raised under the "Portal Ops" head - Second Response, Question 6.

²⁷ Second Response, Question 7(i) and (ii).

²⁸ Second Response, Question 7(iii).

²⁹ Second Response, Question 7(v).

Governance systems to identify billing issues

- 3.26 giffgaff's contractual arrangements with [X] set out the governance systems in place to escalate billing issues. These include:³⁰
- a) Weekly operational meetings: attended by giffgaff and [X] operational process owners *"to discuss operational issues (including those relating to billing and charging). This governance system also includes a three-way meeting between giffgaff, [X] and [X]"*.
 - b) Weekly delivery governance meetings: senior stakeholders from [X] and giffgaff discuss day-to-day operational issues.
 - c) Weekly service governance meetings: to discuss *"the day to day running and change programmes relating to the billing and charging system"*.
 - d) Monthly governance review meetings: high-level review meetings where all major issues are escalated. giffgaff has confirmed that monthly reports are produced which *"document any significant issues that may have arisen or changes which have been implemented during the review period"*.³¹
- 3.27 giffgaff has explained that there are also governance systems in place between giffgaff and [X] to escalate potential issues and system errors, with the main reference tool being the "Major Incidents Process" document identified above. In this regard, the contract between giffgaff and [X] requires the following:³²
- a) Weekly (or fortnightly) calls between the giffgaff Service Ops team and [X]. These calls are used to facilitate *"any progression or escalation of cases already assigned to the giffgaff Tech Ops team. The Service Ops team then progresses these cases locally."*
 - b) Monthly and quarterly meetings, which are attended by [X] personnel and wider giffgaff stakeholders (but not Service Ops). Any potential trends and pressing issues from cases raised by [X] agents are discussed. [X] uses a spreadsheet to track new and ongoing issues including the number of incidents, responses and resolutions each day and a [X] escalations manager provides commentary on rises/falls in particular cases and the reasons why certain cases were more prevalent in a given week, as well as highlighting potential future issues. However, this spreadsheet is not shared with giffgaff for the purpose of the weekly meetings described above.

giffgaff's monitoring and risk management processes

- 3.28 giffgaff has explained that during the Relevant Period, its monitoring and risk management processes included:³³

³⁰ August Letter, page 4.

³¹ Second Response, Question 7(vi).

³² Second Notice, Question 7(ii) and Third Response, Question 8.

³³ August Letter, pages 3 and 4; Second Response, Question 3; Third Response, Question 2(i).

- a) Testing by [X] of all billing and charging system changes before they are introduced to ensure there are no adverse impacts – giffgaff has explained that new data sessions were started with every new test.
- b) “Friendly user” testing carried out by individuals outside of giffgaff - individuals carry out tests as real users and seek to identify bugs, crashes and other issues.
- c) *“Data extracts from both [X] and “friendly user” testing are provided to giffgaff detailing all events charged to [customers] to enable giffgaff to undertake a detailed review and assess whether there are any billing errors.”*
- d) *“Records relating to accounts identified by giffgaff as being part of an ongoing charging verification process are extracted and separately sent to a giffgaff third party ([X]) for analysis.”*

[X] is a billing verification provider. It uses eight SIMs to generate 4,000 Call Data Records which it then compares with its analysis of how giffgaff’s billing and charging system should operate to ensure giffgaff is applying the correct charges. Since 2005, giffgaff has used [X] to test voice and SMS services and since June 2017 it has also used [X] to test data and goodybag allowances.

From June 2017, “[X] carried out and reported on data usage and goodybags in three 1-month test campaigns ... designed to replicate a [customer’s] experience as closely as possible.” Each campaign included testing on four separate giffgaff SIMs, of which three used goodybags and one was charged from pre-paid airtime balance. Testers would purchase a new goodybag for the SIM being tested, so each new goodybag was preceded by an old goodybag.

- e) [X]: where cases are raised by [X] agents on [X], *“these are investigated by the giffgaff operations team and [X]. If such an investigation indicates, for example, a billing and charging problem, a change is created, and a fix is applied to the billing and charging system.”*

Change to giffgaff’s billing and charging system

- 3.29 Whilst giffgaff owns its pre-pay billing and charging system which operates on a platform called “[X]”, it utilises O2’s packet core, circuit core and radio access networks.³⁴
- 3.30 On 8 June 2016, a change to giffgaff’s [X] billing and charging system was implemented. This change was driven by O2 and involved a change to the signalling protocol (managed by [X]) between giffgaff’s billing and charging system and the O2 network that giffgaff uses. giffgaff has explained that the change was necessary for giffgaff’s online billing and charging system to continue to communicate with O2’s core network and that it was part of O2’s strategy to ensure its network would remain supported by [X], *“increase network efficiency, improve network performance and optimise network costs”*.³⁵

³⁴ First Response, Question 4.

³⁵ First Response, Question 4(ii).

- 3.31 The new signalling protocol was referred to as “[X]”. giffgaff has explained that it understood implementation of the [X] signalling protocol would result in no change to the functionality of giffgaff’s billing and charging system or its customer experience and that any changes required on giffgaff’s billing and charging system were solely made to support the new [X] protocol. In its First Response, giffgaff provided a presentation on the change which included a slide which, under the heading “Assumptions” stated, *“No change to giffgaff data products as part of the migration”*.³⁶
- 3.32 giffgaff has explained that the following testing of the new [X] signalling protocol was carried out:³⁷
- a) User acceptance testing by [X] over a three-week period including testing by 16 individuals (outside of the giffgaff operations team but known to giffgaff) and friendly users carrying out tests as real users, using different operating systems and different handsets, to identify bugs, crashes and other issues. Each network node was tested separately as it was migrated to the [X] signalling protocol.
 - b) Acceptance testing, whereby [X] and [X] identified 210 tests which were then completed by [X]. Key tests included: (i) regression testing focusing on customer experiences; (ii) refill and end of call testing *“to prove all methods of top-up and the [customer] experience when credit is exhausted”*; (iii) systems testing of the impact on the key systems involved; (iv) *“testing to ensure the back-up, failover and restoration processes worked seamlessly”*; and (v) once the user experience had been tested, a series of tests were carried out to ensure the correct reporting was produced.
- 3.33 A document dated 1 June 2018 analysing the Data Billing Error, and provided by giffgaff in the First Response, stated: *“Nothing was mentioned or examined regarding [X] limitations”*.³⁸ In the Second Response, giffgaff explained this comment as follows:
- “[X] is the name given to the [X] IT middleware system which giffgaff uses for its operating and charging system and which integrates with other [X] platform equipment. The limitations of the [X] referred to in this statement are the behaviour of the system which lead [sic] to members being incorrectly charged.”*³⁹

The Billing Error

The Complaint

- 3.34 giffgaff has explained that it became aware of the Data Billing Error following a customer complaint it received on 8 May 2018. The complainant was unsatisfied with the response he had received from [X] and consequently sent two emails to giffgaff’s CEO, Mike Fairman, on 9 and 12 May. The complainant explained that he had run out of data in a previous goodybag purchase and as a result purchased another goodybag including data.

³⁶ First Response, Question 5.

³⁷ First Response, Questions 3 and 5.

³⁸ First Response, Question 2(ii), Document 60.

³⁹ Second Response, Question 27.

He said he had received a message from giffgaff informing him that the new goodybag was active. However, his balance of pre-paid credit continued to be used when he was consuming data despite the fact he had purchased a goodybag which should have meant any subsequent data use was free. The complainant's first email to giffgaff's CEO was headed "ATTENTION MIKE FAIRMAN – OFFICIAL COMPLAINT TO GIFFGAFF – POSSIBLE FRAUD AND THEFT OF CUSTOMER'S MONEY" and his second was headed "UPDATE – GIFFGAFF TO BE SUED FOR FRAUD".⁴⁰

- 3.35 Following this complaint, giffgaff's CEO emailed members of giffgaff's senior management on 14 May 2018. He said that giffgaff's system should not be working in the way the complainant had suggested and asked that they check with [X] how giffgaff's system worked and to report back to him.⁴¹

giffgaff's investigation

- 3.36 giffgaff has explained that between 12 and 25 May, the issue was initially investigated by [X] and giffgaff's technical operations team. On 25 May 2018, the issue was escalated and a team including members of giffgaff's senior management was set up to investigate the issue in greater detail. On 6 June 2018, this team concluded that the Data Billing Error was caused by the change to the signalling protocol which was implemented on 8 June 2016 and, therefore, the issue had been ongoing for 2 years.⁴²
- 3.37 Following from this, a wider team was set up to identify, contact and refund affected customers and fix the Data Billing Error.⁴³ giffgaff explained that it worked with [X] and implemented a systems fix to the Data Billing Error on 15 June 2018.⁴⁴

Self-Reporting of the Data Billing Error

- 3.38 giffgaff self-reported the issue to Ofcom on 28 June 2018. giffgaff informed Ofcom that the issue had affected its data services and was caused by the implementation of the [X] signalling protocol on 8 June 2016 and, therefore, had been ongoing for 2 years. giffgaff also provided Ofcom with its proposed plan for refunding affected customers.
- 3.39 After opening a formal investigation into the issue, Ofcom sought more information by way of four statutory information requests. A chronology of the investigation is set out at Annex A2.

Identification of the Voice Billing Error and the actual cause and duration of the Billing Error

- 3.40 In the First Response, giffgaff provided documents which indicated to Ofcom that the Data Billing Error may not have been caused by the implementation of the [X] signalling

⁴⁰ First Response, Question 2(i)(d).

⁴¹ First Response, Question 2(i)(d).

⁴² August Letter, page 2.

⁴³ August Letter, page 2.

⁴⁴ August Letter, page 2.

protocol and that it had arisen much earlier than June 2016, as giffgaff had initially explained. As a result, we issued giffgaff with the Second Notice which thoroughly questioned giffgaff on these points, as well as other matters relevant to the Investigation.

- 3.41 The Second Notice also asked giffgaff to confirm how it had satisfied itself that the Billing Error had only affected its data services and had not also affected its voice and SMS services.
- 3.42 In the Second Response, giffgaff said that because the cause of the Data Billing Error was the introduction of the [§<] signalling protocol, and this infrastructure only supports data services, it was satisfied that the issue had only affected its data services. giffgaff explained that its voice and SMS services use different infrastructures and as a result the cause of the Data Billing Error could not have affected its voice or SMS services.⁴⁵
- 3.43 On 30 January 2019, giffgaff telephoned Ofcom and requested a meeting to discuss the Second Response, namely the services affected by the Billing Error. giffgaff explained that following further investigation, an issue had arisen that it would like to discuss face-to-face.
- 3.44 As a result, on 6 February 2019, Ofcom met with giffgaff (the “February Meeting”). giffgaff explained that further investigations had revealed that:
- a) The cause of the Billing Error was not the implementation of the new [§<] signalling protocol in June 2016. giffgaff characterised the error as a misalignment between customer expectation (due to the fact its terms and conditions said a goodybag would start following a successful purchase) and the way in which its billing and charging system worked (which meant a goodybag would not actually start until a customer started a new data session or ended the voice call they were on). giffgaff confirmed that the cause of the Billing Error was the result of how its billing and charging system operated. However, the implementation of the [§<] signalling protocol did significantly exacerbate the impact of the Data Billing Error. This is because it enabled data sessions to be open for a longer period ([§<]) than the previous signalling protocol.⁴⁶
 - b) The Billing Error arose prior to June 2016. giffgaff explained its preliminary view that the Data Billing Error arose on 4 April 2011.
 - c) Voice services were affected in addition to data services. giffgaff explained its preliminary view that its voice services were affected from 14 April 2010 (although later updated that view to confirm some giffgaff-to-giffgaff calls were affected from 25 February 2010) until the fix on 14 February 2019.
- 3.45 giffgaff also explained that it was working out the best way to estimate the impact in terms of the number of customers affected and the amount they had potentially been overcharged based on the actual duration of the Billing Error and the fact it also affected voice services.

⁴⁵ Second Response, Question 5.

⁴⁶ First Response, Question 4(ii).

3.46 In relation to giffgaff-to-giffgaff calls, giffgaff has explained that the Billing Error arose where a customer had not purchased pre-paid credit or purchased a goodybag within three months and then, while on a giffgaff-to-giffgaff call, purchased a goodybag (including a voice bundle) or pre-paid credit. In such circumstances, a customer would have expected the next 60 minutes of the call to be free, in accordance with giffgaff's T&Cs. However, a customer's pre-paid credit continued to be used to pay for the call.⁴⁷

Other services

3.47 giffgaff has confirmed that queued and recurring goodybags were, in the majority of cases, not affected by the Billing Error provided a customer had not exhausted their current goodybag before the date on which the queued or recurring goodybag was due to kick-in. If a customer had exhausted their current goodybag before the new goodybag was due to kick-in, then their pre-paid credit balance would legitimately be used. However, the Billing Error did affect some customers that had purchased a queued or recurring goodybag and were mid-call or mid-data session at midnight on the day in which the new goodybag was set to begin. giffgaff has explained that this is because queued and recurring goodybags do not begin until the first chargeable session initiated by the customer after midnight on the day they are due to kick-in.⁴⁸

3.48 giffgaff has confirmed that it does not believe its SMS services were affected by the Billing Error as SMS is a binary event (i.e. once an SMS is sent the service is completed).⁴⁹

Changes implemented by giffgaff following discovery of the Billing Error

3.49 As stated above, giffgaff has characterised the Billing Error as a misalignment between customer expectation, due to what it says in terms and conditions, and the way in which its billing and charging system worked.⁵⁰ The way in which giffgaff's billing and charging system worked was also not how giffgaff's senior management had intended it to work.

3.50 In order to remedy the Data Billing Error, giffgaff has worked with [X] to implement a change to its billing and charging system so that goodybags kick-in following a successful purchase and customers benefit from free data use purchased as part of their goodybag without having to first end their current data session (for example, by turning their phone off and then back on or by switching it in and out of airplane mode). This change was implemented on 15 June 2018.

3.51 Following discovery of the Data Billing Error, and before giffgaff had implemented the fix identified above, on 1 June 2018, giffgaff updated its terms and conditions to include the following wording to clarify when a goodybag containing free data use would kick-in:

"4. Charges...

⁴⁷ 8 February Submission, page 1.

⁴⁸ Third Response, Question 4.

⁴⁹ 8 February Submission, page 2.

⁵⁰ See paragraph 3.44.

4.10. If you purchase a Bundle while actively using your airtime credit top-up for Services, please restart your device to ensure your Bundle is used to provide Services to you instead of your airtime credit top-up”

3.52 This additional clause remains in giffgaff’s current terms and conditions.

3.53 In relation to the Voice Billing Error, giffgaff has explained that it is unable to change the way in which its billing and charging system operates. This is because it is not technically possible for a goodybag containing free voice calls to kick-in while a user is already on a voice call. As a result, giffgaff has amended its terms and conditions to clarify that when a customer purchases a goodybag containing free voice calls while already on a voice call, the goodybag will not kick-in (and the call will therefore continue to be charged from the customer’s pre-paid credit balance) until the customer ends the voice call they are currently on. Customers that are on a voice call and purchase a goodybag mid-call should therefore hang-up and make their call again in order to benefit from the goodybag they have purchased. To clarify this, on 14 February 2019, giffgaff updated Clause 6.2 of its terms and conditions and added a new Clause 6.3 (added text underlined):⁵¹

“6. Bundles...

6.2. A Bundle lasts for a month, (and, subject to paragraph 6.3 below) starts from the moment you successfully make your purchase (i.e. the day of purchase counts as one full day, regardless of the time of purchase, and is included in the monthly period) and the Bundle is allocated to your Account. If you have any remaining Service allowance at the end of this monthly period it will expire and will not be rolled-over into the next month.

6.3. If you make a Bundle purchase, or opt to start a new, already purchased Bundle early whilst your voice call is in progress, the Bundle will not start immediately, in relation to voice services. You should therefore end any voice call before your Bundle purchase to avoid your airtime credit being used to provide voice services to you instead of the newly purchased Bundle, i.e. voice services will only be provided from the Bundle from the beginning of the next call that is made or received. Data services and SMS are unaffected.”

3.54 giffgaff has also updated Clause 4.4 of its terms and conditions in relation to giffgaff-to-giffgaff calls to clarify that customers that purchase a goodybag or pre-paid credit while on a giffgaff-to-giffgaff call, will only benefit from free giffgaff-to-giffgaff calls (for the first 60 minutes of any call) when they end the call they are currently on and make another giffgaff-to-giffgaff call (added text underlined and deleted text struck through):⁵²

⁵¹ Third Response, Question 15; 15 February Submission, page 1.

⁵² Third Response, Question 15.

4.4 You can make free UK calls, texts, call forwarding and video calls to other Members subject to you topping-up or purchasing a Bundle using a credit/debit card or voucher once every 3 months (i.e. a Bundle purchase made using airtime credit does not qualify) (~~Bundle purchases made using airtime credit do not apply~~). Such calls are at no extra cost for the first 60 minutes per call, after which the call will be charged using Charges applicable to standard non-giffgaff UK mobile pricing. Please note that if topping up or purchasing a Bundle (using a credit/debit card or voucher once every 3 months) takes place whilst a call is in progress, free UK calls, texts, call forwarding and video calls to other Members will only start from the next call you make.

Duration of the Billing Error

- 3.55 giffgaff has informed us that the Data Billing Error arose on 4 April 2011 and the Voice Billing Error arose on 25 February 2010.
- 3.56 However, due to the way in which the statutory scheme applies in relation to historic contraventions which pre-date the introduction of sections 96A to 96C of the Act on 26 May 2011, Ofcom is only able to consider the period of any contravention from 26 May 2011 for the purpose of issuing a Confirmation Decision under section 96C of the Act.
- 3.57 Sections 94 to 96 of the Act apply in respect of contraventions that occurred before and up to 26 May 2011 (the date on which those sections came into force). Ofcom can only consider taking enforcement action under these sections if giffgaff had not already remedied the contravention for the full period during which it occurred by taking steps to identify and reimburse all affected customers.
- 3.58 giffgaff does not have records that would allow it to identify the customers that may have been affected during the periods prior to 26 May 2011 and confirm the potential financial impact on them. giffgaff has however estimated the potential overcharge during the periods that pre-date 26 May 2011 and has donated this money to charity. We also note that the number of customers potentially affected and the financial impact during the periods that pre-date 26 May 2011 is low when compared with the impact after that date (in particular after June 2016, when the impact of the Data Billing Error was significantly exacerbated):⁵³
- a) prior to 26 May 2011, the Data Billing Error affected approximately 4,000 customers over a period of less than two months; and
 - b) prior to 26 May 2011, the Voice Billing Error affected approximately 345 customers – as explained above, the impact of the Voice Billing Error was relatively low throughout the full period as it only affected customers that purchased a goodybag while on a voice call.
- 3.59 Ofcom is satisfied that giffgaff has remedied the contravention for the full period during which it occurred and we have not therefore issued a separate notification under section

⁵³ giffgaff email to Ofcom dated 24 June 2019.

94 of the Act in respect of the earlier periods of the contravention up to 26 May 2011, namely (i) 4 April 2011 to 26 May 2011 in relation to the Data Billing Error; and (ii) 25 February 2010 to 26 May 2011 in relation to the Voice Billing Error.

3.60 Therefore, for the purposes of this Confirmation Decision, we consider the contravention of GC 11.1 in relation to the Billing Error as having started on 26 May 2011 in accordance with sections 96A to 96C of the Act.

3.61 Accordingly, we have determined that the relevant periods are from 26 May 2011 to 15 June 2018 in relation to the Data Billing Error and from 26 May 2011 to 14 February 2019 in relation to the Voice Billing Error.

Estimated customer and financial impact

3.62 Due to the length of time from the start of the Relevant Period (26 May 2011), giffgaff does not have call data records (“CDRs”) that would enable it to identify all customers potentially affected by the Billing Error and estimate the financial impact on them for the full duration of the Relevant Period.

3.63 Using CDRs, giffgaff has estimated the consumer and financial impact for the following periods:

- a) For the Data Billing Error, from 1 June 2016 to 15 June 2018.
- b) For the Voice Billing Error, from 1 January 2018 to 14 February 2019.

3.64 giffgaff also undertook a modelling exercise to estimate the number of customers affected and the financial impact for the periods in which it did not have CDRs: ⁵⁴

- a) For the Data Billing Error, from 4 April 2011 to 31 May 2016.
- b) For the Voice Billing Error, from 1 April 2010 to 31 December 2017.

3.65 In summary, giffgaff has estimated that during the Relevant Period:

- a) around 2.6 million customers were overcharged up to almost £2.9 million as a result of the Data Billing Error; and
- b) around 26,000 customers were overcharged up to almost £42,000 as a result of the Voice Billing Error.

3.66 Accordingly, around 2.6 million customers were overcharged up to almost £2.9 million as a result of the total Billing Error. The rounded figures for the total Billing Error are the same as for the Data Billing Error because the impact of the Voice Billing Error was low compared to the impact of the Data Billing Error.

⁵⁴ giffgaff provided an explanation of the methodology used in its modelling exercise to estimate the number of customers affected by the Billing Error and the financial impact on them in its Third Response.

3.67 Ofcom notes that giffgaff’s estimates (in particular its estimates of the financial impact using CDR data) were provided on a “worst case” scenario basis.⁵⁵ For ease of reference for the purposes of this Confirmation Decision, the estimated customer and financial impact have been rounded on a “worst case” scenario basis. In Table 1 below we have also set out the actual numbers provided by giffgaff.

Table 1: Estimated customer and financial impact⁵⁶

Service		Period	Customers affected ⁵⁷	Financial impact
Data Billing Error	Estimated scale of impact (modelled)	26 May 2011 – 31 May 2016	1,375,194	Up to £716,336.75
	Scale of impact using CDRs	1 June 2016 – 15 June 2018	1,214,969	Up to £2,139,327
Voice Billing Error	Estimated scale of impact (modelled)	26 May 2011 – 31 December 2017	20,183	Up to £33,399
	Scale of impact using CDRs	1 January 2018 – 14 February 2019	6,177	Up to £8,591

3.68 In terms of the impact of the Billing Error on individual customers, giffgaff has estimated that of those customers that are still giffgaff customers:⁵⁸

- a) around 610,000 customers were overcharged £0.99 or less;
- b) around 260,000 customers were overcharged between £1.00 and £4.99;
- c) around 100,000 customers were overcharged between £5.00 and £24.99;
- d) around 3,400 customers were overcharged between £25.00 and £49.99; and
- e) around 425 customers were overcharged more than £50.

3.69 In terms of customers that have now left giffgaff, giffgaff has estimated as follows:

⁵⁵ For example, in relation to the Data Billing Error, (i) giffgaff’s methodology showed that its assumptions on data usage were incorrect by an average of 5.26% but it increased the refund amount per member by 6%; (ii) giffgaff’s analysis showed that the latest end time of any data session was 3 mins 59 seconds after the last CDR file was written and it therefore proceeded on this worst case scenario basis for all data sessions; and (iii) for some months where there was an issue with data, giffgaff capped data sessions at [redacted] which is the maximum total duration of any data session. See First Response, Question 16; Second Response, Questions 28 and 29. In relation to the Voice Billing Error, giffgaff has estimated the financial impact on the basis a customer purchased a goodybag containing voice minutes as soon as they made a voice call using pre-paid credit. In reality, a customer may have been on a voice call for a number of minutes before purchasing a goodybag and up until the point they purchased a goodybag, they would have been legitimately charged from their pre-paid credit and were only overcharged from the point at which they successfully purchased a goodybag. Nonetheless, giffgaff has estimated the financial harm resulting from the Voice Billing Error based the whole duration of the call.

⁵⁶ August Letter, page 7; 27 February Email; Fourth Response, Question 3.

⁵⁷ [redacted].

⁵⁸ August Letter, Schedule 1; 15 February Submission, Annex A2.

- a) around 230,000 customers were overcharged between £0.01 and £4.99;
- b) around 14,000 customers were overcharged between £5.00 and £24.99;
- c) around 340 customers were overcharged between £25.00 and £49.99; and
- d) around 40 customers were overcharged more than £50.

Findings under GC 11.1

- 3.70 In light of the above, we have found that giffgaff contravened GC 11.1 in relation to its billing of its data and voice services during the Relevant Period.
- 3.71 This is because, where a customer purchased a goodybag while using pre-paid credit to consume data or while on a voice call,⁵⁹ their pre-paid credit continued to be used to pay for data use or a voice call. Data use or a voice call should have been free from the point a customer successfully purchased a goodybag. However, giffgaff did not immediately apply the goodybag that the customer had purchased to their account as the customer would have expected or as giffgaff had intended. Instead, giffgaff only applied the goodybag to a customer's account when they started a new data session (for example, by turning their phone off and then back on or by switching it in and out of airplane mode) or ended the voice call they were on.
- 3.72 giffgaff's customers do not receive bills from giffgaff in the form of statements of services used and the charges due for payment. They do, however, receive account balance information which informs them how much pre-paid credit they have remaining in their airtime balance.
- 3.73 As a result of the Billing Error, we have found that customers were provided with account balance information which did not accurately reflect the goodybag for which they had paid and the services that giffgaff had provided them. Moreover, it did not reflect the services customers had expected to receive or the services giffgaff had intended to provide.
- 3.74 Accordingly, Ofcom has determined that giffgaff contravened GC 11.1 by rendering Bills to End-Users in respect of Public Electronic Communications Services in which the amounts stated did not represent and exceeded the true extent of any such service actually provided to End-Users in question.
- 3.75 giffgaff remedied the Data Billing Error on 15 June 2018 by implementing a change to its billing and charging system so that goodybags will always kick-in following a successful purchase without customers having to first end their current data session.
- 3.76 giffgaff remedied the Voice Billing Error on 14 February 2019 by amending its terms and conditions to clarify that when a customer purchases a goodybag containing free voice calls while already on a voice call, the goodybag will not kick-in until the customer ends the voice call they are currently on and makes a new call.

⁵⁹ For example, a customer may use a computer to purchase a goodybag while on a voice call.

- 3.77 As a result, we have determined that giffgaff contravened GC 11.1 between 26 May 2011 and 14 February 2019.
- 3.78 Whilst we make no other findings of contravention, we note that giffgaff may have also contravened the following as a result of the Billing Error:
- a) Principal 4 of the Metering and Billing Direction to the extent giffgaff did not *“have systems and processes that accurately record usage by End-Users and enable charging at the correct tariffs.”*
 - b) what was for the majority of the Relevant Period GC 10.1⁶⁰ to the extent the information giffgaff published on its standard tariffs and/or standard contract conditions were not clear and/or up-to date because that information incorrectly informed customers that a goodybag would start as soon as a customer had successfully purchased a goodybag and did not explain that goodybags would only kick-in after a customer started a new data session or ended the voice call they were on.

Conclusion on contravention

- 3.79 Ofcom has therefore found that giffgaff contravened GC 11.1 as a result of the Billing Error between 26 May 2011 and 14 February 2019 as follows:
- a) In relation to its data services, from 26 May 2011 to 15 June 2018 (a period of over seven years).
 - b) In relation to its voice services, from 26 May 2011 to 14 February 2019 (a period of nearly eight years).
- 3.80 The Billing Error directly affected a significant number of customers over a significant period of time - giffgaff has estimated that around 2.6 million customers were overcharged up to almost £2.9 million.

⁶⁰ GCs 10.1 and 10.2 read as follows:

“10.1 The Communications Provider shall ensure that clear and up to date information on its applicable prices and tariffs (which for the avoidance of doubt shall not include bespoke or individual prices and tariffs), and on its standard terms and conditions, in respect of access to and use of Publicly Available Telephone Services by End-Users is published, in accordance with paragraphs 10.2 and 10.3.

10.2 The information published shall include at least the following: ...

(d) the Communications Provider’s standard tariffs, including details of standard discounts and special and targeted tariff schemes, with regard to:

- (i) access;*
- (ii) all types of usage charges; ...*

(g) the standard contract conditions offered ...”

4. Penalty

Summary

- 4.1 Ofcom has imposed a penalty of £1.4 million on giffgaff for its contravention of GC 11.1 in relation to its data and voice services during the Relevant Period and requires it to take steps to ensure it complies with GCs relating to billing going forward. The penalty includes a 30% discount as a result of giffgaff admitting liability and entering into a settlement with Ofcom.
- 4.2 The penalty would have been significantly higher but for giffgaff self-reporting the Billing Error shortly after it became aware, closely co-operating with the Investigation, and taking proactive steps to remedy the contravention.
- 4.3 In reaching this decision, Ofcom has had regard to the need to incentivise giffgaff, as well as other CPs, to comply with their regulatory obligations and to our principal duty of furthering the interests of citizens and consumers. Ofcom's judgment is that this penalty is appropriate and proportionate to the contravention we have found and to have the appropriate deterrent effect on giffgaff and CPs more generally. When setting a penalty that would achieve that objective, we have considered the relevant factors in the round and have had regard to our Penalty Guidelines⁶¹. Our reasons for reaching this decision are set out fully below.
- 4.4 As explained in paragraphs 3.55 to 3.61 above, Ofcom may only consider giffgaff's contravention for the purpose of sections 96A-96C of the Act from 26 May 2011. For this reason, Ofcom has not considered the period prior to 26 May 2011 when deciding whether to impose a penalty on giffgaff and at what level.

Consideration of whether to impose a penalty

- 4.5 Ofcom's principal duty in carrying out our functions is to further the interests of citizens and consumers in relevant markets. GC 11.1 is an important consumer protection provision which embodies one of the most 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 the agreed amount. Consumers tend to 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.
- 4.6 Consumers also have a right to receive what they pay for and receive accurate bills. Likewise, they are entitled to expect that they are only billed for services that they have subscribed to and are not billed for services that they are not being provided or are no longer being provided. In this case, a customer's pre-paid credit was used to pay for data

⁶¹ Section 392 of the Act requires Ofcom to prepare and publish guidelines for determining penalties under sections 96A to 96C of the Act. Section 392(6) of the Act requires us to have regard to those guidelines when determining such penalties. The current version of the Penalty Guidelines was published on 14 September 2017:

https://www.ofcom.org.uk/_data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf

use or a voice call despite the fact they had purchased a goodybag which should have meant that subsequent data use or a voice call was free. As a result, customers were, in effect, charged twice for using data or voice minutes.

- 4.7 In our view, this was a serious contravention that resulted in a significant number of customers (around 2.6 million) being overcharged a significant amount of money (up to almost £2.9 million) over a significant period of time (7-8 years). Further, as explained in more detail below, Ofcom has found that giffgaff failed to take appropriate steps to prevent the Billing Error, its senior management should have been aware of the Billing Error much earlier and giffgaff missed opportunities to identify, escalate and remedy the Billing Error.
- 4.8 We recognise that giffgaff self-reported the Billing Error shortly after it became aware, has closely co-operated with the Investigation and took proactive steps to remedy the contravention.
- 4.9 Notwithstanding, taking into account our view on the seriousness of giffgaff's contravention, in particular the actual and potential harm to consumers, and our principal duty, our view is that a penalty is appropriate in this case. Further, we do not consider that a finding alone, including any reputational impact flowing from such a finding, would act as a sufficient deterrent for giffgaff (or the wider industry).

Penalty amount

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

Deterrence

- 4.11 As set out in the Penalty Guidelines, our central objective in imposing a penalty is deterrence. The level of the penalty must be sufficient to have a material impact on the regulated body so that it is incentivised to put in place procedures and processes to ensure that it is and remains compliant with regulatory requirements and avoids contravening those requirements in the future. giffgaff's customer base has been growing year-on-year⁶² and it is particularly important for giffgaff to be incentivised to comply with regulatory requirements intended to protect consumers. It is also important that the penalty imposed serves to deter the wider industry from contravening regulatory requirements.
- 4.12 Any penalty we set should therefore be sufficiently high to discourage bad conduct and incentivise giffgaff's management to change the conduct of the company, encouraging good practices and a culture of compliance across the organisation.

⁶² Page 3 of giffgaff's Annual Report for the year ending 31 December 2017 explains that giffgaff added around 420,000 new customers in the financial year ending 31 December 2016 and a further 260,000 customers in the financial year ending 31 December 2017.

- 4.13 Under section 97 of the Act, the maximum penalty Ofcom may impose on giffgaff is 10 per cent of its turnover for its relevant business for the period 1 April 2017 to 31 March 2018.⁶³ In its Fourth Response, giffgaff stated that its turnover for its relevant business in that period was £[X] million.⁶⁴ The maximum penalty we may therefore impose on it in respect of the contravention we have found is £[X] million.
- 4.14 To assess the amount of the penalty that might serve as an effective deterrent to prevent further wrongdoing by giffgaff, we have considered the size of the gain giffgaff made from the Billing Error. In this regard, we have taken into account giffgaff's estimate that around 2.6 million customers were overcharged up to almost £2.9 million as a result of the Billing Error.
- 4.15 We have also taken into account the fact that giffgaff has either refunded this money to customers (approximately £2.1 million) and where it has been unable to do so, it has donated the rest to charity (approximately £752,000).
- 4.16 Notwithstanding, the significant gain giffgaff made from its contravention of GC 11.1 (at least from 26 May 2011 until it started refunding customers in 2018) suggests that a significant penalty would be appropriate and proportionate.
- 4.17 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 4.57 to 4.59 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 million⁶⁵ 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 giffgaff. These penalties were also all issued before Ofcom updated its Penalty Guidelines in September 2017 to provide it with the flexibility to impose higher penalties in appropriate cases in order for a deterrent effect to be achieved.⁶⁶
- 4.18 We consider that the penalty which we have imposed on giffgaff is sufficiently large to act as a deterrent, having regard to giffgaff's size and turnover, and is at such a level which can change any potential non-compliant behaviour by giffgaff, and by other regulated entities.

Seriousness, culpability and harm

- 4.19 For the reasons set out above, GC 11.1 is an important consumer protection provision and any contravention of it is therefore potentially serious, particularly where a significant number of consumers are affected. Again, GC 11.1 reflects the fundamental premise that consumers should be billed accurately and only for the services that they are actually being provided.

⁶³ This is the relevant period for the purposes of calculating the maximum penalty, as defined in section 97(5) of the Act.

⁶⁴ In its Third Response, giffgaff explained that its financial year runs from 1 January to 31 December and that it was unable to provide audited turnover for the full period 1 April 2017 to 31 March 2018 before the end of September 2018. In the Fourth Notice, we asked giffgaff to provide its audited turnover for the period 1 April 2017 to 31 December 2017 and unaudited turnover for the period 1 January 2018 to 31 March 2018 which giffgaff provided in the Fourth Response.

⁶⁵ This penalty also included a penalty for a contravention of GC 23.2(a). ⁶⁶ Penalty Guidelines, para. 1.8

⁶⁶ Penalty Guidelines, para. 1.8

- 4.20 In our view, giffgaff's contravention of GC 11.1 was serious. giffgaff overcharged a significant number of customers a significant amount of money over a significant period of time:
- a) Around 2.6 million customers were overcharged up to almost £2.9 million for over 7 years as a result of the Data Billing Error.
 - b) Around 26,000 customers were overcharged up to almost £42,000 for nearly 8 years as a result of the Voice Billing Error.
- 4.21 Further, due to the length of time that has passed, giffgaff has estimated that around 1.4 million customers cannot be refunded. giffgaff has donated the amount it estimates it overcharged those customers to charity (approximately £752,000).
- 4.22 We recognise that the majority of customers were due a refund of £0.99 or less, and less than 5% of customers that were affected by the Billing Error were overcharged more than £5.00. However, a significant number of customers were overcharged a significant amount as a result of the Billing Error. For example, giffgaff has estimated that over 100,000 customers were overcharged between £5.00 and £24.99; over 3,400 customers were overcharged between £25.00 and £49.99; and over 425 customers were overcharged more than £50.00.
- 4.23 Further, as explained in more detail below, we have found that there are a number of factors that exacerbate the seriousness of giffgaff's contravention, in particular giffgaff failed to take appropriate steps to prevent the Billing Error, its senior management should have been aware of the Billing Error much earlier and giffgaff missed opportunities to identify, escalate and remedy the Billing Error.

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

- 4.24 First, we have found that giffgaff's monitoring and risk management processes failed to identify the Billing Error as a result of inadequate testing of giffgaff's billing and charging system including inadequate and/or ineffective testing of the impact of implementing the new [X] signalling protocol on its billing and charging system. We note the monitoring and risk management processes that giffgaff has confirmed were in place during the Relevant Period and that we have set out at paragraph 3.28 above. However, we have found that, to the extent they failed to identify the Billing Error throughout a 7 - 8 year period, they were inadequate and/or ineffective in their scope or implementation.
- 4.25 In terms of the testing of data, goodybags and giffgaff's billing and charging system that giffgaff carried out, or that third parties carried out on its behalf:
- giffgaff has explained that prior to May 2018, the only testing carried out on goodybags was by a third party provider, [Y], which "carried out and reported on data usage and goodybags in three 1-month test campaigns".⁶⁷ giffgaff has confirmed that this testing

⁶⁷ Second Response, Question 3.

did not identify the Billing Error because the Billing Error only occurred when a customer purchased a goodybag while using their pre-paid credit and all [X] tests were carried out when there was a goodybag available prior to testing.⁶⁸ We have found that giffgaff's testing of its data and goodybag allowance during the Relevant Period was inadequate.

- giffgaff has explained that although testing was carried out following implementation of the new [X] signalling protocol, this testing did not identify the Billing Error because testing was *"undertaken on separate charging nodes which meant a new data session was started for every new test"*.⁶⁹ During the course of the Investigation, giffgaff also provided a document which stated *"Nothing was mentioned or examined regarding the [X] limitations"*⁷⁰ which it later explained as meaning no-one examined any possible limitations relating to how the [X] IT middleware system would integrate with giffgaff's billing and charging system as a result of the implementation of the new [X] protocol.⁷¹

We have found that giffgaff's testing of the impact of the new [X] signalling protocol was inadequate and/or ineffective in its scope or implementation. We note that giffgaff had been informed by O2 that there would be *"No change to giffgaff data products as part of the migration"*⁷² to the [X] protocol. However, giffgaff is a communications provider with its own customers and is responsible for thoroughly checking the impact of any changes on its own billing and charging system.

- 4.26 Second, we have found that giffgaff's escalation procedures for dealing with billing issues and complaints were unclear and inadequate and giffgaff provided no training to [X] to help agents understand the type of issues that need to be escalated to giffgaff.
- 4.27 giffgaff has provided evidence indicating that both [X] and [X] were aware of the cause of the Billing Error i.e. they were aware of the fact that giffgaff's billing and charging system operated in such a way that, where a customer was using pre-paid credit to consume data or while on a voice call, and then purchased a goodybag containing free data use or voice minutes, that goodybag would not kick-in until a customer started a new data session or ended the voice call they were on.
- 4.28 giffgaff has explained that [X] agents had received *"guidance from [X] that the charging system was operating as normal"*.⁷³ As a result, some [X] agents that had received complaints relating to the Billing Error, responded to customers explaining that there was *"no error or fault on giffgaff's part"*.⁷⁴ giffgaff has explained that some agents *"advised [customers] to use flight mode as a "workaround" solution, it being recommended by*

⁶⁸ Second Response, Question 3.

⁶⁹ First Response, Question 3.

⁷⁰ First Response, Question 2(ii).

⁷¹ Second Response, Question 27.

⁷² First Response, Question 5.

⁷³ Second Response, Question 12(ii).

⁷⁴ First Response, Question 2(i)(b), Document 8.

*Agents as a common troubleshooting step to resolve other connection problems (as this is easier than switching a device on and off but often has the same effect)*⁷⁵ (although no instructions, advice or guidance was ever issued to agents in terms of how they should deal with complaints relating to the Billing Error).⁷⁶ In our view, such responses to customer complaints are likely to have exacerbated the consumer harm. Not only have customers been overcharged as a result of a goodybag not kicking in immediately but customers were then told this was not giffgaff's fault and that the customer would be required to take additional steps in order for their goodybag to kick-in. This is likely to have caused significant frustration for customers, which is clear in some of the complaints we have reviewed.

- 4.29 giffgaff has identified 207 complaints⁷⁷ that may relate to the Billing Error. Although some of these complaints may relate to other issues,⁷⁸ there may be other complaints which relate to the Billing Error which giffgaff has not identified. In any event, the number of complaints giffgaff has identified which may relate to the Billing Error is significant.
- 4.30 Notwithstanding the view within [X] and [X] that giffgaff's billing and charging system was operating as it was intended, both [X] and [X] were or should have been aware of the impact of the Billing Error on giffgaff's customers, namely that they were being charged from their pre-paid credit for data use or voice calls in circumstances where they would have expected such data use or voice call to be free.
- 4.31 Whilst we cannot comment on what changes to its escalation and governance processes would have resulted in [X] or [X] raising the Billing Error with giffgaff, we have found that there were significant failings in terms of giffgaff's escalation procedures for dealing with complaints and the training provided to [X] agents which contribute to the seriousness in this case.
- 4.32 Where a case has been escalated to a [X] agent, we have set out at paragraphs 3.18 to 3.20 above our understanding of the options available to it based on giffgaff's responses to our statutory information requests. Apart from the Major Incident Process, none of these options are written down in any formal policy or procedure. giffgaff has also corrected earlier responses to statutory information requests on a number of occasions, which indicates it may not have been fully aware of how its escalation procedures operate in practice.⁷⁹
- 4.33 In terms of the Major Incident Process (which is to be read in conjunction with the Priority Level definitions in the [X] Contract), this is a short two-page document that in our view,

⁷⁵ Second Response, Question 12(ii).

⁷⁶ Second Response, Question 11.

⁷⁷ giffgaff informed us that it had identified 158 complaints in its 1 March 2019 Submission. However, giffgaff later provided a further 49 complaints in the Third Response, bringing the total to 207.

⁷⁸ This is because, in some circumstances, a complaint may appear to relate to the Billing Error but the [X] agent may have requested further information from the complainant to verify their identity for security purposes and the complainant did not then respond meaning it is not possible to conclusively determine whether the complaint relates to the Billing Error.

⁷⁹ See, for example, Third Response, Questions 2(i) and 8.

is unclear and difficult to understand. It first relies on a [X] agent or [X] correctly identifying an issue as P1 or P2 incident.

- 4.34 In relation to [X], giffgaff has confirmed that “[w]hilst we know from our analysis that the Billing Error does technically fall under the description of a P1 incident ([X]), in reality, it would never have been described as such by [X]. This was in view of the [X] belief that the billing system was working exactly as it should have been i.e. there was no service failing.”⁸⁰
- 4.35 In relation to [X], giffgaff has explained that “[X]”⁸¹ and “[X]”⁸². giffgaff has also explained that “[t]he Billing Error was not classified as a priority level incident because here had been so few cases raised in relation to it. It therefore fell outside of the Operating Services procedure. This does not mean that all billing errors would fall outside of this procedure, but there would normally always need to be a pattern of similar cases for it to come to the attention of [X] and those at giffgaff liaising with [X].”⁸³
- 4.36 On the basis giffgaff has identified 207 complaints that may relate to the Billing Error, it is unclear to us why [X] did not escalate the Billing Error to giffgaff. giffgaff has said that these complaints represent less than 0.23% of total complaints reviewed by giffgaff and in its view represent a “sporadic number of definitive complaints”.⁸⁴ In our view, this is still a significant number of complaints. We also note that all the complaints giffgaff has identified are dated from January 2014 and the majority are dated after June 2016 (after the introduction of the [X] signalling protocol which exacerbated the impact of the Data Billing Error).
- 4.37 giffgaff has also confirmed that prior to June 2018, [X] were given no specific training on (i) how to identify when to escalate an issue to giffgaff; (ii) identify P1, P2, P3 and P4 incidents; and (iii) know when to invoke the Major Incident Process. giffgaff has explained that “the Major Incident Process is briefed out verbally to the [X] escalations agents through their team manager” and that the [X] escalations team are provided with an “Escalations Incident Matrix” to help them decide which team it is best to escalate issues to (including who within giffgaff).⁸⁵
- 4.38 Third, none of the governance systems identified in paragraphs 3.26 to 3.27 above, identified the Billing Error throughout the Relevant Period on any of the weekly, fortnightly and/or monthly calls and meetings between giffgaff, [X] and [X] to discuss billing issues.
- 4.39 Fourth, giffgaff failed to take appropriate steps to understand how its billing and charging system operated. giffgaff’s terms and conditions applicable during the Relevant Period stated that goodybags kicked-in “from the moment you successfully make your purchase”. However, in practice this is not how goodybags worked. We would expect a prudent CP to

⁸⁰ Third Response, Question 9(ii).

⁸¹ Second Response, Question 7(ii).

⁸² Second Response, Question 6.

⁸³ Second Response, Question 7(iii).

⁸⁴ Third Notice, Question 9(i).

⁸⁵ Third Response, Question 10.

ensure that its terms and conditions reflect the way its systems work. However, giffgaff has confirmed that no team in giffgaff was “aware that giffgaff’s billing system operated in a way that meant that a goodybag would not kick in until a [customer] started a new data session of voice call”.⁸⁶

4.40 As stated above, giffgaff utilises O2’s core network and [X] and [X] provide products and services relating to its billing and charging platform. We also note that giffgaff has outsourced its customer service function to [X] and its services are advertised on its website as “the mobile network run by you”. We have found that giffgaff’s lack of understanding of its own systems (in terms of when goodybags kick-in) and limited involvement in complaints, coupled with its lack of clear and effective processes and procedures with third parties, indicates a degree of carelessness with regard to its regulatory responsibilities.

4.41 Our finding is supported by the fact that giffgaff’s senior management only became aware of the Billing Error when a customer sent an email directly to giffgaff’s CEO and was only acted upon following the second strongly worded email.

4.42 Accordingly, we have found that giffgaff failed to take appropriate steps to prevent the Billing Error, its senior management should have been aware of the Billing Error much earlier and giffgaff missed opportunities to identify, escalate and remedy the Billing Error, in particular:

- a) giffgaff’s monitoring and risk management processes failed to identify the Billing Error as a result of inadequate testing of giffgaff’s billing and charging system including inadequate and/or ineffective testing of the impact of implementing the new [X] signalling protocol on its billing and charging system;
- b) giffgaff’s escalation procedures for dealing with billing issues and complaints were unclear and inadequate and giffgaff provided no training to [X] to help agents understand the type of issues that need to be escalated to giffgaff;
- c) giffgaff’s governance systems were inadequate to the extent they failed to identify the Billing Error; and
- d) giffgaff failed to take appropriate steps to understand how its billing and charging system operated.

4.43 The failings we have found significantly contribute to the seriousness of this case.

Whether giffgaff took timely and effective steps to end and remedy the contravention

4.44 giffgaff proactively took steps to end and remedy the contravention we have found, including implementing a comprehensive refund plan.

4.45 As set out in paragraphs 3.49 to 3.54 above:

⁸⁶ Fourth Response, Question 1(ii).

- a) giffgaff remedied the Data Billing Error on 15 June 2018 by implementing a change to its billing and charging system so that goodybags kick-in following a successful purchase without customers having to first end their current data session.
 - b) giffgaff remedied the Voice Billing Error on 14 February 2019 by amending its terms and conditions to clarify that when a customer purchases a goodybag containing free voice calls while already on a voice call, the goodybag will not kick-in until the customer ends the voice call they are currently on and makes a new call.
- 4.46 Ofcom notes that for 30 hours between 23 and 24 January 2019, the systems fix to the Data Billing Error implemented on 15 June 2018, fell away due to action taken by [§<], giffgaff's managed service provider. giffgaff discovered this on 31 January 2019 during a weekly governance meeting with [§<] and informed Ofcom soon after at the February Meeting. giffgaff has explained that this affected approximately 7,000 customers and had a financial impact of approximately £6,500. Of the customers affected, 80% were due less than £1 refund. giffgaff has explained that it has been able to refund all but five customers.⁸⁷
- 4.47 When giffgaff self-reported the Data Billing Error to Ofcom on 28 June 2019, it had already devised a refund plan which it presented to Ofcom. Following from this, giffgaff has proactively refunded approximately 1.2 million customers approximately £2.1 million in relation to the Billing Error. We have found that giffgaff's refund plan is comprehensive for the following reasons:
- a) As explained in paragraph 3.67 above, giffgaff's estimates (in particular its estimates of the financial impact using CDR data) were calculated on a "worst case" scenario basis and it is likely that giffgaff has compensated some customers more than what they were overcharged as a result of the Billing Error.
 - b) Depending on how much each customer was overcharged, customers were given a choice of remedy consisting of one or more of the following: (i) airtime credit applied to their account; (ii) a cash refund through PayPal; or (iii) a cheque.⁸⁸
 - c) Although giffgaff did not provide customers with interest on any refunds, for customers overcharged between £25.00 and £49.99, they were given a refund plus a £5.00 goodwill payment and for customers overcharged more than £50.00, they were given a refund plus a £10.00 goodwill payment.⁸⁹
- 4.48 giffgaff communicated the Billing Error to its customers on the same day as it self-reported it to Ofcom through *"its community help page ... a FAQ guide setting out answers to common questions and a helpful online app to enable individuals (both active and churned) to check whether they were affected by the billing issue and eligible for a refund."*⁹⁰

⁸⁷ 15 February Submission. giffgaff has confirmed that it is using a tracing agency to locate the remaining five customers.

⁸⁸ August Letter, Schedule 1; 15 February Submission, Annex A2.

⁸⁹ August Letter, Schedule 1; 15 February Submission, Annex A2.

⁹⁰ August Letter, page 9.

- 4.49 For customers that had already left giffgaff before the Billing Error had been discovered, giffgaff tried to contact them by email. Where the email bounced back, or they did not reply to three separate emails, giffgaff used a tracing agency to try and locate them.
- 4.50 We welcome the proactive steps giffgaff took to remedy the contravention we have found and implement a comprehensive plan to refund customers that were overcharged. We have taken this into account in our penalty assessment.

Co-operation with Ofcom's Investigation

- 4.51 giffgaff self-reported the Billing Error to Ofcom and has cooperated closely with the Investigation. We have taken these points into account when determining the penalty in this case.
- 4.52 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. Notwithstanding the failings we have found in this case, we strongly encourage CPs to take note of giffgaff's conduct in this respect.
- 4.53 giffgaff has generally provided Ofcom with information in a timely manner in response to information requests issued under section 135 of the Act.
- 4.54 However, some information provided by giffgaff in response to statutory information requests issued during the course of the Investigation has been unclear or incorrect based on subsequent information provided by giffgaff (in particular in relation to giffgaff's processes for escalating complaints).⁹¹ This has used up additional time and resource and also resulted in Ofcom issuing further statutory information requests to clarify information previously provided.
- 4.55 We have also today issued a Confirmation Decision under section 139A of the Act to giffgaff setting out our decision that giffgaff provided inaccurate information in response to the First and Second Notices in relation to the cause and duration of the Billing Error. We have not therefore taken these responses that are the subject of the section 139A Confirmation Decision into account when determining the penalty for giffgaff's contravention of GC 11.1.

History of contraventions

- 4.56 giffgaff has no history of contraventions of the General Conditions.

⁹¹ For example, in relation to the different options available to a [§<] escalations agent to try and resolve a case and the circumstances in which [§<] agents are required to escalate a case. Also, see Second Response, Question 14(v); Third Response, Questions 2(i) and 8.

Precedents

- 4.57 As set out in our Penalty Guidelines, Ofcom will have regard to any relevant precedents set by previous cases where they are relevant.⁹² As explained above, Ofcom has issued four previous 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:
- a) Ofcom imposed a penalty on Vodafone in 2016⁹³ 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. The penalty imposed on Vodafone was £3.7m.
 - b) In January 2017,⁹⁴ Ofcom imposed a penalty 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 not did self-report this error although it did take proactive steps to end and remedy the contraventions prior to Ofcom opening its investigation. The penalty imposed on EE was £2.7m.
 - c) Ofcom imposed a penalty 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. The penalty imposed was £880,000.⁹⁵
- 4.58 The facts and context of this case are different. In this case, we have had to balance a number of factors: for example, on the one hand, in our view giffgaff's contravention was serious, it failed to take appropriate steps to prevent the Billing Error, its senior management should have been aware of the Billing Error much earlier and giffgaff missed opportunities to identify, escalate and remedy the Billing Error. On the other hand, giffgaff self-reported the Billing Error shortly after it became aware, has closely co-operated with the Investigation, and took proactive steps to remedy the contravention, including implementing a comprehensive refund plan.
- 4.59 We also note that the previous penalties we have issued for contraventions of GC 11.1 were issued before Ofcom updated its Penalty Guidelines in September 2017 to provide it with the flexibility to impose higher penalties in appropriate cases in order for a deterrent effect to be achieved.

⁹² Penalty Guidelines, paragraphs 1.7 and 1.14.

⁹³ https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01160.

⁹⁴ https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01174.

⁹⁵ 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.

Conclusion on the penalty amount

- 4.60 Considering all of the above factors in the round, the penalty we have imposed on giffgaff is £1.4 million in respect of its contravention of GC 11.1. This includes a 30% discount applied to the penalty of £2 million we would otherwise have set, as a result of giffgaff admitting liability and entering into a settlement with Ofcom.
- 4.61 Ofcom's regulatory judgment is that this is an appropriate and proportionate penalty, taking into account the overall seriousness of the contravention we have found, giffgaff's size and turnover and the need to secure an appropriate deterrent effect to giffgaff and other CPs.
- 4.62 The penalty would have been significantly higher but for giffgaff self-reporting the Billing Error shortly after it became aware, closely co-operating with the Investigation, and taking proactive steps to remedy the contravention, including implementing a comprehensive refund plan.
- 4.63 Nonetheless, we have determined that the level of penalty is at such a level which can change any potential non-compliant behaviour by giffgaff and other CPs. GC 11.1 is an important consumer protection rule and it is important that CPs ensure they are compliant with their regulatory obligations relating to billing.

Actions required of giffgaff

- 4.64 The steps which we consider should be taken by giffgaff, to the extent they have not already been taken, to comply with General Conditions relating to billing are set out below.
- a) giffgaff must review and update its monitoring and risk management processes and governance systems, as appropriate, to mitigate the risk that a similar issue arises in the future and is not identified. This includes implementing a process to ensure that the impact of system changes are properly assessed and any risks are mitigated before any changes, however instigated, are implemented.
 - b) giffgaff must review and improve its escalation procedures to ensure that similar issues are identified and escalated, as appropriate, in the future. This includes implementing clear written processes for when, what and to who issues should be escalated as well as training of relevant staff, including third parties working on its behalf (such as [X] agents), on giffgaff's escalation procedures.

A1. Confirmation Decision to giffgaff Limited of contravention of 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. 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,⁹⁶ or may specify a period within which the person must comply with those requirements; and
 - (d) may require the person to pay:
 - (i) the penalty specified in the notification issued under section 96A of the Act, or
 - (ii) such lesser penalty as Ofcom consider appropriate in light of the person’s representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention, and may specify the period within which the penalty is to be paid.

General Conditions

- A1.3 Section 45(1) of the Act gives Ofcom the power to set conditions, including General Conditions, binding on the person to whom they are applied.
- A1.4 The Schedule to a Notification issued by the Director General of Telecommunications on 22 July 2003 under section 48(1) of the Act, which took effect from 25 July 2003, set out the

⁹⁶ 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 Conditions of Entitlement (the “General Conditions” or “GCs”) which applied to all Communications Providers (“CPs”), as defined in each GC until 1 October 2018. The GCs were amended from time to time between 2003 and 2018 and, on 1 October 2018, a new set of GCs came into effect.

General Condition 11.1

- A1.5 GC 11 was one of the General Conditions introduced in July 2003 and for the purpose of this Notification, its substance remains unchanged since that time.
- A1.6 GC 11 sets out general conditions relating to metering and billing. In particular, GC 11.1 requires CPs to render accurate bills to their customers. GC 11.1 states:
- “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.”*
- A1.7 GC 11.1 applied until 1 October 2018. As from this date, GC 11.1 is contained in GC C3.2 and references to GC 11.1 throughout this Confirmation Decision should be read accordingly.

Subject of this Confirmation Decision

- A1.8 This Confirmation Decision is addressed to giffgaff Limited (“giffgaff”), whose registered company number is 04196996. giffgaff’s registered office is 260 Bath Road, Slough, Berkshire, SL1 4DX.

Notification issued by Ofcom under section 96A of the Act

- A1.9 On 17 July 2019, Ofcom issued a notification under 96A of the Act (the “Section 96A Notification”) to giffgaff as Ofcom had reasonable grounds for believing that between 26 May 2011 and 14 February 2019 (the “Relevant Period”) giffgaff contravened GC 11.1.
- A1.10 The Section 96A Notification also specified the penalty that Ofcom was minded to impose on giffgaff in respect of the contravention of GC 11.1.
- A1.11 The Section 96A Notification allowed giffgaff the opportunity to make representations to Ofcom about the matters set out in the Section 96A Notification.

Confirmation Decision issued under section 96C of the Act

- A1.12 On 22 July 2019, in a letter to Ofcom, giffgaff confirmed that it waived its rights to make representations about the matters notified and admitted liability for the contravention. The period for giffgaff to make representations has therefore expired.
- A1.13 Accordingly, Ofcom is satisfied that giffgaff contravened GC 11.1 during the Relevant Period as follows: (i) from 26 May 2011 to 15 June 2018 in relation to its data services; and

(ii) from 26 May 2011 to 14 February 2019 in relation to its voice services. This is because it overcharged customers who purchased a goodybag (giffgaff's pre-paid bundles for voice and data) while using pre-paid credit to consume data or while on a voice call. The purchase of a goodybag should have made any subsequent data use or voice call free.

A1.14 Ofcom has therefore decided to give giffgaff a Confirmation Decision confirming its contravention of GC 11.1 and our decision to impose a financial penalty on giffgaff of £1.4 million in respect of this contravention.

A1.15 The extent of this 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 giffgaff

A1.16 In order to comply with General Conditions relating to billing, Ofcom considers that giffgaff should, to the extent it has not already done so, take such steps as are necessary for ensuring that:

- a) Its monitoring and risk management processes and governance systems are updated, as appropriate, to mitigate the risk that a similar issue arises in the future and is not identified. This includes implementing a process to ensure that the impact of system changes are properly assessed and any risks are mitigated before any changes, however instigated, are implemented.
- b) Its escalation procedures are reviewed and improved to ensure that similar issues are identified and escalated, as appropriate, in the future. This includes implementing clear written processes for when, what and to who issues should be escalated and includes training of relevant staff, including third parties such as [X] agents working on its behalf, on giffgaff's escalation procedures.

Penalty

A1.17 Ofcom has determined that giffgaff must pay a penalty of **£1.4 million** in respect of its contravention of GC 11.1 during the Relevant Period. This includes a 30% discount to the penalty Ofcom would otherwise have imposed, as a result of giffgaff admitting liability and entering into a settlement with Ofcom.

A1.18 giffgaff has until 5.00pm on Wednesday 28 August 2019 to pay Ofcom the penalty. If not paid within the period specified it can be recovered by Ofcom accordingly.⁹⁷

⁹⁷ Section 96C(7) Communications Act 2003.

Interpretation

A1.19 Words or expressions used in this Confirmation Decision have the same meaning as in the GCs or the Act except as otherwise stated in this Confirmation Decision.

Gaicho Rasmussen,

Director of Enforcement

30 July 2019

A2. Chronology of Ofcom's investigation

- A2.1 On 28 June 2018, giffgaff self-reported the Data Billing Error to Ofcom.
- A2.2 Following from this, we wrote to giffgaff on 18 July 2018 seeking further information about the Data Billing Error to help us determine how serious the issues were and what action, if any, was appropriate. giffgaff responded on 9 August 2018 (the "August Letter"). giffgaff provided more detail about its investigation of the Data Billing Error, the steps it takes to ensure compliance with GC 11.1, its monitoring and risk management processes and governance systems, and its refund plan for remedying the Data Billing Error.
- A2.3 Having considered all the information provided by giffgaff in the August Letter, and in light of our Enforcement Guidelines,⁹⁸ on 17 September 2018 we decided to open an investigation into giffgaff's compliance with GC 11.1.⁹⁹

Information gathering

Information requests and key engagement with giffgaff

- A2.4 We have issued four formal notices to giffgaff under section 135 of the Act, requiring it to provide information to us.

First Notice

- A2.5 The first notice requesting information was issued to giffgaff on 1 October 2018 (the "First Notice"). The First Notice required giffgaff to confirm the accuracy and completeness of information provided in the August Letter; requested further information and evidence in relation to the Data Billing Error, in particular on the cause, its discovery and escalation, as well as its refund plan; and requested further information on some of the points referred to and copies of documents identified in the August Letter.
- A2.6 We received giffgaff's response to the First Notice on 24 October 2018 (the "First Response").

Second Notice

- A2.7 The second notice was issued to giffgaff on 26 November 2018 (the "Second Notice"). The Second Notice sought additional information for the purposes of the Investigation and required giffgaff to explain and clarify comments it made and documents it provided in the August Letter and the First Response (including its supporting documents). The key issues in the Second Notice related to the duration of the Data Billing Error; giffgaff's escalation procedures; previous consumer complaints relating to the Data Billing Error; and its refund plan.

⁹⁸ Ofcom, *Enforcement Guidelines*, 28 June 2017, available [here](#).

⁹⁹ https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01230.

A2.8 giffgaff responded to the Second Notice on 17 and 20 December 2018 (the “Second Response”).

Key Engagement with Ofcom following the Second Response

A2.9 Following its submission of the Second Response, giffgaff requested a meeting with Ofcom, which took place on 6 February 2019. Notwithstanding what giffgaff had said in the First Response and the Second Response, giffgaff explained that further investigations had revealed that:

- a) The cause of the Billing Error was not the implementation of the new [X] signalling protocol in June 2016;
- b) The Billing Error arose prior to June 2016; and
- c) Voice services were affected in addition to data services.

A2.10 At the February Meeting, giffgaff also explained that for 30 hours between 23 and 24 January 2019, the systems fix for the Data Billing Error fell away due to action taken by [X].

A2.11 Ofcom requested various additional information at the February Meeting in relation to the Voice Billing Error; the fix for the Data Billing Error falling away; complaints giffgaff may have received relating to the Billing Error for the full duration of the Relevant Period; and giffgaff’s escalation procedures.

A2.12 Following the February Meeting, giffgaff provided a written submission to Ofcom on 8 February 2019 (the “8 February Submission”). This provided further detail relating to the Voice Billing Error and also explained that giffgaff-to-giffgaff calls were also affected. In response to Ofcom’s request at the February Meeting, the 8 February Submission also included a copy of an additional complaint giffgaff had failed to identify in its response to the Second Notice and provided a flowchart to indicate how its escalation procedures are intended to operate.

A2.13 giffgaff provided a further written update to Ofcom on 15 February 2019 (the “15 February Submission”) which included an update on refunds relating to the Voice Billing Error and the fix to the Data Billing Error falling away between 23 and 24 January 2019.

A2.14 On 27 February 2019, giffgaff sent a further email update to Ofcom (the “27 February Email”), in which it updated us on its review of customer complaints and explained the impact of the Voice Billing Error on giffgaff-to-giffgaff calls.

A2.15 On 1 March 2019, giffgaff provided Ofcom with the results of its review of customer complaints relating to the Billing Error (the “1 March Submission”). The 1 March Submission explained how giffgaff had searched its complaints’ history to identify potentially relevant complaints and giffgaff provided 158 complaints that may relate to the Billing Error.

Third Notice

- A2.16 The third notice was issued to giffgaff on 15 March 2019 (the “Third Notice”). The main purpose of this notice was to clarify some issues in relation to the Billing Error and, as a result of what giffgaff had told us at the February Meeting, confirm the accuracy and completeness of certain information provided by giffgaff in its First Response, Second Response, as well as in the 8 February Submission, the 15 February Submission, the 27 February Email and the 1 March Submission. The Third Notice also requested giffgaff to explain the modelling exercise it undertook to estimate the customer and financial impact of the Billing Error where CDR data was not available and required giffgaff to update its estimates of the customer and financial impact.
- A2.17 giffgaff responded to the Third Notice on 5 and 10 April 2019 (the “Third Response”).
- A2.18 With its response on 5 April 2019, giffgaff provided a further 49 potentially relevant complaints. With its response on 10 April 2019, giffgaff explained the modelling exercise it undertook to estimate the customer and financial impact of the Billing Error as requested by Ofcom.

Fourth Notice

- A2.19 The fourth notice was issued to giffgaff on 25 April 2019 (the “Fourth Notice”). The main purpose was to clarify and obtain additional information in relation to some of giffgaff’s responses to the Third Notice, as well as obtain giffgaff’s relevant turnover.
- A2.20 giffgaff responded to the Fourth Notice on 17 May 2019 (the “Fourth Response”).

Ofcom’s provisional notification and the settlement procedure

- A2.21 On 17 July 2019, Ofcom issued a notification under 96A of the Act (the “Section 96A Notification”) to giffgaff setting out our view that we had reasonable grounds for believing that giffgaff contravened GC 11.1 between 26 May 2011 to 14 February 2019 (the “Relevant Period”) as follows: (i) from 26 May 2011 to 15 June 2018 in relation to its data services; and (ii) from 26 May 2011 to 14 February 2019 in relation to its voice services. This is because it overcharged customers who purchased a goodybag (giffgaff’s pre-paid bundles for voice or data) while using pre-paid credit to consume data or while on a voice call. The purchase of a goodybag should have made any subsequent data use or voice call free.
- A2.22 On 22 July 2019, giffgaff wrote to Ofcom as part of the voluntary settlement procedure it had entered into with Ofcom:
- a) admitting it had contravened 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. Glossary

The ‘Act’	Communications Act 2003
The ‘August Letter’	giffgaff’s letter to Ofcom dated 9 August 2018
‘CDR’	Call Record Data
‘CP’	Communications Provider
‘February Meeting’	Meeting between Ofcom and giffgaff on 6 February 2019
‘[X]’	[X]
‘First Notice’	Ofcom’s information request issued under section 135 of the Act on 1 October 2018
‘First Response’	giffgaff’s response dated 20 October 2018 to Ofcom’s First Notice
‘Fourth Notice’	Ofcom’s information request issued under section 135 of the Act on 15 April 2019
‘Fourth Response’	giffgaff’s response dated 17 May 2019 to Ofcom’s Fourth Notice,
‘General Conditions’ or ‘GCs’	Ofcom’s General Conditions of Entitlement
‘giffgaff’	giffgaff Limited
‘goodybag’	As defined in giffgaff’s terms and conditions as <i>“a Bundle, including minutes, texts and data”</i>
The ‘Investigation’	The investigation Ofcom opened into giffgaff’s compliance with GC 11.1 on 17 September 2018
‘Members’	giffgaff refers to its customers as members
‘[X]’	[X]
‘Relevant Period’	From 26 May 2011 to 14 February 2019, consisting of: <ul style="list-style-type: none">• 26 May 2011 to 15 June 2018 for the Data Billing Error; and• 26 May 2011 to 14 February 2019 for the Voice Billing Error.
‘Second Notice’	Ofcom’s information request issued under section 135 of the Act on 26 November 2018
‘Second Response’	giffgaff’s response dated 17 and 20 December 2018 to Ofcom’s Second Notice
‘Service Ops’	giffgaff’s Service Operations team
‘[X]’	[X]
‘Tech Ops’	giffgaff’s Technical Operation team

'Telefonica'	Telefonica UK Limited
'Third Notice'	Ofcom's information request issued under section 135 of the Act on 15 March 2019
'Third Response'	giffgaff's response dated 10 April 2019 to Ofcom's Third Notice
'8 February Submission'	giffgaff's written submission to Ofcom dated 8 February 2019
'15 February Submission'	giffgaff's written submission to Ofcom dated 15 February 2019
'27 February Email'	giffgaff's email to Ofcom dated 27 February 2019
'1 March Submission'	giffgaff's written submission to Ofcom dated 1 March 2019

The Overview section in the document is a simplified high-level summary only. The decisions we have taken, and our reasoning, are set out in the full document.