Neutral citation [2020] CAT 5

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1302/3/3/19

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

27 January 2020

Before:

THE HON MRS JUSTICE FALK
(Chairman)
MR EAMONN DORAN
MR SIMON HOLMES

Sitting as a Tribunal in England and Wales

BETWEEN:

VIRGIN MEDIA LIMITED

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

Heard at Victoria House on 19-20 November 2019

JUDGMENT (NON-CONFIDENTIAL VERSION)

APPEARANCES

Mr Robert Palmer QC and Mr Stefan Kuppen (instructed by Ashurst LLP) appeared on behalf of the Appellant.

Mr Javan Herberg QC and Mr Tom Coates (instructed by Ofcom Legal) appeared on behalf of the Respondent.

Note: Excisions in this Judgment (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

CONTENTS

A. INTRODUCTION

1. This is an appeal under section 192 of the Communications Act 2003 ("CA 2003") by Virgin Media Limited ("VM") against a decision of the Office of Communications ("Ofcom") dated 16 November 2018 entitled "Confirmation Decision under section 96C of the Communications Act 2003" (the "Decision"). In the Decision, Ofcom found that VM had contravened two of the regulatory obligations, known as the General Conditions of Entitlement ("GCs"), which are generally applicable to electronic communications providers ("CPs") retailing services such as broadband, phone services and access to TV packages. Ofcom imposed a penalty of £7m on VM in respect of the contraventions they found.

2. The contraventions, of General Condition 9.3 ("GC 9.3") and General Condition 9.2(j) ("GC 9.2(j)") as they were in force at the material time, relate to VM's early termination charges ("ETCs"). These are charges that consumers pay if they decide to terminate their contract before the expiry of the minimum term of the contract.

3. By this appeal, VM challenges Ofcom's findings as regards VM's liability for contravention of GC 9.3 and the penalty imposed. This is the unanimous decision of the Tribunal in the appeal.

B. LEGAL FRAMEWORK

4. The provision of electronic communications networks and services including fixed and mobile telecommunications, e-mail and access to the Internet is regulated by the EU Common Regulatory Framework comprised of the Framework Directive (2002/21/EC as amended) and four "specific Directives". Two of those specific Directives, the Authorisation Directive (2002/20/EC as amended) and the Universal Service Directive (2002/22/EC as amended), are of relevance to this appeal.

5. The parts of the EU Common Regulatory Framework that are relevant to this appeal are implemented in the United Kingdom through various provisions of

the CA 2003. The most relevant provisions of the CA 2003 for the purposes of this decision are set out in the Annex to this decision. The CA 2003 imposes on Ofcom both general duties and specific duties (such as duties which are specific to the regulation of the provision of electronic communications networks and services). It also confers powers on Ofcom to carry out their functions.

6. In respect of Ofcom's general duties, s 3 CA 2003 (set out in the Annex) provides that Ofcom's principal duties are to further the interests of citizens in communications matters and to further the interests of consumers, where appropriate by promoting competition. In performing those duties Ofcom must have regard to principles under which regulatory practices should be "*transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed*", together with other principles appearing to Ofcom to represent "*best regulatory practice*".

(1) The regulatory framework for electronic communications networks and services

(a) The EU Directives

7. Articles 2 and 3 of the Authorisation Directive introduced a "general authorisation" framework under which CPs have the freedom to provide electronic communications networks and services, subject to the conditions set out in the Authorisation Directive. The conditions that may be attached to the general authorisation are described in Article 6 of the Authorisation Directive, and a list of conditions that may be attached to a general authorisation is set out in Part A of the Annex to the Authorisation Directive.

8. Articles 6(1) and (3) provide as follows:

> "*Article 6*
>
> **Conditions attached to the general authorisation and to the rights of use for radio frequencies and for numbers, and specific obligations**
>
> 1. The general authorisation for the provision of electronic communications networks or services … may be subject only to the conditions listed in the Annex. Such conditions shall be non-discriminatory, proportionate and transparent …

…

3. The general authorisation shall only contain conditions which are specific for that sector and are set out in Part A of the Annex and shall not duplicate conditions which are applicable to undertakings by virtue of other national legislation.

…"

9. The permitted condition listed in Part A of the Annex to the Authorisation Directive, which is of relevance to this appeal, is:

> "8. Consumer protection rules specific to the electronic communications sector, including conditions in conformity with Directive 2002/22/EC (Universal Service Directive), …"

10. Recitals (15) and (18) to the Authorisation Directive explain that:

> "(15) The conditions, which may be attached to the general authorisation …, should be limited to what is strictly necessary to ensure compliance with requirements and obligations under Community law and national law in accordance with Community law.
>
> …
>
> (18) The general authorisation should only contain conditions which are specific to the electronic communications sector. It should not be made subject to conditions which are already applicable by virtue of other existing national law which is not specific to the electronic communications sector. Nevertheless, the national regulatory authorities may inform network operators and service providers about other legislation concerning their business, for instance through references on their websites."

11. The Universal Service Directive, referred to in the Authorisation Directive, establishes the rights of end-users and the corresponding obligations of undertakings providing publicly available electronic communications networks and services. The original version of Article 30 of the Universal Service Directive, which provided for the ability of end-users to retain their numbers independently of CPs (that is, number portability), was replaced by Directive 2009/136/EC. The revised version of Article 30 is not limited to number portability:

> "*Article 30*
>
> **Facilitating change of provider**
>
> 1. Member States shall ensure that all subscribers with numbers from the national telephone numbering plan who so request can retain their number(s)

> independently of the undertaking providing the service in accordance with the provisions of Part C of Annex I.
>
> 2. National regulatory authorities shall ensure that pricing between operators and/or service providers related to the provision of number portability is cost-oriented, and that direct charges to subscribers, if any, do not act as a disincentive for subscribers against changing service provider.
>
> …
>
> 5. Member States shall ensure that contracts concluded between consumers and undertakings providing electronic communications services do not mandate an initial commitment period that exceeds 24 months. Member States shall also ensure that undertakings offer users the possibility to subscribe to a contract with a maximum duration of 12 months.
>
> 6. Without prejudice to any minimum contractual period, Member States shall ensure that conditions and procedures for contract termination do not act as a disincentive against changing service provider."

12. The recitals to Directive 2009/136/EC explain the rationale for the amendments made by the Directive. This includes recital (47), which explains in respect of the Universal Service Directive that:

> "In order to take full advantage of the competitive environment, consumers should be able to make informed choices and to change providers when it is in their interests. It is essential to ensure that they can do so without being hindered by legal, technical or practical obstacles, including contractual conditions, procedures, charges and so on. This does not preclude the imposition of reasonable minimum contractual periods in consumer contracts. …"

13. Article 21(1) of the Universal Service Directive provides that:

> "Member States shall ensure that national regulatory authorities are able to oblige undertakings providing public electronic communications networks and/or publicly available electronic communications services to publish transparent, comparable, adequate and up-to-date information on applicable prices and tariffs, on any charges due on termination of a contract and on standard terms and conditions in respect of access to, and use of, services provided by them to end-users and consumers in accordance with Annex II. Such information shall be published in a clear, comprehensive and easily accessible form. National regulatory authorities may specify additional requirements regarding the form in which such information is to be published."

(b) The CA 2003

14. In the UK, the relevant Articles of the Authorisation Directive concerning the regulation of the provision of electronic communications networks and services are implemented by provisions contained in Part 2 of the CA 2003. Within

Part 2 of the CA 2003, ss 45 to 49C concern the power of Ofcom to set and modify "general conditions" to the entitlement of CPs to provide electronic communications networks and services and the process for doing so, while ss 51 to 64 relate to the matters to which the general conditions may relate.

15. The GCs are the general conditions imposed by Ofcom on CPs pursuant to their powers under the CA 2003. The GCs have been amended from time to time. The current set of GCs came into force on 1 October 2018, whereas the version of the GCs that were in force at the time of the events which are the subject of the Decision is the consolidated version as at 28 May 2015. References in this decision to the GCs are to the May 2015 version.

16. The Decision under appeal relates to both GC 9.2(j) and GC 9.3. GC 9.2, which implements Article 21(1) of the Universal Service Directive, requires certain minimum requirements in contracts with consumers to be specified in a "*clear, comprehensive and easily accessible form*", including (under sub-paragraph (j)(iii)) any charges due on termination. However, VM does not appeal against Ofcom's finding that VM contravened GC 9.2(j). Therefore, the GC of primary relevance to this appeal is GC 9.3, which implements Article 30(6) of the Universal Service Directive by adopting a so-called "copy out" approach. GC 9.3 provides:

> "Without prejudice to any initial commitment period, Communications Providers shall ensure that conditions or procedures for contract termination do not act as disincentives for End-Users against changing their Communications Provider. …"

17. The term "initial commitment period" is defined in GC 9.4 as:

> "… being the period beginning on the day on which the Communications Provider and Consumer have agreed that the contract shall begin and ending on a day falling no more than 24 months thereafter".

(2) Enforcement of conditions of the general authorisation

(a) The Authorisation Directive

18. Article 10 of the Authorisation Directive provides for the powers that national regulatory authorities ("NRAs") have to ensure compliance with the conditions of the general authorisation:

> "*Article 10*
>
> **Compliance with the conditions of the general authorisation or of rights of use and with specific obligations**
>
> 1. National regulatory authorities shall monitor and supervise compliance with the conditions of the general authorisation …
>
> …
>
> 2. Where a national regulatory authority finds that an undertaking does not comply with one or more of the conditions of the general authorisation …, it shall notify the undertaking of those findings and give the undertaking the opportunity to state its views, within a reasonable time limit.
>
> 3. The relevant authority shall have the power to require the cessation of the breach referred to in paragraph 2 either immediately or within a reasonable time limit and shall take appropriate and proportionate measures aimed at ensuring compliance.
>
> In this regard, Member States shall empower the relevant authorities to impose:
>
> (a) dissuasive financial penalties where appropriate, which may include periodic penalties having retroactive effect;
>
> …
>
> The measures and the reasons on which they are based shall be communicated to the undertaking concerned without delay and shall stipulate a reasonable period for the undertaking to comply with the measure.
>
> …"

19. Recital (27) to the Authorisation Directive explains in respect of penalties that:

> "The penalties for non-compliance with conditions under the general authorisation should be commensurate with the infringement. …"

(b) The CA 2003

20. Section 135 CA 2003 (set out in the Annex) confers on Ofcom the power to require certain persons, including CPs, to provide information for the purpose of ascertaining whether a contravention of a condition has occurred or is occurring.

21. Failure to comply with an information requirement from Ofcom is a contravention, which, under ss 138, 139 and 139A CA 2003, may result in a penalty.

22. Articles 10(2) and (3) of the Authorisation Directive are implemented in the UK through ss 96A to 96C and 97 CA 2003 (also set out in the Annex). Section 96A provides that Ofcom may give a "notification" where they determine that there are reasonable grounds for believing that a person is contravening or has contravened a GC. Where Ofcom decide to give a notification, certain procedural elements set out in ss 96A, 96B and 97 apply. In particular, a notification may be given in respect of more than one contravention (s 96A(3)). It will also specify the period during which the person notified has an opportunity to make representations (s 96A(2)(c)) and any penalty which Ofcom are minded to impose (s 96A(2)(e)). Where the notification specifies a proposed penalty and relates to more than one contravention, Ofcom may specify a separate penalty in respect of each contravention (s 96B(2)).

23. Further, s 97(1) CA 2003 provides for a cap on the amount of penalty notified under s 96A, equal to 10 per cent. of the turnover of the relevant business for the relevant period (each as defined in s 97(5)). Subject to that cap, the penalty must be such amount as Ofcom determine to be appropriate and proportionate to the contravention.

24. With respect to Ofcom's determination of an appropriate and proportionate penalty, s 392 CA 2003 (set out in the Annex) places a duty on Ofcom to publish guidelines and to have regard to them.

25. Ofcom's penalty guidelines have been amended from time to time. The current penalty guidelines are dated 14 September 2017 and that is the version that was in force at the time of Ofcom's notification to VM. References in this decision to Ofcom's penalty guidelines are to the September 2017 version.

26. Following a notification under s 96A CA 2003, Ofcom may take enforcement action after the period allowed for the making of representations has expired by giving the person a "confirmation decision". Section 96C CA 2003 sets out the process and procedure to be followed. In particular, a confirmation decision must be given without delay (s 96C(4)(a)), must include reasons for the decision (s 96C(4)(b)) and may require the person to pay the penalty specified in the notification or such lesser penalty as Ofcom consider appropriate in the light of representations or the steps taken to comply or to remedy the consequences of the contravention (s 96C(4)(d)).

(3) Right of appeal

(a) The EU Directives

27. Article 10(7) of the Authorisation Directive provides for CPs to have a right of appeal against measures taken by an NRA under Article 10 in accordance with the procedure referred to in Article 4 of the Framework Directive.

28. Under Article 4(1) of the Framework Directive:

> "Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise to enable it to carry out its functions effectively. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. …"

(b) The CA 2003

29. In the UK, the right of appeal is set out in s 192 CA 2003 (set out in the Annex), which provides for a right of appeal to this Tribunal by a person affected by a decision under Part 2 of the Act.

30. With effect from 31 July 2017, s 87 of the Digital Economy Act 2017 amended the CA 2003 by inserting s 194A and replacing s 195 of the CA 2003. Section 194A(2) requires the Tribunal to decide the appeal "… *by applying the same principles as would be applied by a court on an application for judicial review*".

31. This contrasts with the pre-31 July 2017 version of s 195 CA 2003, which provided at s 195(2) that "*The Tribunal shall decide the appeal on the merits…*".

32. The implications of Article 4 of the Framework Directive and s 194A CA 2003 to the Tribunal's determination of this appeal are considered when we turn to VM's grounds of appeal.

(4) ETCs and consumer rights legislation

33. Section 62 of the Consumer Rights Act 2015 ("CRA 2015") provides that an unfair term of a consumer contract is not binding on the consumer. Pursuant to s 63, Part 1 of Schedule 2 to the CRA 2015 contains a non-exhaustive list of terms that might be regarded as unfair. These include terms requiring the payment of a "*disproportionately high sum*" in compensation for services not supplied where the consumer decides not to perform the contract, or for failure to fulfil obligations under a contract (paragraphs 5 and 6).

34. Section 62 CRA reflects Council Directive 93/13/EEC on unfair terms in consumer contracts. The Annex to the Directive similarly contains a non-exhaustive list of terms that might be regarded as unfair, which includes requiring a consumer who fails to fulfil his obligation to pay a "*disproportionately high sum*" in compensation (paragraph 1(e)).

35. Ofcom have issued guidance on unfair terms which makes specific reference to ETCs. This guidance cross-refers to more general guidance issued by the Competition and Markets Authority ("CMA"). Ofcom's guidance indicates that CPs may charge ETCs based on the part of the fixed minimum period outstanding at the date of termination, but that they should make a reasonable pre-estimate of the costs they save, the losses they can mitigate and the benefit

of accelerated receipt, and that Ofcom are likely to regard terms purporting to charge higher ETCs as unfair.

36. It was not in dispute that the costs saved by VM on an early termination comprise the VAT that would have been charged on the continued subscription, since VAT is not charged on an ETC (Decision at 3.20), together with other cost savings listed in paragraph 3.33 of the Decision, for example TV content costs, network capacity savings, and the effect of early payment.

C. FACTUAL BACKGROUND

37. The factual background is set out more fully in the Decision and in the witness statement of Mr Tidswell, VM's solicitor, dated 15 January 2019 and filed for the purpose of these proceedings. We summarise it to assist in understanding the issues on appeal.

38. Between 1 September 2016 and 22 August 2017 (the "Relevant Period" for the purpose of the Decision), VM provided its broadband, phone and pay TV services to consumers on either fixed-term contracts with an initial commitment period, or on rolling 30-day contracts. VM's applicable terms and conditions for fixed-term customers during the Relevant Period provided that the customer could end the contract at any time by giving 30 days' notice. If the customer wished to end VM's supply of services before the end of the initial commitment period, they would have to pay an ETC as set out at paragraph M13 of the contract. Paragraph M13 read:

> "You can find details of the early disconnection fee on the Virgin Media Website (http://www.virginmedia.com/shop/the-legal-suff/terms-and-conditions-for-fibre-optic-services/early-disconnection-fees/html). The early disconnection fee will not be more than the charges you would have paid for the services for the remainder of the minimum period less any costs we save, including the costs of no longer providing you with the services."

39. On the specific VM webpage referred to in paragraph M13 of the terms and conditions was a table which set out what ETC rates the customer would be charged for each month remaining in their initial commitment period (the "ETC rate card"). During the Relevant Period VM published three different ETC rate cards, as follows:

(1) An ETC rate card published between 1 September 2016 and 20 March 2017. This referred primarily to "T-shirt sizes" to distinguish between service tiers. The T-shirt sizes related to marketing descriptions used for VM service bundles prior to the Relevant Period.

(2) An ETC rate card published between 20 March 2017 and 21 August 2017. This referred to product names such as "Vivid" and "Superfast 50/70", to distinguish between service tiers. These product names corresponded with the branding used for marketing VM service bundles during the Relevant Period, and the change reflected a customer complaint that it was not clear from the T-shirt sizes which ETC rate applied to which bundle. This rate card also reflected certain changes to ETC rates.

(3) An ETC rate card published from 22 August 2017 onwards. This also used product names to distinguish between service tiers. The product names corresponded with the branding used for marketing VM service bundles during the Relevant Period. This rate card also reduced certain ETC rates.

On the same webpage as the ETC rate card, VM set out an example explaining to customers how to use the table to calculate the total ETC payable and text stating that "*The maximum early disconnection fee is capped at £240*".

40. Up to 22 September 2016, the initial commitment period for VM's fixed-term contracts was typically 18 months. From 22 September 2016, VM changed its broadband pricing and reduced its initial commitment period to 12 months. However, consequential adjustments were not made to VM's method of calculating the ETCs and the ETC rate cards published on VM's website.

41. This resulted in VM advertising and charging certain customers, who ended their fixed-term contracts within the initial commitment period, higher ETCs than the remainder of their minimum period less VM's costs, contrary to paragraph M13 of VM's terms and conditions. Ofcom found that the error affected more than half of VM's "headline packages", and resulted in more than

half of customers who switched during the period being charged an excessive ETC.

42. On 22 August 2017, VM's ETC calculation methodology and ETC rate card were corrected. By this time, Ofcom's investigation had commenced and VM had overcharged more than 80,000 customers a total of £2,790,613.

43. According to Mr Tidswell's witness statement, as at 15 January 2019, VM had made payments to 99.9% of those customers who were overcharged. (The Decision refers at 5.80 to a figure of 98.2%, being the proportion of customers refunded as at 11 July 2018.) Further, VM made donations of over £66,000 to charity in respect of those customers that VM was unable to trace or for whom the amount of refund would have amounted to less than £1. As a result, VM made no financial gain from the overcharging.

D. OFCOM'S INVESTIGATION AND DECISION

44. Prior to Ofcom's investigation, Ofcom wrote to VM about its ETCs on 23 May 2016 and 28 April 2017 and received responses from VM on 14 June 2016 and 26 May 2017 respectively. This correspondence focused on ETCs charged in circumstances where a VM customer moved to a property outside VM's service area. On 27 June 2017, Ofcom informed VM that they had opened an investigation into VM's compliance with GC 9.3 and s 62 CRA 2015 in respect of VM's ETCs.

45. During Ofcom's investigation VM was served seven notices under s 135 CA 2003 between 21 August 2017 and 14 September 2018 requiring it to provide documents and information, to which VM provided responses. Ofcom also met with VM and exchanged correspondence in relation to Ofcom's investigation.

46. On 21 May 2018 Ofcom served on VM a notification under s 96A CA 2003 (the "Notification"), which set out Ofcom's provisional findings and decision that they had reasonable grounds to believe that VM had contravened GC 9.3 and GC 9.2(j). In respect of GC 9.3, the Notification identified five failings, which were provisionally found to give rise individually and cumulatively to a breach

of GC 9.3. Three of the failings concerned the higher ETCs set and charged by VM from 22 September 2016 to 22 August 2017. The fourth concerned those VM customers who moved house between 1 September 2016 and 11 September 2017 to a property where VM's services were available (so-called "on-net home movers") and who were required to pay ETCs or to sign up to a new fixed-term contract with a new initial commitment period. The fifth alleged failing concerned VM's failure to take action between 22 September 2016 and 27 June 2017 to ensure that its conditions and procedures for contract termination did not act as a disincentive for customers to switch CPs. The contravention of GC 9.2(j) related to the ETC rate cards published on VM's website between 1 September 2016 and 20 March 2017. Ofcom's provisional findings were that VM did not publish its ETCs in a clear and comprehensible form during that period and, because from 1 November 2016 to 20 March 2017 the ETC rate card did not accurately represent the ETCs that VM was charging following a price increase on that date, information about ETCs was also not easily accessible during that time.

47. The Notification also specified the provisional penalty amount that Ofcom were minded to impose in respect of the contraventions of GC 9.3 and GC 9.2(j). The Notification referred to Ofcom's penalty guidelines and set out Ofcom's consideration of various factors such as deterrence, seriousness and culpability, precedents and the level of VM's co-operation with the investigation. The provisional penalty amount specified in the Notification was a single, total figure of £[✂].

48. In response to the Notification, VM provided Ofcom with written representations and an economic analysis prepared by Charles River Associates on the impact of ETC over-recovery on customer switching (the "CRA report"). VM also attended an oral representations hearing with Ofcom.

49. On 16 November 2018, Ofcom served on VM two confirmation decisions:

    (1) a confirmation decision under s.96C of the CA 2003 for contraventions of GC 9.3 and GC 9.2(j). This is the confirmation decision following the

Notification referred to above and is the Decision which is the subject of VM's appeal; and

(2) a confirmation decision under s 139A of the CA 2003 for contravention of s 135 of the CA 2003 in respect of Ofcom's third information request. This second decision is not under appeal. It is noted in this decision for the purposes of background and context.

50. The Decision confirmed Ofcom's provisional findings in respect of the contravention of GC 9.3 as far as ETCs charged to switching customers were concerned (but not in respect of on-net home movers) and in respect of the contravention of GC 9.2(j). In relation to the latter, Ofcom concluded that VM did not publish clear and comprehensive information about its ETCs between 1 September 2016 and 20 March 2017, and did not provide in an easily accessible form up-to-date information about its ETCs between 1 November 2016 and 20 March 2017 (Decision at 4.18).

E. THE APPEAL

(1) Grounds of appeal

51. VM challenges the Decision on three grounds:

(1) Ground 1 – Ofcom erred in law in finding a contravention of GC 9.3 by:

(a) treating GC 9.3 as providing a vehicle for an NRA to penalise a CP should it make a mistake in the calculation of ETCs, when the true position is that GC 9.3 does not regulate the level of ETCs at all, there being a "carve out" for conditions and procedures relating to initial commitment periods;

(b) interpreting GC 9.3 in a manner which duplicates existing rules of national law, contrary to Article 6(3) of the Authorisation Directive;

(c) applying GC 9.3 in a way that is incompatible with the principle of legal certainty;

(d) concluding that Ofcom were not required to identify any material effect on switching rates in order to establish a contravention of GC 9.3, and by making the erroneous finding of fact that there had been such a material effect in any event; and

(e) concluding that the absence of any material effect on competition was irrelevant in the context of a regime expressly intended to allow consumers to take full advantage of the competitive environment.

(2) Ground 2 – Ofcom's decision to impose a penalty of £7 million was arbitrary and unfair, and was not adequately reasoned.

(3) Ground 3 – Ofcom's penalty was in any event disproportionate.

(2) Standard of review

52. As already explained at [30] above, under s 194A CA 2003 the Tribunal must decide the appeal "*by applying the same principles as would be applied by a court on an application for judicial review*". There was no dispute that this needs to be interpreted compliantly with the requirements of Article 4 of the Framework Directive so that the "*merits of the case are duly taken into account and that there is an effective appeal mechanism*".

53. The wording in s 194A CA 2003, which took effect from 31 July 2017, differs from the previous wording in s 195, which provided for an appeal to be decided "*on the merits*", so some care is needed in considering earlier case law. However, *T-Mobile (UK) Ltd and another v Office of Communications* [2008] EWCA Civ 1373, [2008] 1 WLR 1565 ("*T-Mobile*") is particularly relevant, because that was a claim for judicial review (an appeal on the merits not being available in respect of the dispute in question). Jacob LJ, with whom the other members of the Court of Appeal agreed, confirmed that the judicial review

procedure was flexible enough to accommodate the requirements of Article 4 ([19] and [29]). He went on to say at [30] that, in fact, the same standard for success would have to be shown whether the case was brought by way of judicial review or appeal to the CAT (had that been available). However, he disagreed with counsel for the second claimant (O2) about the precise standard of review. It was not a question of considering the matter afresh, as though the award had never been made, and he said at [31]:

> "What is called for is an appeal body and no more, a body which can look into whether the regulator had got something material wrong."

54. Jacob LJ went on to add that this may be very difficult if what is impugned is an overall value judgment based on competing commercial considerations in the context of a public policy decision.

55. In *British Telecommunications plc v Telefónica O2 UK Ltd and others* [2014] UKSC 42, [2014] 4 All ER 907 at [13] Lord Sumption referred to the right of appeal required under Article 4 as not being "*just a right of judicial review*", because of the requirement to ensure that the merits of the case are duly taken into account. In our view this does not add to the Court of Appeal's analysis in *T-Mobile*.

56. *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245, [2011] 4 All ER 372 was a case involving an appeal to the CAT. Ofcom objected to BT's attempt to introduce new evidence, and the Court of Appeal dismissed Ofcom's appeal against the CAT's decision to admit it in the interests of justice. At [60], Toulson LJ commented that there was nothing in Article 4 confining the function of the appeal body to a consideration of the merits as they appeared at the time of the decision under appeal. He added:

> "The expression 'merits of the case' [in Article 4] is not synonymous with the merits of the decision of the national regulatory authority."

57. It is clear, however, that this comment was directed at the question before the Court, namely the admission of fresh evidence. The role of the Tribunal is not one of rehearing the case on its merits. Proper respect must be accorded to Ofcom's role as a specialist regulator, and the expertise of Ofcom's staff. As

explained by Green J in *R (Hutchison 3G UK Limited) v Office of Communications* [2017] EWHC 3376 (Admin) ("*Hutchison*") at [40], the focus is Ofcom's decision and whether Ofcom got their decision materially wrong. It is that decision that is being challenged. The question is not what decision the appellate body might itself have reached if it had started afresh.

58. It is also worth making the point that it is not enough to identify some error in the reasoning of a decision. An appeal can only succeed if the decision cannot stand in the light of the error: *Everything Everywhere Limited v Competition Commission* [2013] EWCA Civ 154 at [24]. This is consistent with the test in *T-Mobile*. Errors in reasoning which do not affect the result will not be material.

59. We also agree with Green J's comments in *Hutchison* at [42] that the approach in individual judicial review cases will differ depending on the decision being challenged. In that case the decision required Ofcom to make a judgment call in the context of an auction which took into account a wide range of future uncertain events, including a substantial degree of uncertainty about how the relevant market would evolve. Those are not the facts of this case, but nonetheless it is important to recognise that, as a specialist regulator, Ofcom's judgment, in particular as to the appropriate penalty to impose having regard to the facts of the case and to the principle of deterrence, must be accorded respect.

F. GROUND 1: THE FINDING OF CONTRAVENTION OF GC 9.3

(1) Approach to interpretation of GC 9.3

60. GC 9.3 obviously reflects the wording of Article 30(6) of the Universal Service Directive ("Article 30(6)"), and there was no dispute that it should be interpreted in conformity with that provision.

61. It is a well-established principle that in interpreting a provision of EU law it is necessary to consider not only the wording of the provision, but its context and its aims. For an example of this being applied in the context of the Universal Service Directive see Case C-16/10 *The Number (UK) Ltd and Conduit Enterprises Ltd v Office of Communications and British Telecommunications*

plc EU:C:2011:92 ("*The Number Ltd*") at [28], where in relation to Article 8(1) the Court of Justice stated that:

> "… it must, first, be viewed against its legislative background … Next, it must be interpreted by having regard to its wording, the overall scheme of the directive and the objectives pursued by the legislator."

A similar point was made by the Advocate General in Case C-99/09 *Polska Telefonia Cyfrowa sp. z o.o. v Prezes Urzędu Komunikacji Elektronicznej* ("*Polska Telefonia*") EU:C:2010:199, discussed in detail below (see [92] and following paragraphs), at paragraphs 49 and 50 of the opinion.

62. It is also the case that, in interpreting provisions of EU law, exceptions or derogations from general rules must be interpreted strictly. The best-known example of this relates to derogations from fundamental Treaty rights (see for example Case C-319/06 *Commission v Luxembourg* EU:C:2008:350). That principle was also applied by the Court of Justice in *The Number Ltd* by interpreting an exception to a prohibition on imposing specific obligations on individual operators strictly: see [31].

63. Also relevant to the approach to interpretation in this case is the fact that Articles 6(1) and (3) of the Authorisation Directive make specific provision in relation to conditions attached to general authorisations, requiring them to be "*non-discriminatory, proportionate and transparent*", as well as specific to the sector and non-duplicative of more generally applicable rules. As mentioned at [9] above, the only permitted condition relevant to this appeal is one that allows the imposition of consumer protection rules specific to the sector, including conditions in conformity with the Universal Service Directive. The recitals to the Authorisation Directive require conditions to be limited to what is "*strictly necessary*" (see [10] above).

64. Conditions attached to general authorisations might be seen as exceptions to them, such that it might be argued that they should be construed strictly, in the same way that the Court of Justice in *The Number Ltd* took a strict approach to exceptions to a prohibition on imposing obligations on operators. This might also be regarded as consistent with the requirement for conditions to be limited to what is "*strictly necessary*". However, in our view that would be the wrong

approach in this case. The particular condition at issue here is a condition imposed pursuant to the Universal Service Directive. Article 30 of that Directive imposes positive obligations on Member States with specific consumer protection objectives. These obligations are clearly intended to confer correlative rights on consumers. What it is appropriate to construe strictly is not the obligations contained in Article 30 themselves, but any exceptions to them. The provision with which this case is concerned, namely that the obligations imposed by Article 30(6) are "*Without prejudice to any minimum contractual period*", is such an exception.

65. The relevant context and legislative background include the fact that the original Article 30 was replaced by Directive 2009/136/EC, recital (47) to which is set out at [12] above. That recital states that it is "*essential*" that consumers are able to make informed choices and change providers without being hindered by "*legal, technical or practical obstacles, including contractual conditions, procedures, charges and so on*", but that this does not "*preclude*" the imposition of reasonable minimum contractual periods. Furthermore, the context of Article 30(6) clearly includes the immediately preceding provision, Article 30(5), which precludes initial commitment periods exceeding 24 months and requires consumers to be offered the possibility of subscribing to a contract with a maximum duration of 12 months.

(2) Application of GC 9.3 to ETCs (Ground 1(a))

66. VM's primary case was that GC 9.3 simply did not apply to ETCs, because of the words "*Without prejudice to any initial commitment period*". Mr Palmer, counsel for VM, submitted that those words operated as a "carve out", recognising that CPs are entitled to offer contracts with a minimum term, during which customers may not switch without breaking their contract or incurring a charge. It was self-evident that ETCs are designed to disincentivise switching during the initial commitment period. Ofcom's approach, which amounted to saying that VM breached GC 9.3 because it charged ETCs exceeding the level that it was contractually entitled to charge, was wrong. (Another aspect of Ground 1(a), namely whether questions of materiality are relevant, is dealt with together with Ground 1(d) below.)

67. We do not accept the proposition that any conditions or procedures relating to ETCs are straightforwardly "carved out" from Article 30(6) or GC 9.3. The reference to a minimum contractual period (or initial commitment period in GC 9.3) is necessary because the regime recognises that it is permissible for CPs to impose such a period (within the limits specified in Article 30(5)). The obvious reason why CPs would want to impose a minimum contractual period is an economic one, that is to ensure that a certain level of return can be generated from the contract. In order for a minimum contractual period to be effective in achieving that objective, it is accepted that there may well need to be some disincentive effect on a customer who wishes to terminate his contract before the end of the period, so that the CP's expected return is protected. But that does not mean that there is no role for Article 30(6) or GC 9.3 to play during that period. The "without prejudice" text simply preserves CPs' ability to impose such an initial commitment period. What Article 30(6) and GC 9.3 are without prejudice to is just that, the initial commitment period that a CP is permitted to impose, not any conditions or procedures that might relate to that period, whatever their nature. That is apparent from the language: there is no reference to the provision being "without prejudice to any conditions or procedures relating to" the initial commitment period. It is just without prejudice to that period.

68. The question then becomes one of the precise scope of the opening words of Article 30(6) and GC 9.3 (which for convenience we will refer to as the "carve out"). Clearly some disincentives relating to an initial commitment period are permitted, because otherwise the carve out would not have effect.

69. The interpretation that best accords with the clear purpose of the carve out, and also gives it meaningful effect, is one that permits conditions or procedures that genuinely protect the initial commitment period, and does not go further than that. That approach is in our view consistent not only with the wording of Article 30(6) but also with its context (including Article 30(5)), the legislative background and the aims of the legislation, as indicated in particular by recital (47) to Directive 2009/136/EC. It is consistent with the principle of applying a relatively strict, albeit fair, approach to the scope of exceptions from

Treaty rights. It is also consistent with the requirement of Article 6(1) of the Authorisation Directive that conditions are proportionate and transparent.

70. More specifically, in our view an approach that is limited to genuinely protecting the initial commitment period is one that does so in accordance with applicable legal requirements. Applicable legal requirements include not only contractual terms but the relevant broader legal framework, which may operate to restrict the operation of those contractual terms. In the specific context of ETCs, that framework includes consumer rights legislation based on EU law, under which disproportionately high sums may not be charged to consumers who do not fulfil their obligations.

71. Mr Herberg, counsel for Ofcom, suggested that were VM's interpretation of GC 9.3 to be correct, a provider could impose an ETC amounting to the charges that would be payable under a 48-month contract on a consumer with an initial commitment period of 24 months, undermining the objectives of both Articles 30(5) and (6). Whilst the hypothetical example posed by Mr Herberg provides an illustration of the logical consequences of VM's argument, it does not of itself explain why VM's interpretation is wrong. If VM's position were correct, it could say that such a charge would not in fact undermine Article 30(5) because the consumer would only need to wait until month 25 and would then be able to switch without the charge being imposed. In other words, the consumer would not in fact be stuck with a 48-month contract.

72. The example postulated does however show two things. First, it demonstrates the marked contrast that there would be in that scenario between a customer in month 24 of his contract and one in month 25. If VM's argument was correct (and leaving to one side for a moment the impact of consumer rights legislation) then there would be no restriction on the disincentives that could be imposed on customers right up to the last day of month 24. This would go much further than genuine protection of the initial commitment period, and in practice could result in effects on switching that continue to have an impact after the end of the period. The Decision points out at 3.49 that customers will typically consider switching near the end of their initial commitment periods. Disincentives imposed of the kind illustrated by the example could, at least in practice,

dissuade the hypothetical customer in month 24 from taking steps towards switching after the end of the initial commitment period. Secondly, and more fundamentally, the example highlights the key issue, namely whether the effect of the carve out is that there are no restrictions on disincentives that can be imposed during an initial commitment period, or whether the position is more nuanced than that.

73. VM's response to Mr Herberg's example is that consumer rights rules would prevent such a high charge being imposed. However, another example demonstrates why that is not a sufficient answer.

74. Both Article 30(6) and GC 9.3 refer to "conditions" and "procedures". The reference to "conditions" is clearly apt to cover price and other contractual terms, but "procedures" goes further, and covers the steps that a customer needs to take – the hoops that must be jumped through – in order to change provider. This might include, for example, procedures that made it excessively difficult to contact a CP, or obtain information, about switching. The logical consequence of VM's submissions is that a procedure imposed by a CP that made it excessively difficult or even impossible as a practical matter to change provider (whatever might theoretically be permitted by the contractual terms or consumer rights legislation) would be prohibited by GC 9.3 if it applied to consumers trying to switch outside an initial commitment period, but would be regarded as entirely permissible if it applied to those who sought to switch during the initial commitment period. This would be because (on VM's case) GC 9.3 would logically have no application, and in addition no other relevant provision of national law would obviously be engaged. Switching could be made very difficult, or practically impossible, and the impact of the procedure would go much further than would be required to ensure that the CP's expected return from the initial commitment period was protected. Taking Mr Herberg's example of a 24-month contract, those practical difficulties might be imposed on a customer up until the end of month 24, even if all he was seeking to determine (were he able to overcome whatever procedural obstacles were placed in his path that might prevent him from doing so) was whether it was in his interests to switch after the end of the month.

75. Mr Palmer's response to this was that GC 9.3 could be interpreted so as to carve out only those conditions (and presumably any procedures) that were part and parcel of the initial commitment period, and would not apply to a procedure designed to make it difficult to exercise a right to terminate the agreement early. However, we reject that interpretation as there is no basis for that distinction in GC 9.3 or the legislation from which it derives. We would also observe that, even if Mr Palmer were right, by his reasoning it is hard to see how the carve out would properly apply to an ETC which in VM's submission had been maintained and applied by mistake, since it would be difficult to argue that a mistakenly applied ETC was part and parcel of the initial commitment period.

76. In our view the fact that GC 9.3 and Article 30(6) extend to "procedures" and not simply to contractual terms supports the conclusion we have reached. The fundamental question is whether CPs have an unrestricted ability to disincentivise, or even prevent, switching during an initial commitment period, subject only to the potential operation of other legal principles (such as the law of contract and consumer rights legislation). Given the key objective of enabling consumers to take full advantage of the competitive environment, and the fact that relying only on other rules such as consumer rights legislation would not prevent significant disincentives being imposed in practice, the answer to this question must be no. However, a CP must be able to impose conditions that legitimately protect the initial commitment period, since otherwise the carve out would not achieve its purpose. This being the case, then in determining the appropriate scope of the carve out, other legal principles will be relevant because they will assist in determining what conditions may legitimately be imposed.

77. In this case VM's actual contractual conditions posed no difficulty, because they capped ETCs at a level which it was not suggested was in breach of consumer rights law. What VM in fact did, however, was to impose charges that exceeded those amounts, and that was what fell foul of GC 9.3.

78. It follows from this that we disagree with VM's characterisation of Ofcom's approach as allowing CPs to charge any level of ETCs provided they comply with the terms of the contract. That was not Ofcom's approach. They considered

the actual contractual terms in VM's case, which capped ETCs by reference to revenue foregone less costs saved. There was no dispute over the appropriateness of those terms, so the question postulated did not arise.

79. It also follows (as discussed further below in relation to Ground 1(b)) that Ofcom were entitled to compare the ETCs levied by VM with those chargeable under its contractual terms, being the terms VM chose to impose to protect the initial commitment period.

80. VM also suggested that GC 9.3 is concerned with conditions or procedures, and what it failed to do was to follow its own conditions and procedures. It just made a mistake. We disagree. Its "procedures" in fact involved customers being informed about the level of ETCs and being charged ETCs by reference to the rate cards on its website, which were incorrect. That was a "procedure" which was in breach of GC 9.3.

(3) Whether GC 9.3 duplicates existing national law (Ground 1(b))

81. VM argued that Ofcom's approach to GC 9.3 duplicated other non-sector specific national legislation, contrary to Article 6(3) of the Authorisation Directive, because by focusing on the ETCs being higher than the contractual terms permitted, Ofcom were applying it in a way that duplicated protections offered by the ordinary law of contract and restitution, and by consumer rights legislation.

82. In our view there is no duplication between GC 9.3 and other national law. GC 9.3, which "copies out" Article 30(6), is clearly sector specific, aimed at preventing disincentives to switching between CPs. The requirement to avoid duplication does not mean that there can be no overlap between different rules, or that action taken by the regulator to enforce a relevant condition may not produce a remedy that might in some circumstances have been available through another route. So, for example, the fact that action taken by the regulator to enforce GC 9.3 might, on particular facts, also result in refunds to customers of excessive charges, which they might alternatively have been able to claim by way of breach of contract or by a restitutionary claim, does not mean that GC 9.3

duplicates those other rules. Its function and scope is different. This is not a question, as VM suggested, of reasoning backwards from the desirability of having enforcement powers to obtain contractual remedies on behalf of customers to avoid them having to take legal action individually. Rather it reflects the purpose of the condition, namely to ensure that switching is not disincentivised by whatever means (subject to the carve out). VM's approach would logically mean, for example, that GC 9.3 would have no application even outside an initial commitment period if the disincentive in question was either in breach of the contractual terms or was unfair under the CRA 2015. This would potentially be the case even if no clear alternative remedy was available or it was difficult to ascertain whether such a remedy was available, for example where (or to the extent that) an excessive charge was not in fact levied but customers – who may not have been identified – have been put off switching because of it. VM's approach would place a very significant limit on the scope of GC 9.3, and on the ability of Ofcom to take effective action to ensure that disincentives (save for those permitted by the carve out) do not exist.

83. Mr Palmer drew attention to the fact that in interpreting and applying GC 9.3 the Notification adopted an approach of comparing the ETCs charged with (a) the subscription price, (b) the subscription price less VAT, and (c) the subscription price less VAT and cost savings. He submitted that in doing so Ofcom simply applied a test of fairness rather than focusing on whether there was a disincentive effect. In the Decision at 3.54 Ofcom accepted that the methodology adopted in the Notification was similar to that set out in their guidance on unfair terms in contracts for communication services. However, they stated that they used the methodology to identify ETCs which acted as a disincentive to switch rather than to consider whether they were fair, and that the prohibition on duplication in Article 6(3) of the Authorisation Directive did not regulate the methodology used to identify whether there was a breach of a sector specific condition distinct from the requirements of general national law.

84. Our focus is the Decision, not the Notification and the reasoning in that document. Fairness *per se* is not the test of whether there is a disincentive. However, determining whether a particular condition or procedure acts as a disincentive necessarily involves a comparator. A comparison is necessary

between the effect of having the condition or procedure in place, and the counterfactual of not having it in place. In the context of an initial commitment period the counterfactual must include conditions that are or would be permissible under the terms of the carve out. In our view it was therefore appropriate for Ofcom to determine whether there was a disincentive by reference to the difference between the amount actually charged and the amount permitted to be charged under the contractual terms, which Ofcom did not dispute corresponded with a fair charge under the CRA 2015.

85. Furthermore, the fact that GC 9.3 extends to "procedures" as well as conditions also indicates that it is not duplicative. The example given at [74] above of a procedure which makes it practically very difficult to switch is something to which GC 9.3 would apply, but which may well not amount to a breach of contract and would not amount to a contractual term within the scope of the CRA 2015.

86. We would note, although we do not need to rely on it, that another specific reason why it could be said that there is no duplication in this case is that the alleged duplication relates to the interpretation of an exception to GC 9.3 rather than to the condition itself, whereas the prohibition on duplication relates to the conditions imposed. The fact that other provisions of national law may be relevant in delineating the scope of the carve out does not make the condition duplicative. They simply provide a reference point to assist in determining the proper scope of the carve out.

(4) Legal certainty (Ground 1(c))

87. VM also submitted that Ofcom's approach to the interpretation of GC 9.3 was incompatible with the principle of legal certainty. Ofcom had adopted a "copy out" approach rather than implement Article 30(6) with the necessary specificity, precision and clarity to achieve legal certainty: Case C-225/97 *Commission v France* EU:C:1999:252 at [37]. It was far from self-evident that GC 9.3 would be interpreted in the way that Ofcom did, with penalties being imposed for a mistaken overcharge, and with Ofcom concluding among other things that to "act as a disincentive" did not require any actual effect.

88. Ofcom submitted that there is no requirement to issue guidance about how a legal rule will apply in every situation, provided the rule is sufficiently precise and clear when interpreted in accordance with ordinary principles, including purposive interpretation: *R (Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin), [2007] ICR 1176 at [58] to [60]. Ofcom also referred to a 2011 document[1] that had accompanied the introduction of the revised General Conditions, including GC 9.3. This document noted that there had been a request from one consultee for further clarification of the meaning of "disincentives" and commented that, as explained in the consultation, disincentives could be contractual (including early termination charges) or could be industry processes. A footnote added that consumers must have confidence to be able to exercise choice, and that meant that consumers should be able to switch "*without undue effort, disruption and anxiety*". Procedures and processes that increased switching costs and created barriers to consumers changing CPs were likely to act as disincentives.

89. Dealing first with VM's suggestion that Ofcom's approach meant that no disincentive effect was required, Ofcom concluded that there was an impact on customer behaviour. This is discussed further in relation to Ground 1(d) below.

90. More generally, we do not agree with VM that Ofcom's approach to GC 9.3 fails the test of legal certainty. Ofcom's approach of determining the existence of a disincentive by reference to the amounts by which the charges exceeded those permitted under the contractual terms was clear. Their core reasoning was that GC 9.3 was engaged because customers were charged more than they were entitled to expect under the terms of their contracts. That is not an uncertain or unpredictable approach. It was also not a response by Ofcom to a one-off administrative mistake in the calculation of ETCs for a few customers. VM's procedures involved publishing rate cards with excessive charges and operating a practice of charging ETCs in accordance with those excessive amounts.

[1] *Changes to General Conditions and Universal Service Conditions*, 5 May 2011, paragraphs 7.74 to 7.80.

(5) Meaning of disincentive; materiality needed to engage GC 9.3; need to show actual impact on switching (Grounds 1(a) and (d))

91. VM submitted that there was in any event a question of materiality. GC 9.3 was concerned with the substantive impact of procedures and conditions that apply to switching. Ofcom's approach and the Decision simply assumed that the imposition of higher charges than was permitted under the contractual terms had the requisite substantive impact. If VM had not included the term capping its ETCs at paragraph M13 then there would have been no basis of complaint.

92. VM relied on *Polska Telefonia* EU:C:2010:395. That case related to charges imposed for number "porting", engaging the previous version of Article 30(2) of the Universal Service Directive, which provided that NRAs:

> "… shall ensure that pricing for interconnection related to the provision of number portability is cost oriented and that direct charges to subscribers, if any, do not act as a disincentive for the use of these facilities."

93. The phrase "*do not act as a disincentive*" is obviously the same as that used in what is now Article 30(6), and is directly reflected in GC 9.3.

94. In that case the Polish regulator imposed a fine on Polska Telefonia for the charge it imposed, on the basis that it disincentivised customers from porting numbers between CPs. The Court of Justice interpreted Article 30(2) as obliging the NRA to take account of the costs incurred in porting when assessing whether the charge levied was a disincentive, but found that the NRA also retained the power to fix the maximum charge at a level below the costs incurred where a charge based only on cost was "*liable to dissuade users*" (see the conclusion at [28]).

95. At [25] the Court stated:

> "It is therefore clear from the scheme of the Universal Service Directive that the NRA has the task, using an objective and reliable method, of determining both the costs incurred by operators in providing the number portability service and the level of the direct charge beyond which subscribers are liable not to use that service."

96. VM also relied on a number of references in the judgment to the need to ensure that subscribers are not "*dissuaded*", both in the conclusion and for example at [20] and [21] of the judgment, and the reference to "*dissuasive effect*" at [24].

97. It is clear, and indeed undisputed, that *Polska Telefonia* is authority for the proposition that the regulator must use an objective and reliable method to determine what acts as a disincentive, whether for the purposes of Articles 30(2) or (6).

98. However, VM seeks to go further. It says that the requirement for an objective and reliable method requires an objective measure of the point at which consumers are liable no longer to avail themselves of the service (i.e. a consideration of effect). In doing so it is effectively saying that the Court of Justice put a gloss on the meaning of "*act as a disincentive*". It places particular reliance on the reference to "*liable not to use*" at [25]. (It is worth pointing out that we were only shown the English language version of the judgment.)

99. We do not agree. The Court of Justice was not focusing on the meaning of "disincentive", and indeed it uses that term as well, for example at [26] and [28]. In particular, at [26] it states that the NRA:

> "… must oppose, if necessary, the application of a direct charge which, although in line with … costs, would, in light of all the information at the disposal of the NRA, be a disincentive to the consumer."

100. In any event, the conclusion at [28], as well as the operative part of the judgment, (in the English language version) refers both to "*disincentive*" and to "*liable to dissuade*". The latter is in our view entirely consistent with "*act as a disincentive*". A disincentive is not limited to something that actually deters a particular action, but also extends to things that mean that the step is less likely to be taken: is there some cost or other hindrance which makes the step less attractive, such that customers may choose not to take it? The phrase "*liable to dissuade*" is consistent with this. It does not mean that customers are necessarily deterred. However, if there is no objective evidence that demonstrates that the relevant condition or procedure had an impact on customer behaviour in fact, then it is difficult to see how it could be established that the condition or

procedure does act as a disincentive, bearing in mind that *Polska Telefonia* requires an objective and reliable method to be used to determine whether the relevant condition or procedure acts as a disincentive. As discussed at [105] and [106] below, in this case Ofcom were entitled to conclude that there was an impact on customer behaviour.

101. Ofcom suggest at paragraph 3.66 of the Decision that a disincentive need not necessarily delay or prevent a course of action, but simply make it more difficult or costly to complete, referring to the definition in the Shorter Oxford English Dictionary as "*a source of discouragement, esp. in an economic or commercial matter*". Paragraph 3.66 goes on to state:

> "… where the source of discouragement is established by reference to clear and objective factors, that is sufficient to demonstrate a breach even if the discouragement does not prevent or delay switching in most cases".

Ofcom use this to support a statement that they had complied with the requirement to use clear and objective factors, because they assessed the excessive ETCs by reference to VM's own terms and conditions (Decision at 3.65).

102. In the light of *Polska Telefonia*, we think this slightly overstates the position. The requirement for an objective and reliable method relates not to the source of discouragement as such, but to the question whether the relevant condition or procedure acted as a disincentive. If there was no impact at all on customer behaviour then the test is unlikely to be met. For that reason, for example, a very small overcharge might not be shown to act as a disincentive. In contrast, if there was an objectively measurable impact then that will be evidence that the condition or procedure acted as a disincentive. There may be an impact even if switching was not delayed or prevented in "*most cases*" (Decision at 3.66). Indeed, that phrase implies that there was some impact.

103. Ofcom pick up on this at paragraph 3.67 of the Decision by reference to the CRA report commissioned by VM. Ofcom used evidence derived from that report to state that the excessive ETCs delayed a specified number of customers from switching for a period of time, which Ofcom said equated to a reduction

of one tenth in the switching rates of customers in fixed-term contracts whose ETCs had been set too high, compared to the switching rates that would have occurred if their ETCs had been set correctly. Ofcom concluded that the scale of this impact was material. They also noted that the analysis in the CRA report used a particular econometric specification and model, and alternative specifications or models might yield a larger impact, albeit they did not dispute the "*broad order of magnitude of the results*". A footnote makes the point that unduly high ETCs may also have generated wider or longer term impacts due to loss of trust or the development of other negative perceptions, which would not be captured by the analysis.

104. VM strongly criticised Ofcom's use of the CRA report. Ofcom had produced no evidence of their own of a dissuasive effect, despite the need for that in the light of *Polska Telefonia*. Furthermore, what the report actually found was that a specified number of customers were delayed for a short period, on average [✂] days (because the ETC level dropped each month through the initial commitment period, making customers who were sensitive to the cost less likely to be disincentivised as time went on), with the excessive ETCs causing what CRA said was "*negligible harm*" for consumers who chose not to switch. Because switching rates are so low the one tenth figure was misleading, and in fact represented a tiny percentage of VM's customers, of customers within initial commitment periods, or even of customers who would have been subject to excessive ETCs if they had chosen to switch.

105. We do not agree with these criticisms. It is apparent both from the CRA report and from an internal Ofcom note that assesses that report that Ofcom had all the findings in the report well in mind, and in fact analysed them closely. It was for Ofcom rather than CRA to determine whether the correct pool to consider was customers actually switching, or who would have switched but for excessive ETCs, rather than any wider pool of VM's customer base. Ofcom were entitled to use the figures from the report without being bound by CRA's opinion that the harm was negligible. The internal note commented that the aggregate impact in terms of the number of customers deterred was "*quite modest*" but still concluded that there was a material impact on switching rates "*for the customers affected*". Some customers were directly deterred. The note also correctly

records that the number of customers who were estimated not to have switched due to ETCs was "*new evidence, which fills a potential gap from the May Notification*". It comments that a delay in switching (rather than being permanently dissuaded from switching) still caused harm. Finally, the note records that the deterrent effect of excessive ETCs would have been greater on a more responsive consumer base, and suggests that Ofcom should consider to what extent the penalty should be driven by the underlying responsiveness of the customer base.

106. We consider that Ofcom were entitled to take the approach they did in respect of the CRA report. They were entitled to use evidence from the report in reaching the Decision: this was VM's own evidence and it cannot have taken it by surprise. In our view Ofcom were also entitled to compare the number of consumers deterred from switching with the number who would otherwise have switched, rather than with the number of customers in a much larger pool. Furthermore, we do not accept that some particular threshold of materiality should be read into GC 9.3. As we have said at [102] above, if there is no objectively measurable impact then it is unlikely that it will be demonstrated that the relevant condition or procedure acts as a disincentive. If an impact on customer behaviour is shown, as we consider it was in this case, then the level of materiality may well be relevant to the quantum of penalty, but not to the prior question of whether GC 9.3 is engaged at all.

107. A further, but related, criticism by VM is that in the Decision the evidence from the CRA report is used only as a fallback, the primary focus being the fact that ETCs were charged at a higher rate than would have been payable if they had been set in accordance with the contractual terms. It was that element that was, of itself, regarded as a breach, on the basis that customers were charged more than they would have expected to pay under the terms and conditions (see the Decision at 3.20, 3.21, 3.52, 3.55, 3.57 and 3.65). Mr Palmer submitted that before us Ofcom focused entirely on the CRA report rather than using it as a fallback, and noted that Mr Herberg had also clarified that references to expectation in the Decision were to contractual rather than subjective expectation. It was not being suggested that customers expected a particular figure to be charged under the contractual terms, and then were disincentivised

by being told that a different figure would in fact be charged. Rather, they were disincentivised by being charged more than they were contractually entitled to expect.

108. We have already addressed this point in substance. There is of course no bright line distinction between the calculation of the overcharges by reference to VM's contractual terms and the analysis done by CRA. That analysis was undertaken by reference to the amount of the overcharges, which were calculated by reference to the contractual terms. It is the case that the CRA report provides evidence of an objective method of determining that the overcharges (determined by reference to the contractual terms) actually acted as a disincentive. The fact that the decision maker might have made an error in identifying precisely what must be determined by an objective and reliable method (the "source of discouragement" point referred to at [102] above) does not materially undermine the reasoning in the Decision. The paragraph in which that appears, 3.66, is immediately followed by the paragraph that discusses the CRA report. The introductory words to that paragraph (3.67) read "*In any event*". This made it clear that the Decision did not depend on the analysis in the preceding paragraph being correct.

(6) Impact on competition (Ground 1(e))

109. VM criticised Ofcom's statement at paragraph 3.68 of the Decision that, because the primary purpose of GC 9.3 is consumer protection, it was not necessary to show that the conditions or procedures in question had an effect on competition. VM noted that Ofcom did not repeat a statement in the Notification that the contraventions were "*capable of harming competition*". Although this was not pursued as a separate point in oral argument, Mr Palmer did submit that the question of the impact on competition was relevant to materiality. The fact that no impact on competition had been demonstrated meant that there was no evidence of disincentive effect apart from the numbers derived from the CRA report.

110. We do not consider that Ofcom fell into error on this issue. Article 30(6) and GC 9.3 are straightforward. The aim is to ensure that consumers can change CPs

without being hindered. Clearly, the underlying policy is to allow consumers to take advantage of the competitive environment, but what engages those provisions is conditions or procedures that disincentivise switching. There is no separate requirement to show any particular impact on competition.

G. GROUNDS 2 AND 3: THE IMPOSITION OF A PENALTY AND WHETHER THE PENALTY WAS DISPROPORTIONATE

111. Grounds 2 and 3 both relate to the penalty imposed, and it is convenient to consider them together. Ground 2 is that the decision to impose a penalty in the amount of £7 million was arbitrary and unfair, and not adequately reasoned. Ground 3 is that the penalty was in any event disproportionate.

(1) VM's submissions

112. Mr Palmer submitted that Ofcom had failed to adopt any adequate or transparent process of reasoning in determining the penalty. It did not proceed from the figure on which Ofcom had consulted in the Notification, and VM was deprived of a meaningful opportunity to engage on the question of quantum. In contrast to the position of other regulators including the CMA and the Financial Conduct Authority, there was no staged and transparent approach explaining the starting point and how that starting point had been adjusted to reflect aggravating and mitigating factors to arrive at the final penalty figure. There was no indication of what proportion of the penalty was attributable to the contravention of GC 9.2(j) and, importantly, no indication of the impact on the penalty of the fact that Ofcom abandoned the alleged breach of GC 9.3 relating to on-net home movers, which must have been a significant element of the penalty proposed in the Notification. VM was left without the ability to understand the process adopted, and was therefore deprived of an effective ability to challenge the penalty.

113. Mr Palmer submitted that in any event the penalty was disproportionate. Ofcom focused on deterrence, without recognising that the contraventions were the result of simple oversight, that they were put right when identified, and that VM had made no financial gain because it had ensured that overcharged customers

were refunded with interest. It was clear that insufficient credit had been given for the dropping of the on-net home movers allegation, a central plank of Ofcom's case at the Notification stage and a much more serious allegation if made out. VM's representations had significantly undermined the basis for the penalty proposed in the Notification, but apparently with a limited impact on the final penalty. A significant, but unevidenced, allegation in the Notification about the culture within VM had been dropped. Ofcom had unjustifiably concluded that there was a "*substantial*" degree of harm from the overcharges. The GC 9.2(j) breach was a makeweight one which could not have affected the penalty materially. Finally, and importantly, the penalty was disproportionate as compared to a confirmation decision under s 96C CA 2003 issued on the same date imposing a penalty of £9 million on EE Limited ("EE") (reduced by 30% on account of settlement, to £6.3 million).

(2) Ofcom's penalty guidelines

114. As already mentioned at [24] above, under s 392 CA 2003 Ofcom are obliged to publish guidelines they propose to follow in determining penalties in non-competition cases, and under s 392(6) they must "*have regard*" to those guidelines in determining the amount of any penalty.

115. As noted at [25] above, the current version of Ofcom's penalty guidelines was issued in September 2017, and it was therefore the version that applied at the date of the Decision. It relevantly provides as follows:

> "1.11 Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement. Ofcom will have regard to the size and turnover of the regulated body when considering the deterrent effect of any penalty.
>
> 1.12 The factors taken into account in each case will vary, depending on what is relevant. Some examples of potentially relevant factors are:
>
> • The seriousness and duration of the contravention;
>
> • The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;

> • Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention;
>
> • Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention;
>
> • The extent to which the contravention occurred deliberately or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur;
>
> • Whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it;
>
> • Any steps taken for remedying the consequences of the contravention;
>
> • Whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties); and
>
> • The extent to which the regulated body in breach has cooperated with our investigation.
>
> 1.13 …
>
> 1.14 Ofcom will have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and the context of each case. We will not, however, regard the amounts of previously imposed penalties as placing upper thresholds on the amount of any penalty.
>
> 1.15 Ofcom will have regard to any representations made to us by the regulated body in breach.
>
> 1.16 Ofcom will ensure that the overall amount of the penalty is appropriate and proportionate to the contravention in respect of which it is imposed, taking into account the size and turnover of the regulated body.
>
> 1.17 Ofcom will ensure that the overall amount does not exceed the maximum penalty for the particular type of contravention.
>
> 1.18 Ofcom will have regard to the need for transparency in applying these guidelines, particularly as regards the weighting of the factors considered."

116. There are some important features to note. First, these guidelines expressly provide for the circumstances to be considered "*in the round*" (paragraph 1.11). Secondly, it is clear that the key objective is deterrence and the penalty must be sufficient to act as an effective incentive to comply, having regard to seriousness (paragraph 1.11). Thirdly, the factors to be taken into account will vary but will include such matters as the seriousness and duration of the contravention, the degree of harm, any gain made, the extent to which senior management knew or ought to have known that a contravention was occurring, whether the contravention continued once the regulated body became aware of it, remedial

steps taken, whether there was a history of contraventions, and the extent of co-operation with Ofcom's investigation. Fourthly, there are additional requirements in paragraphs 1.14 to 1.18 which include having regard to relevant precedents and to representations, ensuring that the level of penalty is proportionate taking into account size and turnover, and having regard to the requirement for transparency (particularly as regards the weighting of factors).

117. Whilst VM did not seek to challenge the guidelines as such, in substance their case came close to it. The fundamental objection was that the penalty had been set "*in the round*", rather than by a staged process which might allow VM to determine by how much the quantum of the penalty was affected by individual factors. But considering all the circumstances in the round is precisely what the decision maker is mandated to do by the guidelines. Furthermore, that approach is a legitimate one to adopt. Whilst it is essential that a decision is adequately reasoned such that it can be understood how the decision was reached, it does not follow that the decision maker must spell out precisely how each item is weighed in the balance: compare *HMRC v Proctor & Gamble UK* [2009] EWCA Civ 407, [2009] STC 1990 at [19].

(3) The Tribunal's approach

118. The role of the Tribunal in reviewing a penalty in the light of guidance issued by a regulatory authority has been considered on more than on occasion in the context of the Office of Fair Trading's guidance. Mr Palmer referred us to the following summary in *Kier Group plc v Office of Fair Trading* [2011] CAT 3 ("*Kier Group*") at [74]:

> "… In short the Tribunal will disregard neither the Guidance nor the OFT's approach and reasoning in the specific case. On the other hand, the Tribunal is not bound by the Guidance, and should itself assess whether the penalty actually imposed is just and proportionate having regard to all relevant circumstances as put before the Tribunal in the course of the appeal. …"[2]

[2] It is noted for completeness that the 2013 amendment to s 38 of the Competition Act 1998 now imposes on the Tribunal an obligation to have regard to the CMA's penalty guidance (see e.g. *Balmoral Tanks Limited v Competition and Markets Authority* [2017] CAT 23 at [134]). This statutory requirement does not apply in the present case.

(4) The penalty decision: reasoning adopted

119. We have considered section 5 of the Decision (which deals with the penalty) carefully, alongside the guidelines. We consider that the Decision is sufficiently reasoned and have not detected that Ofcom "*got something material wrong*" (*T-Mobile* at [31]).

120. It is clear from section 5 of the Decision that the decision maker had deterrence in mind as the central objective, both to incentivise compliance by VM and to deter other CPs. VM's complaint that what was being penalised was a simple oversight misses the point. While senior management were not aware of the breaches through much of the Relevant Period, Ofcom found a failure in governance processes in failing to spot and correct an error which affected a substantial proportion of packages offered (Decision at 5.39 and 5.42). In other words, what the penalty was designed to incentivise was putting appropriate procedures in place to ensure that this type of error did not occur in the future. Further, Ofcom found that there were at least three opportunities before they opened their investigation when VM could have taken action to remedy the errors but failed to do so (whereas, in contrast, it took prompt action after the investigation was opened) (Decision at 5.44 to 5.79). Significantly, one of the missed opportunities was the realisation in February 2017 by members of the relevant commercial pricing team that ETCs in respect of some of VM's packages were incorrectly set. Email correspondence between team members expresses a concern that they might be charging ETCs at a level which "*breaks Ofcom regulation*", and includes the following statement:

> "I think it's unlikely to create an immediate issue (a customer is unlikely to complain as they would be looking at the inc. VAT price) but we should resolve this through the price rise project."

The price rise project is a project that would result in revised prices from 1 November 2017.

121. Ofcom regarded this evidence as being of "particular seriousness" (Decision at 5.55). In our view they were perfectly entitled, and indeed, correct to do so. There was a recognition that there could be a regulatory breach, but immediate

action was not needed because customers were unlikely to complain. Whilst Mr Palmer relied on the statement that the issue would be resolved through the price rise project, we do not accept that that comes close to addressing the point. In reality that approach made matters worse. In particular, there is no indication that the matter would be resolved anything other than prospectively, without any compensation to affected customers, and if anything by the overcharges being reduced or eliminated by the effect of the price rises. The evidence relating to the price rise review summarised at paragraphs 5.57 to 5.63 of the Decision supports this, and Ofcom specifically state that there was no evidence of any regard being paid to the ongoing impact of incorrect ETCs, and that they regarded the team's strategy of addressing unduly high ETCs with price rises to be implemented some months later as a "*serious matter*" (Decision at 5.62 and 5.63).

122. The fact that there was no reference in the Decision to the culture within VM (see [113] above) does not in our view reflect a substantial change in Ofcom's position. That comment in the Notification was made with specific reference to the email correspondence in February 2017 referred to above, together with what Ofcom found to be a failure in effective governance. Both of those points were reflected in the Decision. We should record in passing at this point that, whilst we do not consider it necessary for the purpose of explaining the reasons for this decision to repeat the precise phrase used in the Notification to refer to the culture within VM, this is not because we have accepted VM's submissions that either of the provisions of paragraphs 1(2)(a) or (b) of Schedule 4 to the Enterprise Act 2002 apply. Those provisions require the Tribunal to have regard to the need for excluding from a decision, so far as practicable, information the disclosure of which would in its opinion be contrary to the public interest, and commercial information the disclosure of which would or might in its opinion significantly harm legitimate business interests. Neither of these provisions is applicable in our view to exclude the reference in the Notification to the culture within VM.

123. Whilst it is clearly relevant that VM did take steps both to end and to remedy the contraventions, repaying 98.2% of the customers it overcharged by 11 July 2018 (Decision at 5.80), that does not mean that the overcharges did not result

in harm. More than 80,000 customers were in fact overcharged a total of £2,790,613, with an average overcharge of £34, which Ofcom noted was more than the monthly price of VM's cheapest "triple play" package during the Relevant Period (Decision at 2.9, 3.38, 3.40, 5.30 and 5.87). Ofcom found this financial harm to be "*material*" (Decision at 5.29), but they also stated at paragraph 5.79 of the Decision that they had given weight to the remedial steps VM had taken.

124. The fact that customers have been compensated (after Ofcom's investigation was launched) does not eliminate the fact that harm occurred, and does not prevent the scale of the overcharges being relevant to the determination of the penalty. Ofcom correctly recognised it as a mitigating factor, rather than as wiping the slate clean.

125. Ofcom's overall conclusion that the degree of harm resulting from the contravention of GC 9.3 was "*substantial*" (Decision at 5.36) was based not only on the financial harm to customers who were overcharged, but also on VM's evidence about the impact on switching (Decision at 5.28). The Decision referred to the estimated number of customers on fixed-term contracts who were potentially exposed to unduly high ETCs, and to the estimated number derived from the CRA report of customers who delayed switching. It addressed VM's argument that the number was small relative to the number of in-contract customers and the average number of customers subject to unduly high ETCs each month during the Relevant Period, noted that alternative approaches not used in the CRA analysis might yield a larger impact, and commented that unduly high ETCs may have generated other impacts due to loss of trust or the development of negative perceptions (Decision at 5.31 to 5.35).

126. Other matters taken into account by Ofcom included the fact that VM had no history of contraventions of the GCs, three precedents relating to incorrect charges by other CPs (although not involving GC 9.3), and the level of VM's co-operation with Ofcom's investigation (Decision at 5.94 to 5.99). In respect of co-operation, Ofcom took account of the fact that inaccurate information had been provided in certain of VM's responses to four of Ofcom's information requests, which required Ofcom to issue further information requests and used

up additional time and resource. One of the responses had given rise to separate enforcement action, and Ofcom made it clear that that matter was not taken into account in determining the penalty (Decision at 5.98 and 5.99).

(5) The process to arrive at the penalty, weighting and impact of other allegations

127. We do not consider that Ofcom were under any obligation to apply some form of staged process in the determination of the penalty. The penalty guidelines certainly do not require it. What they do require is that the decision maker considers the circumstances in the round. That is precisely what the Decision indicates was done. Although that might mean that it is more difficult to determine the relative weighting of different factors, that does not mean that the Decision is unfair or arbitrary, or that it is inadequately reasoned. VM is not in the position of being unable to understand the process adopted, or prevented from being able to challenge the penalty effectively. The process – namely setting the penalty in the round, considering all the factors identified by Ofcom and set out in the Decision – is transparent, and VM has been perfectly able to mount a detailed challenge.

128. The reasoning in section 5 of the Decision is detailed. It also gives a number of indications as to the weight attributed to various factors. In particular, it is made clear that the central objective was deterrence, with the penalty level being set at a sufficient level to have a "*material impact*" (Decision at 5.19). The degree of harm was regarded as "*substantial*" (Decision at 5.36). Ofcom regarded with "*particular seriousness*" the evidence that the pricing team became aware of the issue in February 2017, concluding that the strategy they pursued to address the issue was a "*serious matter*" (Decision at 5.55 and 5.63), and that "*repeated failures to act*" between September 2016 and Ofcom opening their investigation in June 2017 were "*serious*" (Decision at 5.74). However, Ofcom gave "*weight*" to the steps taken to remedy the contraventions (Decision at 5.79). In relation to the contravention of GC 9.2(j) Ofcom concluded that it was "*serious and harmful to consumers*" (Decision at 5.91), but that the £7 million penalty related "*principally*" to the contravention of GC 9.3 (Decision at 5.100). Ofcom also

made clear where a matter had not been taken into account: see [126] above in respect of a matter which was the subject of separate enforcement action.

129. VM makes specific complaints about the effect on the size of the penalty of Ofcom's dropping the on-net home movers allegation and the difficulty of discerning the portion of the penalty attributable to the breach of GC 9.2(j). In relation to the former, it also complains of unfairness in the penalty being capped at the single penalty amount proposed in the Notification, rather than at a proportion of that penalty amount calculated to exclude the on-net home movers allegation. It points out that Ofcom's published practice of ensuring that the final decision maker is a person who was not involved in the investigation or the preparation of the Notification means that it was not possible for the decision maker to understand what proportion of the original penalty related to the on-net home movers allegation. The result was that he was using a cap which reflected a significant allegation that had been dropped, rather than the figure that would have been notified if that allegation had not been made.

130. Section 96A(3)(a) CA 2003 expressly provides that Ofcom may give a notification in respect of "*more than one contravention*" of a condition set under s 45. Section 96B(2) provides that where that occurs a separate penalty "*may*" be specified in respect of each contravention. Section 96C(4)(d) permits Ofcom to charge a penalty at the amount specified in the notification, or such lower amount as they consider appropriate in the light of the representations made or the steps taken to comply with the condition or remedy the consequences of the contravention. This should be read with subsection (3), which provides that Ofcom may not give a confirmation decision unless they are satisfied that the person has "*in one or more of the respects notified, been in contravention of a condition specified in the notification …*". That provision therefore recognises that one or more breaches alleged in a notification may fall away and not be reflected in a confirmation decision.

131. The legislation therefore contemplates that a notification can cover more than one alleged contravention, that a single penalty may be specified, that a confirmation decision may not extend to all alleged contraventions, and it provides that the penalty is capped at the amount specified in the notification.

132. This straightforwardly addresses VM's allegation about GC 9.2(j). Ofcom were entitled to issue a single notification and decision and to specify a single penalty, and indeed the appropriateness of them choosing to do so in this case is not challenged. But Ofcom also went further and made it clear that the penalty imposed related principally to the breach of GC 9.3. In any event we see no real basis for VM's suggestion that the GC 9.2(j) finding was a makeweight one. Ofcom concluded that the breaches of GC 9.2(j) aggravated, or potentially aggravated, the impact of the overcharging (Decision at 5.84 and 5.87) and were "*serious and harmful to consumers*" (Decision at 5.91). There is no appeal against Ofcom's findings in respect of GC 9.2(j).

133. We consider that the legislation also addresses VM's argument regarding the on-net home movers allegation. Ofcom were not obliged to split the penalty proposed in the Notification between different allegations. They were obviously entitled to issue a confirmation decision that did not pursue an allegation originally made. Nothing in the legislation required Ofcom to recalculate the penalty (assessed in the round) that would hypothetically have been proposed in the Notification in the absence of the on-net home movers allegation, and treat the recalculated amount as the cap for the purposes of the Decision. What Ofcom were obliged to do, however, was to provide reasons for their Decision under s 96C(4)(b) CA 2003 and, under s 96C(4)(d), to require payment either of the penalty specified in the notification or "*such lesser penalty as Ofcom consider appropriate in the light of the person's representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention*".

134. The £7 million penalty imposed in the Decision is materially lower than the penalty proposed in the Notification, so on the face of it VM's representations, which included those in relation to the on-net home movers allegation, have indeed been taken into account. However, VM complains that insufficient credit was given, particularly having regard to the seriousness of the on-net home movers allegation.

135. Witness evidence provided by the decision maker indicated that he did not work backwards from the amount proposed in the Notification and assess by how

much it should be reduced. Rather, he came to his own view as to the appropriate penalty, setting it in the round based on his assessment of the factors identified in the penalty guidelines, having regard to the Notification, the written representations (including the CRA report), Ofcom's internal assessment of that report, representations made by VM at an oral hearing, and discussions with the case team. He was aware of the penalty proposed in the Notification and that it acted as a cap, but he did not use it as a starting point.

136. In our view this approach cannot be criticised. Looking at the matter afresh in the light of all the material available, rather than starting with the notified penalty figure that was proposed without the benefit of all that information (including, significantly, without the benefit of representations) appears to us to be the approach least likely to result in error, and in particular to reduce the risk of confirmation bias in favour of the previously proposed penalty amount. Ofcom's practice of ensuring that the final decision maker has not previously been involved clearly has the same aim. It is designed to ensure that all relevant factors, including in particular representations received, are properly taken into account. The cap has an important function, but as an overall cap and not more. It informs the CP of the maximum amount it is at risk of having to pay, enabling it to plan its affairs accordingly and to tailor its representations appropriately. Ofcom must in turn consider, in the light of the representations and the other matters referred to in s 96C(4)(d)(ii) CA 2003, whether the appropriate level of the penalty is the previously stated amount or a lesser amount.

137. Furthermore, we do not agree with VM's suggestion that the on-net home movers allegation was a central focus of the Notification. Whilst it is clear that, prior to the investigation being opened, Ofcom had focused on customers moving homes (albeit initially on customers moving outside a VM service area), the Notification lists five suspected breaches of GC 9.3, only one of which related to on-net home movers (see [46] above). We accept that three of the others essentially relate to the same issue of excessive ETCs (breaking the allegation down between ETCs charged in an amount higher than (a) monthly subscriptions, (b) monthly subscriptions less VAT, and (c) monthly subscriptions less VAT and cost savings), but overall it is clear that the question of excessive ETCs is the key focus. That occupies most of the discussion in the

Notification, in contrast to the on-net home movers allegation which takes up little space and is substantially less reasoned. ETCs being the key focus is also consistent with the fifth alleged breach, relating to VM's failure to take action between 22 September 2016 and 27 June 2017 in relation to ETCs, and with the fact that in relation to the on-net home movers allegation Ofcom note that the disincentive effect for home movers was "*exacerbated*" by the excessive ETCs during the Relevant Period.

138. Mr Palmer suggested that the on-net home movers allegation was more serious than Ofcom were arguing in their Defence because Ofcom were saying that VM was wrong to require customers who moved to another address within their initial commitment period either to sign up to a new fixed-term contract or pay an ETC. Customers who chose the former (which they did in proportionately higher numbers than customers outside an initial commitment period) became locked into another initial commitment period, which would have generated significant revenue. Others paid an ETC, which Ofcom were apparently saying should not have been paid at all. Compared to the overcharged ETCs that were the subject of the Decision, the amounts involved would have been considerably larger.

139. We do not consider that it can be concluded from the Notification that Ofcom were asserting that no ETC was appropriate for on-net home movers who chose to terminate their contracts. The focus was on the new fixed-term contract and not the application of ETCs to on-net home movers, and this is supported by the fact that Ofcom appear to have regarded the alleged contravention to have ceased once it became clear that VM would allow on-net home movers to transfer their existing contracts to their new address. In any event, however, the points made by Mr Palmer need to be weighed against the fact that the allegation only affected the relatively small number of customers who moved homes to another area serviced by VM. In contrast, excessive ETCs not only affected those who chose to pay ETCs or were actually put off switching, but potentially also affected the very much broader pool of customers on fixed-term contracts to which excessive ETCs applied. All those customers were individuals who, potentially, might otherwise have decided to switch, or to consider switching, to another CP.

(6) The EE decision

140. As already mentioned at [113] above, VM contend that the penalty was disproportionate as compared to, and wholly inconsistent with, a decision issued on the same date in the case of EE, also for contraventions of GCs 9.2(j) and 9.3, that imposed a penalty of £9 million (before a 30% settlement discount).

141. Although the decisions were issued on the same date, there were different decision makers. The evidence demonstrates that the decision maker in VM's case in fact reached his decision before the decision maker in the EE case, and that he therefore did not take account of it. Whilst there was some discussion between the two decision makers, that was at a time when the VM case was well advanced and the EE case was at an earlier stage.

142. Paragraph 1.14 of the penalty guidelines, set out at [115] above, states that Ofcom will have regard to precedents set by previous cases. Strictly the EE decision was not a "previous" case (in that the two decisions were issued on the same date). The Decision did consider three other precedents relating to incorrect charges (imposing penalties of £3.7 million, £2.7 million and £880,000 respectively, although not involving GC 9.3), but concluded that they could be distinguished on the grounds that the scale of the contraventions and number of affected customers were substantially lower than in VM's case. Ofcom also noted that they had not previously issued a penalty in respect of GC 9.2(j) or GC 9.3, so that there were "*no directly relevant precedents*" (Decision at 5.96).

143. Although Ofcom did not technically breach their own guidelines in failing to consider the EE decision, we consider that it would have been preferable, and certainly best regulatory practice, for Ofcom to have considered the EE case when making the final decision in the VM case. This would have been the best way of ensuring compliance with Ofcom's duties under s 3 CA 2003, in particular the duty under s 3(3)(a) to have regard to the principle of consistency. We do not accept Ofcom's argument that this was not possible because the decision maker in the VM case had actually made his decision on an earlier date, before the decision was made in the EE case. The decisions are both those of

Ofcom rather than an individual, and both were issued on the same date, 16 November 2018. There is no indication that it was not practically or sensibly possible for a process of cross-checking to occur before that date. It therefore appears to us that it should in fact have been possible to ensure that the decision maker in the VM case did consider the proposed decision in the EE case before reaching a final decision. Consistency of decision making is obviously important, and ensuring a cross-check between the two decisions would have been the obvious, and best, way of ensuring that full regard was had to that principle.

144. We should emphasise that this point is made by reference to the facts of this case, and in particular the fact that both decisions were issued on the same date. It is certainly not the case that Ofcom is required, for example, to delay making a decision for a lengthy period to allow account to be taken of another investigation, noting also the statutory requirement in s 96C(4)(a) CA 2003 to give a confirmation decision "*without delay*".

145. However, whilst it would have been preferable to consider the EE case, precedents are only one of a number of relevant factors. Caution is required in comparing the two penalties. As the Tribunal stated in *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 at [102], "*comparisons between individual penalties will rarely be justified as a basis for an appeal*".

146. We have concluded that, while Ofcom's failure to consider the EE case fell short of best regulatory practice, the failure is not sufficiently material to impugn the Decision. We have conducted a comparison of the penalty imposed on EE (on the basis of the non-confidential version of the decision issued in that case) and the penalty imposed on VM, and have concluded that the approach taken by Ofcom in the Decision can be justified relative to the EE decision. In carrying out that assessment we have considered each of the factors that VM claims should have resulted in it receiving a materially lower penalty relative to EE.

147. In summary, whilst there are some factors that might point to a lower penalty for VM relative to EE, there are also factors that justify imposing a higher

penalty, such that, overall, the penalty amount in the Decision can be justified relative to that in EE.

148. VM relied on the penalty imposed on it as representing a materially higher percentage of relevant turnover than the penalty imposed on EE. However, it became clear during the hearing that, whilst VM might be able to argue that this was the case if calculated using the correct EE turnover figure, Ofcom's EE case team had in fact incorrectly used a lower figure for EE's relevant turnover. On the basis of that incorrect lower figure the penalties imposed by Ofcom on VM and EE are at a similar level when expressed as a percentage of relevant turnover. Whilst EE might fortuitously have benefited from a mistake, that does not justify perpetuating its effect by extending the benefit to VM. We therefore do not think it is appropriate to have regard to this element as an indicator that the penalty imposed on VM was excessive.

149. VM also relied on other factors which it said showed that the infringement in EE's case was more serious, in particular that it affected more customers, lasted for a much longer period with a higher overall excessive charge, reimbursement fell materially short of the amount overcharged, and (unlike VM) there was a history of previous contraventions. It suggested that whilst VM's own contravention was simply an error, EE had been shown to have a complete disregard for compliance.

150. It is the case that EE's contravention affected a substantially larger number of customers and over a much longer period, and that reimbursement fell short of the total amount overcharged. The total amount overpaid was estimated at between £3m and £4.3m and the amount reimbursed was around £2 .7 million, such that up to £1.6 million might not have been refunded. There were also some previous issues with non-compliance.

151. However, in our view there are material factors pointing in the opposite direction. Most significantly, there is a sharp contrast with the EE case in the fact that members of VM's pricing team detected the breach and decided not to do anything about it (pending a proposed price increase to take effect some months later), with no concerted action being taken until after Ofcom's

investigation was opened. This was rightly regarded as being particularly serious. Ofcom were also entitled to conclude that, whilst the contravention was the result of a mistake, the reason that the mistake was not addressed was a failure of governance processes in respect of changes to contractual terms. In addition, Ofcom took account of the fact that there were failures in providing co-operation during the investigation (see [126] above), whereas no such failures were identified in EE's case. In the decision relating to EE Ofcom commented that the penalty would have been "*significantly higher*" but for EE's close co-operation, as well as the steps it took to remedy the breaches and ensure compliance with the GCs.

(7) Penalty quantum: conclusion

152. In determining whether the penalty set was proportionate, it is appropriate to have particular regard to Ofcom's position as a specialist regulator, and to the level of expertise and knowledge that would have been available to Ofcom when they determined the appropriate level of the penalty in the light of the various factors they identified, including in particular deterrence. An appropriate margin of appreciation is required, and the Tribunal's primary task is to assess the justice of the overall penalty (*Kier Group* at [76]).

153. In our view, having regard to the factors considered by Ofcom, and taking account of the margin of appreciation that should be accorded to them as a specialist regulator, the penalty was appropriate and proportionate. Taking account of the penalty guidelines, we have not identified any factors taken into account by Ofcom that should not have been taken into account, or any relevant factors excluded from consideration. The weighting of factors identified in the Decision also appears to be appropriate, and certainly within the margin of appreciation to be accorded to Ofcom. The process adopted, in particular ensuring that the decision maker was not previously involved in the investigation, cannot seriously be challenged. We have addressed the one issue that we have identified, namely an apparent failure to organise matters so that the (simultaneously issued) EE decision could be considered, and have concluded that it is not sufficiently material to call the Decision into question.

H. CONCLUSION

154. In conclusion:

(1) Ofcom did not err in law in finding that VM contravened GC 9.3; and

(2) Ofcom's decision to impose a £7m penalty was not arbitrary, unfair, inadequately reasoned or disproportionate.

155. Accordingly, VM's appeal is dismissed.

The Hon Mrs Justice Falk
Chairman

Eamonn Doran

Simon Holmes

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 27 January 2020

ANNEX

Extracts from the Communications Act 2003

3. General duties of OFCOM

(1) It shall be the principal duty of OFCOM, in carrying out their functions—

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

…

(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and

(b) any other principles appearing to OFCOM to represent the best regulatory practice.

…

96A.— Notification of contravention of condition other than SMP apparatus condition

(1) Where OFCOM determine that there are reasonable grounds for believing that a person is contravening, or has contravened, a condition … set under section 45, they may give that person a notification under this section.

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

(a) sets out the determination made by OFCOM;

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

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

(d) specifies the steps that OFCOM think should be taken by the person in order to—

(i) comply with the condition;

(ii) remedy the consequences of the contravention;

(e) specifies any penalty which OFCOM are minded to impose in accordance with section 96B;

…

(3) A notification under this section—

(a) may be given in respect of more than one contravention; and

(b) if it is given in respect of a continuing contravention, may be given in respect of any period during which the contravention has continued.

…

96B.— Penalties for contravention of conditions

(1) This section applies where a person is given a notification under section 96A which specifies a proposed penalty.

(2) Where the notification relates to more than one contravention, a separate penalty may be specified in respect of each contravention.

…

96C.— Enforcement of notification under section 96A

(1) This section applies where—

(a) a person has been given a notification under section 96A;

(b) OFCOM have allowed the person an opportunity to make representations about the matters notified; and

(c) the period allowed for the making of representations has expired.

(2) OFCOM may—

(a) give the person a decision (a "confirmation decision") confirming the imposition of requirements on the person, or the giving of a direction to the person, or both, in accordance with the notification under section 96A; or

(b) inform the person that they are satisfied with the person's representations and that no further action will be taken.

(3) OFCOM may not give a confirmation decision to a person unless, after considering any representations, they are satisfied that the person has, in one or more of the respects notified, been in contravention of a condition specified in the notification under section 96A.

(4) A confirmation decision—

(a) must be given to the person without delay;

(b) must include reasons for the decision;

(c) may require immediate action by the person to comply with requirements of a kind mentioned in section 96A(2)(d), or may specify a period within which the person must comply with those requirements; and

(d) may require the person to pay—

(i) the penalty specified in the notification under section 96A, or

(ii) such lesser penalty as OFCOM consider appropriate in the light of the person's representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention, and

may specify the period within which the penalty is to be paid.

(5) It is the duty of the person to comply with any requirement imposed by a confirmation decision.

…

97 Amount of penalty under s. 96 or 96A

(1) The amount of a penalty … notified under section 96A (other than a penalty falling within section 96B(4)) is to be such amount not exceeding ten per cent. of the turnover of the person's relevant business for the relevant period as OFCOM determine to be—

(a) appropriate; and

(b) proportionate to the contravention in respect of which it is imposed.

…

(5) In this section—

"relevant business" means (subject to the provisions of an order under subsection (3) and to subsections (6) and (7)) so much of any business carried on by the person as consists in any one or more of the following—

(a) the provision of an electronic communications network;

(b) the provision of an electronic communications service;

(c) the making available of associated facilities;

(d) the supply of directories for use in connection with the use of such a network or service;

(e) the making available of directory enquiry facilities for use for purposes connected with the use of such a network or service;

(f) any business not falling within any of the preceding paragraphs which is carried on in association with any business in respect of which any access-related condition is applied to the person carrying it on;

"relevant period", in relation to a contravention by a person of a condition set under section 45, means—

(a) except in a case falling within paragraph (b) or (c), the period of one year ending with the 31st March next before the time when notification of the contravention was given under … 96A;

(b) in the case of a person who at that time has been carrying on that business for a period of less than a year, the period, ending with that time, during which he has been carrying it on; and

(c) in the case of a person who at that time has ceased to carry on that business, the period of one year ending with the time when he ceased to carry it on.

…

135 Information required for purposes of certain OFCOM functions

(1) OFCOM may require a person falling within subsection (2) to provide them with all such information as they consider necessary for the purpose of carrying out their functions under—

…

(c) this Chapter.

(2) The persons falling within this subsection are—

(a) a communications provider;

…

(3) The information that may be required by OFCOM under subsection (1) includes, in particular, information that they require for any one or more of the following purposes—

(a) ascertaining whether a contravention of a condition or other requirement set or imposed by or under this Chapter has occurred or is occurring;

…

(4) A person required to provide information under this section must provide it in such manner and within such reasonable period as may be specified by OFCOM.

…

192 Appeals against decisions by OFCOM, the Secretary of State etc.

(1) This section applies to the following decisions—

(a) a decision by OFCOM under this Part … that is not a decision specified in Schedule 8;

…

(2) A person affected by a decision to which this section applies may appeal against it to the Tribunal.

…

194A Disposal of appeals under section 192 (other than against certain decisions of Secretary of State)

…

(2) The Tribunal must decide the appeal, by reference to the grounds of appeal set out in the notice of appeal, by applying the same principles as would be applied by a court on an application for judicial review.

(3) The Tribunal may—

(a) dismiss the appeal or quash the whole or part of the decision to which it relates; and

(b) where it quashes the whole or part of that decision, remit the matter back to the decision-maker with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal.

(4) The decision-maker must comply with a direction under subsection (3)(b).

…

392 Penalties imposed by OFCOM

(1) It shall be the duty of OFCOM to prepare and publish a statement containing the guidelines they propose to follow in determining the amount of penalties imposed by them under provisions contained in this Act ….

(2) OFCOM may from time to time revise that statement as they think fit.

(3) Where OFCOM make or revise their statement under this section, they must publish the statement or (as the case may be) the revised statement in such manner as they consider appropriate for bringing it to the attention of the persons who, in their opinion, are likely to be affected by it.

(4) Before publishing a statement or revised statement under this section OFCOM must consult both—

(a) the Secretary of State, and

(b) such other persons as they consider appropriate,

about the guidelines they are proposing to include in the statement.

(5) Before determining how to publish a statement or revised statement under this section OFCOM must consult the Secretary of State.

(6) It shall be the duty of OFCOM, in determining the amount of any penalty to be imposed by them under this Act … to have regard to the guidelines contained in the statement for the time being in force under this section.

…