



Notification of Contravention of General Condition 24 under section 96C of the Communications Act 2003

Notification issued to Universal Utilities Limited
("Unicom") by the Office of Communications ("Ofcom")

**This is the non-confidential
version**

Confidential information has been
redacted.

Redactions are indicated by [X]

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Section 1

Notification to Universal Utilities Limited (“Unicom”) of contravention of General Condition 24 under section 96C of the Communications Act 2003

Section 96C of the Communications Act 2003

- 1.1 Section 96C of the Communications Act 2003 (the “Act”) allows the Office of Communications (“Ofcom”) to issue a decision (a “Confirmation Decision”) confirming the imposition of requirements on a person where that person has been given a notification under section 96A of the Act, Ofcom has allowed that person an opportunity to make representations about the matters notified, and the period allowed for the making of representations has expired. Ofcom may not give a Confirmation Decision to a person unless, having considered any representations, we are satisfied that the person has, in one or more of the respects notified, been in contravention of a condition specified in the notification under section 96A.
- 1.2 A Confirmation Decision:
- a) must be given to the person without delay;
 - b) must include the reasons for the decision;
 - c) may require immediate action by the person to comply with the requirements of a kind mentioned in section 96A(2)(d) of the Act,¹ or may specify a period within which the person must comply with those requirements; and
 - d) may require the person to pay:
 - i) the penalty specified in the notification issued under section 96A of the Act, or
 - ii) such lesser penalty as Ofcom consider appropriate in light of the person’s representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention, and may specify the period within which the penalty is to be paid.

General Condition 24

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

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

sets out the General Conditions of Entitlement (the “General Conditions” or “GCs”) which apply to all Communications Providers (“CPs”) defined in each GC. The GCs have, from time to time, been amended.²

1.5 On 18 December 2009 Ofcom introduced new sales and marketing rules applicable to transfers of Fixed-Line Telecommunications Services between Communications Providers.³ The rules were set out in a new General Condition 24 (“GC24”) which came into force on 18 March 2010 (see Annex 1 for the full text of GC24).⁴ GC24 applied to all CPs who sell Fixed-Line Telecommunications Services to Domestic and Small Business Customers⁵ (see GC24.1).

1.6 On 20 December 2013, Ofcom revoked General Condition 24 and modified General Condition 22 with effect from 20 September 2014.⁶ The requirements that were in GC24.3 are now set out in GC22.3.⁷ For the purposes of this Confirmation Decision and the period to which it relates, however, the provisions of GC24, and GC24.3 in particular, are relevant.

1.7 GC24.3 required that:

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

- a) engage in dishonest, misleading or deceptive conduct;*
- b) engage in aggressive conduct;*
- c) contact the Customer in an inappropriate manner; or*
- d) engage in Slamming.”⁸*

² A consolidated version of the General Conditions as at 16 May 2014 (and which version applied throughout the period relevant for this Confirmation Decision) is located on the Ofcom website: http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/GENERAL_CONDITIONS_AS_AT_16_MAY_2014.pdf

³ For the definitions of the terms “Fixed-Line Telecommunications Services” and “Communications Providers” see Section 5 below.

⁴ http://stakeholders.ofcom.org.uk/binaries/consultations/protecting_consumers_misselling/statement/statement.pdf

⁵ “Domestic and Small Business Customer” has the meaning set out in section 52(6) of the Act: *“In this section “domestic and small business customer”, in relation to a public communications provider, means a customer of that provider who is neither –*
(a) himself a communications provider; nor
(b) a person who is such a customer in respect of an undertaking carried on by him for which more than ten individuals work (whether as employees or volunteers or otherwise)”.

⁶ See <http://stakeholders.ofcom.org.uk/binaries/consultations/consumer-switching-review/statement/statement.pdf>. This modification gave effect to our decisions set out in that Statement as well as those in *Consumer Switching, A statement and consultation on the processes for switching fixed voice and broadband providers on the Openreach copper network*: http://stakeholders.ofcom.org.uk/binaries/consultations/consumer-switching-review/summary/Consumer_Switching.pdf.

⁷ A consolidated version of the General Conditions as at 28 May 2015 is located on the Ofcom website at http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/CONSOLIDATED_VERSION_OF_GENERAL_CONDITIONS_AS_AT_28_MAY_2015.pdf.

⁸ “Slamming” was defined in GC24.19(m).

Subject of this Confirmation Decision

- 1.8 This Confirmation Decision is addressed to Universal Utilities Ltd (referred to as “Unicom”) whose registered company number is 03667643. Unicom’s registered office is Universal Utilities Ltd, Universal House, Longley Lane, Manchester M22 4SY.

Notification given by Ofcom under section 96A

- 1.9 On 30 April 2015, Ofcom issued a notification under section 96A of the Act (“the Section 96A Notification”) to Unicom, stating that Ofcom had reasonable grounds for believing that from 1 March 2013 to 8 July 2014 (“the Relevant Period”), Unicom had contravened GC24. Specifically, it had contravened the provision relating to mis-selling under GC24.3(a), by providing information to prospective customers that gave them a mis-leading impression that on transferring their Fixed-Line Telecommunications Services to Unicom:
- 1.9.1 they would not incur Early Termination Charges (“ETCs”) or costs related to the early termination of contracts with their existing CP where they were still within the minimum contract period (“MCP”) of that contract; and
 - 1.9.2 they would experience no effect on their existing broadband services.
- 1.10 The Notification also notified Unicom that Ofcom was minded to impose a penalty of £250,000 on it in respect of the contravention of GC24.3.
- 1.11 Before giving this Notification, OFCOM considered whether it would be more appropriate to proceed under the Competition Act 1998.⁹ Ofcom decided that it would not be more appropriate to do so on the basis that the contravention Ofcom had reasonable grounds for believing had occurred did not appear to involve breaches of competition law.
- 1.12 Following its request for an extension of the time for doing so, Unicom was given until 5pm on 5 June 2015 to make written representations to Ofcom about the matters set out in the Section 96A Notification. It did so on that date. Unicom also had the opportunity to make oral representations, which it did on 19 June 2015.

Confirmation Decision

- 1.13 Having served the Section 96A Notification on Unicom, which allowed it the opportunity to make representations, the period allowed for making representations having now expired, and having carefully considered Unicom’s representations, Ofcom is satisfied that Unicom has, in one or more of the respects notified, been in contravention of a condition specified in the Section 96A Notification (specifically GC24.3) in the Relevant Period. Ofcom has decided to give Unicom a Confirmation Decision, and to impose a financial penalty, in accordance with section 96C of the Act. The reasons are set out in the remainder of this document (the “Explanatory Statement”).

⁹ <http://www.legislation.gov.uk/ukpga/1998/41/contents>

Requirements imposed on Unicom

- 1.14 Taking full account of the steps it has taken in these regards, and to the extent it has not already done so, the steps which Ofcom confirms must be taken by Unicom to comply with the requirements of GC24.3(a), as now reflected in the corresponding provisions of GC22, in particular, are:
- i) making all necessary changes to its policies, procedures, marketing materials and sales scripts and/or guidance to sales staff;
 - ii) providing appropriate further training to sales staff; and
 - iii) implementing an effective quality assurance process to monitor compliance by Unicom's agents with the requirements of the relevant GCs.
- 1.15 Again taking full account of the steps it has taken in these regards, and to the extent it has not already done so, the steps which Ofcom confirms must be taken by Unicom to remedy the consequences arising from its contravention of GC24.3(a) are the establishment and effective implementation of schemes for:
- i) paying to all affected customers it is able to identify amounts by way of compensation for loss or damage suffered by them or in respect of annoyance, inconvenience or anxiety to which they have been put and/or by way of ex gratia payments;
 - ii) allowing any customers who were misled by Unicom to cease their contract with it, regardless of the length of contract served, with no requirement to pay an early termination charge or disconnection fee and no requirement to pay any charges for services other than those the customer has used (and where the customer chooses to return to their previous CP, this would include compensation for any charges the Customer may incur in the process of returning to that provider); and
 - iii) compensating customers who may otherwise have fallen into the above category but who have already returned to their previous Communications Provider and have incurred charges in doing so

Penalty

- 1.16 Ofcom has determined that a penalty of £200,000 be imposed on Unicom in respect of its contravention of GC24.3(a) during the Relevant Period.

Next steps

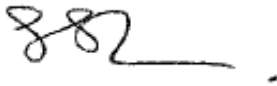
- 1.17 Unicom must comply with the requirements imposed on it by this Confirmation Decision within a reasonable period agreed with Ofcom and in any event no later than three months from the date of this decision.
- 1.18 Unicom has until 5.00pm on 26 August to pay Ofcom the penalty of £200,000.

Interpretation

- 1.19 Words or expressions used in this Notification have the same meaning as in the GCs or the Act except as otherwise stated in this Notification.

Chris Taylor (Director – Consumer Policy) and Siobhan Walsh (Director – Competition Policy)

as decision makers for Ofcom

Handwritten signature of Chris Taylor in cursive script.Handwritten signature of Siobhan Walsh in cursive script.

27 July 2015

Section 2

Executive Summary

This document

- 2.1 The remainder of this document is an Explanatory Statement in support of the Confirmation Decision Ofcom gives Unicom under section 96C of the Act, in respect of its contravention of GC24.3.

Background

- 2.2 On 18 December 2009, Ofcom introduced new sales and marketing rules in a new GC, GC24, set under section 45 of the Act, which came into force on 18 March 2010. These rules include explicit prohibitions on all CPs from engaging in dishonest, misleading or deceptive conduct.
- 2.3 On 18 March 2010, Ofcom opened an own initiative investigation to monitor industry-wide compliance with GC24 (the “Programme”). This has since been replaced by a new GC22 monitoring and enforcement programme, following the introduction of a revised GC22, replacing GC24, in September 2014.

Investigation of Unicom

- 2.4 On 21 February 2014, Ofcom decided to open an own-initiative enquiry into Unicom in light of the volume and nature of complaints it had received regarding Unicom’s sales and marketing practices between August 2013 and January 2014. On completion of that enquiry, we decided, on 26 March 2014, it was appropriate to open a formal investigation (the “Investigation”) into Unicom’s conduct under GC24 (and GC9)¹⁰. The investigation involved gathering information and evidence from Unicom and its customers.
- 2.5 Having carefully considered the information and evidence available to us, Ofcom decided we had reasonable grounds for believing that during the period 1 March 2013 to 8 July 2014 (the “Relevant Period”), Unicom contravened GC24.3 by engaging in misleading conduct. Specifically, Ofcom had reasonable grounds to believe that Unicom had contravened GC24.3(a) by operating standard sales and marketing processes under which it provided prospective customers with information that gave them a misleading impression that on transferring their Fixed-Line Telecommunications Services to Unicom:
- i) they would not incur ETCs or costs related to the early termination of contracts with their existing CP where they were still within the minimum contract period (“MCP”) of that contract; and
 - ii) they would experience no effect on their existing broadband services.

We considered that Unicom had in practice provided prospective customers with misleading information in these respects.

¹⁰ GC9 places various requirements on CPs in respect of the provision of information, the length of contracts and the conditions for termination. The scope of the Investigation was narrowed during its course, and the consideration of issues under GC9 was discontinued.

- 2.6 Accordingly, Ofcom decided to give Unicom a notification in accordance with section 96A of the Act (the “Section 96A Notification”) (a copy of which is at Annex 29 to this Confirmation Decision). Amongst other things, this notification set out Ofcom’s determination and that Ofcom was minded to impose a penalty of £250,000 on Unicom in respect of its contravention of GC24.
- 2.7 Our provisional regulatory judgment was that the proposed penalty was appropriate and proportionate to the contravention in respect of which it would be imposed. In taking that view, Ofcom had regard to our published Penalty Guidelines and the basis for our view was explained in Section 7 of the Section 96A Notification.
- 2.8 Following its request for an extension of the relevant time, Unicom was given until 5.00pm on 5 June 2015 to make written representations to Ofcom about the matters set out in the Section 96A Notification and the accompanying Explanatory Statement. It did so on that date (a copy of its “Written Representations” is at Annex 30 to this document). Unicom was also given the opportunity to make oral representations to Ofcom in relation to these matters. It did so on 19 June 2015 (a copy of the transcript of the hearing of its “Oral Representations” is at Annex 31) (and together Unicom’s Written and Oral Representations are referred to as the “Representations”).

Decision

- 2.9 Ofcom has carefully considered the Representations and all the relevant evidence and is satisfied that, during the Relevant Period, Unicom contravened GC24.3 in some of the respects notified, in particular circumstances and in relation to some prospective customers. The bases for Ofcom’s views as to the contravention are explained in Section 6 of this document.
- 2.10 Ofcom also confirms its decision, in all the circumstances, to impose a penalty on Unicom in respect of its contravention. The penalty is £200,000. Ofcom’s judgment is that this penalty amount is appropriate and proportionate to the contravention in respect of which it is imposed. In making that judgment Ofcom has had regard to all the relevant evidence, the Representations and Ofcom’s published Penalty Guidelines. The bases for Ofcom’s view as to the penalty are explained in Section 7 of this document.
- 2.11 Unicom has until 5.00pm on 26 August 2015 to pay Ofcom the penalty.

Section 3

Background

The statutory framework

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

Ofcom's duties and functions

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

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

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

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

3.4 With section 3(3) in mind, Ofcom has published a statement of regulatory principles.¹¹ These include that Ofcom will:

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

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

¹¹ <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>

- 3.6 Under section 45 of the Act, Ofcom has the power to set (and the function of setting) GCs binding the persons to whom they are applied in accordance with section 46. Under section 46, a GC may be applied generally to every person providing an electronic communications network or electronic communications service, or to every person providing such a network or service of a particular description specified in the GC. GCs can only contain provisions authorised or required by one or more of sections 51, 52, 57, 58 or 64 of the Act.
- 3.7 The Schedule to a Notification issued by the Director General of Telecommunications on 22 July 2003 under section 48(1) of the Act, which took effect from 25 July 2003, sets out the General Conditions of Entitlement which apply to all CPs defined in each GC. The GCs have, from time to time, been amended.¹²
- 3.8 Ofcom introduced new sales and marketing rules in a new GC, GC24,¹³ made under section 45 of the Act, which came into force on 18 March 2010. These rules explicitly prohibited all companies from engaging in dishonest, misleading or deceptive conduct, and slamming, and obliged CPs to ensure consumers fully understand and consent to a contract before it is agreed. GC24 also set out the information that must be made available at the point of sale and during the defined Transfer Period,¹⁴ and the right to terminate a contract without charge before the completion of that Period.
- 3.9 Ofcom also has the following functions and powers relating to the enforcement of GCs under the Act.
- 3.10 Under section 96A where Ofcom determines that there are reasonable grounds for believing that a person is contravening, or has contravened, a condition (other than an SMP¹⁵ apparatus condition) set under section 45, Ofcom may give that person a Notification. Section 96A(2) states:
- “A notification under this section is one which-*
- (a) sets out the determination made by Ofcom;*
 - (b) specifies the condition and contravention in respect of which that determination has been made;*
 - (c) specifies the period during which the person notified has an opportunity to make representations;*
 - (d) specifies the steps that Ofcom think should be taken by the person in order to-*
 - (i) comply with the condition;*
 - (ii) remedy the consequences of the contravention;*

¹² A consolidated version of the GCs as at 16 May 2014 (and which version applied throughout the period relevant in this matter) is located on the Ofcom website:
http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/GENERAL_CONDITIONS_AS_AT_16_MAY_2014.pdf

¹³ http://stakeholders.ofcom.org.uk/binaries/consultations/protecting_consumers_misselling/statement/statement.pdf

¹⁴ The period of 10 working days defined in GC24.19(q) before which a customer's transfer to a new CP may be activated and in which the transfer may be cancelled.

¹⁵ “Significant Market Power”.

- (e) *specifies any penalty which Ofcom are minded to impose in accordance with section 96B;*
- (f) *where the contravention is serious, specifies any direction which Ofcom are minded to give under section 100; and*
- (g) *where the contravention relates to a condition set under sections 87 to 91, specifies any direction which Ofcom are minded to give under section 11A.”*

3.11 As set out above, where the Notification under section 96A specifies any penalty which Ofcom are minded to impose, the penalty must be in accordance with section 96B. Section 96B says:

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

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

(3) Where the notification relates to a continuing contravention, no more than one penalty may be specified in respect of the period of contravention specified in the notification.

(4) But, in relation to a continuing contravention, a penalty may be specified in respect of each day on which the contravention continues after—

(a) the giving of a confirmation decision under section 96C(4)(c) which requires immediate action; or

(b) the expiry of any period specified in the confirmation decision for complying with a requirement so specified.

(5) The amount of a penalty under subsection (4) is to be such amount not exceeding £20,000 per day as OFCOM determine to be—

(a) appropriate; and

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

3.12 Section 97 is concerned with the amount of the penalty notified under section 96A (other than a penalty falling within 96B(4)). Section 97(1) says:

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

(a) appropriate; and

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

3.13 Section 97(3) states that the turnover of a person's relevant business for a period shall be calculated in accordance with any rules set out in an order made by the Secretary of State. It also says that such an order may provide for determining what is to be treated as the network, service, facility or business by reference to which the calculation of that turnover falls to be made.

- 3.14 Section 97(5) states that, as far as relevant here, “relevant business” means (subject to the provisions of an order under section 97(3)) “*so much of any business carried on by the person that consists in any one or more of the following:*
- a) *the provision of an electronic communications network;*
 - b) *the provision of an electronic communications service;*
 - c) *the making available of associated facilities;*
 - d) *the supply of directories for use in connection with the use of such a network or service;*
 - e) *the making available of directory enquiry facilities for use for purposes connected with the use of such a network or service; and*
 - 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.”*
- 3.15 Section 97(5) also states that, for present purposes, the “relevant period”, in relation to a contravention by a person of a condition set under section 45, means “*...the period of one year ending on 31 March before the notification of the contravention was given under section 96A*”.
- 3.16 The Electronic Communications (Networks and Services) (Penalties) (Rules for Calculation of Turnover) Order 2003¹⁶ sets out rules governing the way in which the turnover of a notified CP of electronic communications networks, services, facilities, or apparatus should be calculated for the purposes of section 97. Relevant paragraphs of the Schedule to that Order state:
- “1. *The turnover of a notified provider shall be calculated in conformity with accounting practices and principles which are generally accepted in the United Kingdom.*
 2. *The turnover of a notified provider shall be limited to the amounts derived by that provider from the relevant business after deduction of sales rebates, value added tax and other taxes directly related to turnover.*
 3. *When a notified provider's relevant business consists of two or more undertakings that each prepare accounts then the turnover shall be calculated by adding together the turnover of each, save that no account shall be taken of any turnover resulting from the supply of goods or the provision of services between them.”*
- 3.17 Section 392(1) of the Act, meanwhile, requires Ofcom to publish a statement containing the guidelines we propose to follow in determining the amount of penalties imposed by us under provisions in the Act (or any other enactment apart from the Competition Act 1998). Section 392(6) says Ofcom has a duty, in determining the amount of any penalty to be imposed by us under the Act (or any other enactment apart from the Competition Act 1998), to have regard to the guidelines contained in the statement for the time being in force.

¹⁶ See <http://www.legislation.gov.uk/uksi/2003/2712/contents/made>

- 3.18 Section 96C of the Act confers on Ofcom the power to issue a decision confirming the imposition of requirements on a person where: that person has been given a notification under Section 96A of the Act; Ofcom has allowed that person an opportunity to make representations about the matters notified; and the period allowed for the making of representations has expired.
- 3.19 Ofcom may not give a confirmation decision to a person unless, after considering any representations, we are satisfied that the person has, in one or more of the respects notified, been in contravention of a condition specified in the notification under section 96A.
- 3.20 Section 96C(4) states:
- “A confirmation decision:*
- (a) must be given to the person without delay;*
 - (b) must include reasons for the decision;*
 - (c) may require immediate action by the person to comply with requirements of a kind mentioned in section 96A(2)(d), or may specify a period within which the person must comply with those requirements; and*
 - (d) may require the person to pay-*
 - i) the penalty specified in the notification under section 96A, or*
 - ii) such other lesser penalty as Ofcom consider appropriate in light of the person’s representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention,*
- and may specify the period within which the penalty is to be paid.”*
- 3.21 It is the duty of the person to whom a confirmation decision is issued to comply with the requirements imposed by that decision. Ofcom may enforce those requirements in civil proceedings (for example, by way of an injunction).

Ofcom’s penalty guidelines

- 3.22 On 13 June 2011, Ofcom published our current guidelines under section 392 (the “Penalty Guidelines”).¹⁷ The Penalty Guidelines provide that:

“Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement.”

They also set out examples of potentially relevant factors in the determination of a penalty, to which we return in section 7 below.

¹⁷ Also available at <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>

General Condition 24

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

3.24 GC24.3 is the focus of this Confirmation Decision. Although GC24 was revoked with effect from 20 September 2014 and its provisions on the sale and marketing of Fixed-Line Telecommunications Services were incorporated to a modified GC22, it was in force during the Relevant Period. GC24.3 required that:

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

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

3.25 Of these various forms of mis-selling, those referred to in GC24.3(a) are relevant for the purposes of this Confirmation Decision.

The Programme

3.26 On 18 March 2010, Ofcom opened the Programme to monitor industry-wide compliance with GC24. Under the Programme, Ofcom actively monitors CPs’ compliance with the rules through complaints made to Ofcom by industry and members of the public. Ofcom also gathers monthly industry data from Openreach¹⁸ to support its monitoring activities. Analysing this data over time enables Ofcom to determine benchmarks in relation to mis-selling, which then provides us with a basis for targeting regulatory intervention against those CPs whose performance is outside normal industry parameters in any given month. Ofcom opens individual investigations and/or takes direct enforcement action under this Programme where required.¹⁹

3.27 The GC24 Programme was closed on 20 September 2014. A new GC22 Programme was opened on 22 September 2014.²⁰ Tackling mis-selling of Fixed-Line Telecommunications Services remains an important Ofcom priority. Mis-selling works against the interests of consumers, both directly through harm and distress as well as

¹⁸ BT’s infrastructure division responsible for network access.

¹⁹ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01045/

²⁰ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01137/

undermining confidence in the development of competition and in the industry as a whole.

Unicom's relevant regulatory history

- 3.28 Another relevant part of the background to this matter is the enquiry, monitoring and investigation Ofcom conducted between June 2006 and July 2007 into Unicom's compliance with the mis-selling rules at that time provided for in GC14.5. This involved Ofcom serving on Unicom, in July 2007, a notification under section 94 of the Act, setting out our determination that we had reasonable grounds for believing that, amongst other things, between May 2005 and July 2006, Unicom had contravened GC 14.5(b) in respect of its written promotional materials.²¹
- 3.29 The relevant enquiry began in June 2006. As part of it, Ofcom wrote to Unicom on 6 July 2006.²² The letter was addressed to Unicom's then CEO, [X].
- 3.30 Amongst the concerns Ofcom outlined in that letter, and which are relevant in light of the findings in this Confirmation Decision, was that, *"Unicom's sales representatives are assuring prospective customers that they will not have to pay termination fees to their existing suppliers on switching to Unicom."*
- 3.31 That letter went on to highlight the specific concerns about Unicom's written marketing and process materials. We noted:

"The orange marketing brochure states, under the sub-heading "How we keep your costs down", that "change over is free of charge". We are concerned that this creates the impression that customers will not incur any costs from either their existing provider or Unicom in the event of a change over. We believe this should be more accurately confined to a statement about Unicom's costs to a prospective customer in the event that they switch their supply to Unicom. Further, in the light of allegations made by some Unicom customers who have complained to Ofcom regarding verbal assurances made by Unicom sales staff that they will not have to pay termination fees to their existing suppliers in the event of a switch over, we are concerned to ensure that Unicom clarifies with prospective customers, orally and in writing, that Unicom is not responsible for any termination fees charged by the customer's existing service provider, nor can it offer any guarantee that such termination fees will not apply."

- 3.32 We also raised concerns about the content of the *"Unicom Verbal Telesales Training Manual Trainee Induction Course: Part 2"* document (Version 3 April 2006).²³ This appears to have been the training manual for Unicom telesales staff at the relevant time. It included instructions in the form of a *"Telesales Questions and Answers"* document.
- 3.33 Amongst the questions and answers covered were:

"Q: Will there be any costs to change?"

A: No. We will do absolutely everything required for you on your behalf to change your billing to Unicom. This service is provided completely free of charge.

²¹ Copy attached at Annex 3

²² Copy attached at Annex 4A

²³ Copy attached at Annex 5

“Q: I am currently in a contract and I need to pay a termination fee

A: If you were not made aware of the termination fee at the point of sale you should take this up with your existing supplier. It may very well be that your existing supplier would be sympathetic with your situation in these circumstances. It is not uncommon for suppliers to waive their right to a termination fee. We sometimes do.”

3.34 Our letter said:

“... the suggested answer to the question ‘Will there be any costs to change?’ should make clear that Unicom will not impose costs for changing over a customer’s service to Unicom, but that no guarantee can be made as to charges imposed by the customer’s existing provider. As drafted, the customer is likely to be left with the impression that neither Unicom nor its existing service provider will impose switching charges.”

3.35 Unicom responded on 13 July 2006, in a letter from its CEO, [X].²⁴ Amongst other things, the letter outlined changes Unicom would make to this training manual. The questions and answers in the corresponding section in the *“Verbal Telesales Training Manual Version 5 July 2006”* were amended to read:

“Q: Will there be any costs to change?

A: We will not charge you to change over to Unicom, but you may incur a termination fee from your existing supplier. Who is your existing supplier?”

“Q: I am currently in a contract and I need to pay a termination fee.

A: You will need to deal with this yourself. Unicom will not pay termination fees charged by customer’s existing suppliers. You will need to discuss this with your existing supplier.”²⁵

Similar amendments were also reflected in Unicom’s *“Product Knowledge Q&A Version 5 July 2006”* document, which appears to have been another sales process or training document in use at that time.²⁶

3.36 On the basis of those changes, Ofcom decided, at that stage, not to commit resources to an investigation of those matters. We did, however, make clear, in our letter of 19 June 2006 relaying our decision to Unicom,²⁷ that:

“... Ofcom’s decision in this case is merely to forbear from investigation at the current time – we will continue to actively monitor complaints received by the Ofcom Contact Centre and, in the event that the level of complaints received regarding Unicom do not continue to decrease over the coming months, Ofcom may revisit its decision and open a full investigation into both new and existing complaints.”

3.37 Thereafter, on 18 December 2006 and following a period of monitoring of complaints about Unicom, Ofcom opened an investigation into Unicom’s sales and marketing activity’s compliance with GC14.5. This led to the issuing of the notification described

²⁴ Copy attached at Annex 6

²⁵ Copy attached at Annex 7

²⁶ Copy attached at Annex 8

²⁷ Copy attached at Annex 8A

above. One aspect of the contravention Ofcom found was that in some of its sales process documents, Unicom stated it was, "*Free of charge to change over.*" Ofcom considered this inaccurate on the basis some CPs, including Unicom, apply an ETC for consumers transferring services whilst still within their MCPs.

Section 4

The Investigation

- 4.1 On 24 March 2014, Ofcom opened an own-initiative investigation into Unicom (“the Investigation”) in order to examine its compliance with GC24, and specifically GCs 24.3 and 24.6,²⁸ in connection with its sales and marketing of Fixed-Line Telecommunications Services and with GC9, and specifically GC9.3 and GC.9.4,²⁹ in connection with the requirement to offer contract terms with minimum terms.
- 4.2 The decision to conduct the Investigation was primarily driven by complaints to Ofcom’s Consumer Contact Team (“the CCT”) from consumers who alleged they had been mis-sold Fixed-Line Telecommunications Services by Unicom. In light of these, Ofcom undertook a preliminary enquiry (the “Enquiry Phase”). Analysis of information submitted by Unicom during the Enquiry Phase gave rise to further concerns which Ofcom considered to merit further investigation. The history of the Investigation in more detail is as follows.

The Enquiry Phase

- 4.3 On 21 February 2014, Ofcom decided to open an own-initiative enquiry into Unicom due to the volume and nature of complaints it had received regarding Unicom’s sales and marketing practices between August 2013 and January 2014. Details of these complaints were provided to Unicom in an attachment which accompanied Ofcom’s letter to Unicom informing it of our decision to open an enquiry into its conduct (“the Enquiry Opening Letter”).³⁰
- 4.4 Ofcom’s preliminary analysis of these complaints identified that a significant number of cases involved Unicom customers alleging that they were provided with false/misleading information or, in other cases, a lack of information at the point of sale. Ofcom also received a number of complaints from Unicom customers alleging practices that could fall under GC9, such as the inclusion in their contracts with Unicom of automatically renewable terms (“ARCs”) and/or MCPs which exceeded 24 months.
- 4.5 Unicom provided Ofcom with written representations on 14 March 2014 (“the Enquiry Opening Letter Response”).³¹ This response included the following:
- a covering letter which sets out:
 - details of Unicom’s renewal process strategy which was introduced following Ofcom’s decision to ban automatically renewable contracts;
 - details of the sales and marketing channels used by Unicom to market its Fixed-Line Telecommunications Services: its “Paper Sales” and “Verbal Sales” Methods;

²⁸ About information CPs must provide at the point of sale

²⁹ About automatic renewal of fixed term contracts and the duration of fixed term contracts for the provision of ECS.

³⁰ Copy attached at Annex 9

³¹ Copy attached at Annex 10

- an overview of the processes involved in the provisioning of Unicom's Fixed-Line, Broadband and Mobile services; and
 - a summary of Unicom's review of Ofcom's CCT complaints data as well as an explanation of reasons for common customer complaints.
- presentation materials used by Unicom's field-sales representatives, including copies of the paperwork left with the Customer at the point of sale in the Paper Sales Method;
 - copies of documentation provided to customers in durable medium following agreement to transfer Fixed-Line Telecommunications Services to Unicom in both the Paper Sales and Verbal Sales methods;
 - verification materials and scripts used by Unicom's Branch Managers and telesales representatives;
 - a copy of Unicom's Notification of Transfer Letter which CPs are required to issue upon placing a transfer order for the Customer's Fixed-Line Telecommunications Service;
 - a summary of Unicom's procedures for handling Customer complaints, including a copy of Unicom's sales and marketing Code of Practice which is provided to the Customer at certain stages of the sales process; and
 - details of Unicom's review of Ofcom's CCT complaints data, which Unicom categorised as falling into categories of 'mis-selling', 'slamming' and 'Cancel Other' and in which Unicom disagreed with the allegations of mis-selling made by Customers in a significant number of cases.

Scoping the Investigation

4.6 Ofcom considered the Enquiry Opening Letter Response and the accompanying documents. We also took account that, during the period of 1 August 2013 to 31 January 2014, Ofcom received 171 complaints from consumers alleging various forms of mis-selling and contractual issues.³² Further analysis of these complaints raised specific concerns in connection with Unicom's compliance with its regulatory requirements. These included that it was:

- providing mis-leading information about potential savings on call costs compared to the consumer's current CP, the services to be included in the package (e.g. call diverts) and/or Unicom's relationship with BT;³³
- providing mis-leading information about the validity of ETCs that would be payable to the customer's previous CP following the switch;³⁴
- offering to pay ETCs that would be payable to the customer's previous CP following the switch (and not doing so);³⁵

³² Copy attached at Annex 9. Complaints were provided to Unicom only where the consumer had given permission to Ofcom to share their details.

³³ Possibly in contravention of GC24.3.

³⁴ Ibid.

³⁵ Ibid.

- providing mis-leading information about the likelihood of disruption to existing broadband services;
 - not providing information about MCPs at the point of sale;³⁶
 - signing up residential customers on three year contracts;³⁷ and
 - that its contracts still contained automatically renewable terms.³⁸
- 4.7 In light of this further analysis and a thorough review of the information provided by Unicom, and in accordance with Ofcom’s Enforcement Guidelines, Ofcom decided it was appropriate to open the Investigation into Unicom’s conduct under GC24 and GC9. Unicom was informed of this decision on Wednesday 26th March 2014.
- 4.8 The scope of the Investigation was revised during its course as new information became available.³⁹ In particular, Ofcom discontinued the investigation of possible contraventions of GC9.3 and GC9.4 following our analysis of information obtained from Unicom.

Information gathering

- 4.9 During the Investigation Ofcom issued five formal notices to Unicom, requiring it to provide information to us, under section 135 of the Act. Unicom also voluntarily submitted additional information to Ofcom at various points in the Investigation. Ofcom also served information notices under the same section of the Act on 12 other CPs providing services to business customers.
- 4.10 The following section provides a chronological summary of the information obtained from Unicom and other relevant CPs. All of it has been taken into consideration by Ofcom in making our judgments about Unicom’s compliance with GC24.

Unicom letter of 23 May 2014

- 4.11 Unicom wrote to Ofcom on 23 May 2014 to update it on actions taken in respect of the areas for improvement identified in the Enquiry Opening Letter Response. This letter also suggested that these improvements had already had a positive effect on the number of complaints to Ofcom’s CCT.⁴⁰
- 4.12 Unicom provided Ofcom with the following documents:
- a covering letter outlining the steps Unicom had taken to make improvements and providing details of steps taken to improve customer satisfaction. Unicom also provides details of internal enforcement action and the introduction of a new disciplinary procedure referred to as the “*3 strike system*”;
 - copies of Unicom’s standard contracts for Fixed-Line Telecommunications Services, which had been amended explicitly to state that broadband is not

³⁶ Possibly in contravention of GC24.6.

³⁷ Possibly in contravention of GC9.4.

³⁸ Possibly in contravention of GC9.3.

³⁹ Following information obtained from Customer witness statements, analysis of information obtained from Unicom as well as Ofcom’s CCT complaints data.

⁴⁰ Copy attached at Annex 11.

included and displaying the actual line rental cost of £13.99. These versions were introduced on 28 April 2014;

- a copy of a standard form prepared letter to be signed by the Customer at the point of sale of Fixed-Line Telecommunications Services, which had been amended explicitly to state that broadband is not included;
- e-mail memos to Unicom's Branch Managers and Verbal Sales Managers from its Compliance Manager, dated 25 April 2014, explaining the above amendments and also outlining changes made to Unicom's Fixed-Line Pricing Sheets to clarify that mobile, international, premium rate and 084/087 numbers are not included in Unicom's UK Landline calls bundle;
- copies of verification scripts used by sales representatives during the Verbal Sales Method which had been amended explicitly to state that broadband was not included in sales of Fixed-Line Telecommunications Services;
- copies of letters issued to Unicom customers in the form of a receipt during the Paper Sales Method and included in the Welcome Packs for the Verbal Sales Method, again amended explicitly to state that broadband is not included in sales of Fixed-Line Telecommunications Services;
- an e-mail memo to all Unicom's sales representatives from its CEO, dated 24 April 2014, stating that Unicom does not pay its competitors' ETCs and giving instructions to sales representatives; and
- monitoring forms used by retentions teams as part of improvements to reduce instances of erroneous Cancel Other requests.⁴¹

Ofcom Clarification Letter of 25 June 2014

4.13 On 3 June 2014, Ofcom sent to Unicom for comments a draft version of the First Information Request described below. Unicom responded on 6 June 2014 and, on 25 June 2014, Ofcom wrote to Unicom seeking clarification on certain points made by Unicom in that response ("the Clarification Letter").⁴²

4.14 Ofcom sought clarification of the following:

- Unicom's policy on recording sales and marketing calls across each of its sales processes/channels;
- the availability of sales and marketing call recordings during between July 2013 and February 2014; and
- the availability of written and electronic sales records for the 171 Ofcom CCT complaints that accompanied the Enquiry Opening Letter.

4.15 Ofcom also sought assurances from Unicom that, where available, all relevant call recordings and sales records referred to above would be retained for the purposes of the Investigation.

⁴¹ Cancel Other is a consumer protection mechanism which allows the Customer's existing CP to cancel a transfer order placed by another CP for reasons specified in GC24. It was designed to ensure Customers are not transferred between CPs, without their express knowledge and/or consent.

⁴² Copy attached at Annex 12.

Unicom's response to Ofcom clarification letter of 25 June 2014

4.16 Unicom provided a response to the Clarification Letter ("the Clarification Letter Response") 27 June 2014, which included:⁴³

- a covering letter setting out:
 - details of Unicom's sales and marketing functions, including descriptions of the processes used by Unicom to sell its Fixed-Line Telecommunications Services: the Paper Sales and Verbal Sales methods;
 - Unicom's policy in respect of recording sales and marketing calls, including a description of some issues experienced as a result of Unicom installing a new telephone recording system in July 2013;⁴⁴
 - confirmation that no contracts are processed via the Verbal Sales Method where the contractual call recording is missing;
 - confirmation that Unicom retains a permanent record of all sales;
 - a breakdown of the number of successful sales via the Paper Sales and Verbal Sales methods; and
 - an offer for Ofcom to visit Unicom's Head Office in Manchester to demonstrate the improvement initiatives adopted by Unicom over recent months;
- copies of scripts, appointment sheets and Branch Manager verification forms used by sales representatives via the Paper Sales Method;
- copies of scripts, verification forms and contract verification scripts used by sales representatives via the Verbal Sales Method;
- a copy of the presentation materials used by field-sales representatives via the Paper Sales Method;
- a copy of the welcome pack issued to new Customers via the Verbal Sales Method (which includes start letter, contract, Direct Debit confirmation letter, pricing sheet, sales and marketing code of practice and a brochure); and
- copies of receipt letters issued to Customers following the request to transfer services to Unicom.

First Information Request to Unicom

4.17 Following these exchanges, on 8 July 2014, Ofcom issued a notice to Unicom under section 135 of the Act ("the First Information Request"), requiring it to provide specified information by 29 July 2014.⁴⁵ The information required was necessary to

⁴³ Copy attached at Annex 13.

⁴⁴ This meant that Unicom was unable to provide Ofcom with recordings of calls made during the initial sales processes and for which Unicom used to audit the quality of its representatives performance.

⁴⁵ Copy attached at Annex 14.

ascertain details of Unicom's sales and marketing processes and whether prohibited terms and conditions had been included in Unicom's contracts.

- 4.18 Ofcom also clarified certain aspects of the Investigation following Unicom's Clarification Letter Response, including, the duration of the relevant periods of time for examining possible contraventions:
- the relevant period for examining possible contraventions of GC24 was set at 1 March 2013 to 8 July 2014 ("the Relevant Period");
 - the relevant starting date for examining possible contraventions of GC9.3 (within "the Relevant GC9.3 Period") was determined by the date this rule took effect:
 - 1 January 2012 in respect of all residential consumers and small business customers who were not, at that date, in a contract with a CP containing automatically renewable terms; and
 - 1 January 2013 in respect of all residential consumers and small business customers other than those identified above; and
 - the relevant starting date for examining possible contraventions of GC9.4 ("the Relevant GC9.4 Period") was determined by the date this rule took effect: 26 May 2011.
- 4.19 The First Information Request required specific documents relating to:
- the company background and general sales information;
 - the sales process, including procedures for providing the Customer with relevant paperwork;
 - customer contracts using during the Relevant GC9.3 and GC9.4 periods, including the terms and conditions;
 - Unicom's sales and marketing functions, including descriptions of all sales channels and corresponding processes;
 - Unicom's processes for dealing with cancellation requests received during the Transfer Period;⁴⁶
 - recordings of all sales and marketing calls made via the Verbal Sales Method during the Relevant Period, including calls where a Customer has called Unicom to invoke their right to cancel their contract without charge during the Transfer Period;
 - written materials used to train staff involved in selling Unicom's products and services, including details of any bonus or incentives schemes;
 - the number of successful set-up orders processed by Unicom for Customers of its Fixed-Line Telecommunications Services for each month during the Relevant Period;

⁴⁶ As defined in GC24.19 (n), meaning the period of 10 Working Days from before a customer's order can be activated. Unicom also confirmed that cancellation requests are handled by a separate 'Contract Enquiries' team based at its Manchester Head Office.

- the various improvements implemented by Unicom, as described in its Opening Letter Response;
- internal governance documents, including records which demonstrate Unicom’s senior management’s awareness of and involvement in Unicom’s sales and marketing processes; and
- Unicom’s relevant turnover information.

Unicom’s response to the First Information Request

4.20 Unicom provided a response to the First Information Request (“the First Response”) on 29 July 2014, which included:⁴⁷

- a covering letter which set out:
 - details of Unicom’s sales and marketing functions, including descriptions of the processes used by Unicom to sell its Fixed-Line Telecommunications Services: the Paper Sales and Verbal Sales Methods;
 - a diagram (including timescales) showing the processes involved in the acquisition of a Customer and the provisioning of Unicom’s Fixed-Line Telecommunication Services;
 - the volume of outbound sales and marketing calls made by Unicom during the Relevant Period;⁴⁸
 - the number of enquires made into Unicom’s Head Office from Customers during the Transfer Period;
 - an overview of Unicom’s senior management structure and relevant responsibilities;
 - details of Unicom’s compliance processes, including auditing of sales and marketing call recordings via the Verbal Sales Method as well as the quality checks undertaken on contractual document via Paper Sales Method;
 - a description of Unicom’s governance processes, including arrangements for board of directors meetings and relevant compliance discussions;
 - a description of the process followed when dealing with Customers’ requests to terminate their agreement without charge from the point of sale to the completion of the Transfer Period;
 - the total number of successful set-up orders placed by Unicom during the Relevant GC24 Period;

⁴⁷ Copy attached at Annex 15.

⁴⁸ Annex 15 – Tab 1 page 9 of the covering letter where Unicom stated that it was unable to differentiate which calls were made in relation to its sales and marketing activities for its Fixed-Line Telecommunications Services and which calls were made in relation to other non-telecommunications products and services it provides.

- details of the commission and bonus structure in place for Unicom's sales employees;
- details of Unicom's "3 strike" disciplinary system implemented on 16 April 2014 for ensuring sales and non-sales employees are fully compliant with regulations;
- details of Unicom's customer base, saying that Unicom does not conduct sales to residential sales to consumers nor did it have any Customers on contracts with automatically renewable terms; and
- a summary of Unicom's review of Ofcom's CCT complaints data as well as an explanation of reasons for common customer complaints;
- call scripts used by Unicom's telesales openers (Paper Sales and Verbal Sales Methods);
- call scripts used by Unicom's Branch Managers during verification calls to the Customer (Paper Sales Method);
- call scripts used by Unicom to verify and record the Customer's agreement to enter into a contract (Paper Sales and Verbal Sales Method);
- call scripts used by Unicom's Head Office Contract Enquiries Team when a Customer calls to cancel their contract during the Transfer Period;
- copies of documents used to monitor telesales representatives' performances;
- presentation materials used by field-sales representatives during the Paper Sales Method;
- copies of paperwork left with the Customer at the point of sale via the Paper Sales Method as well as included in the welcome pack issued to Customer's via the Verbal Sales Method:
 - the relevant 1 Year, 2 Year or 3 Year Fixed-Line Telecommunications Agreements and corresponding Fixed-Line Pricing Sheet;
 - a copy of Unicom's sales and marketing code of practice;
 - a copy of a disclaimer which the Customer must sign at the point of sale during the Paper Sales Method; and
 - other relevant documents including a brochure, Direct Debit forms and additional information sheets;
- copies of correspondence issued to the Customer following their agreement to enter into a contract with Unicom, including the Notification of Transfer Letter which CPs are required to send under GC24.7;
- all versions of Customer contracts, pricing sheets, Sales and Marketing Code of Practice, Brochures, Termination Fee offer letters, Start letters and Notification of Transfer letters used during the Relevant Period;

- data on the success of Unicom’s verification calls as well as example reports generated to monitor the quality of contracts/paperwork processes via the Paper Sales Method;
- a hard drive containing 22, 772 call recordings and a schedule of call records describing the purpose/nature of the call (in paper form only);⁴⁹
- materials used for the purposes of training field-sales representatives (Paper Sales Method), telesales representatives (Paper Sales and Verbal Sales Methods) and Head Office telesales representatives involved in handling Customer’s requests to cancel during the Transfer Period;
- example reports generated for compliance and internal governance processes, including relevant excerpts of packs used during Unicom board meetings;
- documents and internal emails related to the introduction of Unicom’s “3 strike” disciplinary system;
- internal emails and memos to Unicom staff regarding compliance with Ofcom regulations;
- documents related to a Bundle Package (fixed-line voice and broadband) which Unicom trialled between 18 March 2013 and 31 July 2013; and
- documents related to Unicom’s relevant turnover information.

Unicom letter of 11 September 2014

4.21 Unicom wrote to Ofcom on 11 September 2014 to make us aware of its attempts to engage with an individual named [X] the lead co-ordinator for a website collating complaints from former Unicom Customers [X].⁵⁰ Unicom also offered to meet with Ofcom to discuss these issues in more detail. Ofcom responded to Unicom on 26 September 2014.

4.22 In this letter, Unicom also stated that:

- it has taken pro-active steps to engage with the individual leading the co-ordinated third party action, including an offer of a meeting with Unicom’s senior management;⁵¹
- [X]
- the complaints made to Ofcom are not an accurate reflection of Unicom’s performance, partly because of an increase in the number of complaints per complainant;⁵²

⁴⁹ Unicom explained that it was “unable to time stamp the recordings as we do not retain the actual time that the call has been made, only the time that the recording has been uploaded onto our CRM, which can sometimes be two days after the sale has been concluded.”

⁵⁰ Copy attached at Annex 16.

⁵¹ A copy of an email exchange between the individual leading third party action and Unicom’s CFO was attached to this letter.

⁵² A breakdown of complaints made to Ofcom about Unicom was attached to this letter.

- Unicom is not getting the opportunity to resolve Customer complaints before contact is made with Ofcom; and
- [X]

Unicom letter of 9 October 2014

4.23 Unicom also wrote to Ofcom on 9 October 2014, in respect of the complaints data provided by Ofcom during the Investigation.⁵³ Ofcom acknowledged Unicom's letter the same day when issuing the Second Information Request.

4.24 In the letter, Unicom set out:

- further improvements made following the implementation of GC22 in September 2014, including amendments made to the Unicom's sales and marketing code of practice to make clearer the Customer's right to cancel during the Transfer Period;
- a re-iteration of Unicom's views regarding the detrimental impact of [X]'s website on its complaints data;
- its concerns that the uncertainty arising from the Investigation was having a detrimental impact on Unicom's business; and
- Unicom's view that the Investigation should be closed by Ofcom on the basis of reduced complaint numbers and improvements made to increase compliance.

Witness statements

4.25 Ofcom conducted witness statement interviews with 27 Unicom Customers during July and September 2014. These Customers were identified following analysis of the CCT complaints data during the Relevant Period. Some Customers were also considered in this process after contacting Ofcom's Investigation team directly via e-mail.

4.26 Some witnesses were discounted at this stage as the practices they alleged did not fall within the narrowed scope of the Investigation. Ofcom subsequently received 15 signed witness statements from Unicom Customers. One of these statements – from [X] had to be discounted as Unicom provided evidence that the sale of services to her took place outside the Relevant Period.⁵⁴

Second Information Request to Unicom

4.27 On 9 October 2014, Ofcom issued a second notice to Unicom under section 135 of the Act ("the Second Information Request"), requiring it to provide specified information by 16 October 2014.⁵⁵ The purpose of this notice was to obtain written, verbal or electronic sales records in respect of those customers who provided witness statements to Ofcom as well as to clarify certain aspects of Unicom's response to the First Information Request.

⁵³ Copy attached at Annex 17.

⁵⁴ Copies of all 14 witness statements attached at Annex 18.

⁵⁵ Copy attached at Annex 19.

Unicom's response to the Second Information Request

4.28 Unicom provided a response to the Second Information Request (“the Second Response”) on 16 October 2014, which included:⁵⁶

- a covering letter;
- three arch-lever files containing written sales records for 26 Customers as specified in the Second Information Request;⁵⁷
- a document entitled “*Ofcom reviews*” in which Unicom details the outcome of its review into the above Customers’ cases;
- two call recordings in relation to [X];
- details of the number of Customers who expressed an intention to invoke their right to cancel during the Transfer Period;⁵⁸
- a copy of the Common Question and Answers document used by Unicom’s sales representatives; and
- a document entitled “*Compliance 3 Strike Report*”, setting out details of disciplinary action taken against Unicom’s sales representatives.

Unicom letter of 16 February 2015

4.29 Solicitors acting for Unicom wrote to Ofcom on 16 February 2015 regarding timescales for completion of the Investigation.⁵⁹ Ofcom responded to this letter on 19 February 2015.

4.30 In this letter, Unicom also set out:

- its view that Ofcom should take account of Unicom’s overall customer service management and complaints handling;
- its analysis of Ofcom’s CCT complaints data and its view that the number of monthly complaints had reduced significantly during the Investigation. Unicom also offered to meet with Ofcom to discuss these findings in more detail;
- changes to Unicom’s management structure which have resulted in the separation between its sales and compliance activities; and
- its willingness to assist Ofcom in any matters that would bring the Investigation to a close.

⁵⁶ Copy attached at Annex 20.

⁵⁷ The sale for one Customer [X] took place outside the Relevant GC24 Period.

⁵⁸ Unicom has been unable to provide details of the number of Customers who have specifically called to invoke their right to cancel during the Transfer Period, merely an intent to do so.

⁵⁹ Copy attached at Annex 21.

Third Information Request to Unicom and First Information Request to other CPs

- 4.31 On 6 March 2015, Ofcom served on Unicom a third notice under section 135 of the Act (“the Third Information Request”). On 6 March 2015, we served a similar request on 12 other CPs who provide fixed and mobile voice, and broadband, services to business customers.
- 4.32 These notices were primarily served for the purpose of a project Ofcom is undertaking in relation to the provision of telecommunications services to small and medium-sized enterprises (“SMEs”). However, some of the information they required relevant CPs to provide was, and is, relevant to the Investigation.
- 4.33 In particular, the notices served on Unicom and other CPs contained four common questions each relevant to Ofcom’s SME project. The fourth related to the payment by customers of ETCs and was, and is, also relevant to the Investigation. The notice served on Unicom also required it to provide an estimate of its relevant turnover for the year ending on 31 March 2015. A copy of the notice served on Unicom, which is similar in the respects described to that served on other CPs, is at Annex 25.⁶⁰
- 4.34 Question 4 of the notices required Unicom and, where they provided services to SMEs on standard terms for businesses,⁶¹ other CPs, to state for the 12 months ending on 31 December 2014:
- the number of their SME customers who terminated a contract with them for the supply of a service or services;
 - the number of those SME customers who paid an ETC; and
 - the amount of ETCs paid by SMEs in aggregate during this period.
- 4.35 A copy of Unicom’s response (the “Third Information Response”) is at Annex 27 (in its Written Representations, Unicom corrected some of the information in that response). For reasons of confidentiality and the irrelevance of most of their contents, copies of the other CPs’ responses are not annexed to this notification. Instead, the second and fourth columns in Table 1 below set out Unicom’s (amended) response to question 4 of the notice and the responses of other CPs that were required to answer it.⁶²
- 4.36 The third column of the table contains additional information. Where other CPs – CPs 1 – 4 in the table – indicated that they held information about relevant terminating SME customers and those paying ETCs, we also required them to provide information about the number of such terminating customers who were liable to pay ETCs (in addition to the number who had paid them). They did so pursuant to further notices under section 135 of the Act (see Annex 28). Unicom provided the figures relating to it as part of its Written Representations.

⁶⁰ An anonymised (for reasons of confidentiality) copy of the notice served on other CPs and related correspondence about the use of the information for the purpose of the Investigation are at Annex 26.

⁶¹ Any CPs which supplied SME customers on standard retail consumer terms were not required to answer.

⁶² One CP asked was not required to answer question 4 on account that it only supplies SME customers on standard retail consumer terms. The other CPs have been anonymised on account of the confidentiality of the information.

Table 1

CP	Number of customers terminating	Number liable to pay ETCs	Number who paid an ETC	Proportion of (liable) customers who paid an ETC ⁶³
[X]	[X]	[X]	[X]	33.8%
CP1	[X]	[X]	[X]	100%
CP2	[X]	[X]	[X]	88.3%
CP3	[X]	[X]	[X]	19.7%
CP4	[X]	[X]	[X]	11.6%
CP5	[X]	[X]	[X]	0%
CP6	[X]	[X]	[X]	N/A but assumes a collection rate of 5% of ETCs invoiced for mobile services
CP7	[X]	[X]	[X]	N/A
CP8	[X]	[X]	[X]	N/A
CP9	[X]	[X]	[X]	N/A
CP10	[X]	[X]	[X]	N/A
CP11	[X]	[X]	[X]	N/A

Notification under section 96A of the Act

4.37 On the basis of our careful assessment of the information gathered above, Ofcom determined that it had reasonable grounds for believing that between 1 March 2013 and 8 July 2014 Unicom had contravened GC24.3(a). It did so by operating standard sales and marketing processes under which it provided prospective customers with information that gave them a misleading impression that on transferring their Fixed-Line Telecommunications Services to Unicom:

- they would not incur ETCs or costs related to the early termination of contracts with their existing CP where they were still within the MCP of that contract; and
- they would experience no effect on their existing broadband services.

⁶³ The figures in column 5 are calculated by Ofcom based on information provided by CPs under section 135 of the Act. In the case of CPs 1, 2 and 4, the % shown is the % of SME customers liable for ETCs who paid them. In the case of CP3, the % is that of all customers who terminated contracts in 2014 and who paid ETCs, the number of those liable to pay them not being available. Were that number available it is possible the % in column 4 would be higher in respect of that CP.

Ofcom also considered that Unicom had in practice provided prospective customers with misleading information in these respects.

- 4.38 Following its request for an extension of the relevant time, Unicom was given until 5.00pm on 5 June 2015 to make written representations to Ofcom about the matters set out in the Section 96A Notification and the accompanying Explanatory Statement. It made its Written Representations on that date. Unicom also had the opportunity to make oral representations, and it did so on 19 June 2015.

Unicom email of 22 June 2015

- 4.39 Following the hearing of its Oral Representations, on 19 June 2015 Unicom provided Ofcom by email with a copy of a spreadsheet entitled “*Anonymised Termination Fee Credits Applied During the Relevant Period.*” This contained redacted details of customers who had received offers of credits from Unicom in respect of their previous CPs’ ETCs under what Unicom calls its “TF1” and “TF2” credit processes (see section 6 below).⁶⁴

Fourth Information Request

- 4.40 On 2 July 2015, Ofcom served on Unicom a fourth notice under section 135 of the Act (“the Fourth Information Request”) which required it to provide specified information by 9 July 2015.⁶⁵ The information required was necessary to clarify certain aspects of Unicom’s Written and Oral Representations. In particular, in relation to its approach to dealing with customers who, after completion of the transfer of their services to Ofcom, are liable to pay ETCs to their previous CP. The documents which Unicom was required to provide included those which:

- set out the processes to be followed by Unicom staff in its “Retentions” and “Retentions Non-Losings” department; and
- contain details of Unicom’s “TF1” and “TF2” credit processes.

Unicom’s response to the Fourth Information Request

- 4.41 Unicom provided its response to the Fourth Information Request (“the Fourth Response”) on 9 July 2015.⁶⁶ This included:

- a covering letter which set out:
 - details of Unicom’s internal processes for providing financial assistance to customers who have received an ETC from their previous CP, known as the “TF1” and “TF2” processes;
 - details of Unicom’s internal processes for dealing with customers who have raised the issue of ETCs from their previous CP after completion of the transfer of their services to Unicom; and
 - the number of customers who were able to cancel their agreement with Unicom (without penalty) after their services had transferred to Unicom;

⁶⁴ Copy attached at Annex 32

⁶⁵ Copy attached at Annex 33

⁶⁶ Copy attached at Annex 34

- copies of the “TF1” and “TF2” letters issued to inform customers that Unicom may credit their account with up to [£<] or [£<] towards future expenditure on Unicom services (already provided with Unicom’s First Response);⁶⁷
- a copy of a document entitled “*Advanced Contract Enquiries: Pre-Live Telecoms Cancellations*” which is an earlier version of a document already provided with Unicom’s First Response;⁶⁸ and
- copies of documents entitled “*Advanced Retentions*” and “*Retentions Cancellation Requests*” which are used for the purposes of training staff in Unicom’s Retentions Department (who are responsible for dealing with Customers who contact Unicom, after completion of the transfer of their services, about their liability for ETCs to their previous CP).

Fifth Information Request

4.42 On 14 July 2015, Ofcom served on Unicom a fifth notice under section 135 of the Act (“the Fifth Information Request”) which required it to provide specified information by 16 July 2015.⁶⁹ The information required was necessary to confirm previous estimates of Unicom’s relevant turnover for the year ending on 31 March 2015.

Unicom’s response to the Fifth Information Request

4.43 Unicom provided its response to the Fifth Information Request (“the Fifth Response”) on 16 July 2015.⁷⁰ This included documents related to Unicom’s relevant turnover information for the year ending 31 March 2015.

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Copy attached Annex 35

⁷⁰ Copy attached at Annex 36

Section 5

Application of General Condition 24 to Unicom

5.1 This section sets out Ofcom's reasoning and findings that Unicom is subject to GC24.

GC24

5.2 GC24.1 states that:

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

5.3 GC24.2 notes that:

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

5.4 Therefore, in issuing a Confirmation Decision under section 96C to Unicom in relation to a contravention of GC24, Ofcom must be satisfied that, in respect of the matters referred to in the decision, Unicom:

- a) was a Communications Provider as defined in GC24.1;
- b) provided a Fixed-Line Telecommunications Service to Domestic and Small Business Customers; and
- c) transferred or was seeking to transfer a Fixed-Line Telecommunications Service to customers from another CP to Unicom.

5.5 Ofcom notes that Unicom does not dispute that it is subject to GC24. It is clear that it is, in any event, as follows.

Communications Provider

5.6 "Communications Provider" is defined in GC24.19, which states:

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

5.7 An "Electronic Communications Network" ("ECN") and an "Electronic Communications Service" ("ECS") are defined in section 32 of the Act as, respectively:

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

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

5.8 “Signal” is defined in Section 32(10) of the Act, and includes:

- a) *“anything comprising speech, music, sounds, visual images or communications or data of any description; and*
- b) *signals serving for the impartation of anything between persons, between a person and a thing or between things, or for the actuation or control of any apparatus;”*

5.9 In the Relevant Period, and as it noted in its Representations (see section 6 below), Unicom purchased wholesale telephone access line and call services from BT Wholesale in a product known as wholesale line rental (“WLR”). Under this service, Unicom effectively rented the line from BT and used the WLR product to enable it to offer retail line rental and call services - the conveyance of signals (i.e. speech) by way of BT’s ECN - to customers. By means of these, Unicom provided an ECS and was a Communications Provider.

Fixed-Line Telecommunications Services

5.10 “Fixed-Line Telecommunications Services” are defined in GC24.19 which states:

““Fixed-Line Telecommunications Services” means Narrowband call and/or line rental services provided to Domestic and Small Business Customers;”

5.11 “Narrowband” is defined in GC24.19 which states:

“Narrowband” means services provided over a traditional Public Communications Network, excluding services provided over a Cable Network;”

5.12 “Public Communications Network” (“PCN”) is defined in Part 1 of the GCs which states:

“Public Communications Network” means an Electronic Communications Network used wholly or mainly for the provision of Public Electronic Communications Services which support the transfer of information between Network Termination Points;”

5.13 A “Public Electronic Communications Service” (“PECS”) is defined in section 151 of the Act as *“any electronic communications service that is provided so as to be available for use by members of the public”*.

5.14 The relevant part of the definition of “Network Termination Point” (“NTP”) is contained in Part 1 of the GCs, which states:

“Network Termination Point” means the physical point at which a Subscriber is provided with access to a Public Electronic Communications Network...”

5.15 Finally, “Subscriber” is defined in Part 1 of the GCs as:

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

- 5.16 To fall within the definition of providing Fixed-Line Telecommunications Services in the Relevant Period, Unicom must have provided a Narrowband call and/or line rental service. It did so using the WLR product purchased from BT Wholesale, as described above. The services it provided to consumers were call and/or line rental provided over BT's copper wire network. This is, and was, a PCN within the definition set out above - it is, and was, used by members of the public who become Unicom's Subscribers to access lines and to make and receive telephone calls over that network. Unicom did therefore provide Fixed-Line Telecommunications Services.

Domestic and Small Business Customer

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

“(i) himself a communications provider; nor

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

- 5.18 "Customers" is defined in section 405(1) of the Act, which states:

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

- a) the persons to whom the network, service or facility is provided or made available in the course of any business carried on as such by the provider or person who makes it available;*
- b) the persons to whom the communications provider or person making the facility available is seeking to secure that the network, service or facility is so provided or made available;*
- c) the persons who wish to be so provided with the network or service, or to have the facility so made available, or who are likely to seek to become persons to whom the network, service or facility is so provided or made available.”*

- 5.19 In the Relevant Period Unicom provided its services to persons in the course of its business. Unicom's customers included Small Business Customers who were not Communications Providers. Accordingly, Unicom was during the Relevant Period a CP providing Fixed-Line Telecommunications Services to Domestic and Small Business Customers for the purposes of GC24.1.

- 5.20 As demonstrated by the facts and matters referred to in the following sections of this document, Unicom's practices in the Relevant Period which were under investigation concerned the sale and marketing of Unicom's services in situations where customers were transferring their Fixed-line Telecommunications Services between Unicom and other CPs. As such, they fell within the scope of GC24.

Section 6

Evidence of contravention

Contravention of GC24.3 (a)

- 6.1 This section sets out in detail the evidence relied upon by Ofcom in determining that we are satisfied Unicom has contravened GC24.3(a).
- 6.2 GC24.3(a) requires that:
- “When selling or marketing Fixed-Line Telecommunications Services, the Gaining Communications Provider must not: engage in dishonest, misleading or deceptive conduct”*
- 6.3 According to Ofcom’s *Guidelines in respect of General Condition 24*, the term “mis-leading conduct” includes “... either deceiving a Customer or providing the Customer with mis-information which is likely to affect a Customer’s purchasing decision.” Examples of prohibited behaviour include (but are not limited to) “..... the omission of relevant information or the provision of false and/or mis-leading information.”⁷¹
- 6.4 On the bases set out below, Ofcom is satisfied that, in the Relevant Period, Unicom contravened GC24.3(a) by engaging in mis-leading conduct in respect of information provided to (prospective) customers which would likely affect their decision to transfer their Fixed-Line Services to Unicom. This information related to two matters: (i) ETCs payable to the customers’ existing/previous CPs; and (ii) the effect on customers’ existing broadband services of a transfer of their fixed line services to Unicom.

ETCs on transfer to Unicom

Relevant background

- 6.5 It is a common feature of a competitive market that undertakings will seek to protect their rights in a fixed-term contract by including in it terms providing for payment of an ETC when a Customer wishes to terminate the contract before the end of the MCP. This is common in the fixed-line telecommunications sector where consumers choose to transfer their services to another CP whilst still within that minimum period.
- 6.6 Ofcom is satisfied that, in the Relevant Period, Unicom operated standard sales and marketing processes under which it provided some prospective customers with information that gave them a misleading impression that they would not incur ETCs or costs related to the early termination of contracts with their existing/previous CP where they were still within the MCP of that contract. That impression was likely to have affected their purchasing decisions. Ofcom is also satisfied that in some cases Unicom made other misleading statements about ETCs, whether or not provided for in its standard sales processes, likely to have affected relevant purchasing decisions.

⁷¹ This is the definition adopted in the “Guidelines in respect of General Condition 24”; set out in Ofcom’s statement “Protecting Consumers from Mis-selling of Fixed-Line Telecommunications Services”, 18 December 2009: http://stakeholders.ofcom.org.uk/binaries/consultations/protecting_consumers_misselling/statement/statement.pdf

6.7 This is on the basis of:

- instructions given to Field Sales and Verbal Sales representatives, and to staff in its Customer Enquiries and Retentions teams, in training and process materials;
- instructions given to Unicom's sales staff by its CEO;
- complaints made to Ofcom's customer contact centre;
- evidence given to Ofcom in witness statements; and
- evidence obtained from an analysis of call recordings.

Field (Paper) Sales Method

6.8 One means by which Unicom markets and sells its Fixed-Line Telecommunications Services is via Field Sales representatives who make sales visits to prospective customers' business premises. This process appears in some Unicom documents to be referred to as its "Paper Sales" process. It appears to operate⁷² by Field or Paper Telesales representatives calling prospective customers and offering sales visits by Field Sales representatives.

6.9 Unicom's First Response included documents relating to this process. One was the "*Unicom Paper Telesales Trainee Induction Course Parts 1 and 2.*"⁷³ This appears to be training material for the sales staff responsible for calling prospective customers and arranging the Field (Paper) Sales visits.

6.10 This document included a page headed, "*Product Knowledge Telesales Questions and Answers.*" This includes instructions to the telesales representatives for answering commonly asked questions. One is:

"Q: I am currently in a contract and I need to pay a termination fee

A: You will need to deal with this yourself. Unicom will not pay termination fees charged by customer's existing suppliers. You will need to discuss this with your existing supplier."

6.11 Unicom's First Response also included a copy of the "*Unicom 3 Year Fixed-Line Field-Sales Training Induction Course Manual.*" This document is intended to instruct Unicom's Field-Sales Representatives in marketing its Fixed-Line Telecommunications Services at the sales appointments made for them by their telesales counterparts. It, too, includes a "*Common Q & A*" sheet to assist Field-Sales representatives answer common questions from prospective customers.⁷⁴

6.12 The Q&A sheet begins with the following in highlighted text:

"The below answers are designed to help you accurately and compliantly answer some of the common questions customers will ask you without jeopardising your sale.

⁷² Or this appears to be one way in which it operates, at least.

⁷³ Copy attached at Annex 15 - Tab 33.

⁷⁴ Copy attached at Annex 15 - Tab 34.

It is important you always answer questions accurately and do not make up or guess answers you are unsure of.

Providing inaccurate information to a customer will cause unnecessary attempts at cancellation, destroy the customer's trust and prevents our Contracts team from dealing with easily resolvable problems."

- 6.13 Ofcom notes that, after that introduction, Unicom's Field-Sales representatives are first instructed to establish the prospective customer's existing contractual arrangements:

"Fact find with the consumer to find out if (A) they are in the initial term of their contract, rolled over before the end of 2012 or are unsure or (B) beyond the initial term of their contract and didn't roll over in 2012 or earlier".

- 6.14 Unicom further instructs the representatives to provide the following information to any prospective customers still within their MCP:

*"First of all it's important to remember that the vast majority of customers do not get a termination fee. Most suppliers initially write to transferring customers warning that there **may** be termination fees applicable but frequently no termination fee is subsequently charged. Many customers can successfully challenge the termination fee and for the remainder who have a valid Termination fee, our Contracts Team at Head Office will walk you through how to handle it. Most of the time we can assist and in rare occasions the very worst scenario is that you have to cancel your transfer to Unicom."⁷⁵*

Verbal Sales Method

- 6.15 A second means by which Unicom markets and sells its Fixed-Line Telecommunications Services is via telesales, using telesales staff who engage in selling directly over the phone to prospective business customers using Unicom's Verbal Sales Method. In the First Response, Unicom provided Ofcom with its "Telecoms Training – Trainer Notes," which is a training guide for new staff involved in this process (and which appears to have replaced the Verbal Sales Training Manual in use during 2006).⁷⁶
- 6.16 Section 3.10 of this document is entitled, "Overcoming Objections." It begins, "Below are some of the main objections and how they should be handled when speaking to the customer" and goes on to instruct staff in the responses to give to the main objections raised by prospective customers to transferring their services to Unicom. Ofcom notes from the First Response that new starters are also provided with a hard copy of this section in laminated format.
- 6.17 The relevant responses include:
- "How long have you been in this contract? Now I can appreciate that; however it is in the nature of this industry that there generally won't be a time when you are not in a contract. What you have to understand is that many providers do not pursue these contracts if you decide to leave, and if you do have any problems with regards to this then we have a dedicated contract team to help and give advice...."*

⁷⁵ Copy attached at Annex 15 - Tab 34.

⁷⁶ Copy attached at Annex 15 - Tab 17.

“Your current provider would need to provide a termination fee with a copy of the contract and in our experience many providers find this hard. Therefore termination fees are not often pursued...we have a highly skilled dedicated contracts team to help.”

- 6.18 Unicom confirmed in its Second Response that its Verbal-Sales representatives also use a “*Common Questions*” document containing the same information provided to Field-Sales Representatives, as described in paragraph 6.11 – 6.14 above.⁷⁷

Pre-Live Contract Enquiries

- 6.19 Unicom also has a Contract Enquiries team, based at its Head Office in Manchester, responsible for handling queries and cancellation requests from customers who are in the process of transferring their Fixed-Line Telecommunications Services to Unicom. In the First Response, Unicom provided Ofcom with its “*Module 16: Advanced Contract Enquiries: Pre-Live Telecoms Cancellations*” training manual for these staff.⁷⁸ This instructs them on how to answer prospective customers’ questions and overcome any objections raised during the Transfer Period.⁷⁹
- 6.20 One situation which this team deals with is where a customer contacts Unicom during the Transfer Period seeking to cancel the transfer of their services to Unicom, having received notification of an ETC from their existing/previous CP. The manual sets out processes that Unicom staff should follow and instructions for re-assuring customers in these circumstances that ETCs can be disputed and avoided. It includes examples of specific statements for staff to use to give effect to the instructions. It also makes clear, on its first page, that it only applies where customers contact Unicom about ETCs during the Transfer Period. Customers contacting Unicom about ETCs once their transfer has been completed are to be passed to its “Retentions” (or “Retentions Non-Losings”) Team (see below).
- 6.21 The relevant section (16.5) of the manual begins with instructions about how to structure the relevant conversation with a customer. Contract Enquiries staff are instructed at an early stage to explain that their existing CP’s demand for an ETC, “... *will not leave them out of pocket, which will lead you on to the re-assurance.*” They are instructed that an example of a statement they might make is, “*Let me assure you this is something I deal with a number of times a day so we can certainly give reassurance and advice to make sure you’re not left out of pocket.*” The staff are also instructed, “*You then need to get the information necessary from the customer to get them to dispute the contract.*”
- 6.22 Paragraph 16.5.1 of the manual is headed, “*How to dispute a Termination Fee.*” It instructs Contract Enquiries staff to advise customers to obtain a copy of their contract with their existing CP. It goes on to instruct staff that:

“If the customer is unable to obtain a copy of their contract then it does not mean that the termination fee is not valid. It does however mean that it is unlikely the current provider will pursue the customer for this fee, after they have successfully transferred to us. In line with General Condition 24.11, providers are only required to retain records pertaining to the sale of fixed-line telecommunications for period of 6 months. Therefore, customers who cannot

⁷⁷ Copy attached at Annex 19 - Tab 28.

⁷⁸ Version 6, copy attached at Annex 15 – Tab 31.

⁷⁹ The period of 10 working days defined in GC24.19(n) before which a customer’s transfer to a new CP may be activated and in which the transfer may be cancelled.

obtain a contract copy should be advised to dispute the termination fee with the other provider. You will also need to make the customer aware that their current provider may just send them a copy of their current terms and conditions. This is not proof of the customer's individual termination fee. It would need to be a contract that the customer has signed or agreed to on a contractual recording."

- 6.23 The same section of the document also tells staff that where, despite the re-assurances given in relation to ETCs, a customer is reluctant to transfer their services to Unicom on account of their liability for ETCs (Unicom's **emphasis**):

*"If the customer still does not wish to transfer their services to Unicom, purely due to the termination fee from their current provider you may offer to credit Telecoms customers **UP TO** [£<] excluding VAT"*

This offer of credit is part of what Unicom calls its TF1 process (see further below).

- 6.24 The relevant staff are further instructed that:

"If the customer is still unsure about transferring over to Unicom, you may advise the customer that if the Termination Fee from their current provider is enforced, we can place the contract on hold until their current contract is finished and then apply for their services."

"If the customer declines then 'Lose' the contract by logging the result 'Cancellation Lost.' Before logging a result you should ensure you have explored all methods of retaining the customer first."

- 6.25 The manual also contains a flowchart, at 16.5.2, headed, "Current Supplier Retention: Termination Fee," which gives relevant staff further instructions about how to respond in a number of scenarios related to ETCs. In particular, in certain scenarios, they are told to say:

"Do you remember entering into a contract with a termination fee?"

"You should ask for a copy of the contract that demonstrates you were made aware of the termination fee and agreed to it"

"If your previous supplier cannot provide the contract and termination fee by supplying a copy of it, and you do not remember agreeing to it, ask them to remove the termination fee."

"If they refuse, raise the issue with Ombudsman Services (the ADR scheme) and ask them to adjudicate."

"In the meantime, let's agree to continue with the transfer of your services over to Unicom."

- 6.26 Other instructions to Contract Enquiries staff, in the "Module 16: Advanced Contract Enquiries: Pre-Live Telecoms Cancellations" training manual include that:

"If their [the customer's] current provider cannot provide the contract then it is not definitive that the customer does not have to pay the termination fee, however it goes a long way when getting the customer on board."⁸⁰

⁸⁰ Copy attached at Annex 15 - Tab 31.

Retentions

6.27 A final set of relevant process documents relates to Unicom's department responsible for customer retentions.⁸¹ Amongst other things, this department is responsible for dealing with customers who contact Unicom about their previous CP's ETCs after completion of the transfer of their services to Unicom.

6.28 Unicom's Fourth Response contained process and training documents relating to this department. "*Module 24: Advanced Retentions*"⁸² provides relevant staff with training in the processes they are to follow. Alongside that document Unicom also provided other documents setting out guidance to those staff on the relevant processes. These included a call script-type document headed, "*Current Supplier Retention: Threatened with Termination Fee (Post Live)*"⁸³ and a process map for the staff to follow.⁸⁴

6.29 Section 24.15 of the *Module 24* document contains instructions for the relevant staff to follow in the relevant circumstances. It says (Ofcom's **emphasis**):

*"If the customer had any doubt regarding the applicability of the termination fee with their previous supplier, and the customer is being threatened with a termination fee, **we may consider cancelling or suspending our contract with the customer as a gesture of goodwill.***

To agree to this you must be confident that the previous supplier termination fee is a legitimate charge."

6.30 The same document also provides a procedure for placing on hold, for later completion, of some customers' transfer orders to Unicom. Point 3 of that procedure is:

"As long as the customer has less than 3 months remaining on their previous supplier's contract, and has been authorised in accordance with 2 (above), the Retentions advisor should SAVE the account, and alert Senior Management or Head of Department who will set the contract to 'On Hold' and arrange any necessary re-apply orders through Provisioning."

The notes to the procedure, meanwhile, say that, "*If a customer has a contract that expires in more than 3 months, you must review the account with the Retentions Head of Department before agreeing to place the contract on hold.*"

6.31 The process map Unicom provided, meanwhile, outlines four scenarios that may apply where a customer contacts the Retentions Team about their liability for ETCs after the transfer of their services to Unicom. The four scenarios provided for are:

- **Scenario 1** – where the customer has previously contacted Unicom's Contract Enquiries Team and agreed with Unicom that it will provide a credit in respect of their previous CP's ETCs, in which case the process provides for Unicom to pay the relevant credit;

⁸¹ Copy attached at Annex 34

⁸² Ibid.

⁸³ Ibid

⁸⁴ Ibid

- **Scenario 2** – where the customer has not previously contacted Unicom’s Contract Enquiries Team during the Transfer Period and alleges that its sales representative said Unicom would pay the relevant ETC or mis-sold Unicom’s services, in which case the process provides for Unicom to offer up to [X] credit in respect of the customer’s previous CP’s ETCs (the TF1 process);
- **Scenario 3** – where the customer has not previously contacted Unicom’s Contract Enquiries Team and either (i) does not allege that its sales representative said Unicom would pay the relevant ETC or mis-sold Unicom’s services or (ii) makes that complaint but rejects the credit offered in scenario 2, in which case the Retentions staff are told to , “*Advise the customer to go away and dispute [the ETC],*” and where, if the customer refuses, the staff are to “*follow CTI process*” (which Ofcom notes from Version 6 of March 2014 of *Unicom’s Module 16: Advanced Contract Enquiries: Post-Live Telecoms Cancellations document*⁸⁵ stands for “Contract Terms Informed” and which we understand to mean that the customer may terminate their contract with Unicom but be liable for Unicom’s ETCs (see further below)); and
- **Scenario 4** – where, in the circumstances of scenario 2, [X] credit is insufficient to cover the customer’s liability for ETCs to their previous CP, in which case a number of possibilities are provided for, including Unicom offering additional credit or placing the customer’s transfer on hold until expiry of their existing contract.

Other documents

6.32 We are also aware that Unicom gave its staff other instructions. Examples include the e-mail memoranda its CEO sent to its sales staff on 11 April 2013, 30 May 2013, 11 July 2013, 29 August 2013, 24 October 2013, 28 November 2013, 27 March 2014 and 24 April 2014.⁸⁶ Amongst other things, these memoranda included the following instructions (or instructions to the same or similar effect):

“Over recent months a small number of customers have been confused by our sales people as to whether Unicom will pay any termination fee that is charged by the customer’s current telecom supplier. Please note that Unicom does not pay termination fees in order to win new customers and to say that it does is gross misrepresentation.

As you are all aware, many of our competitors’ contracts can be terminated without the customer becoming liable for a termination charge. Most of the customers who have agreed to transfer their services over to Unicom over the last few years have not had to pay a termination charge to their previous provider. However, if a customer is in a contract that does have termination provisions, the customer will have to deal with this issue with their current provider. Although Unicom is able to offer advice to customers, we do not deal with our competitors on this, and do not get involved with any contracts between customers and their current providers. Please ensure that customers are properly advised on this matter.

Comments such as “you won’t get a termination fee” or “termination fees aren’t enforceable” or “don’t worry we will get you out of your contract” are incorrect, cause unnecessary cancellations and prevent our Contract Enquiries Teams from being able to save contracts as the customer feels mis-led and has lost their trust in

⁸⁵ Copy attached at Annex 15

⁸⁶ Copy attached at Annex 11

Unicom. For extra clarification on this, we have provided a standard answer you can give to the potential customer below:

“What Happens If I Get A Termination Fee?”

“First of all it’s important to remember that the vast majority of customers don’t get termination fees. Secondly if you do, you don’t need to be concerned as all you need to do is contact our Head Office and somebody within our Contracts team will walk you through how to handle it. Most of the time we can assist and on rare occasions the very worst case scenario is that you have to cancel your contract with Unicom.”

Provisional analysis

- 6.33 In the Section 96A Notification, Ofcom set out our judgment that we had reasonable grounds for believing that instructions Unicom gave to its staff contained statements that individually, and in their cumulative effect, mis-informed the (prospective) customer, or gave the customer a misleading impression, in certain scenarios (where it *might be a possibility* the ETC could be challenged), that they *would* incur no ETC or costs from terminating their contract with their existing CP during its MCP. The reality was that there was a significant possibility they would have to pay a substantial amount and/or Unicom was in no position to say whether the particular customer would have to pay an ETC. That misleading prospective customers to these effects was the aim, we considered, was indicated by the statement Unicom’s Contract Enquiries staff were instructed to make that, “*Let me assure you this is something I deal with a number of times a day so we can certainly give reassurance and advice to make sure you’re not left out of pocket.*” This misleading impression gave rise to a real possibility that (prospective) customers’ decisions to transfer their Fixed-Line Telecommunications Services to Unicom would be affected.
- 6.34 In reaching this view, Ofcom acknowledged that in some cases, where a prospective customer’s liability to pay an ETC was established, Unicom might have offered the customer [§<] credit in respect of the ETC.⁸⁷ In such scenarios, Unicom may have made no, or only limited, misleading statements.
- 6.35 We also considered whether, in light of all the evidence, it might have been said that all Unicom did was to make accurate representations to the following effects:
- where the customer’s existing CP could prove liability to pay an ETC, the customer would have to pay it and Unicom would give [§<] credit towards the cost;
 - if that CP could not prove liability, the customer could challenge that liability in various ways, about which Unicom provided information; and
 - that, in a number of cases, CPs will not or are unlikely to pursue payment of ETCs in any event.
- 6.36 In considering these particular points, we took into account that, in their initial conversations with prospective customers, Field (Paper) Sales telesales

⁸⁷ We note, for example, that the flowchart at 16.5.2 in the Contract Enquiries staff’s manual, described above, indicates that, in cases where the prospective customer confirms they are within a MCP with their existing provider and their contract contains provision for ETCs, the Unicom staff might offer the customer [§<] credit in respect of the ETC. Some versions of the letter Unicom sends customers after they have spoken to the Contract Enquiries team are to similar effect.

representatives were instructed to tell customers of their possible liability for ETCs, “... you may incur a termination fee from your existing supplier...,” and, “You will need to deal with this yourself.” We also took into account that the evidence from CPs in Table 1 in section 4 above suggests it is literally true that in a % of cases customers of some CPs will avoid paying ETCs.

- 6.37 Ofcom’s view, however, on the bases set out in the Section 96A Notification, was that the explicit instructions Unicom gave relevant staff, and the impression they are likely to have created, went beyond these arguably accurate impressions. They were instructions about the statements to be made in the context of detailed sales conversations later in the sales process, in which prospective customers were encouraged to dispute ETCs, where the possibilities for challenging an ETC were put forward in the guise of assurances that it would not have to be paid, and where the customers were offered assurances that their transfer to Unicom would not result in them having to pay sums to their existing/previous CP in respect of the termination of their contract. That, in Ofcom’s view, was misleading.
- 6.38 We noted, in particular, that the statements Ofcom considers misleading in the current Field and Verbal Sales methods, and in the Contract Enquiries documents, were to similar effect to some of those which were in the “*Unicom Verbal Telesales Trainee Induction Course: Part 2*” document (Version 3 April 2006).⁸⁸ Ofcom objected to those as misleading in July 2006 and Unicom changed them. We considered, however, that in the Relevant Period Unicom was giving its staff instructions as part of its standard processes that in some respects were more explicit in their suggestion ETCs would not have to be paid (and doing so in ways which, in no sense, did Ofcom approve as acceptable in conclusion of our investigations in 2006 and 2007).
- 6.39 We similarly considered whether the version of the memorandum Unicom’s CEO sent to its sales staff on 24 April 2014 altered our assessment. We did not consider that it did so, for the following reasons.
- 6.40 First, what it tended to indicate was that, at least until 24 April 2014, Unicom’s sales staff were making statements to prospective customers that they would not have to pay ETCs. Otherwise, there would have been no need for the instructions in the memorandum.
- 6.41 Second, the memorandum may have sought to instruct sales staff not to make incorrect statements, by telling them not to say things like, “*termination fees aren’t enforceable.*” But, those explicit instructions were followed immediately by a re-iteration of most of the instructions on ETCs contained in the Paper Sales process (see above). For the reasons we set out in the Notification, we considered this statement, in the overall context of the sales conversations in which it would be made, misleading.

Unicom’s Representations

Substantive Representations

- 6.42 In response to the Section 96A Notification Unicom made a number of Representations, orally and in writing⁸⁹, and Ofcom has carefully considered all of them in making this Confirmation Decision. They include, as far as Ofcom’s

⁸⁸ Copy attached at Annex 5.

⁸⁹ Copies attached at Annex 30 and Annex 31.

provisional findings in respect of ETCs are concerned, substantive and procedural representations to the following effects.

- 6.43 Unicom's principal contention is that the statements about ETCs provided for in its sales processes did not mislead prospective customers. They are factually accurate statements about ETCs made to those who ask about ETCs, not all prospective customers.
- 6.44 That is, it is factually accurate to tell those customers that the vast majority of customers – 80% of those liable to pay them, according to Ofcom's evidence – do not pay ETCs. Similarly, it is true to say that many ETCs can successfully be challenged, since many CPs simply "...warn that ETCs may be applicable."
- 6.45 Additionally, Unicom offers prospective customers credits in respect of their ETC liabilities and tells them they can cancel their transfers if such liabilities are established. And, its processes do provide for the payment of such credits, under what it calls its "TF1" and "TF2" processes, and it does allow relevant customers to cancel their transfers, where those customers contact it having received notification from their previous CP of their possible liability for an ETC. Indeed, it paid [X] in ETC credits during the Relevant Period. [X] customers, meanwhile, cancelled their transfers to Unicom, without any charges, on account of ETCs during the Transfer Period and [X] customers did so on that account, without having to pay charges to Unicom, at a later stage.
- 6.46 Accordingly Unicom said, "*When making statements regarding whether an ETC is payable, Unicom has not been providing "assurances to customers, instead Unicom has been setting out the facts on the likelihood of whether an ETC would be levied" [sic] and the statements provided for in its standard sales processes are accurate, not misleading. Unicom further contended that the obligation in GC24.3 not to mislead by omission required it to provide this information.*
- 6.47 As to the email memoranda sent to its sales staff by its CEO, Unicom said it did not indicate that its sales staff had made, or were instructed to make, misleading statements about ETCs to prospective customers. Its Representations included that:
- [it] "...repeatedly circulates memos in the form referred to above and has done so on a periodic occasions since March 2012, to ensure continued compliance and not as a reaction to non-compliance with the GCs and relevant consumer protection regulations.....;"
 - "The management at Unicom felt that, in light of previous customer confusion that had arisen, that it was essential (and best practice) to reinforce the importance of adhering to good sales practices...;" and
 - "Unicom tried to ensure that its sales representatives were providing the correct information to customers... [and] disagree with the assertion that it "continued, even in this email, to instruct its sales staff to make misleading statements about ETCs."
- 6.48 Unicom also made the submission that its commercial interests were in keeping customers happy, in order to cross-sell other services to them, and so would not act in a misleading way:

"[X]"

- 6.49 It similarly submitted that its processes provide for sales verification calls to be made by managers in almost every case, after sales have been agreed between sales staff and prospective customers. It said this “... *verification process will weed out anything where there has been any uncertainty or where the customer – when speaking to the customer as part of the verification call, the customer says, ‘Well I didn’t understand that’ or ‘I didn’t understand this’ or whatever. The whole purpose of the verification call is to give that extra loop in the process to ensure that the customer is not confused in any way and, you know, doesn’t understand what the process involves and so on.*”
- 6.50 Unicom relied in support of its contentions on the numbers of complaints made to Ofcom. It said only 53 complaints in total related to relevant sales during the Relevant Period, 36 concerning ETCs and 17 concerning broadband. It submitted that, had its processes misled prospective customers, who are mainly small businesses likely to be diligent in their affairs, more than 36 would have complained about ETCs. It also said that in 2007 Ofcom had given Unicom a target of 0.3% of complaints as a proportion of total successful customer transfers as an acceptable level, but the level of relevant complaints in the present matter is very low at only [X] (though Unicom also said that it, “... *acknowledges that the target [0.3%] was not, and is not, a regulatory requirement but believes it to be a useful bench mark figure,*” and we do not understand it to contend that the point precludes Ofcom from taking action in this matter). It described Ofcom’s provisional decision as not being “*evidence based or proportionate.*”
- 6.51 Unicom also submitted that the numbers of complaints “... *significantly declined during the course of Ofcom’s investigation.*” It said that decline reflected its compliance with GC24.3.
- 6.52 It also relied in a number of other respects on the payment of ETC credits of [X] under its TF1 and TF2 processes. It described these as another part of the steps it had taken to ensure compliance with GC24.3 and as, “...*unequivocal evidence that it was committed to ensuring that its customers were not harmed.*” It highlighted that, of the 36 complaints about ETCs in the Relevant Period, 20 of the complainants were offered ETC credits by Unicom, with 8 accepting and receiving credits totalling [X], and 2 cancelling their orders without being subject to any ETCs by Unicom.

Procedural Representations

- 6.53 Unicom also raised a number of procedural points. It said that it had asked to meet with Ofcom on a number of occasions, which Ofcom had refused. It contended that this confounded the expectations it derived from its experience of its investigation by Ofcom in 2006/7.
- 6.54 Unicom said that, had Ofcom met earlier with it, it could have provided relevant information bringing the Investigation to an end earlier. It submitted that Ofcom should have agreed to meet and adopted an early settlement process. It said that it should not be penalised for the length of time it has taken Ofcom to conclude its investigation, given that it has made every effort to bring matters to a close, and, accordingly, if Ofcom were to impose a penalty it should apply the equivalent of an early settlement discount.
- 6.55 Unicom also contended that Ofcom had failed to follow its own regulatory principles, in not meeting with it, in not providing sufficient updates to it about the investigation and in providing information in response to a Parliamentary question and which was included in a media report. It similarly said that, in issuing notices to other CPs under

section 135 of the Act, requiring them to provide information to Ofcom relevant to the Investigation and/or writing to those CPs about the use of that information, Ofcom had indicated to them that we had decided to issue a notification to Unicom under section 96A of the Act.

Ofcom's considerations and decisions

Procedural matters

- 6.56 Before we set out our consideration of the relevant substantive matters, it is convenient to consider Unicom's Representations on procedural matters. Ofcom agrees that we would have preferred to conclude this matter more quickly. We also agree that the information we were required to provide in response to the Parliamentary question should have been given to Unicom at the same time and not later. However, we do not agree we acted procedurally improperly.
- 6.57 Ofcom opened our enquiry on 21 February 2014 and the Investigation on 26th March 2014, as explained in section 4 above, having considered the number and range of complaints we had received about Unicom's sales and marketing practices between August 2013 and January 2014. At its outset, the Investigation was looking into a number of matters under GCs 9 and 24. This necessarily involved obtaining and assessing a large volume of evidence, in light of the statutory burdens on Ofcom and the requirements of fairness to Unicom. Only after a detailed assessment was it possible for Ofcom fairly and properly to focus the Investigation on particular matters – ETCs and effects on broadband services – in the Relevant Period.
- 6.58 A number of Unicom's requests to meet Ofcom, however, were made at early stages in this matter. Some were made before the Investigation had started (and were about whether Ofcom should open the Investigation). Others were made before Ofcom had gathered and assessed evidence and identified the specific issues on which the evidence suggested there may have been regulatory contraventions in respect of which Ofcom could make findings under sections 96A – 96C of the Act.
- 6.59 At the time of the earliest requests, Ofcom had obtained sufficient information in order to decide to open the Investigation in line with our enforcement guidelines without the need to meet Unicom. On that basis, we reasonably took the view there was no need to meet at that stage. As to those requests made before Ofcom had assessed all the evidence, it would have been premature to meet Unicom during the Investigation before the specific issues had been identified.
- 6.60 We also note that Unicom's subsequent requests to meet Ofcom were made at later stages in the Investigation and at times after the Relevant Period. In particular, Unicom and/or its solicitors wrote to Ofcom on 11 September 2014, 9 October 2014, 28 November 2014, 16 February 2015 and 30 March 2015 offering or requesting to meet Ofcom and/or referring to steps Unicom had taken to ensure its regulatory compliance.
- 6.61 Ofcom considered these requests carefully, but took the view that, in light of, amongst other things, the matters under investigation, Unicom's previous regulatory non-compliance, the timing and the opportunities Unicom would have to make representations should Ofcom issue a notification under section 96A of the Act, it was appropriate for Ofcom to continue its investigation and, if appropriate, to issue a notification. We also noted that in the relevant correspondence Unicom had made points and provided information it wanted to re-iterate at the requested meeting(s),

that we would take it all into account in our deliberations and that it was not clear on that basis that meeting would serve a further purpose.

- 6.62 Unicom was not prejudiced by this approach, nor was the approach in breach of the relevant provisions of the Act, Ofcom's regulatory principles or any expectations Unicom might properly have had about Ofcom investigations. Unicom was aware of the matters under investigation from the information Ofcom provided to it at the enquiry stage and early stages of the Investigation. Ofcom's enquiry opening letter, for example, set out the matters under consideration and provided a detailed spreadsheet of the complaints with which Ofcom was concerned. The First Information Request also set out in detail the matters under Investigation. That correspondence did not, of course, presage the findings Ofcom went on to make, since they had not been made and any such indication would have been prejudicial, but it was always open to Unicom to take whatever steps it considered appropriate to address and/or remedy the matters Ofcom was considering.
- 6.63 The relevant subsequent requests to meet, meanwhile, were after the end of the period under investigation and in respect of which Ofcom makes findings. That period, the extent of Unicom's contravention and any consequent penalty are not increased by the fact Ofcom focused its assessment of the relevant evidence in other ways and did not meet Unicom. Ofcom was not treating the contravention as continuing and Unicom is not, therefore, being penalised for the time Ofcom's investigation has taken.
- 6.64 Rather, it was appropriate for Ofcom to continue its assessment of the relevant evidence, to narrow the Investigation where appropriate, and to make provisional findings and give Unicom opportunity to make representations in response to them. Unicom derives benefit from the narrowing of the Investigation and has been given fair opportunity, in accordance with the Act, to put its case. Ofcom has taken into account the points Unicom made and the information it provided in relevant correspondence about meetings (and which it proposed to re-iterate at those meetings). The extent to which, for example, Unicom took steps to comply with GC24.3 in relevant regards and remedy any contravention, and its co-operation with Ofcom's Investigation are matters we have taken into account in making this Confirmation Decision and assessing the penalty to be imposed on Unicom.
- 6.65 As to the contentions Unicom makes about the information requests Ofcom issued to other CPs requiring them to provide information to Ofcom relevant to the Investigation, and related correspondence, and that Ofcom had indicated to those CPs that we had decided to issue a section 96A notification, that is not correct. Ofcom was, properly, making clear to those CPs what information was required and how it might be used – putting that use on a proper footing – whilst making clear from the conditional language used that Ofcom had taken no decision.
- 6.66 To illustrate, the relevant information requests said, "*Ofcom's use of the information may involve its inclusion in a notification*" The relevant correspondence said the use of the information, "*....is likely to involve reference to the information in a notification to Unicom under section 96A of the Act (should Ofcom decide to issue one).*" That does not, as Unicom contended in its written representations, "*...give a clear indication that Ofcom had decided to make a notification,*" nor make, "*....clear to another CP that Ofcom is going to issue a notification.*" It does no more than re-iterate that possible outcome, as Unicom acknowledged in its oral representations, which possibility was in any event clear from the fact an investigation was ongoing and its existence had been properly publicised in Ofcom's consumer bulletin.

Substantive matters - assessment of sales statements

- 6.67 Turning back to the relevant statements provided for in Unicom's standard sales processes, Ofcom's judgments, having carefully considered Unicom's Representations, is that their individual, and cumulative, effects are misleading to some customers, albeit more narrowly than in our provisional assessment. That is, they are misleading in some of the scenarios, and to some of the prospective customers, contemplated in that assessment, as follows.
- 6.68 In particular, they are liable to mislead those customers who, in sales conversations, are offered re-assurance that they will not incur costs in respect of ETCs and told they can always cancel their transfers, but whose liability for their previous CP's ETCs is not established during the Transfer Period and who contact Unicom at a later date. Where these customers fell into scenarios 2 and 3 as set out in the Retentions process map described above, they are liable to have been misled. Further, and in any event, there is also evidence indicating that other misleading statements about ETCs were made to some customers.

Opening statements

- 6.69 The instructions in both the Field and Verbal Sales methods begin with analogous statements that, "... *the vast majority of customers do not get a termination fee. Most suppliers initially write to transferring customers warning that there may be termination fees applicable but frequently no termination fee is subsequently charged.....*," and, "... *What you have to understand is that many providers do not pursue these contracts if you decide to leave....*" In other words, statements to the effect that even if an ETC may be payable, a CP is unlikely to pursue it and the customer is unlikely to have to pay it.
- 6.70 In light of all the evidence, including a careful consideration of Unicom's Representations, Ofcom agrees that it is factually correct that the majority of customers do not pay ETCs. Nevertheless, a number of points are relevant and mean that such statements are liable to contribute to a misleading effect on some prospective customers.
- 6.71 Ofcom notes in this respect that it is common practice across industry for CPs to include ETC provisions in agreements for Fixed-Line Telecommunications Services. Unicom's standard terms and conditions, and those of its main competitors, contain provisions that result in charges being applied for termination of the agreement within the MCP.⁹⁰ A contractual liability for such a charge will therefore arise where a customer terminates their contract within that period. Moreover, relevant evidence indicates that, in a significant minority of cases, that liability will be pursued and a payment made.
- 6.72 The findings reported in Ofcom's "*SME experience of communications services – a research report*"⁹¹ show the following. First, that 67% of SMEs surveyed had fixed term contracts for their Fixed-Line Telecommunications Services and so are likely to

⁹⁰ These CPs include; Utility Warehouse

(<https://www.utilitywarehouse.co.uk/legal/termsandconditions>), BT

(<http://www2.bt.com/static/i/btetail/panretail/terms/index.html>), Talk Talk Business

(<http://www.talktalkbusiness.co.uk/legal/>), XLN Telecom (<http://www.xlntelecom.co.uk/xln-telecom-terms-of-business.aspx>) and Chess Telecom (http://www.chesstelecom.com/terms_and_conditions).

⁹¹ Published at http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/sme/sme_research_report.pdf and accordingly not annexed to this Notification.

have been liable to ETCs, while 33% did not and are unlikely to have been. Second, 13% of SMEs who had not switched CP recently said they had not done so because they were tied into an existing contract and, amongst those who had considered switching and decided not to, 9% gave that reason and a further 4% cited their liability for ETCs. Third, amongst the surveyed SMEs who had switched CP, 74% had not been subject to an ETC, whilst 22% had been subject to an ETC and 14% had paid it.

- 6.73 Taking into account that one-third of SMEs are not subject to MCPs and liabilities for ETCs, and that those switching are, on the basis of the above, more likely to be outside their MCP and any ETC liability, this suggests a number of SMEs switching supplier are pursued for, and end up paying, ETCs. Amongst those SMEs in our survey who switched and were subject to an ETC, only in one-third of cases did the SME avoid paying it.
- 6.74 The evidence obtained from CPs set out in Table 1 in section 4 above offers a similar indication, again at least in respect of a significant minority of cases. It shows that around 20% of SME customers, across CPs, pay ETCs and that those of some CPs pay them in a high proportion of cases (100% for one small CP, 88.3% for another CP). Indeed, on the basis of the revised figures it provided to Ofcom in its Representations, Unicom itself obtained payment from [3<] % of liable SME customers who terminated contracts with it in 2014.
- 6.75 More broadly, that evidence indicates that a range of different outcomes is likely to arise when a customer terminates their contract with a CP within a MCP. For some CPs a high proportion of customers will have to pay ETCs. For others, a smaller, but not necessarily insignificant proportion (between 10 and 20%), pursue and obtain payment. For others still, even the CPs themselves do not have information about the numbers of terminating customers who pay ETCs.
- 6.76 Unicom is not on that basis in a position to offer any individual prospective customer the impression their existing CP is unlikely to pursue payment and an assurance they will not have to make it. Whether any prospective Unicom customer is likely to be pursued for, and end up paying, an ETC is likely to depend on largely circumstantial factors outside Unicom's control. These include the customer's precise contractual situation (the remaining MCP, for instance), the number and contractual situation of customers attempting to switch their services within their MCP during a given period and the particular approach the existing CP chooses to take to customer retention and enforcement of the payment of ETCs. It does not appear to Ofcom that Unicom has grounds to assure any particular prospective customer they will not have to pay, which is what these statements seek to do. Unicom cannot know.
- 6.77 We have noted in this regard that, in its Representations, Unicom said, "*Whilst Unicom acknowledges that the statements are made to individual customers, they are made in the context of a sales and purchase conversation.*" It also said, "*There was no intention in making that statement and making that statement sound specific to the individual person who was on the other end of the telephone line or was, you know, in front of the salesperson where they were in the field sales scenario...*" In Ofcom's assessment, however, it is precisely because the statements are made to individual customers in the context of a sales conversation that they provide a degree of personal assurance to that customer in respect of their payment of ETCs. For some customers found liable to pay ETCs after their transfer to Unicom, this is liable to be part of a misleading assurance by Unicom that they will not have to pay anything in respect of the early termination of their existing contract.

Second statements

- 6.78 Both sets of instructions continue with statements about the ability of a prospective customer's existing CP to recover an ETC and the customer's ability successfully to challenge it:

"Many customers can successfully challenge the termination fee" and

"Your current provider would need to provide a termination fee with a copy of the contract and in our experience many providers find this hard. Therefore termination fees are not often pursued..."

- 6.79 These statements, and the misleading effects Ofcom considers they have, are re-enforced by the statements Unicom's Contract Enquiries staff are instructed to make. They are given explicit instructions, in respect of relevant enquiries from prospective customers, that they, "... need to get the information necessary from the customer to get them to dispute the contract." They are also given instructions to tell customers:

"You should ask for a copy of the contract that demonstrates you were made aware of the termination fee and agreed to it"

"If your previous supplier cannot provide the contract and termination fee by supplying a copy of it, and you do not remember agreeing to it, ask them to remove the termination fee....," and

"If they refuse, raise the issue with Ombudsman Services (the ADR Scheme) and ask them to adjudicate."

- 6.80 There does not appear to Ofcom to be any reasonable basis for Unicom to make such broad statements as those above about the likelihood of any individual customer successfully challenging an ETC nor about the basis on which they could do so. We note again that, on the basis of the evidence described above, a significant minority of customers liable for ETCs end up paying them. Any one individual customer could have to do so and Unicom cannot know with sufficient certainty any particular customer's position.

- 6.81 The instructions to Contract Enquiries staff appear to indicate that the basis for Unicom's reassurances about the possibilities of successfully challenging an ETC are a number of assumptions about:

- the record-keeping practices of other CPs and their ability to retrieve contracts with their clients;
- the likelihood of another CP removing the termination fee upon request; and
- the successful completion of an ADR procedure.

- 6.82 These purely hypothetical assumptions cannot underpin the reassurances Unicom seeks to give, noting again that Contract Enquiries staff are instructed to tell prospective customers Unicom, "... can certainly give reassurance and advice to make sure you're not left out of pocket." What actually is offered is the possibility an ETC could be disputed, in the guise of reassurance that it will not have to be paid. That seems to be acknowledged in other information Unicom gives those staff (but not, it appears, as a statement to communicate to prospective customers) (Ofcom's **emphasis**):

*“If their current provider cannot provide the contract then **it is not definitive** that the customer does not have to pay the termination fee, **however it goes a long way when getting the customer on board.**”*

In Ofcom’s view, the emphasised words show that the intention is to give prospective customers information that secures the transfer of their services to Unicom, not accurate information.

- 6.83 Further, and in any event, it does not appear to Ofcom unreasonable to expect the likelihood of a successful challenge to an ETC to vary by CP and at different points in time. The likelihood of any individual (prospective) customer successfully challenging an ETC will depend on circumstances specific to their and their CP’s individual position. So, even if it were statistically correct, reference to the position of “many customers” is not relevant to an individual Customer.
- 6.84 On each of these bases, the statements appear to Ofcom liable to give some customers, in relevant scenarios, further misleading re-assurance that they will not end up paying an ETC and, on that account, should proceed to transfer their services to Unicom.

Third statements

- 6.85 The instructions go on to tell relevant Unicom staff to make statements that Unicom will help the prospective customer avoid paying ETCs:

“... and for the remainder who have a valid fee, our Contracts Team at Head Office will walk you through how to handle it. Most of the time we can assist”,

“... if you do have any problems with regards to this then we have a dedicated contract team to help and give advice....”, and

“... we have a highly skilled dedicated contracts team to help.”

- 6.86 Again, Ofcom acknowledges that, in some scenarios where the validity of the demand for an ETC is established, Unicom’s Contract Enquiries staff may simply offer the prospective customer credit under its TF1 or TF2 process in respect of their liability (or the possibility of cancelling or putting on hold their transfer to Unicom). In particular, Unicom’s standard processes provide that, where a prospective customer contacts it during the Transfer Period to cancel the transfer having been notified by their previous CP about ETC liability (or possible liability), and the customer refuses to dispute the liability, Unicom may give the customer credit of [X] (under the TF1 process) or, where the ETC liability is greater, [X] plus [X] of any liability in excess of [X] (the TF2 process). Where that liability is established at that time, Unicom may make the credit immediately. Where the liability is subject to confirmation, Unicom’s processes provide for it to record the offer of credit in writing, to be paid once the liability is confirmed.
- 6.87 We take full account that Unicom has paid customers [X] in ETC credits and, in the circumstances in the previous paragraph, the customer may not be misled. We make no finding that customers are misled in those circumstances. Nonetheless, in other scenarios, where there might be a possibility an ETC could be challenged, these statements are again in our view liable to mislead some customers in certain regards.
- 6.88 That is, Unicom’s Contract Enquiries team is responsible, in the present context, for handling contacts from prospective customers who, during the Transfer Period, call

to exercise their rights to cancel their transfer on account of their existing/previous CP telling them they may be liable for ETCs. As is indicated in the instructions given to those staff, their assistance in relevant cases is actually limited to the provision of general information about the potential routes available for challenging an ETC (requesting contractual documents, requesting that ETCs be waived and seeking to challenge their imposition in ADR proceedings).

- 6.89 As we note above, in a significant minority of cases, ETCs are paid, suggesting that in any particular case challenging an ETC through these routes may fail. Challenging an ETC with the relevant CP and/or in ADR by no means guarantees it will not have to be paid by any particular customer to whom the apparent re-assurance is offered. On the contrary, it may well in any particular case lead to the CP enforcing liability and/or an adjudication that the charge is due, and Unicom cannot know in what cases that will be so.
- 6.90 We also note again that staff are instructed to make some of these statements in anticipation of a conversation with Unicom's Contract Enquiries staff in which Unicom's whole focus is on persuading the prospective customer, who has called to cancel their transfer, not to do so. The Contract Enquiries staff are told to tell the customer that Unicom "*can certainly give reassurance and advice to make sure you're not left out of pocket.*" Such staff have also been told, in relation to this conversation, that an existing CP's inability to produce a contractual document is, "... *not definitive that the customer does not have to pay the termination fee,*" but that the re-assurance in this regard, "... *goes a long way when getting the customer on board.*"
- 6.91 We similarly note that, in respect of the same conversation, the Contract Enquiries staff are instructed in paragraph 16.5.1 of the relevant process manual (Annex 15, Tab 31) only to make the offer of credit if the customer indicates a refusal to dispute the ETC and maintains a wish to cancel the transfer:
- "If the customer still does not wish to transfer their services to Unicom, purely due to the termination fee from their current provider you may offer to credit Telecoms customers **UP TO** [X] excluding VAT towards the other supplier's termination fee...."*
- 6.92 So, prospective customers who derive re-assurance that they will not be left out of pocket because they can challenge the ETC and agree to continue the transfer on that basis will not even receive the offer of credit (at that stage, at least). And, having provided what is in Ofcom's view false assurance to such a customer, Contract Enquiries staff is instructed to say, "*In the meantime, let's agree to continue with the transfer of your services over to Unicom.*"
- 6.93 Putting all this another way, some customers who call Unicom to cancel their transfer are told only about their ability to challenge their ETC, presented as re-assurance that it can be avoided. They are persuaded to continue the transfer on that ground alone, no mention is made to them of any offer of credit for their ETC and they do not receive an offer of that credit (verbally or in writing). At the very least, the transfer is concluded, Unicom derives the benefit of signing up the customer and any attempt to cancel is 'kicked into the long grass' and the, more onerous, onus is placed on the customer to have to try to reverse it later, when the automatic right to cancel, in the regulated Transfer Period, has expired.
- 6.94 Accordingly, the statements relevant staff are instructed to make really only relate to or describe, at best, ways in which prospective customers could continue arguing

that they should not pay an ETC to their existing CP. They are, however, offered up, in their overall context, as statements that such a challenge will or is likely to succeed, with Unicom's help. As such they are, Ofcom considers, misleading in respect of at least some customers.

Fourth statements

- 6.95 Finally, the instructions include statements which staff are told to make about circumstances in which existing CPs insist on payment of ETCs. The Field-Sales Method document concludes with an instruction to say that, "... *in rare occasions the very worst scenario is that you have to cancel your transfer to Unicom.*" Contract Enquiries staff, meanwhile, are instructed, as well as telling prospective customers to challenge the ETC and/or to pursue the matter in ADR, to say that, "*If your current provider pursues the fee you can return to your previous provider.*"
- 6.96 It seems clear enough to Ofcom, from the overall context, that these statements offer re-assurance that the customer could cancel the transfer to Unicom and return to their previous CP at no cost to themselves. That, after all, is the whole point of the statements and is how they would be understood by recipient customers. These statements are misleading in our view in the following aspects.
- 6.97 First, it is correct that the prospective customer could cancel the transfer during the 10-working day regulated Transfer Period. A customer whose liability for an ETC is established during that period may indeed cancel the transfer, necessarily without any cost, during that period. We take account in that regard of Unicom's representation that, in the Relevant Period, just over 2000 customers cancelled transfers during the Transfer Period on account of ETCs.
- 6.98 However, the relevant liability may well not be established during that period, and may only be established later when the automatic regulatory right to cancel the transfer has been lost. As Unicom's CEO said during its oral representations:
- "From our experience, many CPs will say that a termination fee may be liable, but it's not certain at the point of during the transfer, because there's a number of CPs that don't have that information available to them during the relatively short transfer period."*
- 6.99 Second, the references to the prospective customer cancelling the transfer to Unicom and transferring back to their previous CP are made in the overall context of the conversation described above, in which Unicom seeks to persuade the customer not to cancel their transfer and in which its Contract Enquiries staff advise the customer to challenge the payment of ETCs in an ADR process. Likewise, where staff are instructed to suggest to consumers that, notwithstanding that their liability to pay ETCs may be unresolved and there is no guarantee a challenge to any liability will succeed, they continue with their transfer.
- 6.100 These statements seem to envisage the transfer proceeding and the customer transferring back to their previous CP, without any cost, at some later point. In those circumstances, it is not clear that the customer would have the right to make that further transfer, nor that, as appears to be implied, no liability for ETCs or any other cost would apply.
- 6.101 We note in this regard that, in its oral representations, Unicom said that every customer contacting it after the Transfer Period on account of their liability for an ETC to their previous CP is given credit or allowed to cancel their transfer to Unicom:

“There have been a handful of occasions where customers have come to Unicom after the Unicom service has gone live and said, ‘Actually, we’ve been charged ETCs by our previous supplier’ and you have satisfied them either by letting them – by giving them the credit, the TF1, TF2 process, or by releasing them from their contract with Unicom without penalty.”

6.102 In the covering letter to its Fourth Response, meanwhile, Unicom said:

“These post-live customers are treated in the same manner as a customer who contacts Unicom during the transfer period. The TF1 and TF2 offers are made in the same manner and the customer is given the option to accept the offer. Should the customer refuse the offer, our employees will ascertain whether the customer was told or given the impression they would not be impacted by a termination fee from their previous supplier. If the customer indicates this is the case, the customer may end their contract with Unicom without Unicom’s own ETC being charged.”

6.103 These submissions are contradicted, however, by statements in its Written Representations and by Unicom’s standard sales processes (which provide for a number of outcomes), which indicate that Unicom’s processes do not provide for a right to cancel transfers in the relevant post-Transfer Period circumstances. These statements suggest Unicom may or may not allow the customer to transfer. We take account, in respect of that inconsistency, of Unicom’s statement in its Oral Representations that, “..... if there was any inconsistency in what we said here as opposed to what we said in the written submission, take the written submission.”

6.104 In its Written Representations, Unicom said (Ofcom’s **emphasis**):

*“If they do not wish to take advantage of the TF1 or TF2 process, the customer is able to cancel the agreement with Unicom at any stage, within the 10 day transfer period. **Cancellations for post-live customers are dealt with on a case by case basis.**”*

6.105 Unicom’s process documents for its Retentions department⁹² meanwhile, provide for a number of possibilities consistent with the position that Unicom may allow customers to cancel transfers after completion but that they have no right to do so (at least not without cost).

6.106 We note that, as set out above, the “*Module 24: Advanced Retentions*” process document, for example, instructs Retentions staff in section 24.15 that (Ofcom’s **emphasis**):

*“If the customer had any doubt regarding the applicability of the termination fee with their previous supplier, and the customer is being threatened with a termination fee, **we may consider cancelling or suspending our contract with the customer as a gesture of goodwill.**”*

To agree to this you must be confident that the previous supplier termination fee is a legitimate charge.”

It also provides for transfers to be placed on hold in certain circumstances. In particular, where the customer’s contract with their previous CP has less than three months to run.

⁹² Copies attached at Annex 34

- 6.107 The Retentions process map (in Annex 34), meanwhile, outlines four scenarios described above that may apply where a customer contacts the Retentions Team about their liability for ETCs after the transfer of their services to Unicom.
- 6.108 Ofcom agrees that, in scenario 1 in that process, which applies where the customer has previously spoken with Unicom's Contract Enquiries staff, been promised credit in respect of ETCs and received a letter about payment of that credit, the customer may simply be provided with the credit promised. In that case, the customer may not be misled.
- 6.109 However, in other scenarios provided for, some customers are liable to be misled. In particular, the process provides, in scenario 2, that customers not previously offered credit will only be offered credit in respect of ETCs if they allege that Unicom's sales staff said Unicom "...would PAY the TF/been mis-sold."
- 6.110 Moreover, according to the process, if the customer rejects the offer of credit in these circumstances, scenario 3 applies. As set out in the process map, this provides that Unicom's Retentions staff should advise the customer to dispute the termination fee and, "*If the customer refuses to dispute contract – follow CTI process.*"
- 6.111 As noted elsewhere, Ofcom understands "*CTI*" to stand for "Contract Terms Informed." It is referred to in paragraph 16.1 of Unicom's *Module 16: Advanced Contract Enquiries: Post-Live Telecoms Cancellations* document⁹³ which refers to customers cancelling transfers during the Transfer Period, where Unicom, "... choose not to set these requests to '*CTI*' and allow the customer to cancel without penalty." It is also referred to in paragraph 24.14 of the Module 24 Advanced Retentions process document⁹⁴, which describes the CTI process as applicable "... if lines have left in breach." Ofcom infers from its name and these references that the CTI process means the customer may terminate their contract with Unicom but will be liable for Unicom's ETCs.
- 6.112 These scenarios therefore apply where a customer has been misled in relation to ETCs. It does not necessarily undo that misleading effect to offer the customer credit under scenario 2. They have still been misled into continuing their transfer to Unicom and Unicom has obtained the benefit of that transfer (and making misleading statements and then giving customers credits is not acceptable way of recruiting customers). Scenario 3, meanwhile, provides for a standard process in which a customer who, in accordance with other parts of Unicom's standard sales processes, has been told the worst case is that they have to cancel their transfer to Unicom, is told that they may cancel their contract but only on payment of ETCs to Unicom. This clearly runs counter to the assurance previously provided for that the worst case scenario is that they could cancel their contract with Unicom (at no cost to themselves) and return to their previous CP.
- 6.113 We note in this regard that, in its covering letter to the Fourth Response, Unicom presented the sequence of events, for customers contacting its Retentions department, in a different order and in a different way. It suggested offers of credit are made before the customer alleges any relevant mis-selling and that rights to cancel without liability for Unicom's ETCs are given if that offer is refused and Unicom's staff subsequently ascertain there was such mis-selling. The Retentions process map contradicts this in respect of customers who fall into scenarios 2 and 3. Given that staff in the Retentions department will likely see the process map (it is

⁹³ Copy attached at Annex 15 – Tab 31

⁹⁴ Copy attached at Annex 34

produced for them), but not Unicom's letter to Ofcom, we rely on the contents of the process map.

- 6.114 Further, even if our assessment of scenario 3 above is incorrect in some cases, and Unicom does not enforce its ETCs in some such cases, that does not mean the customer involved has not been misled. The process map indicates that a customer only ends up in that scenario where they have been mis-sold by reference to ETCs in the first place. Allowing them to cancel their contracts with Unicom would not necessarily erase that mis-selling. In those circumstances, the customer would still have the liability for their previous CP's ETCs which Unicom had misled them that they would not face.
- 6.115 Additionally, and as is indicated above, we also take account that, if a Unicom customer challenges their liability to pay ETCs to their previous CP, through the ADR process, it is entirely possible they could be found liable to pay them. Their previous CP may or may not allow them to enter into another contract for services, but that would not necessarily extinguish their liability to pay the previously incurred ETCs. More clearly still, the cancellation of the transfer to Unicom would not, by itself, extinguish that liability.
- 6.116 All these points being so, it is not, Ofcom considers, correct to state that the "very worst scenario" for a customer liable for ETCs is that they have to cancel the transfer to Unicom (and can freely return to their previous CP). Rather, the worst scenarios include that they can only cancel their contract with Unicom on payment of its ETCs and/or they are left with a significant liability for ETCs to that previous CP. It appears to Ofcom, with all these points in mind, that all the relevant statements really do is to provide false assurances to some customers that they should transfer to Unicom regardless of their current contract because they can always avoid having to pay anything in ETCs, when that is not necessarily the case.
- 6.117 In our provisional assessment we also considered other matters, including whether the amounts of credit in respect of ETCs offered by Unicom would in any event be sufficient to mean that customers would not be "out of pocket" in respect of ETCs. One reason we considered was that the offer of [redacted] credit would not necessarily, in any case, cover the prospective customer's liability for ETCs so as to substantiate Unicom's broad statement of assurance in this regard.
- 6.118 We considered that the position would depend on the amount of the ETC actually incurred in each individual case. In that connection, Ofcom noted that, in our SME research, 55% of SMEs subject to an ETC paid up to £500, 12% paid between £500 and £1000 and 6% more than £1000 (with 27% not knowing the amount paid). On that basis, [redacted] credit would leave a number of relevant customers out of pocket.
- 6.119 In response, Unicom has submitted that its TF1 and TF2 processes between them provide for payment of credits up to a maximum of [redacted]. In particular, under the TF2 process, Unicom would pay the first [redacted] of an ETC and [redacted] of any amount due on top of that up to a limit of a [redacted] ETC. So, for instance, a customer with a liability of, say, £600, would receive a credit of [redacted]. Unicom further submitted that the average ETC for its customers was below the amount that Unicom offered to pay in full and only 3.6% of its customers paid ETCs over that amount.
- 6.120 On those bases, Ofcom notes that the credits payable to many of Unicom's customers' would cover their ETC liabilities. Even so, it follows from Unicom's evidence and its process that any customer whose liability exceeded [redacted] would in fact have to pay part of it, despite Unicom's assurances they would not end up out of

pocket. In respect of a small number of customers, therefore, this assurance would be misleading.

Cumulative effect

6.121 Each of the individual statements Unicom staff are instructed to make is in Ofcom's view misleading to some prospective customers on the bases above. Their cumulative effect appears to us similarly misleading to such customers. It is to suggest that, one way or another, some customers, in relevant circumstances, will not have to pay an ETC and will not have to incur any financial cost in connection with the termination of their contract with their existing CP.

6.122 In particular, those customers who:

- are told that most consumers do not have to pay an ETC because most CPs do not pursue them;
- are told that, if CPs do pursue them, the customer can successfully challenge them;
- are also told that, even if that challenge fails, the customer can take the matter to ADR and avoid the charge, and Unicom have a team which can assist and make sure the customer does not incur a cost;
- are similarly told that, in any event, they can always just cancel the transfer to Unicom (without cost);
- are satisfied by these assurances and to whom Unicom therefore makes no offer of credit under its TF1 or TF2 processes during the Transfer Period; and
- who contact Unicom about their ETC liability after the Transfer Period, and fall within scenarios 2 or 3 of the standard processes applicable to Unicom's Retentions department.

Other customers liable to be misled include any who do challenge their previous CP's ETCs via ADR and end up with a liability to pay those charges and any whose liability for such ETCs exceeds [X].

6.123 For any customers in these categories, the assurances Unicom offers will not necessarily mean they will incur no costs for terminating their contract with their existing/previous CP. Relevant customers could face significant ETC liabilities and have to pay them. Unicom cannot know what will be each individual prospective customer's position in these regards.

Effects on purchasing decisions

6.124 There appears to Ofcom little difficulty in inferring that these statements, individually and cumulatively, would have misled relevant prospective customers and been likely to affect their purchasing decisions. That is, presumably, the reason Unicom made them. We note it specifically includes them in its instructions to staff about overcoming such customers' objections to transferring their services to Unicom and persuading them to change their minds.

Conclusions on Unicom's standard processes

6.125 On the bases above, Ofcom is satisfied that Unicom adopted standard sales and marketing processes which provided for it to give some prospective customers misleading information that they would not incur ETCs or costs related to the early termination of contracts with their existing CP. Further, we have the following grounds to be satisfied these processes were applied to some prospective customers and that, in any event, some customers were misled in practice.

Application of Unicom's standard processes

Standard processes

- 6.126 We take account that the processes described were Unicom's standard processes. They included explicit instructions to staff and specific examples of statements they should make, and staff were trained to follow them. It is reasonable to infer that they were adopted so staff would follow them as their standard operating procedure and that they in fact did so. There is no evidence that staff followed any alternative processes or received alternative instructions.
- 6.127 We also take account that, while some of the statements Unicom staff were instructed to make are described as "*examples*," the overall effect of the instructions to staff is prescriptive. That is, they are instructions that Unicom staff should, in relevant scenarios, give prospective customers re-assurance to the effect that they will not have to pay ETCs. Where statements are suggested to staff as "*examples*," they are specific means for staff to use to give effect to the over-riding instructions.
- 6.128 Also relevant, is that frontline sales and customer service staff will often be, or at least include, junior staff and/or staff incentivised to secure sales following Unicom's standard sales processes.⁹⁵ They are likely on those accounts to have followed Unicom's standard processes in relevant cases.
- 6.129 Given each of the foregoing points, it is reasonable to suppose that Unicom staff did generally apply the standard processes and so misled some prospective customers in respect of ETCs.
- 6.130 Ofcom has given careful consideration in this context to Unicom's submission that it gave customers the right to cancel their transfers to Unicom on account of ETCs after the Transfer Period, and [~~some~~] of them did so, without having to pay ETCs to Unicom, in the Relevant Period. We accept that these [~~some~~] cancellations occurred, noting again that section 24.15 of the *Module 24 Retentions* department process document⁹⁶ says that, in the relevant circumstances, Unicom, "...*may consider cancelling or suspending our contract with the customer as a gesture of goodwill.*"
- 6.131 However, the fact that Unicom exercised such choice in these cases does not mean it was not exercised in others and that some customers were instead misled and/or dealt with in accordance with scenarios 2 and 3 of the Retentions department's process map.⁹⁷ This is supported by the complaints made to Ofcom, the contents of

⁹⁵ As evidenced by email memos from Unicom's Senior Management to sales representatives regarding commission and bonus payments, detailed at Annexes 44 and 46 of Unicom's First Response.

⁹⁶ Copy attached at Annex 34

⁹⁷ Copy attached at Annex 34

witness statements, call recordings and the memoranda emailed to Unicom's sales staff by its CEO.

Complaints

- 6.132 We note that, accepting Unicom's representations as to their number, 36 of the complaints made to Ofcom about Unicom in the Relevant Period alleged that the (prospective) customer had been misled about their liability to pay and/or their likelihood of having to pay ETCs to their existing/previous CP.⁹⁸ Ofcom's records of these complaints are at Annex 23. We take account of their consistency with Unicom's standard processes in drawing the inference that the substance of the complaints is, on the balance of probabilities, justified in some cases at least, and that the complaints in any event indicate that some individual customers were misled about ETCs.
- 6.133 In connection with the complaints, Unicom's Representations included a submission that the small number of complaints indicated that its standard sales processes did not involve provision of misleading information about ETCs. Ofcom notes a number of points in this regard.
- 6.134 Our finding is that a sub-set of Unicom customers, in the circumstances described above, were liable to have been misled, rather than all prospective customers. This would tend to limit the numbers of complaints.
- 6.135 There are also reasons why any particular customer may or may not complain to Ofcom. They may have accepted the credit offered to them in scenario 2 described above, which might remove their inclination to complain but not the fact they were misled in the first place. They might complain to Unicom but not Ofcom. They might decide that, despite being disgruntled, they need to get on with running their small businesses rather than pursuing complaints.
- 6.136 Nonetheless, the 36 complaints indicates that statements provided for in Unicom's standard sales processes had the potential to mislead some customers. They also indicate that misleading statements were being made in practice and that some customers were misled. We note in this regard that, in its written representations (paragraph 11), Unicom accounts for 20 of the complaints, by reference to the provision of credits under its TF1 and TF2 processes, but leaves 16 unaccounted for.
- 6.137 We also note that in its Representations Unicom submitted that the numbers of complaints about it "... *significantly declined during the course of Ofcom's investigation,*" and that this reflected its compliance with GC24.3. It provided charts relating to this.⁹⁹ It appears to Ofcom that two points are particularly relevant. First, there is a fall in the number of complaints across all categories of complaints (in total) – not just relevant complaints about ETCs and broadband – taking account of a period starting before and ending after the Relevant Period. Second, Ofcom is primarily concerned here with complaints during the Relevant Period. In that period, their numbers were broadly constant.

⁹⁸ In total, Ofcom received 407 complaints relating to Unicom's sales and marketing practices during the Relevant Period.

⁹⁹ Copies attached at Annex 34

Witness statements

- 6.138 Ofcom has taken more detailed witness statements from 14 of the complainants, copies of which are at Annex 18. Of them, eight attest that they were misled by Unicom about their liability to pay and/or the likelihood of having to pay ETCs and/or complain that Unicom said it would resolve issues relating to ETCs and the customer would not have to pay anything. Some indicate they made their purchasing decisions on the strength of Unicom's reassurances.
- 6.139 Relevant excerpts from these witness statements, which are consistent with the application of Unicom's standard processes and/or with the making of statements by Unicom staff to the same or similar effect to those they are instructed to make (as described above), are set out below. Again, given their consistency with the instructions given to Unicom staff in the standard processes, in some cases such as those on [redacted] and [redacted] in particular, it appears to Ofcom that, on the balance of probabilities, the statements alleged about ETCs, or statements to similar effect, were made being made to some relevant customers and that, in any event, some customers were misled about ETCs. In that regard we note that some of Unicom's responses to the relevant complaints¹⁰⁰ do not rebut the complainant's allegations about ETCs.
- 6.140 In taking this view, we have also noted that, in both its response to the complaints and in its oral representations, Unicom has said that, in some cases, the complainant pursued matters in ADR with the relevant ombudsman service, and that findings were made in Unicom's favour. Ofcom has made its own assessment, based on all the evidence, including as set out in Unicom's standard sales processes and all the complaints and witness statements and made a judgment that we are satisfied Unicom has contravened GC24.3(a) in particular ways in respect of some customers.

Statement of [redacted]¹⁰¹

- 6.141 [redacted] states at paragraphs 3, 5, 9, 17 and 19, respectively, of his statement:

"During the visit from the sales representative I explained that I currently had fixed line and broadband with Talk Talk... I was in a contract with Talk Talk and was quite happy with them so I asked Unicom's sales representative specifically about already being in a contract with Talk Talk."

"The Unicom sales representative was persistent and told me that this will not be a problem and if there are any early termination charges from Talk Talk, Unicom's legal team were confident they could sort them out."

"I was led to believe that any early termination charges I received from my current provider Talk Talk would be dealt with by Unicom's legal team."

"In February 2014 I received an early termination charge from TalkTalk for £300. I rang Unicom to discuss these early termination charges as I had been led to believe Unicom's legal team would sort these out, however, when I called Unicom they refused to pay any money towards the Talk Talk early termination charge. I spoke to so many people at Unicom about this but I could not manage to get them to pay a penny towards the early termination charge and I had to pay it myself"

¹⁰⁰ See Annex 20 and Annex 34

¹⁰¹ Copy attached at Annex 18 – Tab 6.

"I was also happy with my current contract with Talk Talk and was also wary about having to pay early termination charges. I was told by the Unicom sales representative that the Unicom legal team were confident they could sort these out but this also did not come to fruition and I had to pay £300 to Talk Talk."

- 6.142 Additionally, in [§<] case, Unicom has provided material that is consistent with the application of its standard processes in his case. In an audio call recording included in Unicom's First Response¹⁰², - which appears to relate to Unicom's Head Office administration call made to ensure [§<] agreed to proceed with the transfer to Unicom - Unicom's representative informed [§<] that Unicom has, "A *designated contract team who can provide full assistance and support.*" In a letter of 11 February 2014 to [§<], Unicom advised him to, "Contact your current supplier to advise them that you are disputing the applicability of this fee and to request a copy of the agreement that clearly demonstrates you were made aware of this cancellation fee and your agreement to it."
- 6.143 Ofcom also notes that, in its response to [§<] complaint (in Annex 20), Unicom merely states that, "There have been no further issues with this account, except for a discussion over a termination fee from TalkTalk, which Mr Cotterill was given advice on." It does not rebut [§<] complaint about ETCs.

Statement of [§<]¹⁰³

- 6.144 [§<] states at paragraphs 2, 6, 7 and 12, respectively, of her statement:

"I received a sales call from a Unicom telesales agent on or around 14 January 2014. I explained that I was in a contract with BT until June 2014 and was not therefore interested in transferring my services to Unicom";

"I explained to the sales representative that I was not interested in transferring my services to Unicom at this point in time – but may be interested when my BT contract expired. He advised me that the termination date was not important and that Unicom would sort this out with BT on my behalf. He also said that Unicom was duty bound to contact me if they could not satisfactorily settle the early termination charges with BT";

"This all sounded impressive and I agreed to sign up to Unicom. This was purely on the basis of the monthly figure that I had been quoted and that Unicom would take care of my existing contract with BT"; and

"The BT letter also stated that I owed around approximately £300 in early termination charges. I therefore immediately called Unicom and was told by a telesales agent that I shouldn't worry, as Unicom's dedicated team would sort this out with BT directly. I was told to expect a call back from Unicom but this never transpired."

- 6.145 Unicom has also provided Ofcom with material consistent with the application of its standard processes in [§<] case. In particular, in a call recording – which again appears to relate to Unicom's Head Office administration call made to ensure she agreed to proceed with the transfer to Unicom - Unicom's representative told her, "If

¹⁰² Copy attached at Annex 15 - call recordings provided on USB memory stick. This recording is only identifiable by the file name 400321_20131217_1.

¹⁰³ Copy attached at Annex 18 – Tab 11.

you do get any contractual issues whatsoever just give us a call and we will get you through to the relevant team who can help you.”¹⁰⁴

6.146 Again, we note also that, in its response to the complaint (in Annex 20), Unicom does not rebut [X] contentions about ETCs.

Statement of [X]¹⁰⁵

6.147 [X] states at paragraphs 2, 5 and 13, respectively, of her statement that:

“I made it very clear that I would only switch my services if Unicom could get us out of the 18 months remaining on my contract with [Network Billing Services]”

“I reiterated my concerns about the 18 months I had remaining on my contract with NBS. In response, [X] explained that Unicom had a specialist team in Manchester who would speak to NBS and get us out of the contract. He advised that nine out of ten communications providers do not actually chase customers for early termination charges anyway. I felt reassured on the basis of these comments but made clear our decision to transfer our services was conditional on this aspect. [X] clearly stated that our services would not transfer to Unicom if it was unable to get us out of the contract with NBS.”

“I only signed the document with [X] on the basis of the false promises he made to me...”

Statement of [X]¹⁰⁶

6.148 [X] states at paragraphs 2 and 4 of her statement:

“I received a call from a Unicom telesales agent in September 2013 and was informed that a sales representative happened to be in my local area. I explained that I still had two years remaining on the contract with my current provider XLN Telecom. The Unicom telesales agent advised that I shouldn’t worry about this as Unicom would pay the termination fee. I was also informed that I could get a cheaper deal with Unicom (than XLN Telecom) for both my fixed-line telephone and broadband services. I therefore agreed to an appointment visit from the Unicom sales representative explained that I still Unicom would pay the termination fee.”

“I reiterated my concern about the termination fees that would be payable to my current provider XLN Telecom but the Unicom sales representative assured me that Unicom would pay the termination fee.”

She also confirms in paragraph 11 that Unicom did not pay the relevant ETC.

Statement of [X]¹⁰⁷

6.149 [X] states in paragraph 9 of his statement:

“I was still unsure about switching my services over to Unicom at the time of the visit by the sales representative. However, he informed me that Unicom would get me

¹⁰⁴ Copy attached at Annex 15 – call recordings provided on USB memory stick. This recording is only identifiable by the file name 401105_20140116_1.

¹⁰⁵ Copy attached at Annex 18 – Tab 10.

¹⁰⁶ Copy attached at Annex 18 - Tab 1.

¹⁰⁷ Copy attached at Annex 18 - Tab 9.

out of my current contract with Chess Telecom – he told me not to worry about it. I was unsure about this claim but I was comforted when it was reiterated by a Unicom telesales representative who called me a few days after the visit.”

Statement of [REDACTED]¹⁰⁸

6.150 [REDACTED] states at paragraph 2 of her statement:

“I explained that I was currently in a contract with TalkTalk for a further six months. However, the telesales agent informed me that Unicom could help me exit this contract early.”

Statement of [REDACTED]¹⁰⁹

6.151 [REDACTED] states in the sixth paragraph of his statement:

“I was concerned about BT levying early termination charges (ETCs) if I transferred my services to another communications provider before the agreed contract end date. However the representative explained that Unicom would cover my ETCs – I would just need to call Unicom and an advisor would pay this money directly to BT on my behalf. This made me feel much better about the risk of receiving large bills from BT.”

Statement of [REDACTED]¹¹⁰

6.152 [REDACTED] states in paragraphs 7 and 8, respectively, of his statement:

“This was a very good price but at this point I advised Unicom that I was still in contract with BT. The Unicom sales representative asked me if I had anything in writing from BT and I told him that I did not have anything in writing as I had been with BT for a long time and any contract upgrades I had agreed to had happened over the phone. The Unicom sales representative then told me that I was not in contract with BT and I would not have any early termination charges to pay. He had also told me that BT was not able to offer contracts longer than two years and as I had been in contract with them a long time there would be no early termination charges.”

“The Unicom sales representative also said that if I did incur early termination charges from BT then Unicom could sort them out for me and pay up to [REDACTED]. I did receive early termination charges from BT of £300 and Unicom promised to pay them but luckily I did not have to pay the early termination charges to BT.”

Call recordings

6.153 Ofcom also relies on evidence from the following analysis of the call recordings obtained from Unicom in the First Response. As set out in Section 4 above, we obtained 22,772 such recordings. We have listened to a sample, to understand more about the practical application of Unicom’s processes.

¹⁰⁸ Copy attached at Annex 18 - Tab 2.

¹⁰⁹ Copy attached at Annex 18 - Tab 3.

¹¹⁰ Copy attached at Annex 18 – Tab 4.

6.154 In considering these recordings, we note that Unicom's Verbal Sales process had three stages, only the latter two of which may have been recorded. Unicom explained this in its First Response:

*"As stated above under questions 1 and 2, the process for verbal sales calls is concluded in 3 stages. Stage 1 is the opening call, this call is not recorded but is made in order to establish interest. If the customer expresses an interest in Unicom's package then the call is transferred to a closer. If the customer is then happy to enter into the contract at this stage the call is then recorded. Once the contractual recording has been concluded, a second call (stage 3) is then made to the customer by the section managers for verification purposes, this call is also recorded."*¹¹¹

6.155 This means Unicom only recorded calls after the customer had agreed to transfer, and so after a stage when misleading conduct may have occurred (in order to induce the customer's agreement). This limits the assessment Ofcom is able to make of the recordings.

6.156 Nonetheless, we note that, amongst the recordings, were also some calls made to Unicom's Contract Enquiries team during the Transfer Period. Such calls may occur where a customer has received notice of an ETC payable to their existing CP. So, there is a possibility during these calls of the customer being given assurances about ETCs (see above).

6.157 Given these limitations of the recordings, we decided to cap the number we listened to. We have analysed every 50th call from each of the two main folders of recordings Unicom gave us –183 in total.¹¹²

6.158 Our provisional analysis of these found that, in 40 recordings,¹¹³ Unicom representatives made statements which were in our view liable to create an impression that (prospective) customers would not incur any costs related to the early termination of contracts with their existing CP. Records of these are in Annex 24 and examples of statements made to customers are set out below.

6.159 In its written representations, Unicom challenged whether two of the recordings - with references 181937_20130410_2 and 193400_20130910_5 - evidenced misleading statements about ETCs. Ofcom has considered that, but disagrees at least in the latter case. Accepting Unicom's contention in the former case nonetheless leaves 39 recordings containing statements liable in Ofcom's view to create a misleading impression in respect of ETCs, including the two examples that follow.

Call Recording 181937_20130410_2¹¹⁴

"Like I said [✂], we are doing absolutely everything for you - we aren't going to cost you any money... with these changes to the contracts it puts us in a far better position to help you anyway. When we place an order on the BT gateway and that will inform them and they'll send you your final usage bill - any other correspondence from them you give me a call on that direct line."

Call Recording 260781_20131128_1¹¹⁵

¹¹¹ Copy attached at Annex 15 – Tab 1, page 10 of covering letter.

¹¹² Although 41 of these were duplicates included amongst the recordings Unicom provided.

¹¹³ Not including twice any duplicate calls.

¹¹⁴ Copy attached at Annex 15 – call recordings were provided on USB memory stick.

"We will do all the legwork for you with our contracts team, all you need to do is pay your final bill, cancel your direct debit and we will get everything up and running for yourself."

"In regards to cancellation and termination fees, BT will threaten you with them. 9 times out of 10 we are bringing people straight through without any problems. The reason being is discrepancies in the contract done over the phone. They've not been done with reps with paper. We've got a specialist contracts team that work in-house upstairs above me. All they do day in day out is go through people's contracts. When we get in contact with BT we will then ask for the information - if we can't help you with that termination fee Richard I'll leave you exactly where you are. If you do get a termination fee, pick up the phone, let me know I'll take it upstairs and we'll get it sorted from our contracts team."

Other evidence of misleading statements

6.160 In any event, in Ofcom's judgment what the complaints, witness statements and call recordings indicate is that statements that had the effect of confusing and misleading prospective customers about ETCs were made in some cases, whether in accordance with Unicom's standard sales processes or not. That judgment is reinforced by the contents of the memoranda from Unicom's CEO to its sales staff. We note that it was sent on eight occasions in the Relevant Period, with the paragraphs about ETCs beginning each time with the following words (or words to the same effect):

"Over recent months a small number of customers have been confused by our sales people as to whether Unicom will pay any termination fee that is charged by the customer's current telecom supplier....."

6.161 We take into account that in its Representations Unicom has submitted that the repeated distribution of the memoranda should be seen as part of ongoing attempts to ensure compliant practice by sales staff, not a response to repeated misconduct. In Ofcom's judgment however, the repeated use of the quoted words indicates that over repeated periods sales staff were making misleading statements about ETCs. That conclusion is hard to avoid. If it is not correct, the opening words of the quotation are wrong. It would be puzzling that Unicom's CEO thought it necessary every few month or two to send sales staff a memorandum that said incorrect statements about ETCs had been made, if in fact they had not and sales staff were not acting in a misleading way.

6.162 We also maintain the view that, while the memoranda instructed sales staff not to make incorrect statements like, *"termination fees aren't enforceable,"* those explicit instructions were followed immediately by a re-iteration of instructions that are misleading as set out in this Confirmation Decision. In particular, a re-iteration of the instructions on ETCs contained in the Paper Sales process (see above).

Overall conclusions on ETCs

6.163 The above facts and matters all contribute to Ofcom being satisfied that, during the Relevant Period, Unicom contravened GC24.3(a), by making statements that were misleading to some prospective customers, including as part of its standard sales and marketing processes, regarding:

¹¹⁵ Copy attached at Annex 15 – call recordings were provided on USB memory stick.

- the likelihood of their previous provider claiming payment of an ETC, as a result of the customer terminating his/her contract with them during the MCP;
- the likelihood of successfully challenging such ETC;
- the assistance that Unicom would provide in challenging such ETC; and
- the overall costs for the customer of terminating their contract with their previous provider and transferring to Unicom.

Impact on existing broadband services

Relevant background

6.164 As is noted elsewhere in this Confirmation Decision, and in common with most CPs, Unicom provided its services in the Relevant Period via BT's (Openreach) ECN, using wholesale access products it purchased from BT (BT Wholesale and/or Openreach). Different access products can be used for different services. For example:

- WLR is a wholesale product purchased from BT Wholesale under which a line is, effectively, rented from BT by another CP and can be used by the latter to provide retail fixed voice (line rental and calls) services (Fixed-Line Telecommunications Services for the purposes of GC24), and in some cases broadband services, to its customers;
- Shared Metallic Path Facility ("SMPF") is a product sold at the wholesale level by BT (Openreach) which uses lines which have been partly unbundled from the BT (Openreach) ECN, and a CP can use it to provide retail broadband services over BT's (Openreach) ECN to customers (while at the same time it, or another CP sharing the line, can provide fixed voice services, for example using WLR); and
- Metallic Path facility (MPF) is a wholesale product sold by BT (Openreach) which gives a single CP control over the whole unbundled line and enables it to provide retail fixed voice and broadband services to customers.

6.165 The result is that retail customers may be in receipt of, again for example:

- fixed voice services (Fixed-Line Telecommunications Services) only, provided by WLR;
- a bundle of fixed voice and broadband services, provided by a CP, or two different CPs, using WLR and SMPF, respectively; or
- a bundle of fixed voice and broadband services, provided by a single CP using MPF.

6.166 Some of these alternatives are mutually exclusive. In particular, a customer could receive services by WLR or by MPF, but not both at the same time. Those customers will not necessarily know, however, the underlying wholesale products and methods by which their services are provided to them. Neither, necessarily, would sales staff from a CP seeking to secure the transfer of that customer's services.

- 6.167 Different rules and processes for switching apply to different services. In particular, in the Relevant Period GC24 applied to transfers of Fixed-Line Telecommunications Services and such transfers used the industry-established Notice of Transfer switching process. GC22, meanwhile, applied to transfers of broadband services, using a Migration Authorisation Code (“MAC”) process. Depending on the services being transferred, the wholesale products used to provide those services before and after the transfer, and the process followed, the transfer of one service may have an effect on another.
- 6.168 In particular, where a retail customer is receiving Fixed-Line Telecommunications Services and broadband using MPF and the transferring CP provides Fixed-Line Telecommunications Services only using WLR (i.e. a standalone WLR fixed voice service only), the effect of the transfer would be to cut off the broadband service. There is no migration process which facilitates a seamless transfer from the bundled MPF services to the single WLR service. In effect, a line can be either a WLR line or a MPF line, not a combination of both.
- 6.169 It is also possible that a CP transferring customers to a standalone WLR voice service, from an existing voice and broadband bundle provided using WLR/SMPF technology, may cut off the broadband service. This will depend on the terms and conditions under which the bundled voice and broadband services were provided. In particular, whether they include terms which say the provision of each service is conditional on the continued provision of the other.

Application to Unicom

- 6.170 Unicom confirmed in its First Response and its Enquiry Opening Letter Response, respectively, that:

“Unicom purchases products and services from BT Wholesale and BT Openreach in exactly the same way as BT Retail. This enables Unicom to provide its customers with products and services, which are exactly the same as they would receive from BT Retail, including Calls & Access via a single line PSTN service.”¹¹⁶; and

“An order is placed with Openreach to transfer the services to Unicom’s reseller ID. All services are provided using WLR3 at this stage, though some customers are provided using MPF at a later stage.”¹¹⁷

- 6.171 Unicom also stated in its Enquiry Opening Letter Response that, except for a period between 18 March 2013 and 31 July 2013, it did not sell bundles of fixed voice and broadband services to customers during the Relevant Period:

“Broadband is only sold to existing fixed line customers.”¹¹⁸

“Unicom does not make the broadband sales conditional on the fixed line sale and that the customer can choose to have broadband from Unicom, an alternative supplier or not at all as we treat them as separate sales.”¹¹⁹; and

“[redacted]”

¹¹⁶ Copy attached at Annex 15 – Tab 33.

¹¹⁷ Copy attached at Annex 15 - page 6 of covering letter.

¹¹⁸ Copy attached at Annex 15 –page 7 of covering letter.

¹¹⁹ Copy attached at Annex 15 –page 12 of covering letter.

6.172 In other words, for [§<] of the Relevant Period, where Unicom transferred a customer's Fixed-Line Telecommunications Services, it did so by transferring them to a standalone fixed voice service only, provided using WLR. This is likely, in light of the foregoing explanation of the ways services are provided and the effects of transfer, to have had the effect of cutting off some customers' broadband services.

Provisional analysis

6.173 In the Section 96A Notification Ofcom set out our judgment that, on the bases we described, we had reasonable grounds to believe that, in the Relevant Period, Unicom contravened GC24.3 by operating standard sales and marketing processes under which it gave prospective customers misleading information about the effect of transfers to Unicom on their broadband services. In particular, information that misled them that the transfer of their Fixed Line Telecommunications Services would have no effect on their broadband services. This was likely to have affected their purchasing decisions.

Unicom's Representations

6.174 In its Representations in response to that notification, Unicom acknowledged that:

- its processes for transferring Fixed Line Telecommunications Services would have had the effect of cutting off some customers' broadband services; and
- its standard sales processes provided for its sales staff to give those customers incorrect information that there would be no such effect.

6.175 Unicom said that these consequences were unintended. Its contention was that its compliance with GCs 24.3 and 24.7,¹²⁰ effectively combined to produce them. It referred to obligations that both it and any losing CP would have had under GC24.7 – to tell customers about services affected and unaffected by transfers – and noted that as a gaining CP it would have been unaware where there was a broadband service (which it described as a “conditional” service) on a line that would be affected by a relevant transfer.

6.176 It said that, as a technical matter, the consequences were the result of changes in the way CPs provided, and customers received, services. In particular, the increased provision of services by way of MPF meant that transfers of Fixed Line Telecommunications Services to Unicom would cut off the broadband service of any customer receiving that service by way of MPF, which had not been the case where services were more commonly provided by WLR.

6.177 It said of the relevant statements in its standard sales process:

“Whilst the statements used by Unicom were historically correct in the WLR environment, as other providers started to utilise an MPF solution it is now clear that the statements did not cover all technologies.”

¹²⁰ Which during the Relevant Period required that, “Where the Customer enters into a contract for a Fixed-Line Telecommunications Service, the Gaining Communications Provider and the Losing Communications Provider must each send the Customer a letter, in accordance with the industry-agreed process, stating that the Customer is transferring their Fixed-Line Telecommunications Service, in paper or another Durable Medium, which clearly sets out, as appropriate: (iii) the list of services affected/unaffected.....”

It described the relevant statements having the effect of “... confusion that may have arisen with individual customers ...,” and said, “...its communications with its new customers could have been clearer.”

6.178 Unicom also again referred to the numbers of complaints in the Relevant Period. It said there were only 17 made to Ofcom in the Relevant Period, as against [X] customer transfers in that period.

6.179 It also submitted that it took steps to address the issue as soon as it became aware of it (though it also acknowledged, “... that we should have spotted that potential for that problem and reacted to that sooner and deployed better communication to our salespeople”). Unicom further said that:

“With regard to the investigation surrounding broadband sales Unicom has amended its sales advice so that there can be no doubt that the sales person is selling only fixed line services. The sales verification call that is made to every new customer has also been amended to ensure that the customer is under no doubt that only fixed line services are being offered.”

Ofcom’s considerations and decisions

6.180 Ofcom has carefully considered Unicom’s Representations. In light in particular of the admissions it makes, and taking into account all the following matters, we are satisfied that, in the Relevant Period, Unicom contravened GC24.3 by operating standard sales and marketing processes under which it gave prospective customers information that misled them that the transfer of their Fixed Line Telecommunications Services would have no effect on their broadband services. This was likely to have affected their purchasing decisions.

Field-Sales Method

6.181 The “*Unicom 3 Year Fixed-Line Field-Sales Training Induction Course Manual*” again gives (or gave in the Relevant Period) Unicom’s Field-Sales Representatives relevant instructions for marketing its Fixed-Line Telecommunications Services. The “*Common Q & A*” sheet included within it¹²¹ instructs those Representatives to provide the following guidance to prospective customers enquiring about their broadband service:

“Q: But I want my Telecom and Broadband under one supplier?”

“A: For customers on the BT Network there should be no interruption to your broadband when you transfer your telecoms. It’s not a problem to deal with separately, whether you want to add another product after your lines transfer.”

6.182 This statement speaks for itself. It tells prospective customers there will be no impact on their existing broadband service when transferring their Fixed-Line Telecommunications Services to Unicom. There will, however, be such disruption, as set out above, and as Unicom acknowledges, where the prospective customer was in receipt of bundled services provided by MPF. There may also be disruption where the customer received such bundled services by way of WLR and SMPF, and a Unicom sales representative would not be in a position, without seeing the customer’s existing terms and conditions, to give re-assurance there would not be.

¹²¹ Copy attached at Annex 15 – Tab 34

6.183 Ofcom also notes that Unicom’s Field-Sales Representatives present the benefits of Unicom’s services to prospective customers using a document entitled “*Why Unicom for Telecom?*”¹²² It states the following:

“Comfort. No interruption to service during a changeover.”

6.184 Ofcom acknowledges that this statement may literally be true, where the prospective customer only receives a fixed voice service from an existing CP or if it were likely to be understood as referring only to a single, fixed voice service. What is important, however, is the effect of the statement; the way it is likely to be understood, in context, by those to whom it is made. In that light, Ofcom considers the statement is misleading for the following reasons.

6.185 First, we note from our SME research the unsurprising finding that 96% of SMEs used landline voice services and 78% internet services. 51%, meanwhile, purchased bundled services from a single supplier, the bundle comprising landline voice services in 94% of these cases and broadband in 87%. The recipients of the statement are, therefore, likely in a majority of cases to be businesses in receipt of broadband as well as Fixed Line Telecommunications Services.

6.186 Second, the statement is put forward in the context of sales conversations in which Unicom’s sales staff are also instructed to state, as set out above, that, “*For customers on the BT Network there should be no interruption to your broadband when you transfer your telecoms....*”

6.187 Third, the statement is made without qualification and is plain and stark in the total re-assurance it gives to these, and indeed any, recipients. The implication is that any transfer to Unicom will always be smooth and there is nothing to worry about. In its overall context, it is likely to be understood by prospective customers as a re-assurance there will be no impact on their existing telecommunications services, whatever they are, when transferring their Fixed-Line Telecommunications Service to Unicom. For the reasons set out above, this will not always be the case (where the customer was receiving bundled MPF services and in some cases where their bundle comprised WLR and SMPF services).

Verbal-Sales Method

6.188 Unicom confirmed in its Second Response that its Verbal-Sales Representatives also use a “*Common Q+As*” document to answer common questions from prospective Customers.¹²³ Ofcom notes that this document contains exactly the same information and instructions as that given to Field-Sales Representatives, and that the making of statements to this effect by Verbal-Sales Representatives would have similarly misleading effect.

Effects on purchasing decisions

6.189 Again, Ofcom considers that it can reasonably be inferred that the re-assurances about broadband services provided for in Unicom’s standard processes would have been likely to affect prospective customers’ purchasing decisions. There is no reason for Unicom to have made them other than to seek to secure such customers’ agreements to transfer their Fixed Line Telecommunications Services. Moreover, any customer asking about broadband is likely to have considered their broadband

¹²² Copy attached at Annex 15 – Tab 34

¹²³ Copy attached at Annex 20

service important. Any customer told the transfer would adversely affect that service is unlikely to have made the transfer.

- 6.190 In reaching these decisions, we have given consideration to other points Unicom made in its Representations. In particular, the following.
- 6.191 First, Ofcom does not agree that the relevant statements meant “... *confusion ... may have arisen with individual customers*,” nor simply that Unicom’s, “...*communications with its new customers could have been clearer,*” to use the terms in Unicom’s Representations. The statements were clear and unequivocal and misleading to any customer who was receiving a broadband service by way of MPF and possibly where the customer received such bundled services by way of WLR and SMPF.
- 6.192 Second, we do not agree that the misleading consequences arose because Unicom’s compliance with GCs 24.3 and 24.7 combined to produce them.
- 6.193 GC24.7 is not relevant in this particular context. It is about information that losing and gaining CPs were required, as appropriate to their positions and knowledge in the transaction, to provide to a customer *after* a transfer had been agreed.
- 6.194 What we are concerned with here, however, are statements Unicom instructed its sales staff to make *before* a transfer was agreed, in order to induce agreement to it. Moreover, Unicom instructed its staff to make those statements notwithstanding, as it said in its Representations, that as the gaining GP it would not necessarily know how the customer received services and what the effect on them would be. For some customers, those statements would have been misleading in breach of GC24.3. What Unicom and the losing CP should and would have said later in the process under GC24.7 has nothing to do with that.
- 6.195 Third, the number of complaints made to Ofcom is also not especially relevant, at least to the question of whether the statements provided for by Unicom’s standard sales processes were misleading. The statements were misleading to some customers, as set out above and as Unicom acknowledges, whatever the number of complaints. Some of the reasons set out above, in relation to ETCs, about why customers may or may not complain may also account for the number of complaints in this context.
- 6.196 In any event, what even the relevant number of complaints shows is that some customers were misled in practice (see further below). And, as the provision of services by way of MPF has become more common, the number of prospective customers liable to be affected by the relevant misleading statement became greater.
- 6.197 Fourth, in so far as, as it said, Unicom has changed its standard sales processes to make clear where its staff are selling only Fixed-Line Telecommunications Services, that does not really go to the particular point here. It is important that sales staff give prospective customers accurate information about the services they are selling, but the specific point here is that such staff must not give misleading information about the effect of transfers on services they are not selling. The changes to the processes to which Unicom referred do not go to address the point that such staff were saying broadband services would not be affected when, in fact, for some customers, they would have been.

Conclusions on Unicom's standard processes

6.198 Accordingly, Ofcom is satisfied that Unicom operated standard processes in which it provided inaccurate information to customers that misled them in respect of the impact on their existing broadband service when transferring their fixed voice service to Unicom. This information is inaccurate as far as transfers from bundled MPF services are concerned. With regard to transfers from bundled WLR+SMPF services, these statements provided a false re-assurance to these customers by creating a misleading impression that there would be no impact, when Unicom was in no position to make any such claims.

Application of Unicom's standard processes

6.199 Further, we have the following grounds to be satisfied that Unicom's standard processes were applied and prospective customers were in practice misled in respect of their broadband services.

Standard processes

6.200 First, we take similar account, as set out in paragraph 6.126 – 6.129 above, that Unicom's standard processes and instructions to staff were likely to have been followed in practice.

Complaints

6.201 Second, we note that, accepting Unicom's representations about their number, 17 of the complaints made to Ofcom about Unicom in the Relevant Period alleged that the (prospective) customer had been misled about the effect on their existing broadband services of the transfer of their fixed voice services to Unicom. Ofcom's records of these complaints are at Annex 23 to this Confirmation Decision.

6.202 Third, witness statements Ofcom has taken from some complainants, copies of which are at Annex 18, include six who attest that their broadband services were affected by the transfer of their fixed voice services to Unicom and/or they were misled by Unicom that such effects would not occur. Others refer to their business's reliance on broadband services, from which it can be inferred that their purchasing decisions were affected by what they were told about the effect of a transfer on such services.

6.203 As in relation to ETCs, Ofcom notes the consistency of the complaints and the witness statements with the application of Unicom's standard processes and/or with the making of statements by Unicom staff to the same or similar effect to those they are instructed to make (as described above). On that basis, Ofcom is satisfied, on the balance of probabilities, that the statements about broadband referred to, or statements to similar effect, were made to the relevant customers.

Statement of [§<]¹²⁴

6.204 In paragraphs 3, 6 and 10, respectively, of her statement, [§<] makes complaints that are consistent with her having been misled that the transfer of her Fixed Line Telecommunications Service to Unicom would not affect her broadband service:

¹²⁴ Copy attached at Annex 18 – Tab 1.

“The sales representative also confirmed that broadband was included as part of this price and that I would not experience any loss of service to either my fixed-line voice or broadband services during the transfer period.”

“I received this telephone call from the manager while the sales representative was still present in my business premises...The manager then confirmed that I would be saving £10 per month and that my broadband transfer would go ahead seamlessly.”

“I first realised that I had been transferred to Unicom when my broadband internet connection suddenly went down. I kept the telephone number of the Unicom manager that I spoke to during the sales process and I called him back when my broadband went down. He advised me that I had not signed up for broadband – only the voice telephone service.”

Statement of [X]¹²⁵

6.205 In paragraphs 3, 13, 18 and 20, respectively, of his statement, [X] also makes complaints that are similarly consistent with his having been misled that the transfer of his service to Unicom would not affect his broadband service:

“During the visit from the Unicom sales representative I explained that I currently had fixed line and broadband with Talk Talk...It was clear to me that this price quoted by the Unicom sales representative included fixed-line and broadband...I was also told that there would be no interruption to my fixed line and broadband during the transfer.”

“When the switch happened my phone line and broadband were not working for about half a day so I called Unicom and complained that the Unicom sales representative told me I would not have any break in service. Unicom told me that on the odd occasion there is a break in service but not often and my phone line started working shortly afterwards. However, my broadband did not start working and when I called Unicom I was told that broadband was not included in the package.”

“... I would never have agreed to transfer my fixed line to Unicom if I knew they would not be including the broadband in the sale.”

“Switching to Unicom has cost my business financially. I had to pay Talk Talk £300 in early termination charges, my business was without internet for almost 2 weeks costing us potential business. I had to purchase a mobile broadband connection and for about 4 to 5 days myself or my colleagues were regularly on the phone to Unicom trying to sort this issue out instead of actually working. I have also been under a lot of emotional stress as a result of Unicom.”

6.206 Ofcom also has regard to additional material obtained from Unicom, which is consistent with [X] complaints of having been misled in this regard. First, Unicom’s own assessment of his case, provided as part of its Second Response, notes:¹²⁶

“[X] also advised that he had lost his broadband supply upon transfer. As Unicom were not supplying the broadband service, he was advised to speak to TalkTalk in relation to this...we advised him that he was free to choose any broadband provider and that depending on what he chose it could work out cheaper than TalkTalk”; and

¹²⁵ Copy attached at Annex 18 – Tab 6.

¹²⁶ Copy attached at Annex 20 - see document entitled “Ofcom Reviews 16.10.2014”

“Unicom acknowledge that the representative may have given [§<] some confusing information in relation to the broadband services.”

- 6.207 Second, Unicom’s Second Response included copies of notes from Unicom’s Customer Records Management (“CRM”) system, made by one of Unicom’s Contract Enquiries Representatives. These show Unicom told [§<] that:

“BB doesn’t normally go down”;

*“No technical reason why Talk Talk could not provide BB and was retention tactic”;
and*

“Field reps don’t know all details of BB.”

Statement of [§<]¹²⁷

- 6.208 Paragraph 18 of [§<] statement is also consistent with her having been led to expect that her broadband services would not be adversely affected by her transfer to Unicom:

“I was also left with no internet service for a number of weeks while Unicom transferred over my services from BT. I was very angry about this as I was specifically told that broadband was included in my package. This resulted in me losing business – I failed to respond to enquiries from customers and emails about future stock orders.”

Statement of [§<]¹²⁸

- 6.209 [§<] complaints in paragraphs 12, 13 and 15 of her statement are similarly consistent with her having been misled by Unicom about her broadband services in line with its standard processes:

“Unicom called us up a few weeks later and told us that we also needed to sign up with them for broadband. This was the first time that I had spoken to Unicom about its broadband services as [Mr Wood] gave me the impression that my current broadband service could remain with Utility Warehouse.”

“I realised that my broadband had been disconnected following the transfer to Unicom. My business partner Lynda was confused and worried by this development as the telesales representative had not warned me about loss of my broadband service...We were without broadband services for around 4-5 weeks during this time.”

“We were without broadband services for around 4-5 weeks during this time. The loss of business had a very damaging impact on our business as we rely heavily on the internet for all new and existing customers. The complaints team at Unicom were extremely rude – I felt like I was getting nowhere with them. We were determined to get our issue resolved so I wrote a letter to our local MP, Trading Standards, Ofcom and the Ombudsman.”

¹²⁷ Copy attached at Annex 18 – Tab 11.

¹²⁸ Copy attached at Annex 18 – Tab 12

6.210 Ofcom also has regard to other material provided by Unicom, which corroborates or is consistent with [§<] complaints. For example, Unicom’s own assessment of her case, provided to us as part of its Second Response notes that:

“On 29 November 2013, Unicom successfully transferred [§<] services and confirmation of the transfer was issued. On 3 December 2013, [§<] entered into a broadband agreement”; and

“On 5 December 2013, we spoke to [§<] regarding the cancellation request, [§<] claimed that the original representative informed her that the transfer would be seamless and she had lost her broadband on 29 November 2013.”

6.211 Unicom’s CRM system notes made by one of Unicom’s Contract Enquiries Representatives, provided to us in Unicom’s Second Response, meanwhile, similarly demonstrate the provision of misleading information about the effects of a relevant transfer on broadband. They record that (Ofcom’s **emphasis**):

*“Cust advised the BB has been down since the 29th and the business predominately runs of the BB...advised the cust in regards to the BB we will credit for a dongle to use this up and **also advised that the reason the rep would have stated no down time is because there wouldn’t usually be.**”*

Statement of [§<]¹²⁹

6.212 In the penultimate paragraph of [§<] statement, he states:

“I had lost complete confidence in Unicom by this stage and asked the telesales representative to cancel my order. I would not have even entertained entering into a contract if I knew this about the broadband. My business is totally reliant on a working internet connection and I was told by the visiting Unicom representative that everything would stay the same as my contract with BT and I would not suffer any interruption to my services.”

Statement of [§<]¹³⁰

6.213 In paragraphs 5, 10, 11 and 13, respectively, of his statement, [§<] makes complaints that indicate that he was misled, in his case by the omission of material information, that the transfer of his Fixed Line Telecommunications Service would not affect his broadband service:

“It was not clear whether this quote related to all my services or just my fixed-voice landline...”

“I received a modem router through the post sometime after the visit from the sales representative. I was under the impression that I had just agreed to switch my fixed-line voice services so was not expecting to receive this from Unicom. The sales representative did not at any point discuss a broadband package with me.”

“On the day of the transfer my broadband services went down and I lost my connection to the internet. When I called up to question this, a Unicom telesales person explained that the type of line at my business premises apparently meant that it was not possible to transfer just the fixed-voice services. I was then told by

¹²⁹ Copy attached at Annex 18 – Tab 3.

¹³⁰ Copy attached at Annex 18 – Tab 9.

the telesales agent that I would also need to switch over my broadband to Unicom to get both my fixed-voice services and connect to the internet restored at my business premises. I was told this was due to my business premises only having a single phone line installed. Why did the sales representative not explain this to me at the time?”

“In any event, my broadband service still does not work at my business premises. I am not sure whether the sales representative was aware that my broadband would be disconnected as a result of switching my fixed-voice line. I would have at least expected the sales representative to have some product knowledge – customers expect that of me when I am selling. I also lost my fixed-voice telephone services for around three days following the transfer.”

Call recordings

6.214 Ofcom also again relies on evidence from the analysis of the call recordings described earlier in this section. Having listened to the sample previously described above, and again noting that it seems to us reasonable to assume that misleading statements about the effects on broadband services may well have been at earlier unrecorded stages of the sales process, Ofcom found that in 8 recordings the Unicom representative created an impression that (prospective) customers would not experience any impact on their existing broadband service following the transfer to Unicom. Ofcom’s records of these are in Annex 24.

Overall conclusions on impact on existing broadband service when transferring to Unicom

6.215 On all these bases, Ofcom is satisfied that, during the Relevant Period, Unicom contravened GC24.3(a), by making misleading statements, as part of its standard sales and marketing processes, about the effect of a transfer to Unicom of a prospective customer’s Fixed Line Telecommunications Services on that customer’s existing broadband services.

Section 7

The penalty

7.1 The following sets out Ofcom's decision that it is appropriate to impose a penalty on Unicom in respect of its contravention of GC24.3(a) and as to the amount of the penalty. It explains why, in our judgment, a penalty of £200,000 is appropriate and proportionate to the contravention in respect of which we impose it.

Provisional assessment

7.2 Ofcom's provisional view, as set out in the Section 96A Notification, was that we should impose a penalty of £250,000 on Unicom. We considered that this would help to secure our objective of furthering the interests of citizens and consumers by deterring non-compliance with legislation and regulatory principles. We were minded to view such a penalty as a proportionate response to the nature and seriousness of Unicom's contravention and as being targeted at a case in which that action is appropriate.

7.3 In reaching this view, we gave weight to each of the following factors that, for the reasons set out, we considered tended to add, to varying degrees, to the penalty and, in our view, meant it should be substantially more than trivial:

- the seriousness of Unicom's contravention, its systemic nature and substantial dimensions;
- the significant potential for harm that accordingly attached to the contravention;
- the need to deter contraventions of that type and dimension and their effects on the functioning of the market;
- Unicom's failure to take steps to prevent, and indeed taking steps – by including misleading statements in its standard sales and marketing processes – to give rise to, the contravention;
- the fact Ofcom had previously taken relevant enforcement action against Unicom;
- the relevant knowledge of senior managers and the intention or recklessness involved in the contravention;
- the duration of the contravention, from 1 March 2013 to 8 July 2014; and
- the lack of widespread action by Unicom for remedying the consequences of the contravention.

7.4 We also gave Unicom credit in respect of the following matters, which we considered meant the penalty should be smaller than might otherwise have been the case. Namely, that Unicom:

- did take significant steps to comply with GC24 generally, albeit not in the relevant respects;

- has taken some limited steps to remedy the consequences of the contravention in some cases; and
- has fully cooperated with Ofcom's investigation.

We also considered that the penalty should be lower than it might have been owing to the limited direct evidence of quantifiable harm to an identifiable number of Unicom customers.

Unicom's Representations

- 7.5 Unicom's Representations also contained submissions in respect of the proposed penalty, principally in connection with the question of ETCs. It said that, "*Unicom does not believe that the Ofcom Notification decision is evidence based, proportionate, consistent, accountable or transparent...*," and that, "*We can see no reason for a penalty to be imposed as there has been no contravention of GC24.3 in respect of the investigation concerning ETCs.*" It also made a number of submissions in the event that Ofcom remained minded to impose a penalty.
- 7.6 In the first place, Unicom re-iterated its procedural concerns (summarised in section 6 above) and the extent of its co-operation with Ofcom's Investigation and its requests to meet Ofcom to address relevant matters. Amongst its Representations, as we note in section 6 above, it said that, "*Unicom should not be penalised for the length of time it has taken Ofcom to conclude its investigation given that Unicom has made every effort to bring matters to a close. Therefore, without prejudice, if Ofcom were to impose a penalty it should apply the equivalent of an early settlement discount.*"
- 7.7 As to the specific factors in Ofcom's penalty assessment, Unicom made submissions to a number of effects. It also challenged the parallels Ofcom had provisionally drawn between the present case and others in which we had imposed penalties.
- 7.8 One of Unicom's main submissions was that it had not intended to mislead prospective customers about ETCs or about broadband services and there was no systemic failure in its processes. It also said that it had not been reckless as to whether it misled prospective customers in the relevant regards.
- 7.9 As to ETCs, it said it had sought, learning the lessons of Ofcom's enforcement action in 2006/7, to develop a means of winning customers by giving them accurate information about the likelihood of their having to pay ETCs to their previous CPs and offering them credits (and cancellation rights) where their liability for those charges is established. In doing so, "*Unicom has endeavoured to ensure that its sales representatives provide accurate information to its customers....*," by giving all sales staff compliance training and updates, and has not instructed them to mislead those whose business it sought to attract. Unicom also made submissions about the improvements it said it continued to make to its sales processes and compliance training in order to reduce the number of complaints. It said was, "*.... not accurate to say that any of this was a systemic issue within Unicom.*"
- 7.10 Unicom said the memoranda circulated by Unicom's CEO to its sales staff, "*.... clearly sets out that Unicom does not support or advocate the dissemination of any information that may lead to customers being misled,*" and, "*.... Continuous reinforcement of compliance best practice cannot be seen as an acknowledgement that there is a systemic and wide spread problem of non-compliance, quite the opposite.*"

- 7.11 As to the effect of transfers on broadband services, and as we have noted elsewhere in this document, Unicom said, “... *the confusion that may have arisen with individual customers about the provision of broadband services was unintended.*” Those processes provided for the making of statements which were, “... *historically correct in the WLR environment....*,” but, “... *as other providers started to utilise an MPF solution it is now clear that the statements did not cover all technologies.*” Unicom submitted that, as part of addressing this issue, it, “... *is proposing to take measures to ensure that their customers are informed that there is a possibility that they may lose their broadband service upon transfer....*,” and, “... *has made changes to the information provided to customers, to ensure that any confusion that may arise for potential new customers is minimised.*”
- 7.12 Unicom also submitted that, had Ofcom told it sooner about the issues it was concerned about in the Investigation:
- “...*(a) we don't think there was an issue, but (b) if there was an issue and you'd told us about it earlier, they could have focused on it earlier. So the fact that, you know, you've investigated this but it took over a year before we knew really what the focus of the investigation was on, I think is something that's definitely worth taking into account.*”
- 7.13 Unicom challenged Ofcom's provisional views about the numbers of customers affected by the relevant provisions of its standard sales and marketing processes. It noted that the relevant information on ETCs was part of the “frequently asked questions” section of its process documents and would only have been provided to customers if they asked relevant questions during the sales process. Only a small number of customers would therefore have been affected by the relevant provisions.
- 7.14 Unicom also re-iterated the small numbers of complaints Ofcom received during the Relevant Period and the limited amount of consumer harm it said those indicated. It said, “*The impact of the changes already implemented by Unicom to ensure compliance with GC24.3 is evidenced by the fact that the number of complaints has significantly declined during the course of Ofcom's investigation.*” It submitted that, “*Ofcom's conclusions as to the degree of harm do not stand up to reasonable scrutiny, are not evidence based and are disproportionate relative to the number of complaints received.*”
- 7.15 Unicom similarly challenged Ofcom's provisional assessment of the gains it was liable to have made from the contravention. Referring again to the number of complaints to Ofcom it said that, “... *It cannot be a correct assumption that if there were 53 complaints out of a customer transfer base of [X] that Unicom made financial or other gains from those customers who did not consider they had a reason to complain and therefore did not complain.*”
- 7.16 Unicom also re-iterated its submissions about the payment of [X] in credits in respect of ETCs during the Relevant Period, under its TF1 and TF2 processes. It said these payments are, “... *unequivocal evidence that it was committed to ensuring that its customers were not harmed,*” as well as support for its contentions about its financial gains. It likewise noted that, during the same period, [X] customers cancelled the transfer of their services to Unicom, and so suffered no harm either. It said that, “... *the degree of harm was not as big as would justify a fine of £250,000,*” as well as noting that, “... *Unicom would highlight that Ofcom has taken no account of the steps taken by Unicom to provide customers with redress.*”

Ofcom's considerations and decisions

- 7.17 Ofcom has carefully considered Unicom's Representations. Having done so, we have decided that we should impose a penalty on Unicom and our judgment is that a penalty of £200,000 is appropriate and proportionate to the contravention in respect of which we impose it. This is a reduction in the amount of the penalty we were provisionally minded to impose.
- 7.18 The penalty reflects in particular that Unicom's standard sales and marketing processes contained statements liable to mislead some prospective customers. These had the potential to mislead any prospective customers to whom they were made and misleading statements were made to some customers in practice.
- 7.19 The penalty also reflects that in one of the two substantial respects in which Ofcom makes findings – relating to broadband services – Unicom admitted the contraventions and has not made Representations that substantially affect the matters Ofcom took into account in its provisional assessment of the penalty in that regard. A substantial element of the provisional penalty therefore remains in place.
- 7.20 The reduction in the penalty nonetheless reflects the narrowing of Ofcom's findings as to Unicom's contravention of GC24.3(a) in respect of ETCs. The provisional penalty reflected a preliminary view that Unicom had sought to create a misleading impression in this regard to prospective customers more generally. Ofcom accepts that Unicom was seeking generally to develop a means of winning customers by giving them information about the likelihood of their having to pay ETCs to their previous CPs and offering them credits where their liability for those charges is established. The reduction in the penalty reflects that Ofcom's finding is limited to a group of those prospective customers, in respect of whom Unicom's processes provided for misleading information to be given, and those customers to whom there is evidence of the provision of misleading information in practice.
- 7.21 Our judgment is that such a penalty is sufficient to secure our objective of deterring non-compliance with regulatory provisions. Likewise, that it is a proportionate response to the nature and seriousness of Unicom's contravention and as being targeted at a case in which that action is appropriate. A full explanation of the bases for that judgment is set out below.

Consideration of whether to impose a penalty

- 7.22 Our first consideration is whether we should impose a financial penalty at all.
- 7.23 As set out in Section 3 above, section 96A(2)(e) of the Act provides that a Notification served on a person under section 96A may specify any penalty which Ofcom is minded to impose in accordance with section 96B. Ofcom may specify a fixed penalty in respect of the period covered by the Notification and, where a contravention is continuing, may also specify a penalty in respect of each day on which the contravention continues after the giving of a Confirmation Decision under section 96C(4)(c). The penalty Ofcom may impose in a Confirmation Decision is the proposed penalty or such lesser penalty as we consider appropriate in light of any representations made by the relevant person and any steps that person has taken to comply with the contravened condition or to remedy its contravention.
- 7.24 Our regulatory judgment is that the imposition of a penalty in this case would help to secure Ofcom's objective of furthering the interests of citizens and consumers by helping to foster compliance with regulatory requirements. A financial penalty would

be a proportionate response to the nature and seriousness of Unicom's contravention of such requirements and targeted at a case in which that action is appropriate.

- 7.25 In reaching this view, we have given careful consideration to all of Unicom's Representations, the steps taken by it, during the Investigation and, in particular, to seek to comply with GC24. We give Unicom some credit for these in our reckoning of the penalty and have reduced it from the level we were provisionally minded to impose.
- 7.26 We give greater weight, however, to the view that Unicom's contravention of GC24.3(a) nonetheless has elements that can be characterised as serious and systemic, with the potential to harm a significant number of customers, having arisen mainly out of the application of its standard sales and marketing processes. That being so, and for the reasons we set out in more detail below, we assess that it is necessary and appropriate to impose a penalty to deter breaches of that nature and to uphold the system of regulation by the GCs.
- 7.27 Our next consideration, therefore, is the amount of that penalty. That consideration takes into account all the following matters.

Turnovers for relevant business

- 7.28 In its Fifth Response Unicom confirmed its turnover for relevant business in the period 1 April 2014 to 31 March 2015, which is the relevant period for the purposes of section 97 of the Act, was [X]. The maximum penalty Ofcom may impose on Unicom, in accordance with section 97 of the Act, is therefore, [X].

The penalty guidelines and relevant factors

- 7.29 As set out in our Penalty Guidelines, Ofcom considers all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The particular factors we have considered in our determination of the penalty in this case, including those in the Penalty Guidelines, are:
- a) our duties under section 3(3) of the Act, to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed;
 - b) the central objective of imposing a penalty which, as stated in the Penalty Guidelines, is deterrence - the amount of any penalty must be sufficient to ensure that it will act as an effective incentive for compliance, having regard to the seriousness of the infringement;
 - c) the following factors which appear to us to be relevant in determining an appropriate penalty that is proportionate to the contravention in respect of which it is being imposed:
 - i) the size and seriousness of Unicom's contravention;
 - ii) the degree of harm, actual or potential, caused by that contravention;
 - iii) the duration of the contravention;
 - iv) any gain (financial or otherwise) made by Unicom as a result of the contravention;

- v) whether Unicom has a history of contraventions;
- vi) whether, in all the circumstances, Unicom took appropriate steps to prevent the contravention;
- vii) any steps Unicom has taken for remedying the consequences of the contravention;
- viii) the extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, it was occurring or would occur;
- ix) the extent to which Unicom has co-operated with the Investigation;
- x) the extent to which earlier cases set a precedent for any penalty that might be imposed on Unicom; and
- xi) the extent to which the level of penalty is proportionate, taking into account Unicom's size and turnover.

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

Regulatory principles and procedural matters

7.30 We note all the Representations Unicom made about Ofcom's regulatory principles and procedural matters. We have set out in detail, in section 6 above, our consideration of what Unicom said. In particular, its Representations on the length of Ofcom's Investigation and Unicom's requests to meet with us, and that Ofcom should not penalise Unicom because of the time the Investigation has taken and should instead give it the equivalent of an early settlement discount. Even so, where these submissions are relevant to specific factors in our consideration of the penalty, we set out our further assessments below.

Deterrence

7.31 Deterrence is one key consideration in our determination of the appropriate amount of any penalty. Another consideration, particularly in light of the requirement of proportionality, is the need for the penalty to reflect the size and seriousness of the contravention and Unicom's culpability in that contravention. Ofcom is mindful of the need to strike a fair balance between those considerations.

7.32 In this regard, Ofcom considers that, whilst there should be a relationship between the size and seriousness of Unicom's contravention and the amount of the penalty, this is not necessarily a linear relationship. Some factors weigh more heavily than others in Ofcom's determination.

7.33 These points go to ensuring that:

- a) any amount imposed both appropriately and proportionately penalises Unicom's contravention notified to it in this Confirmation Decision; and

- b) creates an appropriate and proportionate deterrent effect for both Unicom and other CPs providing (or using) an electronic communications network or an electronic communications service.
- 7.34 Applying those points here, we take into account that the GCs are a set of regulatory interventions and rules in the electronic communications sector applying where, amongst other things, such intervention is appropriate for protecting the interests of end-users. It is imperative that all CPs comply with them. The amount of any penalty should pursue the general aim of incentivising that compliance.
- 7.35 More specifically, the rules in GC24.3 were (and are now, in their present incarnation in GC 22.3) part of ensuring the relevant market works well for consumers (including business customers). That is, on the demand-side, consumers have accurate information enabling them to make informed choices and, on the supply-side, suppliers compete fairly to meet that demand. On that basis, prices are more likely to be set efficiently and innovation and investment in existing and new networks and services are more likely to be incentivised.
- 7.36 The importance of this is reflected in Ofcom's strategic objectives as set out in our 2013-14 Annual Plan (covering most of the Relevant Period). In that, Ofcom set out our over-arching strategy, including that:
- "We will work for consumers and citizens by promoting effective competition, informed choice and the opportunity to participate in a wide range of communications services"*
- 7.37 We also set, as one of our strategic purposes, to "**Promote effective competition and informed choice.**" We said in fulfilment of that purpose we would, "*Promote effective choice for consumers by ensuring that clear and relevant information is readily available.*"
- 7.38 We set out in paragraph 3.3 of that Plan:
- "Effective competition and informed choice** across all communications services is a key element of our strategy. This incorporates activities on both the demand and supply side to increase choice for consumers. Under this purpose, key activities will include:
- i. supply-side competition policy for services where there are or may be enduring economic bottlenecks, including residential fixed access, business telecoms, mobile communications, broadcasting and post; and
 - ii. demand-side activities to empower consumers by providing the information necessary to enable effective consumer choice and to ensure easy switching between services."

7.39 We continued in paragraph 3.25 that:

"Our strategy in this area is about empowering consumers to make effective choices, reducing barriers to their ability to make the most of choice on the supply side. We do this by developing policies, and where necessary intervening, to correct demand-side market failures; for example, arising from inadequate information for consumers to make informed choices and barriers to switching."

7.40 We said in paragraph 4.11 that:

“We believe that for communications markets to work well, consumers must be able to make informed choices. It is important that relevant, clear, accurate and understandable information is available to them. This will enable them to make decisions and act on them; for example, by switching provider in order to get a better deal.”

7.41 The statement in which Ofcom set out our decision to make GC24¹³¹ also reflects these important points. We said of our policy objectives, in paragraph 2.5:

“Our overall policy objective is that switching processes should promote switching and competition, whilst protecting consumers. This reflects our principal duty in section 3(1) of the Communications Act 2003 (‘the Act’). This objective aims to achieve the following:

- *good customer experience of switching;*
- *protection against inappropriate sales and marketing activity;*
- *well-informed consumers able to discipline providers by making informed and considered choices, based on timely, objective and reliable information; and*
- *that competition is supported in retail and wholesale markets to the benefit of consumers, particularly by minimising obstacles to switching.”*

7.42 The rules in GC24 were designed (and now in GC 22 are designed) to ensure consumers have the accurate information they need to make informed choices. They are, therefore, important in pursuit of the key strategic purposes and objectives described above. Mis-selling, including by providing consumers with misleading information, works against these purposes and objectives, prevents the market working well and so operates against the interests of both competition and consumers. It also undermines general consumer confidence and trust in the telecommunications industry as a whole.

7.43 It is therefore also important that where, as here, Ofcom is satisfied that a contravention of the condition prohibiting mis-selling has occurred, the penalty imposed deters such contravention and the adverse effects on the market that result. That deterrence should take into account the size and nature of the contravention in the particular case, also taking all the contravening party’s representations into careful account.

7.44 Our judgment, taking all these factors into consideration in this case, is that the penalty imposed on Unicom should be more than trivial, even accounting for the limitations of its contravention (as described). That reflects the importance of the relevant condition and of the consequences of breaching it.

Size and seriousness

7.45 To the extent described in section 6 above, Ofcom is satisfied Unicom contravened GC24.3(a) during the Relevant Period by providing information to prospective customers, as part of its standard sales and marketing policies, that misled them that

¹³¹ Publicly available on our website at:

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

they would not, when transferring their Fixed-Line Telecommunications Service to Unicom:

- (i) have to pay ETCs or incur any other relevant costs if they terminated their contracts with their existing CPs during the MCP; and
- (ii) suffer any adverse effect on their existing broadband service.

Likewise, that some prospective customers were in any event misled in some cases.

- 7.46 Our assessment is that these contraventions had some significant aspects in terms of their dimensions and seriousness. These should add a corresponding significance to the penalty.
- 7.47 In making this assessment, we have taken careful account of submissions Unicom made to Ofcom during the Investigation. These include its letters to Ofcom dated 11 September and 9 October 2014, and 16 February 2015 (Annexes 16, 17 and 21), in which it made a number of contentions, including that the volume of relevant complaints against it was, “... *accentuated (in our view inappropriately) by the interventions of the organisers of the website www.unicom-complaints.co.uk.”*
- 7.48 Likewise, of the Representations described above. In particular, those that the number of relevant complaints were in any event limited, and those to the effects that Unicom did not intend to mislead consumers, took a number of steps to ensure it did not do so, in its process and training documents and instructions to staff, and that, consequently, it is inaccurate to describe any contravention as serious and/or systemic.
- 7.49 Having done so, we have modified our provisional view. In particular, we acknowledge that in its standard sales processes Unicom sought generally to set out a means of winning customers by giving them information about the likelihood of their having to pay ETCs to their existing/previous CPs and offering them credits (and cancellation rights) where their liability for those charges is established. Some consumers may not therefore have been misled and we make no finding that they were. Rather, our finding is that only some customers in particular circumstances are liable to have been misled, as set out in section 6 above.
- 7.50 In that respect, our decision is narrower than our provisional view. We are satisfied that Unicom is only liable to have misled sub-groups of the prospective customers who were the subject of our provisional view. We apply a reduction to the penalty, accordingly.
- 7.51 Nevertheless, we consider this narrower finding still to have some significant aspects in terms of size and seriousness, which should be reflected in the penalty. In making this judgment, we take account of the following points in particular.
- 7.52 Considering first the seriousness of the contravention, we take account of its nature and impact (or potential impact) on a well-functioning market. The importance of consumers having the accurate information they need to make well-informed decisions is described above. Where they are denied that information, they make sub-optimal choices. That demand-side flaw in the market, in turn, reduces the effect, on the supply-side, of disciplining providers to meet informed consumer demand and rewarding those who compete fairly to do so.

- 7.53 On that basis, misleading conduct of the relevant kinds, which has adverse effects on some individual consumers' choices and on the functioning of the market as a whole, has an intrinsic seriousness. Ofcom's judgment is that this should be reflected in an appropriate penalty.
- 7.54 As to the size of Unicom's contravention (as well as its seriousness), we note first of all that, notwithstanding Unicom's Representations, it had systemic aspects. In so far as it was liable to mislead some prospective customers, the provision of misleading information was built into its standard sales and marketing processes.
- 7.55 Second, Unicom completed [X] transfer orders during the Relevant Period. It is reasonable to suppose, on the bases described in section 6 above, that each, or at least the overwhelming majority, of the customers involved would have been subject to Unicom's standard sales and marketing processes.
- 7.56 Whilst we agree with Unicom that not all of them would have asked questions about ETCs and/or the effects of transfers on broadband services, any one of those customers could have been subjected to what Ofcom considers to be the misleading contents of the relevant processes in respect of those matters. We consider it reasonable to assume that some of them may well have been so subjected.
- 7.57 Third, and the previous point made, we acknowledge that not all these [X] or so customers would necessarily have been misled in the relevant ways identified. A number, for example, will have been outside the MCP with their existing CP and not liable for ETCs. Others still may have been given accurate information about ETCs, credits and cancellation rights, as set out in section 6 above. Some, meanwhile, may not have been in receipt of fixed voice and broadband services or not been in receipt of those services in a bundle from a single CP, and so they are unlikely to have been misled in a relevant way about their broadband service.
- 7.58 Nonetheless, it also seems reasonable to Ofcom to infer that a number would have been so misled. For example, and while we take account they are liable to have been a sub-set of the relevant prospective customers, some are likely to have ended up in scenarios 2 and 3 of the Retentions process relating to ETCs, as described in section 6 above (as Unicom itself acknowledges in the relevant process map documents). In reaching that view, we note again the evidence and assessment relied upon in section 6 relating, for example, to the numbers of SMEs liable to have to pay ETCs and the time at which that liability may be established. We also have regard, as far as broadband services are concerned, to the numbers of SMEs purchasing broadband services as part of a bundle.
- 7.59 Fourth, we take account of the number of complaints made to Ofcom by customers that they were misled that they would not (i) have to pay ETCs to their existing/previous CP, or (ii) experience any effect on their existing broadband service by transferring to Unicom. Again accepting Unicom's Representations as to their number, the 53 such complaints represent [X] of all the transfer orders Unicom placed during the Relevant Period (out of [X] transfer orders).
- 7.60 By way of one comparison, the CP attracting the most complaints to Ofcom about all types of mis-selling (and therefore a much wider category than is considered here for Unicom) during approximately the same time period was the subject of [X] such complaints and placed circa [X] transfer orders in that period. The much wider category of complaints therefore represented only [X] of its transfer orders.

- 7.61 By way of another, information obtained from Unicom's website shows that Unicom's overall Customer base is approximately [X], meaning that the 53 complaints about Unicom's mis-leading conduct in respect of ETCs and broadband represent [X] of that base. For the most complained of CP, the [X] complaints it drew (in respect of all mis-selling) represent [X] of its customer base of approximately [X].
- 7.62 In making these assessments, Ofcom accepts that the circumstances referred to by Unicom might have led more of its customers to complain and that, even so, the number of complaints in absolute terms is small. We have also given close consideration to Unicom's submission that complaint numbers have fallen during the period of Ofcom's Investigation and through to the present time. We make a number of observations in these connections.
- 7.63 First, we note that the fact the number of complaints may be small, but nonetheless inflated, does not alter the fact that those customers who did complain were aggrieved by aspects of Unicom's standard sales and marketing processes. Second, complaints are only one indication we have taken into account in our analysis, not a determinative one. Third, and in any event, it is not clear that complaint numbers did fall during the Relevant Period, which is the time we are principally concerned with in assessing the penalty for Unicom's contravention. The Annex to Unicom's Written Representations (Annex 30 to this Confirmation Decision) might suggest they fell over the course of the whole period from the start of 2012 to the present, but that document itself would suggest they were at similar levels at the start and end of the Relevant Period, having fluctuated, and at times increased, during that time.
- 7.64 On these bases, Ofcom's judgment is that Unicom's contravention has serious aspects which, though we cannot quantify it precisely, had the potential to harm a significant number of small business customers and therefore to have dimensions making it well beyond trivial in size. We judge that, accordingly, the penalty should have a significance that reflects these factors (albeit less than we were provisionally minded to impose).

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

- 7.65 Ofcom has also taken careful account of Unicom's Representations about the lack of harm arising from its conduct. In particular, those relating to the mitigation or prevention of any harm as a result of its payments of credit in respect of ETCs and the rights to cancel transfers which it said it gives relevant customers. Our view, however, is that various aspects of harm arise from the misleading conduct comprised in Unicom's contravention. These include the following.
- 7.66 Mis-selling by providing misleading information about ETCs and the effects on broadband services is liable to cause affected customers financial harm. This will include any ETCs they are unexpectedly charged by their previous CP because they were misled that no such charge would be levied. It may also include customers for whom, contrary to Unicom's reassurances, the transfer cut off their existing broadband service and their losing CP imposed an ETC.
- 7.67 In this regard, Ofcom notes, once more, the evidence relied upon in section 6 above about the extents to which SMEs are likely to have contractual liabilities for ETCs and to which some CPs enforce those liabilities and secure payment of ETCs. Moreover, that evidence also shows that ETCs can be substantial. Of the surveyed SMEs subject to an ETC when transferring their Fixed-Line Telecommunications Service, around 6% paid in excess of £1000, with 12% paying between £500-1000, and 55%

paying an ETC of up to £500.¹³² This demonstrates the possibility that misled customers could incur substantial costs.

- 7.68 There are also likely to be other types of financial harm. For instance, customers who are misled into agreeing to transfers and subsequently cancel them are liable to incur costs in terms of time and inconvenience. 'Unwinding' orders in this way also imposes financial costs on CPs which may ultimately be borne by consumers generally.
- 7.69 Similarly, customers who, in reliance on Unicom's reassurance that they could avoid ETCs by challenging them in ADR, will incur costs. Research commissioned by Ofcom suggests that ADR complaints involving Fixed-Line Telecommunications Services take an average of 6.6 hours to conclude, with consumers incurring a direct monetary cost of around £57.¹³³ In addition, the average value of working time, as calculated by the Department of Transport, is around £30 per hour.¹³⁴ It is reasonable to infer that relevant complainants dealing with Unicom would in many cases have done so during working hours, displacing other work that could have been done. These figures suggest that, in some cases at least, the average cost of time and other costs of taking a dispute to ADR, which would not necessarily have been successful, would have been around £250 (in addition to any ETC the customer was found liable to pay).
- 7.70 Also important is that Unicom supplies services to small to medium sized businesses. The financial effect of loss of broadband service on a business will clearly depend on the nature of the business, but could be material if it means a business loses sales or marketing opportunities.
- 7.71 Such mis-selling can also cause other types of harm. This can include annoyance, distress and anxiety, arising from matters such as the time and effort trying to resolve the situation and the threat of significant financial liabilities.
- 7.72 There is also the potential for harm to the efficient functioning of the market. Some aspects of this have already been outlined and taken into account. In addition, mis-selling of the relevant kinds, and any attendant publicity, can harm customer's confidence and propensity to switch. Discouraging switching in this way would undermine the competitive process and, so has the potential to limit the benefits to consumers as a whole that accrue from well-functioning markets in which customers can move fairly to those offering the most suitable services and prices.
- 7.73 There is also the potential for further, consequential negative impacts on competition. Where switching is discouraged, this would create supply side barriers. For example, where new entrants are deterred from entering, or existing CPs are deterred from investing in new services, in the knowledge that it will be difficult to persuade customers to switch from their existing CP.
- 7.74 These are all aspects in which, in Ofcom's assessment, Unicom's mis-selling has the potential to cause harm. Moreover, we are minded to regard that potential as having a degree of significance on the basis the mis-selling arises from Unicom's standard sales and marketing processes. Again we note that, in the Relevant Period, Unicom

¹³² 27% of consumers did not know the size of their ETC.

¹³³ Table 1.1, Alternative Dispute Resolution GFK consumer research for Ofcom. Available at http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/adr-august-2013/ADR_august2013.pdf

¹³⁴ <https://www.gov.uk/government/publications/webtag-tag-data-book-november-2014>

placed just over [§<] transfer orders. It is likely to have followed its standard processes in most if not all of them and in some cases, on the bases outlined elsewhere in this decision, (prospective) customers are likely to have been liable for ETCs and/or susceptible to adverse effects on their existing broadband services.

7.75 For instance, these sorts of harms are likely to be suffered by misled customers who fell into scenario 3 as set out in Unicom's Retentions process map (Annex 34). Such customers do not necessarily receive any credits from Unicom nor the right to terminate their contracts with Unicom without cost. Similarly, even where customers fall within scenario 2 as set out in that document, there is liable to be some harm involved. Such customers have still been misled and so denied their freely informed choice of CP. That may harm their position, as well as the competitive dynamics of the market. Any one of the [§<] or so customers in respect of whom Unicom placed transfer orders in the Relevant Period could have fallen into one of these groups.

7.76 There is therefore the potential for some customers to have been misled in significant ways and for the kinds of harm described to be realised. That is a factor to which Ofcom considers we should attach weight and which would tend to add a degree of significance to the penalty. We nonetheless again attach slightly less weight to this factor than in our provisional assessment. This reflects the narrowing of our finding as to the extent of Unicom's contravention of GC24.3(a) and our assessment of the groups of prospective customers liable to be affected by it. As both are narrower, so must the assessment of harm be less. We take account that in many cases customers may not have been misled and may have been accurately informed recipients of ETC credits and/rights to cancel their transfers to Unicom.

7.77 Ofcom would also have been minded to add to the penalty further still were there greater evidence of actual, quantifiable harm. We note, however, that what Ofcom is concerned with is, effectively, misleading marketing or advertising statements, made to Unicom's prospective customers generally (and liable to affect only some of them). Likewise, that some of the relevant types of harm are not really amenable to precise quantification (e.g. emotional distress), while others will depend on the varying individual circumstances of each affected customer.

7.78 That said, there is evidence in complainants' witness statements which shows that Unicom's contravention did cause harm in practice. This demonstrates that the potential for harm in this case is real, not notional, and that, in individual cases, customers will have incurred material harm (which the penalty reflects).

7.79 For example, in her statement, [§<] says:

- *"I have been trying to cancel the agreement since.. My colleague [§<] and I then spent a great deal of time unsuccessfully corresponding with Unicom. I have since received a letter from NBS demanding £2000 in early termination charges."*
- *"I received a bill from Unicom... This was almost double what we paid NBS for similar services over the course of a full month."*
- *"Overall I feel that Unicom did not comply with the most basic aspects of its own Sales and Marketing Code of Practice. It has been a nightmare. I have been quoted an early termination charge of around £6000 to leave my contract with Unicom. We have wasted both time and money as a business trying to resolve this issue."*

7.80 Similarly, in his statement, [§<] states:

- *“I was told by the Unicom sales representative that the Unicom legal team were confident that they could sort these out but this also did not come to fruition and I had to pay £300 to Talk Talk.”*
- *“Switching to Unicom has cost my business financially. I had to pay £300 in early termination charges, my business was without internet for almost 2 weeks costing us potential business. I had to purchase a mobile broadband connection and for about 4 to 5 days myself or my colleagues were regularly on the phone to Unicom.”*

7.81 [X], meanwhile, attests:

- *“The BT letter also stated that I owed approximately £300 in early termination charges.”*
- *“I was also left with no internet service for a number of weeks while Unicom transferred over my services to BT... This resulted in me losing business – I failed to respond to enquiries from customers and emails about future stock orders.”*
- *“This whole ordeal has had a huge impact on me. I was continually stressed and I have wasted a great deal of time and money when I have a business to run.”*

7.82 In his statement, [X] says:

- *“This whole ordeal has caused me a great deal of stress. I definitely lost business as a result... I am still unable to access the internet but I am usually too busy at work to find time to sort these issues directly with Unicom.”*

7.83 In hers, [X] states:

- *“I was told by a Unicom advisor to change my internet provider to Plusnet when I called back to complain. The Unicom advisor said that if I take broadband from Unicom it would be £48 a month. I also explained that I was receiving letters from my previous provide XLN Telecom to pay the outstanding termination fee. The advisor told me that I would have to pay the termination fee myself and then Unicom would credit my account. The after discussing it further, they said no sorry we will not pay the fee...”*
- *“This ordeal has caused me a lot of stress and anxiety which has made me ill. I was on anti-depressants and had to get solicitors involved... I ultimately had to pay Unicom £50 and then £180 for a solicitor’s fee, and a further £99 cancellation fee with XLN for broadband.”*

7.84 Finally, in her statement [X] says:

- *“We were without broadband services for around 4-5 weeks during this time... The loss of business had a very damaging impact on our business as we rely heavily on the internet for all new and existing customers. The complaints team at Unicom were awful when we tried to raise our concerns.”*
- *“We only started the business 3 years ago and we are still building it up. To be stung like that by Unicom really upset us and had a significant impact on our business finances.”*

7.85 Additionally, Ofcom notes that the evidence of actual harm in these statements is supported by material provided by Unicom in its Second Response. This includes, in various cases:

- extensive CRM system notes made by Unicom Head Office Representatives;
- details of correspondence between the witnesses and/or their solicitors and Unicom; and
- documents relating to the witnesses' pursuit of their complaints via ADR.

7.86 Accordingly, Ofcom regards Unicom's contravention as having the potential for a degree of significant harm, and which harm has been realised in some cases. The penalty we impose should be sufficiently significant to reflect that.

The duration of the contravention

7.87 Ofcom is satisfied that Unicom contravened GC24.3(a) during the Relevant Period: 1 March 2013 to 8 July 2014 (17 months and 8 days). This is a substantial period of time for such a contravention, given its serious aspects and potential to cause harm to customers. This is a factor which should be taken account in adding to the amount of any penalty.

7.88 In reaching that view we have considered the Written Representations that Unicom made in this connection about the fall in the number of complaints about it. Likewise those that contended that Ofcom's conduct had prolonged the Investigation, that it should not be penalised on that account and should receive the equivalent of an early settlement discount.

7.89 As set out above, it is not clear to Ofcom that complaints numbers did fall during the Relevant Period, even if they fell before and after that time. Similarly, we set out in section 6 above why the conduct of the Investigation has not caused the period of the contravention to be extended nor the penalty to be increased on account of any extension of the duration of the contravention. As to the question of early settlement discount, we set out relevant considerations below in our assessments of the steps Unicom took to end the contravention when it became aware of it and of its co-operation with our Investigation.

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

7.90 In its Representations, Unicom contended that it made no gains from any contravention. It relied in support on the limited numbers of complaints and, in relation to ETCs, on the payment of [X] in credits under its TF1 and TF2 processes.

7.91 Ofcom's assessment, having considered these Representations, is that:

- by way of the contravention Unicom sought to make some financial gains;
- it is liable to have made some such gains in some cases;
- we note from relevant witness statements that gains were in fact made;
- we do not, however, have evidence precisely to quantify all the gains Unicom made; and

- the penalty we impose reflects these points, albeit on a precautionary basis in light of the limitations of our assessment.
- 7.92 As to the first two bullets, we take account that, in those cases, as set out in section 6 above, where a customer entered into a contract with Unicom on account of being misled by it about not having to pay ETCs and/or there being no effect on their existing broadband service, Unicom will have made some gain from its contravention. We infer that it intended to do so in the relevant scenarios from, for example, the fact that its instructions to staff about paying ETCs are in sections of its standard process documents about overcoming customers' objections to transferring their services to Unicom and/or persuading them not to cancel transfers to Unicom.
- 7.93 In reaching this view, we have considered the credits Unicom paid in respect of ETCs. We agree that, in cases where, as set out in section 6, Unicom may not have misled customers and paid them the relevant credits, there may be no illicit gain for Ofcom to take into account. We do not do so. We also agree that, where customers fell into scenario 2 set out in Unicom's Retentions process map – where they were misled but Unicom pays relevant credits – this will offset some of any gain Unicom would have made. Even so, two other points are relevant.
- 7.94 First, even in respect of those customers in the relevant scenario 2, Unicom is liable to have made some gain. It will have misled the customer into agreeing a transfer of their services where they might not otherwise have done so, and so gain from that ongoing subscription and other charges they might not otherwise have obtained.
- 7.95 Second, such gains are even more likely in respect of those customers who fell into scenario 3 set out in the Retentions process map – where they were misled and refuse Unicom's offer of relevant credits. In such cases, Unicom would gain ongoing subscription and other charges, or (unless it exercised discretion to waive them in the particular case) payment of its own ETCs in order to allow the customer to cancel the contract, that they might not otherwise have obtained (and without any off-setting of the gain as a result of paying ETC credits).
- 7.96 As to the amount of those gains, one relevant consideration is that Unicom's cheapest service for a business customer is £13.99 per month with a "UK Landline Call" bundle at £6 per month.¹³⁵ In relevant cases, that would provide Unicom with a financial gain it would not otherwise have made comprising at least a part of that total of £19.99 per month. The amount of any such gain would, of course, have been limited by the costs of supplying the Customer's Fixed-Line Telecommunications Services that Unicom would have incurred.
- 7.97 Ofcom does not purport precisely to quantify the total amount of any such gains. We do take account, however, that, as noted elsewhere, Unicom placed around [X] transfer orders in the Relevant Period. We do not consider that each customer in those cases was misled in relevant ways and do not make any finding that Unicom's gains correspond with that number. However, we do take account, as elsewhere, that the misleading statements were part of Unicom's standard sales and marketing processes, and there was the potential for Unicom to make an unlawful gain in any one of the cases in which those processes were applied and relevant misleading statements were made.

¹³⁵ The "UK Landline Call Bundle" does not include calls to mobile, international, premium rate and 084/087 numbers.

- 7.98 Further, there is evidence in relevant witness statements that Unicom did in practice make gains from the contravention. In particular:
- [X] witness statement indicates she was misled by Unicom about her need to pay her existing CP ETCs and that, when she sought to terminate her contract with Unicom, it demanded an ETC of £630.96 from her;
 - [X] statement indicates he had to pay Unicom an ETC of £1,646.18 to end his contract with Unicom;
 - in his statement, [X] says he entered into a three-year contract with Unicom, on account of being misled about his ETCs to his existing CP, costing him £35 – 40 per month, on which basis its total cost to him would be in the region of £1250 - 1400;
 - [X] statement says the contract he entered into with Unicom costs an average of £200 per month, equating to £4800 over a two year contract or £7200 over three years;
 - [X] statement indicates she entered into a three-year contract costing £28 per month, or £1080 over the MCP, having been misled she would not have to pay ETCs; and
 - in her statement [X] says Unicom has quoted her an ETC of £6000 to end the contract she entered into after being misled about having to pay her existing CP ETCs.

7.99 These figures alone total £15,407.14. There would need to be some netting off of Unicom's costs (though the quoted ETC figures are more likely net figures that indicate what Unicom stood to gain from the relevant contract), but they show Unicom's ability to make gains of thousands of pounds from its contravention.

7.100 Ofcom's view, accordingly, is that the penalty should take account that Unicom operated standard processes, involving mis-selling in certain respects in some cases, which were intended to win customers and make it gains. Those processes stood ready to be applied and realise those gains in any one of the [X] cases in which Unicom placed transfer orders in the Relevant Period. There are reasonable grounds to infer that it made some such gains, not least in those cases cited where Ofcom has evidence it did so. The penalty should therefore reflect such prospects of making gains, and deter Unicom and other CPs from conduct that gives rise to the possibility of making them. We would have ascribed a more significant aspect of the penalty to Unicom's gains had there been evidence enabling us precisely to quantify them.

Whether in all the circumstances Unicom took appropriate steps to prevent the contravention (and took timely steps to end it once it became aware)

7.101 CPs' compliance with the GCs that apply to them is a fundamental and on-going obligation, and is the responsibility of each CP. It is important that compliance is part of the ordinary course of a CP's business. Accordingly, Ofcom is likely to attach significant weight to any failure by a CP to have in place processes, staff training and other means designed to ensure compliance with the GCs and to prevent contraventions occurring.

- 7.102 In the present case, Ofcom's assessment is that Unicom did not have in place such processes and the like in relation to the contraventions Ofcom is satisfied occurred. On the contrary, they were provided for in Unicom's standard sales and marketing processes. Ofcom attaches significant weight to this in our penalty assessment.
- 7.103 In reaching this view, we have carefully considered all of Unicom's relevant submissions and Representations. We acknowledge and give Unicom credit that it had in place processes and training materials to comply with GC24 generally. Additionally, it reviewed and amended those processes and materials on becoming aware of Ofcom's Investigation.
- 7.104 In particular, we have taken careful account of the information provided by Unicom in relation to the systems and processes it has in place to ensure compliance with the requirements of GC24. In our assessment this demonstrates that Unicom understood the requirements of GC24.3 and sought to comply with many of them. We note, in this regard, that Unicom has said it is "*committed to ensuring the highest standards of regulatory compliance.*" It re-iterated these points in its Representations.
- 7.105 Unicom's Enquiry Opening Letter and First Information Request provided specific evidence of Unicom's awareness of GC24 and the steps it had taken towards compliance, which included:
- training materials for Field-Sales, Verbal Sales and Contract Enquiries Representatives which set out requirements of GC24 and the particular types of conduct which might amount to mis-selling;
 - materials stating that Unicom would not be liable for any ETCs arising from a customer's transfer of their Fixed-Line Telecommunications Services to Unicom;
 - a description of the processes followed by Unicom's Head Office administration and verification teams to ensure that the customer has clearly agreed to the contract for Fixed-Line Telecommunications Services and that the key features of the contract are understood;
 - a copy of Unicom's Sales and Marketing Code of Practice which confirms the customer's right to cancel during the Transfer Period without charge as per the requirements of GC24.9;
 - a diagram that shows the time-line for each of the separate stages involved in provisioning Unicom's Fixed-Line Telecommunications Services (in respect of which Unicom said it affords customers a longer window for cancellation than the minimum required by GC24);
 - internal governance documents relating to meetings of Unicom's parent company's board of directors and discussions surrounding compliance with GC24 over the Relevant Period;
 - descriptions of Unicom's general compliance activities, in which Unicom states that:
 - complaints from customers are directed through its Compliance Department, with its Sales Director having overall responsibility for investigating the allegations made and taking appropriate disciplinary actions against the relevant sales representative;

- a report detailing the quality of contracts received by its Head Office administration teams is generated for use by Unicom's Sales Directors (which Unicom says allows deviations from its sales and marketing processes to be identified);
- reports detailing the quality of call recordings made during the Verbal-Sales Methods are generated for the CEO and Head of Compliance to ensure that compliance issues are identified; and
- a weekly compliance report is generated for the CEO, Customer Relations Director and Head of Compliance (which Unicom says allows its management team to monitor any areas of concern and take appropriate action to ensure compliance with the GCs).

7.106 Further, on receipt of Ofcom's Enquiry Opening Letter, providing details of 171 complaints made to us between 1 August 2013 and 31 January 2014, Unicom undertook a detailed review of the complaints. It provided Ofcom with the results of its analysis in its Enquiry Opening Letter Response:

"We will address each of these areas of concern in the context of the categories and explain our current processes to guard against breaches of the General Conditions in each of these areas, how we think any breaches may have occurred and what actions, if any, we think are appropriate to reduce the likelihood of any future breaches."

7.107 Unicom also identified a number of areas for improvement in its processes, as follows:

- *"Termination free from losing provider":*
 - *"There are seven cases in this category. In each of these cases, the customer has complained because they believed that Unicom would pay the termination fee of their current supplier if they transferred to Unicom. This issue has historically been a bigger issue with regards to our sales process and one which we think has largely been eradicated."*
 - *"We consider that further training on the correct handling of this issue can further reduce the volume of complaints."*
- *"Broadband bundle":*
 - *"There are sixteen cases in this category. The cases in this category can be generally summarised that the customer thought they were getting a broadband connection at the same time as the fixed line was being agreed to and taken live. In some cases the customer thought the broadband service was included in the price they were quoted and in other cases they understood we could provide broadband at a price less than we charge for broadband."*
 - *"This is an issue to which we have become aware relatively recently and it is evident from the complaints that they are skewed to the later months of the complaint period. We have held several meetings with our senior sales managers to explain that this issue must be explained better."*

- *“During the summer of 2013, we experimented with a fixed line/calls/broadband bundle, but found that many customers experienced difficulties obtaining a MAC from their current supplier. This sometimes resulted in the fixed line services transferring and the broadband services not, which caused further customer dissatisfaction. When the WLR and broadband migration processes are aligned it is envisaged that this problem will cease to exist.”*
- *“From the evidence provided by Ofcom and from our own internal monitoring, we have concluded that further changes are required to our processes and sales material to prevent this issue occurring in the future.”*

7.108 Unicom subsequently informed Ofcom, in its update letter of 23 May 2014, of the steps it had taken to improve its compliance with GC24 in light of the foregoing. These included:

- an e-mail memo to all Unicom’s sales representatives from its CEO, dated 24 April 2014, clarifying that Unicom does not pay its competitors’ ETCs and providing guidance on potential statements to be used by sales representatives;
- copies of Unicom’s standard contracts for Fixed-Line Telecommunications Services, which had been amended explicitly to state that broadband is not included and displaying the actual line rental cost of £13.99, and which versions were introduced on 28 April 2014;
- a copy of a standard form prepared letter to be signed by the customer at the point of sale, which had been amended explicitly to state that broadband is not included as part of the transfer of Fixed-Line Telecommunications Services;
- e-mail memos to Unicom’s Branch Managers and Verbal Sales Managers from its Compliance Manager, dated 25 April 2014, explaining the above amendments, and which e-mail also outlined changes made to Unicom’s Fixed-Line Pricing Sheets to clarify that mobile, international, premium rate and 084/087 numbers are not included in the UK Landline calls bundle;
- copies of verification scripts used by sales representatives during the Verbal Sales Method which had been amended explicitly to state that broadband was not included;
- copies of letters issued to Unicom customers in the form of a receipt during the Paper Sales Method and included in the Welcome Packs for the Verbal Sales Method, now amended explicitly to state that broadband is not included;
- monitoring forms used by retentions teams as part of improvements to reduce instances of erroneous Cancel Other requests; and
- a covering letter outlining the steps Unicom had taken to improve customer satisfaction, including details of internal enforcement action and the introduction of a new disciplinary procedure for sales staff referred to as the “3 strike system.”

7.109 Unicom also highlighted in correspondence other steps it had taken on compliance with GC24. For example, the changes in its management structure to separate sales

and compliance activities, and the improvements in complaints numbers, indicated in its solicitor's letter of 16 February 2014.

- 7.110 In its Representations, Unicom re-iterated that it, "... *has endeavoured to ensure that its sales representatives provide accurate information to its customers....*," by giving all sales staff compliance training and updates, and has not instructed them to mislead those whose business it sought to attract. It also made submissions about the improvements it said it continued to make to its sales processes and compliance training in order to reduce the number of complaints.
- 7.111 In addition to these general matters, Ofcom also again gives Unicom credit in respect of this specific point in respect of ETCs. That is, again, that its processes sought generally to give effect to a means of winning customers by giving them information about the likelihood of their having to pay ETCs to their previous CPs and offering them credits (and cancellation rights) where their liability for those charges is established. Since we have decided, on that footing, that Unicom's contravention in respect of ETCs was narrower than we provisionally considered, so our assessment of this factor in the penalty is smaller.
- 7.112 None of these points, however, mean Unicom took steps to address the particular matters giving rise to the contravention (as Ofcom more narrowly finds it) nor to stop it occurring.
- 7.113 In particular, Unicom's statements about prospective customers' ETCs and existing broadband services that Ofcom considers misleading, as set out in section 6 above, were provided for in its standard sales and marketing processes throughout the Relevant Period. It is these which give rise to Unicom's contravention of GC24.3 (as we find it). The steps taken by Unicom to comply with GC24 and to improve its processes did not change these aspects of the processes nor prevent the contravention to which they give rise. In taking this view, we take account of some additional points.
- 7.114 First, and tending in some respects to further to add to the proposed penalty is that, as set out elsewhere in this document, Ofcom had in 2006 raised objections to Unicom's misleading statements about ETCs to broadly similar effect to those now impugned. Unicom, at that time, changed those statements. Thereafter, in July 2007, Unicom was subject to a formal finding in a notification under section 94 of the Act that it was making inaccurate statements to customers that they would pay no charges to switch services. Not only, therefore, did Unicom fail to take steps to prevent the present contravention of GC24.3(a), it actively took steps that give rise to it (by devising procedures that provided for it), notwithstanding that it had clear notice from preceding events not to do so.
- 7.115 Second, in forming this aspect of our view, we have considered specifically the contents of the memoranda sent on a number of occasions by Unicom's CEO to its sales staff. We acknowledge that, on its face, this appears to seek to stop staff making at least more egregious inaccurate statements about ETCs. However, for the reasons in paragraphs 6.160 – 6.162 above, we consider that Unicom continued, even in these memoranda, to instruct its sales staff to make statements about ETCs that would have contributed to the misleading effect on some customers.
- 7.116 Third, we also take account that Unicom's GC24 compliance review was prompted by receipt of Ofcom's Enquiry Opening Letter and, accordingly, limit any credit otherwise due. This point suggests, in Ofcom's view, that Unicom did not have sufficient compliance monitoring processes in place to become aware of its Field-

Sales Representatives mis-leading conduct. This is despite the fact that Unicom received monthly complaints reports from Ofcom during the Relevant Period that would have indicated some issues regarding its compliance with GC24.

- 7.117 Fourth, we have carefully considered Unicom's Representations that, had Ofcom agreed to its requests to meet, it would have changed the relevant aspects of its processes, and should receive the equivalent of an early settlement discount rather than being punished on that account. Likewise, those about the falling numbers of complaints and that, "*The impact of the changes already implemented by Unicom to ensure compliance with GC24.3 is evidenced by the fact that the number of complaints has significantly declined during the course of Ofcom's investigation.*"
- 7.118 As to the former, we note that Unicom has not, even after receipt of the Section 96A Notification, provided any evidence of changes to the relevant aspects of its standard sales and marketing processes. In this connection, we note Unicom's Representations that it, "*... is proposing to take measures to ensure that their customers are informed that there is a possibility that they may lose their broadband service upon transfer...*," but it has not provided any evidence that any relevant changes have been made.
- 7.119 Moreover, and in any event, even if Unicom would have made such changes, this aspect of our penalty assessment is not just concerned with Ofcom telling a CP that we consider it to have contravened a condition and it making changes in response. Rather, an aspect of our consideration is about whether CP took action to prevent the conduct that comprised the contravention and/or took action to stop that conduct during the period it was happening, once the CP was aware the conduct was taking place, and regardless of whether Ofcom had indicated its position. An important question is whether the CP was aware of the relevant conduct and deliberately undertook and carried on with it.
- 7.120 In this respect, and as we have noted, Unicom had built that conduct into its standard sales processes, so it was aware of it and did not take action to prevent or stop it during the Relevant Period. In Ofcom's view, this is a legitimate factor to weigh in our penalty assessment.
- 7.121 As to the falling numbers of complaints, we have also noted elsewhere that it is not clear on Unicom's submissions that they did fall during the Relevant Period. To the extent they have, we are pleased that complaints about mis-selling generally against Unicom have fallen over time. However, any such fall in complaints about general mis-selling alone is not necessarily evidence of compliance with GC24.3(a) in the relevant respects in the Relevant Period. It is not clear in any event that complaints have fallen because Unicom took steps during the Relevant Period to prevent the specific kinds of misleading statements that Ofcom finds comprise Unicom's contravention.
- 7.122 Taking account of these factors, our view is that Unicom did not take appropriate steps to prevent the contraventions of GC24.3(a) during the Relevant Period that are the subject of this Confirmation Decision. On the contrary, it devised and maintained standard processes giving rise to those contraventions. We regard this as an aggravating factor in determining the appropriate and proportionate penalty, and which should add another significant aspect to it (albeit again to a lesser extent than in our provisional view).

Whether in all the circumstances Unicom took appropriate steps to remedy the consequences of the contravention

- 7.123 Ofcom's provisional view was that Unicom had not taken sufficient steps to remedy the consequences of its contravention of GC24.3(a). It had not provided any evidence to suggest that it had taken steps in this regard in relation generally to customers misled about their ETCs and/or the effects of transfers on their broadband services.
- 7.124 In its Representations, Unicom said Ofcom had taken no account of the significant sums it had paid in ETC credits. Ofcom acknowledges that Unicom paid significant sums in such credits. A substantial element of those, however, would have been paid to customers in respect of whom Ofcom makes no finding they were misled. What is key is whether any remedial steps have been taken in respect of those groups of customers who are liable to have been misled.
- 7.125 In that relevant regard, we also agree that customers who fell into scenario 2 as set out in Unicom's Retentions process map – and so who were misled but received ETC credits – will have been subject to remedial action in the form of those credits. However, there is no evidence Unicom has taken any such remedial steps in respect of any customers who fell into scenario 3 as set out in the same document (though we also note Unicom appears to have allowed [X] customers to cancel their contracts, post-transfer, without liability for Unicom's ETCs, which may have had some remedial effect for some of them).
- 7.126 Additionally, there remains no evidence Unicom has taken any remedial steps in respect of customers misled about the effects of transfers to Unicom on their broadband services, as provided for in Unicom's standard sales processes. It is also not clear that Unicom has taken any more than limited remedial steps in respect of other customers misled in practice about ETCs or effects on broadband services. We take account that Unicom's Second Response indicates that six of the 27 customers about whom Ofcom wrote in the Second Request received credit or other forms of reimbursement after alleging mis-leading conduct. While this is welcome, there is nevertheless no evidence this was extended to others.
- 7.127 Accordingly, we treat the steps Unicom has taken as mitigating to some extent the penalty we impose. Overall, however, the limits of such action is a factor we treat as adding to the level of the penalty (though, once more, to a lesser extent than in our preliminary view).

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

- 7.128 Ofcom considers that the following indicate Unicom's contravention occurred with a degree of intention and a lack of due care, if not a degree of recklessness. Likewise, that its senior management knew, or ought to have been aware, that there was a significant risk that it was occurring or would occur.
- 7.129 In this regard, we take account that in its Representations Unicom strongly opposed Ofcom's provisional views to these effects. We note and again agree that, in relation to ETCs, Unicom was seeking generally in its standard processes to give effect to a means of winning customers and some may not have been misled by statements made in accordance with those processes. We nonetheless consider, on the following bases, that Unicom intentionally included provision for the relevant misleading statements in its standard processes, at least in the sense that it deliberately chose to include them, and without due care for whether they were liable to mislead customers.

- 7.130 As far as ETCs are concerned, Ofcom has previously, in 2006 and 2007, raised the concerns and taken the action described elsewhere in this Confirmation Decision. The correspondence in July 2006 referred to was between Ofcom and Unicom's then CEO. Unicom's current CEO and its Compliance Manager were also employed by Unicom in senior management roles then and were copied in on correspondence from Unicom to Ofcom at that time (see, for example, Unicom's letters of 22 June and 13 July 2006).¹³⁶ Unicom's senior managers were, therefore, aware of the sorts of matters that now give rise to part of the contravention in hand (the misleading provision of information, under Unicom's standard sales and marketing processes, about ETCs).
- 7.131 Notwithstanding what should have been the chastening experience of Ofcom's action in 2006 and 2007, Unicom nonetheless chose to include in its processes the statements Ofcom now finds liable to have misled some customers in the Relevant Period. At the very least that would suggest a lack of due care about whether some customers were misled. Moreover, it seems reasonable to Ofcom to infer that being aware, from that experience in 2006 and 2007, of the regulatory importance of the position on ETCs, the relevant senior management would, or should (through checking), have been aware of their inclusion and their effects, and therefore shared that lack of due care. Those assessments appear to Ofcom hard to avoid, given the previous warnings Unicom and its managers should have derived from the previous Ofcom enquiry and enforcement action, and the fact Unicom previously amended similarly misleading statements to customers.
- 7.132 We also take further account of the memoranda sent on several occasions by Unicom's CEO to its sales staff. We again acknowledge that, in those memoranda, the CEO may have been seeking to address more egregious misleading statements about ETCs. However, the memoranda also indicate the CEO's awareness of the sorts of matters comprising the contravention. Likewise, his involvement in issuing instructions to sales staff that are liable to have contributed to the misleading effect on some customers.
- 7.133 As to the effects on broadband services, Ofcom acknowledges there is less material on which to take a view. However, we note Unicom's comment in its Enquiry Opening Letter Response about "*a greater number of potential customers taking a bundle of products from their current supplier.*"¹³⁷ We note, too, similar acknowledgments in its Representations of changes in the numbers of customers receiving services by WLR and MPF and that it should have realised sooner the misleading effects of some of the statements provided for by its standard sales processes. These indicate that, as a CP providing services using the Openreach network, Unicom was or should have been aware of the possible effect on a customer's existing broadband service of a transfer of their Fixed Line Telecommunications Service to a WLR voice only service.
- 7.134 More generally, and in respect of the standard processes relating to both ETCs and broadband, we also take account that it is normal practice within an organisation that senior management are ultimately responsible for, will often be involved in the construction of, and/or have sign-off on, essential processes, policies and training. This is, or should particularly be, so in respect of such documents relating to fundamental requirements like regulatory rules.
- 7.135 In the present case, we note that Unicom has confirmed that its CEO has overall responsibility for both its operational and sales divisions: "*as the key decision maker*

¹³⁶ Annexes 4 and 6

¹³⁷ Copy attached at Annex 10 – covering letter

for the business the CEO is involved in all aspects of the business, this includes Unicom's sales and marketing processes." On that basis, it seems clear to Ofcom that Unicom's senior management were aware of the inclusion in those policies of the statements giving rise to the contravention in respect of both ETCs and broadband.

- 7.136 These matters, in Ofcom's view, are factors tending to add a further significant element to the penalty we impose.

Co-operation with Ofcom's investigation

- 7.137 Ofcom's Penalty Guidelines say, "Ofcom may increase the penalty where the regulated body in breach has failed to cooperate fully with our investigation." Ofcom acknowledges that, as set out in its Representations, Unicom has co-operated with the Investigation, providing a large amount of relevant material and offering on a number of occasions to meet with us. Ofcom does not therefore consider there to have been a lack of co-operation in this case that might otherwise serve as an aggravating factor in the amount of any penalty we impose.

Whether Unicom has a history of contraventions

- 7.138 As set out in section 4 and above, Ofcom notes that Unicom was previously found to have contravened GC14.5 in ways that are similar, at least in relation to ETCs, to the present contravention. The fact there is a recorded contravention by Unicom, of a similar nature, is in our view a factor that should count towards a higher penalty.

Precedents

- 7.139 In our provisional assessment Ofcom reflected parallels with, and important differences from, the following cases.
- 7.140 The first related to the TalkTalk Telecom Limited and Tiscali U.K. Limited case about contravention of GC11.1 (inaccurate billing). Ofcom imposed a penalty of £1,524,728 on the former and £1,512,392 on the latter for their billing of 62,055 customers between 1 January and 1 November 2010 for services not provided.¹³⁸
- 7.141 This is the highest penalty Ofcom has imposed for contravention of the GCs. It reflected that the contraventions were large, serious and systemic; that they arose out of company-wide procedural flaws and failures to take appropriate preventative steps; and occurred (and continued) with the knowledge of the TalkTalk Group's senior management. It also reflected the significant financial harm caused to consumers and the companies' financial gains (prior to remedying the contravention). Those factors contributed to Ofcom's judgment that penalties of those significant amounts would have appropriate deterrent effect and reflect the companies' culpability.
- 7.142 The second related to Ofcom's enforcement action in 2014 against Hutchinson 3G UK Ltd (trading as "Three UK") for contravening GC 14. Three failed to have and comply with procedures that conform to the Ofcom Approved Code of Practice for Complaints Handling (in Annex 4 to GC14) when handling complaints made by domestic and small business customers.

¹³⁸ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01051/

- 7.143 In particular, for the purposes of its complaints procedures, Three adopted a different definition of “*complaint*” to that prescribed in GC 14.4 and closed some customers’ complaint cases before they were resolved. This in turn exposed the generality of its customers to the possibility their complaints against Three were not considered in accordance with the proper procedure and improperly limited their ability to access ADR (although Three provided evidence that the substance of complaints was considered in practice in many cases). As a result, Ofcom imposed a penalty on Three of £250,000.
- 7.144 The third related to BT’s contravention of GCs 15.3 and 15.5 in respect of its failure to provide its customers with the required text relay services between April and September 2014 and for which, in March 2015, Ofcom imposed a penalty of £800,000. This reflected, amongst other things, that the contravention arose out of failures in BT’s systems and/or processes (rather than, for example, misconduct or failings of individuals) and was serious, but also the credit Ofcom gave BT for certain matters including the steps it took to come into compliance with the relevant GCs and to remedy their breach, as well its record of regulatory compliance.
- 7.145 Ofcom’s provisional view was that the present case had similar aspects to one or more of those above. Unicom’s contravention, too, arose out of company-wide flaws in standard processes and failures to take appropriate preventative steps, exposing a whole group of customers to the possibility of harm (that compliance with the relevant regulatory rules would have prevented). It, like the contraventions in those cases, had aspects which, on those bases, can be characterised as serious and systemic, and, as in the TalkTalk case, Unicom’s contravention occurred with senior managers’ knowledge.
- 7.146 Ofcom was minded to take the view that each of these similarities should be similarly reflected in the penalty imposed on Unicom. We were also mindful, however, that TalkTalk case involved direct evidence of quantifiable harm to an identified number of customers. The present case, however, was closer to Three’s and BT’s in that the contravention exposed a broad class of customers to processes and/or outcomes that were liable to cause them harm, without the same evidence of precise quantification. On that basis, and in so far as the TalkTalk, Three and BT cases provided an indicative range of the penalties that might be relevant, our provisional assessment was that the penalty in the present case should be closer to Three’s and BT’s than TalkTalk’s.
- 7.147 In its Representations, Unicom challenged this view and said none were “... *sufficiently similar to the Unicom case to justify following those penalty decisions.*” It contended that unlike in the TalkTalk case, any contravention by it was not systemic and involved falling numbers of complaints. It challenged the parallels with the Three case on the basis that, unlike Unicom’s case, it affected the generality of Three’s customers and there were no remedial steps for which Three should have been given credit. It sought to distinguish BT’s case on the basis its contravention of GCs 15.3 and 15.5 harmed all potential users of the text relay service not just BT’s customers.
- 7.148 Having considered these Representations, Ofcom notes the following points. First, Ofcom’s approach is not simply to follow previous decisions, at least in terms of setting penalty amounts. Rather, we consider each case on its facts and merits, but take account of similarities and seek to take a fair and consistent approach.
- 7.149 Second, we acknowledge, as in several places in this Confirmation Decision, that, while Unicom’s contravention had the potential to affect any one of [X] or so

customers, the groups of customers likely to have been affected were limited. In that respect, the parallels with the Three and BT cases are looser.¹³⁹

- 7.150 Third, there are nonetheless parallels in some respects with the other cases referred to and which justify a consistency of approach. Notwithstanding its Representations to the contrary, and on the bases set out above, we maintain our view that Unicom's contravention, too, arose out of company-wide flaws in standard processes and failures to take appropriate preventative steps, and had aspects which, on those bases, can be characterised as serious and systemic. It also occurred with senior managers' knowledge and gave rise to the potential to harm any one of a significant number of customers, albeit noting that that harm is not precisely quantifiable, unlike the significant financial harm in the TalkTalk case.
- 7.151 On those footings, Ofcom maintains the view that, in so far as the TalkTalk, Three and BT cases provide a guide as to the approach to assessing the penalty in this matter, they suggest a penalty in the present case closer to Three's and BT's than TalkTalk's.

Ofcom's conclusions on the penalty amount

- 7.152 Considering all of the above in the round, the penalty we have decided to impose on Unicom is £200,000.
- 7.153 Ofcom's regulatory judgment is that this penalty is appropriate and proportionate to the contravention in respect of which it is imposed. Ofcom's objectives in setting it are:
- to impose an appropriate and proportionate sanction that reflects the seriousness and significance of Unicom's contravention of GC24.3 and its culpability; and
 - to deter Unicom and other CPs from contravening the GCs, and the new GC 22.3 in particular (which replaced the previous GC24.3 in September 2014).
- 7.154 Ofcom has decided that a penalty of £200,000 secures these objectives in a proportionate way. It reflects each of the factors described in more detail above.
- 7.155 In particular, each of the following that, for the reasons set out, tend to add to the penalty and mean it should be substantially more than trivial:
- the aspects of Unicom's contravention that can be characterised as serious, systemic and substantial in dimension, having been part of Unicom's standard sales and marketing processes that had the potential to mislead any one of the [X] or so customers in respect of whom Unicom placed transfer orders in the Relevant Period;
 - the significant potential for harm that accordingly attached to the contravention;
 - the need to deter contraventions of that type and dimension and their effects on the functioning of the market;

¹³⁹ Though we note for completeness that Unicom's submission that BT's contravention affected relay users who were not BT customers is not correct. BT's obligations under GCs 15.3 and 15.5 were only to its own retail customers.

- Unicom's failure to take steps to prevent, and indeed taking steps – by including misleading statements in its standard sales and marketing processes – to give rise to, the contravention; and
- that failure being more serious in light of the previous Ofcom enquiries and enforcement action, in respect of which Unicom had taken, and later reversed, steps that would have prevented the contravention, and in light of the relevant knowledge of senior managers and the degree of intention or lack of care that, in Ofcom's view, it is reasonable to conclude drove the contravention.

7.156 Our assessment in these regards includes our consideration that, whilst the approach to the penalties imposed on Three and BT provides some guide to the approach in this case, there are aspects of Unicom's contravention not present in some respects in Three's and/or BT's cases. Most notably, the previous relevant Ofcom enquiries and enforcement action, the relevant senior management knowledge, and the degree of corporate intent and/or lack of care that Ofcom imputes to Unicom.

7.157 The penalty also takes account of the following which, in our assessment, add to the amount imposed:

- the evidence (in complaints and witness statements, and the CEO's memoranda) that prospective customers were misled in relevant respects in practice;
- the duration of the contravention, from 1 March 2013 to 8 July 2014; and
- the limitations of the action taken by Unicom for remedying the consequences of the contravention.

7.158 It also reflects that in one of the two substantial respects in which Ofcom makes findings – relating to broadband services – Unicom admitted the contraventions. In that respect Unicom did not make Representations that substantially affect the matters Ofcom took into account in our provisional assessment of the penalty. A substantial element of the provisional penalty therefore remains in place.

7.159 The amount of the penalty is, nonetheless, more limited than it might otherwise have been, and lower than Ofcom was provisionally minded to impose. We have taken full account, in particular, that in its standard sales processes Unicom sought generally to set out a means of winning customers by giving them information about the likelihood of their having to pay ETCs to their previous CPs and offering them credits (and cancellation rights) where their liability for those charges is established. In one respect, therefore, our finding is the narrower one that only some customers in particular circumstances are liable to have been misled, as set out in section 6 of this document, and the penalty we impose is smaller.

7.160 We also take account of the points that Unicom:

- did take significant steps to comply with GC24 generally (albeit not necessarily in the relevant respects);
- has taken some steps to remedy the consequences of the contravention in some cases; and
- has cooperated fully with Ofcom's investigation.

The amount is also lower than it might have been owing to the limited direct evidence of quantifiable harm to an identifiable number of Unicom customers. In our view, the penalty should, on that account, be significantly lower than that in the TalkTalk case.

- 7.161 In taking our view, we have made a regulatory judgment in the round about the appropriate and proportionate penalty to propose. In doing so, we also take a step back from looking just at individual factors set out in our penalty guidelines and make our judgment as to the overall penalty that would reflect all the factors in an appropriate and proportionate way, to secure the overall aim of deterrence.
- 7.162 In making that judgment, we also have regard to Unicom's size and relevant turnover. In particular, we note that turnover to have been [§<] in the period 1 April 2014 to 31 March 2015 (the relevant period for the purposes of section 97 of the Act). We have considered what we judge to be a sufficient penalty to impress upon Unicom (and other CPs) the scale and nature of the contravention and to incentivise compliance with what is now GC 22.3, while being mindful of the resources that are likely to be available to it in meeting the penalty.
- 7.163 We have considered whether Ofcom could achieve the same effect with a smaller penalty. Our judgment is that such a penalty for a contravention with the relevant characteristics would significantly risk being an inadequate deterrent, both to Unicom and other CPs. A smaller penalty would in our view be unlikely to impress upon them that contravening important regulatory obligations will have material consequences, and so would be unlikely to have the appropriate constraining effect on their conduct that we are seeking to achieve.

Section 8

Conclusions and action required by Unicom

Contraventions of General Condition 24

8.1 On the basis of the evidence and reasoning contained in this Explanatory Statement, Ofcom is satisfied that between 1 March 2013 and 8 July 2014, Unicom contravened GC24.3. It did so to the extent set out in this document. In consequence, Ofcom imposes on it a penalty of £200,000, which it is required to pay by 5.00pm on 26 August 2015.

Steps that should be taken by Unicom

8.2 Taking full account of the steps it has taken in these regards, and to the extent it has not already done so, the steps which Ofcom confirms must be taken by Unicom to comply with the requirements of GC24.3(a), as now reflected in the corresponding provisions of GC22, in particular, are:

- i) making all necessary changes to its policies, procedures, marketing materials and sales scripts and/or guidance to sales staff;
- ii) providing appropriate further training to sales staff; and
- iii) implementing an effective quality assurance process to monitor compliance by Unicom's agents with the requirements of the relevant GCs.

8.3 Again taking full account of the steps it has taken in these regards, and to the extent it has not already done so, the steps Ofcom confirms must be taken by Unicom to remedy the consequences arising from its contravention of GC24.3(a) are the establishment and effective implementation of schemes for:

- i) paying to all affected customers it is able to identify amounts by way of compensation for loss or damage suffered by them or in respect of annoyance, inconvenience or anxiety to which they have been put and/or by way of ex gratia payments;
- ii) allowing any customers who were misled by Unicom to cease their contract with it, regardless of the length of contract served, with no requirement to pay an early termination charge or disconnection fee and no requirement to pay any charges for services other than those the customer has used (and where the customer chooses to return to their previous CP, this would include compensation for any charges the Customer may incur in the process of returning to that provider); and
- iii) compensating customers who may otherwise have fallen into the above category but who have already returned to their previous Communications Provider and have incurred charges in doing so.

8.4 Unicom must take these steps within a reasonable period agreed with Ofcom and in any event no later than three months from the date of this decision.

List of Annexes

Annex 1	General Condition 24
Annex 2	Guidelines in respect of GC24
Annex 3	Notification of contravention of GC14.5(b) under section 94 of the Communications Act 2003, served on Unicom dated 18 July 2007
Annex 4	Unicom letter to Ofcom dated 22 June 2006
Annex 4A	Ofcom letter to Unicom dated 6 July 2006
Annex 5	Unicom Verbal Telesales Training Manual Trainee Induction Course: Part 2 (Version 3 April 2006)
Annex 6	Unicom letter to Ofcom dated 13 July 2006
Annex 7	Unicom Verbal Telesales Training Manual (Version 5 July 2006)
Annex 8	Unicom Product Knowledge – Telesales Questions and Answers (Version 5 July 2006)
Annex 8A	Ofcom letter to Unicom dated 19 July 2006
Annex 9	Enquiry Opening Letter to Unicom dated 21 February 2014
Annex 10	Enquiry Opening Letter Response dated 14 March 2014
Annex 11	Unicom letter to Ofcom dated 23 May 2014
Annex 12	Ofcom clarification letter of 25 June 2014
Annex 13	Unicom's response to Ofcom clarification letter dated 27 June 2014
Annex 14	First Information Request to Unicom dated 8 July 2014
Annex 15	Unicom's response to First Information Request dated 29 July 2014
Annex 16	Unicom letter to Ofcom dated 11 September 2014
Annex 17	Unicom letter to Ofcom dated 9 October 2014
Annex 18	Copies of 14 witness statements
Annex 19	Second Information Request to Unicom dated 9 October 2014 (see separate folder for relevant witness statement sales records)
Annex 20	Unicom's response to Second Information Request dated 16 October 2014
Annex 21	Unicom solicitor's letter to Ofcom dated 16 February 2015
Annex 22	Complaints to Ofcom's CCT regarding Unicom's sales and marketing activities during the Relevant Period
Annex 23	Analysis of Ofcom's CCT complaints data

Annex 24	Ofcom's analysis of Unicom's sales and marketing call recordings
Annex 25	Third Information Request to Unicom dated 6 March 2015
Annex 26	Anonymised copy of standard SME First Information Request and related correspondence
Annex 27	Unicom's response to Third Information Request dated 20 March 2015
Annex 28	Information Requests to CPs 1-4 featured in Table 1 in Section 4
Annex 29	The section 96A Notification, dated 30 April 2015
Annex 30	Written Representations from Unicom in response to the section 96A Notification, dated 5 June 2015
Annex 31	Transcript of the Unicom Oral Representations hearing, held on 19 June 2015
Annex 32	Copy of Anonymised Termination Fee Credits applied during the Relevant Period, received on 22 June 2015
Annex 33	Fourth Information Request to Unicom, dated 2 July 2015
Annex 34	Unicom's response to Fourth Information Request, dated 9 July 2015
Annex 35	Fifth Information Request to Unicom, dated 14 July 2015
Annex 36	Unicom's response to Fifth Information Request, dated 16 July 2015