



Notification under section 128
of the Communications Act 2003
regarding persistent misuse of an
electronic communications
network or electronic
communications services

Notice served on
HomeServe PLC by the
Office of Communications ("Ofcom")

This is the non-confidential version.
Confidential information has been redacted.
Redactions are indicated by [X].

Issued on 6 July 2011

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Section 1

Notification under section 128(1) of the Communications Act 2003

1. This notification is issued to HomeServe PLC, trading as HomeServe (“HomeServe”), registered company number **02648297** and registered address Cable Drive, Walsall, WS2 7BN.
2. This notification:
 - a. sets out Ofcom’s determination pursuant to section 128(1) of the Communications Act 2003 (the “Act”);
 - b. specifies the use made of an electronic communications network or electronic communications services by HomeServe that Ofcom considers constitutes persistent misuse; and
 - c. specifies the period during which HomeServe has an opportunity to make representations about the matters notified.
3. Words or expressions used in this notification and the accompanying explanatory statement have the same meaning as in the Act, except as otherwise defined.

Section 128 of the Act

4. Section 128(1) of the Act enables Ofcom to issue a notification to a person where Ofcom has determined that there are reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services.
5. Section 128(5) states that “misuse” occurs if the effect or likely effect of use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety or if the network or service is used to engage in conduct the effect or likely effect of which is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety.
6. Section 128(6) defines persistent misuse as any case in which misuse is repeated on a sufficient number of occasions for it to be clear that the misuse represents a pattern of behaviour or practice, or recklessness as to whether persons suffer annoyance, inconvenience or anxiety.

Ofcom’s determination

7. Ofcom hereby determines that there are reasonable grounds for believing that, between 1 February 2011 and 21 March 2011 (the “relevant period”), HomeServe persistently misused an electronic communications network or electronic communications services on the following basis;
 - a. HomeServe misused the network or service in accordance with section 128(5)(a) of the Act as the effect or likely effect of its use has been to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety; and

- b. the misuse was persistent as set out in section 128(6)(a) of the Act as it was repeated on a sufficient number of occasions for it to be clear that the misuse represented a pattern of behaviour or practice or recklessness as to whether persons suffer annoyance, inconvenience or anxiety.
8. The reasons for Ofcom's determination are as set out below and further explained in the explanatory statement and annexes accompanying this notification.

The use Ofcom considers to be persistent misuse

9. In making this determination and in accordance with section 131 of the Act, Ofcom has had regard to its *Revised statement of policy on the persistent misuse of an electronic communications network or service 2010* (the "guidelines"), published on 1 October 2010¹.
10. Accordingly, Ofcom considers that there are reasonable grounds for believing that HomeServe, by virtue of its use of an Automated Calling System (ACS), has persistently misused an electronic communications network or electronic communications services on the following basis by:
- exceeding an abandoned call rate of three percent of live calls over a 24 hour period on [X] separate occasions during the relevant period; and
 - where a call has been identified by Answer Machine Detection ("AMD") equipment as being picked up by an answer machine (including AMD false positives), making one or more repeat calls to that specific number within the same 24 hour period on [X] x 24 hour periods during the relevant period.
11. Ofcom considers that the effect or likely effect of such use of the network or service has been to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety and this use constitutes "misuse" under the Act.
12. Ofcom also considers that the misuse is persistent as the misuse has been repeated on a sufficient number of occasions for it to be clear that the misuse represents:
- 'a pattern of behaviour or practice'. [X] call centres made calls on behalf of HomeServe during the relevant period. At one of these call centres, (operated by [X]²) the abandoned call rate exceeded three per cent every day that automated dialling was in operation ([X]). The cumulative abandoned call rate at this call centre during the relevant period was [X] per cent.
 - 'recklessness as to whether persons suffer annoyance, inconvenience or anxiety'. By making one or more repeat calls using AMD equipment to a specific number previously identified as being picked up by an answer machine within the same 24 hour period during the relevant period, HomeServe has engaged in conduct which risks persons suffering repeat silent calls within 24 hours, which conduct is reckless as to whether persons suffer annoyance, inconvenience and anxiety. At the call centre operated by [X] on behalf of HomeServe, the 24 hour policy was not complied with on [X] out of the [X] where automated dialling was in operation during the relevant period. This included periods of [X] and [X] consecutive days. The number of calls made which did not adhere to the 24 hour policy was [X] (out

¹ <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf> .

² [X].

of [X] total calls made using AMD equipment). In some instances, the same number was called five times after it had initially been classified as a being picked up by an answer machine.

Representations concerning this notification

13. HomeServe has until 5pm on **10 August 2011** (the “deadline”) to make representations to Ofcom about the matters set out in this notification as explained in the accompanying explanatory statement and to take steps for securing that the misuse is brought to an end and is not repeated and remedying the consequences of the notified misuse.

Other matters

14. Following expiry of the deadline, if Ofcom is satisfied that HomeServe has in one or more of the notified respects persistently misused an electronic communications network or electronic communications services and has not taken all such steps as Ofcom considers appropriate for securing that the misuse is brought to an end and is not repeated and remedying the consequences of the notified misuse, then Ofcom may issue to HomeServe a further notification under section 129 of the Act.

15. If HomeServe has, in one or more of the ways set out in this notification, persistently misused a network or services, Ofcom may impose a penalty on HomeServe under section 130 of the Act.

Interpretation

16. Annex 1 provides definitions of the relevant terms used in the notification and accompanying explanatory statement.

Lynn Parker
Director of Consumer Protection

6 July 2011

Section 2

Explanatory statement

Summary

2.1 This explanatory statement sets out Ofcom's reasons for its determination in paragraphs 9 to 12 of the attached notification ("the notification") that HomeServe PLC, trading as HomeServe ("HomeServe") has persistently misused an electronic communications network or electronic communications services.

Abandoned and silent calls

2.2 Most abandoned and silent calls are not generated with malicious or mischievous intent but by automated calling systems (ACS), used by call centres.

2.3 Use of ACS (also known as "power diallers" or "predictive diallers") means that calls can be initiated without the need for human intervention. If a telephone number is dialled by an ACS, the call is answered by the called person but there is no call centre agent available to handle it or presented with the opportunity to handle it, then the call will be terminated by the ACS and it becomes an abandoned call. In this instance, the recipient of an abandoned call should – as a minimum – hear a recorded information message identifying the caller.

2.4 A silent call is a type of abandoned call where the person called hears nothing on answering the phone and has no means of establishing whether anyone is at the other end. Silent calls may occur for a variety of reasons. They can occur when an ACS user does not include an information message in the scenario described above or as the result of a handling error by a call centre agent.

2.5 Silent calls can also be the result of ACS technology referred to as Answer Machine Detection (AMD) technology³. The technology is not 100 per cent accurate. It may mistake a consumer for an answer machine. The user therefore disconnects a call without playing a recorded information message. This is referred to as an AMD false positive⁴. The way AMD technology works means that if a consumer is mistaken for an answer machine once, it is likely that this will happen again. This means that they may receive repeat silent calls as a call centre continues in its attempts to speak to a consumer. This type of systematic, repeated mistake is unlikely to be always down to human error (see 1.15, *Tackling abandoned and silent calls*).

2.6 Ofcom – through its Consumer Complaints Team (CCT) – received over 9000 complaints about silent calls in 2010. Research undertaken in March 2011 indicated that of consumers who experienced silent calls on a fixed-line phone in the preceding

³ AMD may be used in conjunction with ACS technology to disconnect calls made to answer machines before they are put through to call centre agents. This is significant because a typical daily proportion of ACS users' calls made to answer machines lies between 30 per cent and 50 per cent of all outbound calls. Therefore removing these calls can lead to increased contact time between call centre agents and live individuals and also lower operational costs.

⁴ An AMD false positive is when an AMD device mistakenly identifies a call as being answered by answer machine whereas, in reality, it has been answered by a live individual (A1.20, the guidelines).

six months, three quarters considered them an inconvenience and over half were concerned about their receipt⁵.

Legislative framework

2.7 Section 128(1) of the Act enables Ofcom to issue a notification to a person where it has reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services.

2.8 Section 128(5) of the Act defines “misuse” as follows:

“(5) For the purposes of this Chapter a person misuses an electronic communications network or electronic communications services if –

(a) the effect or likely effect of his use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety; or

(b) he uses the network or service to engage in conduct the effect or likely effect of which is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety.”

2.9 Section 128(6) defines what constitutes “persistent” misuse as follows:

“(6) For the purposes of this Chapter the cases in which a person is to be treated as persistently misusing a network or service include any case in which his misuse is repeated on a sufficient number of occasions for it to be clear that the misuse represents –

(a) a pattern of behaviour or practice; or

(b) recklessness as to whether persons suffer annoyance, inconvenience or anxiety.”

2.10 Section 128(7) provides further guidance on determining whether misuse occurring on a number of different occasions is persistent as follows:

“(7) For the purpose of determining whether misuse on a number of different occasions constitutes persistent misuse for the purposes of this Chapter, each of the following is immaterial –

(a) that the misuse was in relation to a network on some occasions and in relation to a service on others;

(b) that different networks or services were involved on different occasions; and

(c) that the persons who were or were likely to suffer annoyance inconvenience or anxiety were different on different occasions.”

⁵ Consumer Concerns Tracker, Kantar Media omnibus, March 2011. Survey participants were asked separately whether silent calls caused inconvenience and concern.

2.11 Section 129 provides that Ofcom may issue a further notification (known as an “enforcement notification”) in specified circumstances, as follows:

“(1) This section applies where –

- (a) a person (“the notified misuser”) has been given a notification under section 128;
- (b) Ofcom have allowed the notified misuser an opportunity of making representations about the matters notified; and
- (c) the period allowed for the making of the representations has expired.

(2) Ofcom may give the notified misuser an enforcement notification if they are satisfied –

- (a) that he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; and
- (b) that he has not, since the giving of the notification, taken all such steps as Ofcom consider appropriate for –
 - (i) securing that his misuse is brought to an end and is not repeated; and
 - (ii) remedying the consequences of the notified misuse.

(3) An enforcement notification is a notification which imposes a requirement on the notified misuser to take all such steps for –

- (a) securing that his misuse is brought to an end and is not repeated, and
- (b) remedying the consequences of the notified misuse,

as may be specified in the notification.”

2.12 If the notified misuser fails to comply with the section 129 enforcement notification, then under section 129(6) Ofcom can enforce compliance with the enforcement notification by way of civil proceedings.

2.13 Section 130 provides that Ofcom may also impose penalties for persistent misuse, as follows:

“(1) This section applies (in addition to section 129) where –

- (a) a person (“the notified misuser”) has been given a notification under section 128;
- (b) Ofcom have allowed the notified misuser an opportunity of making representations about the matters notified; and

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

(2) Ofcom may impose a penalty on the notified misuser if he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.

(3) Ofcom may also impose a penalty on the notified misuser if he has contravened a requirement of an enforcement notification given in respect of the notified misuse.

(4) The amount of penalty imposed is to be such amount not exceeding £2,000,000⁶ as Ofcom determine to be –

(a) appropriate; and

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

(5) In making that determination Ofcom must have regard to –

(a) any representations made to them by the notified misuser;

(b) any steps taken by him for securing that his misuse is brought to an end and is not repeated; and

(c) any steps taken by him for remedying the consequences of the notified misuse."

2.14 Under section 131 Ofcom has a duty to publish a statement of its general policy with respect to the exercise of its powers under sections 128 to 130 of the Act. Ofcom must have regard to the statement of general policy in exercising these powers⁷.

Ofcom's policy

2.15 Ofcom's statement of general policy (required by section 131 of the Act) was published on 1 October 2010 as the *Revised Statement of policy on the persistent misuse of an electronic communications network or service 2010* (the "guidelines"). The guidelines followed previous statements in 2006⁸ and 2008⁹ and were under consultation between 1 June 2010 and 27 July 2010¹⁰.

2.16 The guidelines provide examples of the types of behaviour that Ofcom considers may be forms of persistent misuse. One such example is making abandoned calls as a result of the use of ACS. In the document *Tackling abandoned and silent calls* (the regulatory statement in which the guidelines were published), Ofcom notes that,

⁶ Section 130(4) of the Act as amended by the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010, SI 2010/2291, section 2(1).

<http://www.legislation.gov.uk/ukxi/2010/2291/article/2/made>

⁷ Communications Act 2003 section 131(4).

⁸ http://stakeholders.ofcom.org.uk/binaries/consultations/misuse/statement/misuse_state.pdf

⁹ http://stakeholders.ofcom.org.uk/binaries/consultations/persistent_misuse/statement/misuse_statement.pdf

¹⁰ *Tackling abandoned and silent calls*

<http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/summary/condoc.pdf>

‘Abandoned and silent calls will almost invariably result in consumer harm, which may range from inconvenience and annoyance through to genuine anxiety¹¹’.

2.17 In deciding in any case whether to take enforcement action, Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment. Ofcom will also take account of steps taken by ACS users to reduce the degree of consumer harm that abandoned or silent calls cause.

2.18 In the above context, section three of the guidelines sets out procedures that companies using ACS can adopt which, taken as a package, can reduce the consumer detriment and/or the degree of concern that silent or abandoned calls cause. These procedures are:

- a) the abandoned call rate shall be no more than three percent of live calls per campaign (i.e. across call centres) or per call centre (i.e. across campaign) over a 24 hour period;

how the abandoned call rate is calculated will depend on whether or not AMD is used;

- i) AMD users must include a reasoned estimate of AMD false positives when calculating an abandoned call rate. This is on the premise that AMD false positives are abandoned calls and should be recorded as such;
- b) in the event of an abandoned call (other than an AMD false positive), a very brief recorded information message must start playing no later than two seconds after the telephone has been picked up or within two seconds of the call being answered¹²;

the information message must contain at least the following information:

- i) the identity of the company on whose behalf the call was made (which will not necessarily be the same company that is making the call);
 - ii) details of a *Special Service* (080 – no charge) or a *Special Services* basic rate (0845 only) or a *Geographic Number* (01/02) or a *UK wide Number at a geographic rate* (03) number¹³ the called person can contact so they have the possibility of declining to receive further calls from that company; and
 - iii) the information message must include no marketing content and must not be used as an opportunity to market to the called person.
- c) calls which are not answered must ring for a minimum of 15 seconds before being terminated;
- d) when an abandoned call (other than an AMD false positive), has been made to a particular number, any repeat calls to that number in the following 72 hours may only be made with the guaranteed presence of a live operator (the “72 hour policy”);

¹¹ 1.6, *Tackling abandoned and silent calls*

¹² ‘within two seconds of the call being answered’ means either (i) no later than two seconds after the telephone has been picked up; or (ii) no later than two seconds after an individual begins to speak (or ‘start of salutation’); or whichever is more applicable to the technology deployed.

¹³ As defined in the National Telephone Numbering Plan.

<http://stakeholders.ofcom.org.uk/binaries/telecoms/numbering/numplan201210.pdf>

- e) when a call has been identified by AMD equipment as being picked up by an answer machine (including AMD false positives), any repeat calls to that number within the same period may only be made with the guaranteed presence of a live operator (the “24 hour policy”);
- f) for each outbound call a CLI number must be presented to which a return call may be made which is either a geographic number or a non-geographic number adopted as a Presentation Number which satisfies the Ofcom *Guide to the use of Presentation numbers*¹⁴;
- g) any call made by the called person to the contact number provided must not be used as an opportunity to market to that person, without that person’s consent; and
- h) records must be kept for a minimum period of six months that demonstrate compliance with the above procedures.

Ofcom’s programme of monitoring and enforcement

- 2.19 On 22 June 2006 Ofcom opened an own-initiative programme of monitoring and enforcement of rules preventing annoyance caused to consumers by silent and abandoned calls (the “programme”). The programme has been ongoing since that time.
- 2.20 In December 2010, we published an open letter¹⁵ about the new 24 hour policy, the threat of enforcement action should this and other elements of our persistent misuse policy not be complied with and the increased maximum penalty level for persistent misuse which came into effect on 25 September 2010¹⁶.

The investigation

Background

- 2.21 As a part of the programme, Ofcom identified that [redacted] of the complaints received by the CCT during the relevant period, were from consumers alleging that they had received silent calls either from HomeServe or from numbers related to HomeServe. Specific complaints received by Ofcom, which we believe relate to calls made on behalf of HomeServe indicated the annoyance, inconvenience and anxiety that repeat silent calls cause:

[redacted].

- 2.22 In light of these complaints Ofcom decided to conduct an investigation into HomeServe’s compliance with the guidelines.

Information gathering – Section 135 information Request

- 2.23 Ofcom issued an Information Request (the “request”) under section 135 of the Act to HomeServe on 12 April 2011¹⁷.

¹⁴ See Annex 1 <http://stakeholders.ofcom.org.uk/telecoms/policy/calling-line-id/caller-line-id/#a>

¹⁵ http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/acs_users.pdf

¹⁶ <http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=415608&NewsAreaID=2>

¹⁷ See Annex 2.

2.24 HomeServe provided a response to the request on 26 April 2011 (the “response”). The information provided by HomeServe in its response included:

- a document that provided a written reply to each applicable question in the response;
- the aggregated abandoned call rates for every 24 hour period in the relevant period, across all call centres/all campaigns;
- data underlying the aggregated abandoned call rates – presented by each call centre;
- data on all calls made using AMD technology during the relevant period;
- a paper titled, ‘*False Positive Testing Report*’ written by [X]¹⁸ for HomeServe and dated 21 April 2011. This paper outlined the testing methodology applied by [X] to establish a reasoned estimate of AMD false positives; and
- an internal HomeServe document titled, ‘*Compliance Standards for Outbound Calling*’. This document sets out the standards HomeServe and its outsource partners are expected to follow when using ACS to make outbound calls to UK recipients.

2.25 A summary of HomeServe’s response is provided in Annex 3.

Ofcom’s assessment and decision

2.26 In order to exercise its power under section 128(1) to issue a notification, Ofcom must be satisfied that there are reasonable grounds for believing:

- a) that a person has used an electronic communications network or electronic communications services;
- b) that the effect or likely effect of that use, or of conduct arising from that use, is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety so as to amount to misuse; and
- c) that the misuse is persistent in that it represents either a pattern of behaviour or practice, or recklessness as to whether persons suffer annoyance, inconvenience or anxiety.

2.27 The following section sets out the basis on which Ofcom has decided to issue the notification to HomeServe, taking into account the elements outlined above.

Use of an electronic communications network or electronic communications services

2.28 The Act defines an “electronic communications network” as:

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

¹⁸ [X] is an independent auditor hired by HomeServe to assess AND accuracy. We note that ACS users may use independent auditors in A1.44 of the guidelines.

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

(i) apparatus comprised in the system;

(ii) apparatus used for the switching or routing of the signals; and

(iii) software and stored data.”¹⁹

2.29 The Act defines an “electronic communications service” as:

“...a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except so far as it is a content service.”²⁰

2.30 The Act defines “signal” as including:

“(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.”²¹

2.31 In its response, HomeServe stated that a total of [X] call centres made calls for it using ACS in the relevant period. HomeServe therefore uses voice telephony to make outbound calls to users of publicly available telephony services²². Making these calls constitutes use of an electronic communications network (‘ECN’) as defined in the Act and use of electronic communications services (‘ECS’) as defined in the Act.

2.32 Ofcom therefore considers that, for the reasons outlined above, there are reasonable grounds for believing that HomeServe has used an ECN and ECSs as defined in the Act.

Misuse

2.33 As stated above, section 128(5) of the Act sets out what constitutes a misuse of an ECN or ECS: that is, the effect or likely effect of that use, or of conduct arising from that use, is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety so as to amount to misuse.

2.34 Evidence gathered during Ofcom’s investigation revealed that HomeServe made abandoned calls during the relevant period. For the reasons set out in paragraph 2.6, and as set out in *Tackling abandoned and silent calls*, it is Ofcom’s view that the effect or likely effect of making abandoned and silent calls is to cause other persons to suffer unnecessary annoyance, inconvenience or anxiety. Ofcom therefore considers that HomeServe’s use of an ECN or ECSs in this case constitutes misuse.

2.35 The guidelines set out details of procedures that can be adopted which may reduce the consumer detriment and/or the degree of concern that silent or abandoned calls

¹⁹ Section 32(1) of the Act.

²⁰ Section 32(2) of the Act.

²¹ Section 32(10) of the Act.

²² Guidelines paragraph A1.7-A1.8.

cause (see 2.19 above). Evidence provided in its response suggests that HomeServe failed to adhere to these procedures during the relevant period, by:

- i) Making an excessive number of abandoned calls.
- ii) Failing to guarantee that when return calls were made to numbers previously identified that day (within a 24 hour period) by AMD equipment as being picked up by an answer machine, a live operator was on hand to take the call (i.e. adherence to the 24 hour policy²³).

2.36 Ofcom believes that there are reasonable grounds for believing that the effect or likely effect of HomeServe's use of an ECN and ECS to make abandoned calls in a way contrary to the procedures in the guidelines – as set out above – has been to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety so as to amount to misuse.

The misuse is persistent

2.37 As set out in paragraphs 2.9 and 2.10, sections 128(6) and 128(7) of the Act set out the basis on which misuse may be considered persistent.

2.38 Properly managed call centres will strive to ensure that they do not generate more calls than they can handle. A persistent failure to do so will constitute an act of persistent misuse and may lead to the issue of a section 128 notification.

2.39 The guidelines also set out that misuse becomes persistent when the behaviour in question is repeated often enough to represent a pattern of behaviour or practice or it is clear that the misuse is reckless.

2.40 Ofcom is of the view that there are reasonable grounds for believing that in this case the misuse was repeated often enough to represent a pattern of behaviour or practice. The guidelines state that although what constitutes a cycle of repetitive behaviour will need to be determined on a case by case basis, it is likely to require a minimum of three instances of the conduct in question.

2.41 In this case, Ofcom considers that HomeServe's misuse was persistent because:

- i) One of its outsourced call centres²⁴ had an abandoned call rate that was above three per cent for [redacted] of the [redacted] x 24 hour periods that the request covered (see Annex 4). The remaining seven periods were Sundays – a day on which the call centre did not make any calls during the relevant period.

According to its response, HomeServe only became aware that it was in breach of the guidelines after AMD false positive testing undertaken by [redacted] on 9 March 2011 revealed a pro-rated false positive rate of [redacted] per cent²⁵. Adding the resultant reasoned estimate of AMD false positives to known abandoned calls produced an overall abandoned call rate in excess of three per cent. The aggregate abandoned call rate at this call centre during the relevant period was [redacted] per cent. HomeServe said that it disabled the use of AMD technology at this call centre once it had established that adding a reasoned estimate of AMD false

²³ Guidelines, A1.55.

²⁴ Operated by [redacted].

²⁵ AMD false positive rate analysis undertaken by [redacted] gave a reasoned estimate of [redacted]. Analysis of calling data by [redacted] suggests that AMD equipment was turned on [redacted] of the time (based on half hourly splits). Therefore [redacted] used a *pro rata* rate of [redacted] across all days of the relevant period.

positives based on sample based testing to known abandoned calls produced an abandoned call rate above the three per cent threshold.

Prior to [redacted] testing, the call centre had been using a manufacturer's estimate to calculate a reasoned estimate of AMD false positives. The response did not indicate what this estimate was, nor did it indicate what the abandoned call rates were while it was using this estimate.

This outsourced call centre and an in-house operation were the only call centres calling on behalf of HomeServe that were using AMD technology during the relevant period. The abandoned call rates for the in-house operation did not exceed three per cent during the relevant period. The aggregate abandoned call rate for this for this call centre was one per cent. The abandoned call rates for the other [redacted] call centres calling on behalf of HomeServe did not exceed three per cent during the relevant period.

- ii) A total of [redacted] calls (out of [redacted]) calls were made by the outsourced call centre.

HomeServe attributed these calls to one individual at the call centre, who lacked the required training. HomeServe noted that this was noticed quickly through normal compliance review procedures and as a result, new training and procedures have been put in place to ensure that it will not recur.

- 2.42 Ofcom considers that there are reasonable grounds for believing that the misuse engaged in by HomeServe was persistent in that it was repeated on a sufficient number of occasions for it to be clear that the misuse represents a pattern of behaviour or practice as set out in section 128(6)(a) of the Act.

Other matters set out in the notification

- 2.43 HomeServe has until 5pm on **10 August 2011** (the "deadline") to make representations to Ofcom about the matters set out in this notification as explained in this explanatory statement and to take all such steps for securing that the misuse is brought to an end and is not repeated and remedying the consequences of the notified misuse.
- 2.44 Following expiration of the deadline, if Ofcom is satisfied that HomeServe has in one or more of the notified respects persistently misused an ECN or ECS and has not taken all such steps as Ofcom considers appropriate for securing that the misuse is brought to an end and is not repeated and remedying the consequences of the notified misuse then Ofcom may issue to HomeServe a further notification under section 129 of the Act.
- 2.45 If HomeServe has, in one or more of the ways set out in this notification, persistently misused a network or services, Ofcom may impose a penalty on HomeServe under section 130 of the Act and having regard to the Penalty guidelines published on 13 June 2011 under section 392 of the Act²⁶. The maximum penalty that may be imposed is £2,000,000.²⁷

²⁶ <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

²⁷ The maximum level of penalty in section 130(4) of the Act was increased from £50,000 to £2m in September 2010, as a result of an order made by the Secretary of State pursuant to section 130(9) of the Act – see *The Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service)*, SI 2010/2291, section 2(1).

Annex 1

Terms defined

- A1.1 We have defined the terms below which are relevant to calculating the abandoned call rate.
- A1.2 **24 hour period** means between midnight and midnight on a calendar day.
- A1.3 An **abandoned call** is where a connection is established but terminated by its originator in circumstances where the call is answered by a *live individual*.
- A1.4 The **abandoned call rate** is the number of *abandoned calls* as a proportion of total *live calls*. It must include *a reasoned estimate of AMD false positives* where AMD is used and may exclude *a reasoned estimate of calls abandoned to answer machines*.
- A1.5 An **AMD false negative** is a call answered by an answer machine but mistakenly categorised as a live call. For the purposes of calculating an abandoned call rate, these should be removed to ensure *the reasoned estimate of AMD false positives* is not applied to a much bigger total of answer machine calls (i.e. they are not recorded as *live calls*).
- A1.6 An **AMD false positive** is when an AMD device mistakenly identifies a call as being answered by an answer machine whereas, in reality, it has been answered by a live individual.
- A1.7 A **campaign** is identified by the use of a single call script to make a single proposition to a single target audience. A campaign can be run from more than one call centre over a 24 hour period. If calls are made for identifiable purposes with a single script to a single target audience, then Ofcom will continue to regard this as a campaign. In the event of an investigation, Ofcom will consider the facts of each case on its own particular merits.
- A1.8 **Guaranteed presence of a live operator** means to ensure that a live operator is available if a repeat call is made during the specific period. That is, when an ACS user makes a call, they can guarantee a consumer who picks up the call will be connected to a call centre agent.
- A1.9 A **live call** is where a connection is established and the call is answered by a *live individual*. This includes *live calls to a live operator* and *abandoned calls*.
- A1.10 A **live individual** refers to a person who is called by an ACS and/or AMD user.
- A1.11 A **live call to a live operator** is a call where a live operator is put through to a live individual. A *live call to a live operator* does not include calls made by ACS and/or AMD users that are answered by answer machines.
- A1.12 A **reasoned estimate of AMD false positives** is an estimate of the number of AMD false positives as a proportion of total live calls.
- A1.13 A **reasoned estimate of calls abandoned to answer machines** is an estimate of the number of ACS identified abandoned calls that have actually been answered by an answer machine. We will assess the methodology used to factor in the number

of calls abandoned to answer machines into an abandoned call rate on a case by case basis.

A1.14 A **silent call** is a type of abandoned call where the person called hears nothing on answering the phone and has no means of establishing whether anyone is at the other end.

A1.15 An **unconnected call** may also be terminated after a predetermined period (i.e. greater than 15 seconds) because it has not been answered, perhaps because no one is there to take it. Within industry terminology and for the purposes of the Revised Statement such calls are not classified as abandoned calls. This is because an abandoned call is one which has been picked up by a live individual.

Annex 2

Questions from formal information request sent to HomeServe under Section 135 of the Act

Questions

Call centres and campaigns

- 1) Please provide the following details of the call centre(s) which made calls to UK consumers on behalf of Homeserve during the relevant period:
 - i. the call centre name or given identity;
 - ii. the address of the call centre;
 - iii. whether or not each call centre was operated directly by Homeserve or on behalf of Homeserve by a third party;
 - iv. the name and manufacturer of the ACS equipment used by the call centre; and
 - v. where applicable, the name and manufacturer of the Answer Machine Detection (“AMD”) hardware and/or software used by the call centre. In addition, please provide copies of the user guidance that accompanies each AMD device used.
- 2) For each campaign conducted during the relevant period, please specify:
 - i. the campaign name or title; and
 - ii. the call centre(s) which worked on the campaign.

Call data

- 3) Please supply:
 - i. the data as set out in Template 1 below, broken down by each 24 hour period during the relevant period. The data should be provided electronically by means of an Excel spreadsheet which contains functioning formulae rather than ‘hard-coded’ numbers.

Please provide one worksheet per call centre, making clear which campaign(s) the data refers to. Where AMD was not used, please complete columns **A to D only**;
 - ii. evidence to substantiate the reasoned estimate of AMD false positives incurred where AMD was used at a call centre²⁸; and

²⁸ Refer to A1.35 – A1.46 of the revised guidelines. How we will assess the robustness of testing used to determine a reasoned estimate of AMD false positives is outlined in A1.40 – A1.43.

- iii. the data as set out in Template 2 below, giving the aggregated figures for HomeServe as a whole per 24 hour period during the relevant period, incorporating all calls made by all call centres across all campaigns.

Template 1:

Call centre 1 / Campaign X (and so on per call centre)

	A	B	C	D	E	F	G
	Date	Number of calls passed to a live operator	Number of abandoned calls (excluding reasoned estimate of false positives)	Abandoned call rate (excluding reasoned estimate of false positives) (%)	Actual false positives figure or reasoned estimated number of false positives	Total number of abandoned calls (including reasoned estimate of false positives) ²⁹	Abandoned call rate including false positives (%) ³⁰
1	x/x/11						
2	y/x/11						
3	z/x/11						

Template 2:

Aggregated figures (one sheet incorporating all call centre totals)

	A	B	C	D	E	F	G
	Date	Total number of calls passed to a live operator	Total number of abandoned calls (excluding reasoned estimate of false positives)	Aggregated abandoned call rate (excluding estimated number of false positives) (%)	Actual false positives figure or aggregated reasoned estimated number of false positives	Total number of abandoned calls (including reasoned estimate of false positives) ³¹	Aggregated Abandoned call rate including false positives (%) ³²
1	x/x/11						
2	y/x/11						
3	z/x/11						

Recorded information message

²⁹ This column will therefore be the sum of columns C and E.

³⁰ This calculation should therefore be performed using the following formula: column F / (column F + column B) x 100/1.

³¹ This column will therefore be the sum of columns C and E.

³² This calculation should therefore be performed using the following formula: column F / (column F + column B) x 100/1.

- 4) Please specify if, within two seconds of a call being answered by an individual³³ and before being terminated or released by the ACS, HomeServe, in each call centre and for each campaign during the relevant period, provided:
- i. a brief recorded information message to inform the called party of the identity of the company on whose behalf the calls was made; and
 - ii. details of a *Special Services* (080 – no charge) or a *Special Services* basic rate (0845 only) or a *Geographic Number* (01/02) or a *UK wide Number at a geographic rate* (03) number³⁴ the called person can contact so they have the possibility of declining to receive further marketing calls from the company.
- 5) Please provide the script(s) of the recorded message referred to in question 4, per call centre or per campaign, as appropriate.

Call duration

- 6) Please state the length of time, in seconds, that the ACS was programmed to ring for before the call was terminated as unanswered, per call centre or per campaign, as appropriate.

Calls within 72 hours of an abandoned call

- 7) Please specify what procedures, if any, HomeServe has in place to ensure that, in instances where an abandoned call is made to a number, any subsequent call to that number in the following 72 hours is made with the guaranteed presence of a live operator. Again, please provide this information per call centre or per campaign, as appropriate.

24 hour policy

- 8) Please specify what procedures, if any, HomeServe has in place to ensure that, in instances where a call is made to a number and that call is identified by AMD technology as being answered by an answer machine, any subsequent call to that number that calendar day is made with the guaranteed presence of a live operator. Again, please provide this information per call centre or per campaign, as appropriate.

Please supply the data as set out in Template 3 below, on all calls made using AMD technology between midnight and midnight on a calendar day:

- (i) Please either provide the information in chronological order, or specify the time of each call.
- (ii) Please provide one worksheet per call centre per day, making clear which campaign(s) the data refers to.

³³ See A1.51 of the revised guidelines for an explanation of 'within two seconds of the call being answered'.

³⁴ As defined in the National Telephone Numbering Plan

<http://stakeholders.ofcom.org.uk/binaries/telecoms/numbering/numplan201210.pdf>

Template 3:

	A	[B]	C	D
	Date	[Time of call]	CLI dialled	Answer phone detected? (Y/N)
1	x/x/11			
2				
3				

Caller Line Identification

- 9) Please confirm whether Homeserve displayed a calling line identification (CLI) number to which a return call may be made, for each outgoing call during the relevant period. Please provide the CLI number/s in question. Again, please provide this information per call centre or per campaign where appropriate.

Consumer complaints and compliance responsibility in relation to abandoned calls

- 10) Please:
- i. describe the arrangements that have been put in place by Homeserve to ensure compliance in relation to outbound calling activity. Include in this description an explanation of the allocation of managerial responsibility for compliance; and
 - ii. outline the procedures that Homeserve has in place, if any, to manage consumer complaints which relate specifically to its outbound call activities. This should include a full description of the remedial actions that Homeserve may undertake or offer to undertake for persons who have complained about receiving abandoned and / or silent calls from HomeServe.

Annex 3

Summary of relevant information and evidence

Part 1 – HomeServe		
Company	HomeServe PLC	
Address	Cable Drive WALSALL WS2 7BN	
Company number	02648297	
Short description	Home emergency insurance and repairs	
Use of ACS	During the relevant period for the notification HomeServe operated [X] campaigns conducted by [X] call centres, all using ACS to make outbound calls. AMD was used in [X] call centres (the In-house operations and an outsourced call centre – [X]).	
Non-compliance	<ul style="list-style-type: none"> • [X] x 24 hour periods of abandoned call rates above three per cent; and • Non-compliance with 24 hour policy at [X] call centre that used AMD ([X]). A total of [X] calls were made which did not adhere to the 24 hour policy. 	
Part 2 - Persistent misuse		
Individual elements considered in Ofcom’s assessment of whether HomeServe’s conduct during the relevant period amounted to persistent misuse		
3(i)	Abandoned call rate per call centre per campaign	The outsourced call centre exceeded the three per cent abandoned call rate on [X] separate occasions. Every instance of exceeding three per cent occurred when AMD was used.
3(ii)	Evidence to substantiate the reasoned estimate of AMD false positives incurred when AMD was used at a call centre	Presented in paper titled ‘False Positive Testing Report’ written by [X] and overseen by [X]. Both are independent auditors employed by HomeServe.
3(iii)	Aggregated abandoned call rate, per 24 hour period	1.2 per cent.
4(i)	Information message is played within two seconds from pickup/ start of salutation in the event of an abandoned call	HomeServe confirmed that information messages were played in the event of an abandoned call as stipulated by the guidelines.
4(ii)	An appropriate number provided in information message	0845 used.
5	Call scripts used in	‘HomeServe attempted to call you today but

	information messages	unfortunately we were unable to connect our call with yourself. Please do not be alarmed by this message but according to UK regulations we are required to notify you of our call in the form of a recorded message. Our telephone number is [X]. We will attempt to contact you again in the future. Please accept our apologies for any inconvenience that this has caused.'
6	Length of time calls were left to ring before termination	All of the call centres left calls to ring for a minimum of 15 seconds before being terminated (between 18 and 40 seconds based on call centre).
7	A process in place which ensured that repeat calls which were made within 72 hours of an abandoned call made by a live agent.	Demonstrated measures in place to ensure that repeat calls made within 72 hours of an abandoned call were made by a live agent and verified by [X].
8	24 hour policy	<p>AMD equipment was used by [X] call centres (the In-house operations and [X]) across [X] campaigns during the relevant period.</p> <p>[X] did not comply with 24 hour policy. Non-compliance explained by operational team over-riding instruction not to recall AMD detects in a calendar day. Attributed to one individual with insufficient training.</p> <p>The dialler used by the In-house operation call centre has been reconfigured to prevent a call back to a record tagged as an answer machine on the same date.</p>
9	Presentation of a CLI presented to which a return call may be made	Confirmed.
10(i)	Ensuring compliance	Included within Compliance Standard document in response which was overseen by [X].
10(ii)	Managing complaints	Primarily managed through return calls to abandoned/silent calls. Process in place to ensure that complainants are added to Do Not Call list. Complaints received by phone, email, letter all responded to in same way.
	Retention of adequate records which demonstrated compliance with the above procedures	Demonstrated.
Part 3 - Ofcom's investigation		
Date programme began		22 June 2006

Why information requested	HomeServe was identified potentially generating silent calls through 38 complaints received by Ofcom over the relevant period.
Date of information requests	12 April 2011
Date information received	26 April 2011

Annex 4

Relevant period outsourced call centre statistics

A	B	C	D	E	F	G
Date	Number of calls passed to a live operator	Number of abandoned calls (excluding reasoned estimate of false positives)	Abandoned call rate (excluding reasoned estimate of false positives) (%)	Actual false positives figure or reasoned estimate of number of false positives	Total number of abandoned calls (including reasoned estimate of false positives)	Abandoned call rate including false positives (%)
01/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
02/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
03/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
04/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
05/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
06/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
07/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
08/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
09/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
10/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
11/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
12/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
13/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
14/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
15/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
16/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
17/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
18/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
19/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
20/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
21/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
22/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
23/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
24/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
25/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
26/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
27/02/2011	[X]	[X]	[X]	[X]	[X]	[X]
28/02/2011	[X]	[X]	[X]	[X]	[X]	[X]

Notification to HomeServe under section 128(1) of the Communications Act 2003

01/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
02/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
03/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
04/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
05/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
06/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
07/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
08/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
09/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
10/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
11/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
12/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
13/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
14/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
15/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
16/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
17/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
18/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
19/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
20/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
21/03/2011	[X]	[X]	[X]	[X]	[X]	[X]
Aggregate totals	[X]	[X]	[X]	[X]	[X]	[X]

Annex 5

AMD calls made which did not adhere to the 24 hour policy: outsourced call centre

Date	Total calls made using AMD equipment	Calls not adhering to the 24 hour policy
1 February 2011	[X]	[X]
2 February 2011	[X]	[X]
3 February 2011	[X]	[X]
4 February 2011	[X]	[X]
5 February 2011	[X]	[X]
7 February 2011	[X]	[X]
8 February 2011	[X]	[X]
9 February 2011	[X]	[X]
10 February 2011	[X]	[X]
11 February 2011	[X]	[X]
12 February 2011	[X]	[X]
14 February 2011	[X]	[X]
15 February 2011	[X]	[X]
16 February 2011	[X]	[X]
17 February 2011	[X]	[X]
18 February 2011	[X]	[X]
19 February 2011	[X]	[X]
21 February 2011	[X]	[X]
22 February 2011	[X]	[X]
23 February 2011	[X]	[X]
24 February 2011	[X]	[X]
25 February 2011	[X]	[X]
26 February 2011	[X]	[X]
28 February 2011	[X]	[X]
1 March 2011	[X]	[X]
2 March 2011	[X]	[X]
3 March 2011	[X]	[X]
4 March 2011	[X]	[X]
5 March 2011	[X]	[X]
7 March 2011	[X]	[X]
8 March 2011	[X]	[X]
9 March 2011	[X]	[X]
10 March 2011	[X]	[X]
11 March 2011	[X]	[X]
12 March 2011	[X]	[X]
14 March 2011	[X]	[X]
15 March 2011	[X]	[X]
16 March 2011	[X]	[X]
17 March 2011	[X]	[X]
18 March 2011	[X]	[X]
19 March 2011	[X]	[X]
21 March 2011	[X]	[X]
TOTAL	[X]	[X]