



Notification to XS Remarketing Ltd of a penalty under section 130 of the Communications Act 2003

Notification served on
XS Remarketing Ltd
by the Office of Communications

This is a non-confidential version.
Confidential information and data
have been redacted. Redactions
are indicated by [X]

Issue date: 24 August 2015

Contents

Section		Page
	Notification to XS Remarketing Ltd of a penalty under section 130 of the Communications Act 2003	2
1	Subject of this Notification	5
2	Background	8
3	Ofcom's decision on next steps	16
4	Determination of the amount of penalty	22
5	Annexes	39

Notification to XS Remarketing Ltd of a penalty under section 130 of the Communications Act 2003

Subject of this Notification

1. This Notification is issued to XS Remarketing Limited, trading as Debt Masters Direct (“DMD”), registered company number SC269362 and registered address 2nd Floor, 4 West Regent Street, Glasgow, G2 1RW.
2. It notifies DMD of the imposition by the Office of Communications (“Ofcom”) of a penalty under section 130 of the Communications Act 2003 (the “Act”) of £150,000.
3. Ofcom has decided to impose this penalty on DMD, as it has, in one or more of the respects notified pursuant to a notification under section 128 of the Act, persistently misused an electronic communications network or electronic communications service between 9 March 2014 and 28 April 2014.

Background

4. Section 130 of the Act applies where:
 - (a) a person has been given a notification under section 128 of the Act;
 - (b) that person has been given an opportunity to make representations; and
 - (c) the period allowed for making representations has expired.
5. Section 130(2) of the Act allows Ofcom to impose a penalty upon that person if he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.
6. On 18 May 2015 Ofcom issued to DMD, under section 128 of the Act, a notification that Ofcom had reasonable grounds for believing that between 9 March 2014 and 28 April 2014 (the “Relevant Period”), DMD had persistently misused an electronic communications network or electronic communications service (the “Section 128 Notification”). This was delivered to the registered office of DMD by courier (and a delivery note obtained). The section 128 Notification is at Annex 11 to this document.
7. Pursuant to section 128(3)(b) of the Act, Ofcom specified a period of not less than one month, during which DMD had an opportunity of making representations about the matters notified in the section 128 Notification. The deadline for representations was 15 June 2015. Ofcom did not receive any representations in relation to the section 128 Notification.

Sections 128, 129, 130 and 131 of the Act

8. Section 128 of the Act says that, where Ofcom determines that there are reasonable grounds for believing that a person has persistently misused an electronic

communications network or electronic communications services, they may give that person (the “notified misuser”) a notification under section 128 of the Act.

9. Ofcom may serve an enforcement notice under section 129 of the Act if, by the end of the period specified in the section 128 Notification, Ofcom is satisfied that the notified misuser:
 - (a) has persistently misused an electronic communications network or an electronic communications service; and
 - (b) has not taken all such steps as Ofcom consider appropriate for:
 - (i) securing that its misuse is brought to an end and not repeated; and
 - (ii) remedying the consequences of the notified misuse.

Compliance with an enforcement notice under section 129 is enforceable in civil proceedings by Ofcom.

10. Section 130 of the Act 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.
11. Where these conditions are met, it provides that 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.
12. Section 130(4) provides that the amount of a penalty imposed is to be such amount not exceeding £2,000,000 as Ofcom determine to be:
 - (a) appropriate; and
 - (b) proportionate to the misuse in respect of which it is imposed.
13. It also provides, amongst other things, that 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.
14. Ofcom may issue an enforcement notification under section 129 of the Act (as referred to above) and impose a penalty under section 130 of the Act (as referred to above).

15. Section 131 of the Act provides that Ofcom, in exercising the powers conferred on it by sections 128 to 130 of the Act, must have regard to the statement of general policy (as referred to at paragraph 16 below).

Determination made by Ofcom

16. For the reasons set out in the Explanatory Statement, Ofcom determines that, pursuant to section 130(2) of the Act, DMD has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.
17. In making this determination and in accordance with section 131 of the Act¹, Ofcom has also had regard to the principles set out in its revised statement of policy on the persistent misuse of an electronic communications network or service 2010², published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement*³ (the "Policy Statement"). For ease of reference, a copy of the Policy Statement is at Annex 1 of this document.
18. Having had regard to the steps taken by DMD for securing that its misuse is brought to an end and not repeated, as set out in the First and Second Responses and subsequent clarifications; and the step taken by DMD for remedying the consequences of the notified misuse, Ofcom has decided to impose a penalty in this case under section 130 of the Act, taking into consideration the nature of the persistent misuse involved in this case.
19. Specifically, having regard to sections 130(4) and (5) of the Act, as well as the Penalty Guidelines published on 13 June 2011,⁴ and to which Ofcom must have regard, under section 392 of the Act (the "Penalty Guidelines") and the Policy Statement, Ofcom has decided to exercise its regulatory judgment to impose a penalty of £150,000 on DMD in relation to DMD's persistent misuse of an electronic communications network or service in one or more of the respects notified in the section 128 Notification. The Penalty Guidelines are at Annex 3 of this document.
20. The reasons for Ofcom's determination are set out in the following Explanatory Statement.

Interpretation

Words or expressions used in this Notification and/or the Explanatory Statement have the same meaning as in the Act except as otherwise stated.



Neil Buckley (Director of Investigations, Competition Group) as decision maker for Ofcom, 24 August 2015

¹ <http://www.legislation.gov.uk/ukpga/2003/21/section/131>

² <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>

³ <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

⁴ <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

Explanatory Statement

Subject of this Notification

- 1.1 This document is a notification of Ofcom's imposition of a financial penalty (the "Notification") on XS Remarketing Ltd, trading as Debt Masters Direct ("DMD") under section 130 of the Communications Act 2003 (the "Act"). It sets out Ofcom's decision that such a penalty should be imposed on DMD and our determination of what that penalty should be.
- 1.2 The issue of this Notification follows Ofcom's:
- (a) information request under section 135 of the Act issued to DMD dated 14 May 2014 (the "First Notice"⁵);
 - (b) analysis of DMD's response to the First Notice received on 29 May 2014 (the "First Response"⁶);
 - (c) information request under section 135 issued to DMD dated 28 July 2014 (the "Second Notice"⁷);
 - (d) analysis of DMD's response to the Second Notice received on 11 August 2014 (the "Second Response"⁸);
 - (e) analysis of subsequent clarifying emails provided by DMD on 24 September 2014, 17 October 2014, 2 December 2014, 12 December 2014 and 15 December 2014;
 - (f) information request under section 135 issued to DMD dated 22 June 2015 (the "Third Notice"⁹);
 - (g) analysis of DMD's response to the Third Notice received on 6 July 2015 (the "Third Response"¹⁰);
 - (h) investigation into DMD's compliance between the period 9 March 2014 and 28 April 2014 (the "Relevant Period") with section 128 of the Act, having regard to the principles set out in the Policy Statement¹¹;
 - (i) determination that during the Relevant Period there are reasonable grounds for believing that DMD persistently misused an electronic communications network or electronic communications service;
 - (j) service on DMD on 1 October 2014 of a notification under section 128¹² of the Act (the "section 128 Notification");

⁵ Annex 6, the First Notice.

⁶ Annex 7, the First Response.

⁷ Annex 8, the Second Notice.

⁸ Annex 9, the Second Response.

⁹ Annex 13, the Third Notice.

¹⁰ Annex 14, the Third Response.

¹¹ See paragraph 2.15.

¹² Annex 12, section 128 Notification, issued 18 May 2015.

- (k) service on DMD on 23 July 2015 of a provisional notification under section 130 of the Act (the “section 130 Provisional Notification”),¹³ setting out, amongst other things, Ofcom’s preliminary view that we should impose on DMD a penalty in respect of its persistent misuse of an electronic communications network or service between 9 March 2014 and 28 April 2014; and
- (l) DMD’s email of 31 July 2015 (“the Email in response to the section 130 Provisional Notification”).¹⁴
- 1.3 Ofcom’s decision is that a financial penalty be imposed on DMD as it has, in one or more of the notified respects set out in the section 128 Notification, persistently misused an electronic communications network or electronic communications service during the Relevant Period. Ofcom’s determination is that the penalty will be £150,000.
- 1.4 Ofcom’s determination is that this penalty is appropriate and proportionate to the contravention in respect of which it is imposed. In taking that view, Ofcom has had regard to:
- a) the First, Second and Third Responses;
 - b) clarifying emails;
 - c) the Email in response to the section 130 Provisional Notification;
 - d) the number and nature of occasions on which DMD was not compliant with the persistent misuse provisions, having regard to the Policy Statement;
 - e) steps taken by DMD for securing that its misuse is brought to an end and is not repeated; and
 - f) the Penalty Guidelines in force under section 392 of the Act at the time that the decision to impose the penalty, and the determination of its amount, was made (the “Penalty Guidelines”).¹⁵
- 1.5 As set out in the Policy Statement, in deciding whether to take enforcement action for persistent misuse caused by abandoned and silent calls in a particular case, we will be guided by a sense of administrative priority determined by the level of consumer detriment and taking account of the steps that have been taken by Automatic Calling System (“ACS”) users to reduce the degree of concern that silent or abandoned calls cause.¹⁶
- 1.6 The reasons for Ofcom’s decision and determination are set out in the following sections of this Notification. In particular, aspects of Ofcom’s decision and determination include that:
- a. DMD has, in one or more of the respects notified in the section 128 Notification, persistently misused an electronic communications network or service during the

¹³ Annex 15.

¹⁴ Annex 16.

¹⁵ Annex 3, see <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>.

¹⁶ Annex 1, Policy Statement (A1.12-A1.13).

Relevant Period (and in respect of which, taking account of our Policy Statement, it is appropriate for Ofcom to take action) by:

- making multiple abandoned calls during each of 37 separate 24 hour periods. Ofcom estimates on the basis of the evidence available that DMD made approximately 55,193 abandoned calls in total on those days. Of these, approximately 53,757 were silent calls resulting from the use of Answer Machine Detection (“AMD”) equipment. Ofcom considers it appropriate to take enforcement action in respect of these periods because the abandoned call rate exceeded three per cent of live calls;
 - making approximately 427,765 repeat calls to individual Calling Line Identification (“CLI”) numbers without the guaranteed presence of a live operator after a call has been identified by AMD equipment as being picked up by an answer machine within the same 24 hour period. This is likely to have generated repeat silent calls to individuals due to the use of AMD equipment resulting in AMD false positives;
 - failing to ensure that an information message played in the event of an abandoned call included details of an appropriate phone number to enable recipients to decline to receive further calls. Ofcom estimates that DMD made 1,436 such calls during the Relevant Period; and
 - failing to suspend or adjust its dialler settings to reduce the risk of repeat abandoned and silent calls over seven separate 24 hour periods, during which time it was trying to fix an error in the process for loading call data into its dialler.
- b. the central objective in imposing a penalty, set out in the Penalty Guidelines, is deterrence, and such persistent misuse is sufficiently serious as to warrant the imposition of a penalty in order to create a deterrent effect both for DMD and for all those subject to regulation by Ofcom;
- c. deterrence is also central in determining the amount of any penalty, so that it is an effective incentive to comply for DMD and others, whilst reflecting the seriousness of the contravention, DMD’s culpability and other relevant factors; and
- d. we also take account that these deterrent effects will in turn help to further the interests of citizens and consumers, as well as those of fair-dealing businesses harmed by the wrongdoing of competitors.
- 1.7 Ofcom’s determination is that a penalty on DMD of £150,000 would be appropriate and proportionate to the contravention for which it would be imposed.
- 1.8 The following sections of this Notification set out:
- a) the background detail to this matter, including the applicable statutory framework;
 - b) Ofcom’s analysis of the options open to it and the basis for our decision to impose a penalty; and
 - c) Ofcom’s determination of the amount of that penalty and the basis on which that determination is made.

Section 2

Background

- 2.1 The following section sets out the background to Ofcom’s investigation into DMD, both before and after the issue of the section 128 Notification to DMD on 18 May 2015.

The statutory framework

- 2.2 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

- 2.3 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.”

- 2.4 Section 3(3) of the Act says 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.”

- 2.5 With section 3(3) in mind, Ofcom has published a statement of regulatory principles¹⁷. 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.

¹⁷ <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>

- 2.6 In performing Ofcom's relevant functions, we must fulfil the duties above and the powers we have to perform those functions are as follows.

Sections 128, 129 and 130 of the Act

- 2.7 Section 128(1) of the Act enables Ofcom to issue a notification to a person where it determines that there are reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services. That notification is one which sets out our determination, specifies the use that we consider constitutes persistent misuse and specifies the period, of not less than one month (or not less than seven days in an urgent case), during which the person notified has an opportunity of making representations about the matters notified.

- 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 service 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) of the Act 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) of the Act 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."

2.11 Section 129 of the Act 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) of the Act Ofcom can enforce compliance with the enforcement notification by way of civil proceedings.

2.13 Under section 130 of the Act, Ofcom may impose a penalty, as well as or instead of, serving a notification under section 129. Section 130 provides 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 £2,000,000¹⁸ 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."

Ofcom's relevant guidelines

2.14 In accordance with section 131 of the Act, Ofcom has published a statement of its general policy with respect to the exercise of its powers under sections 128 to 130 of the Act.

2.15 This most recent statement is the *Revised statement of policy on the persistent misuse of an electronic communications network or service 2010*¹⁹, published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement*²⁰ (the "Policy Statement", see Annex 1).

2.16 Ofcom has also published Penalty Guidelines under section 392 of the Act (the "Penalty Guidelines"). As required under that section, Ofcom has had regard to the Penalty Guidelines in making our determination, as set out in this document.

2.17 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."

2.18 The Penalty Guidelines also set out examples of potentially relevant factors in the determination of a penalty, such as:

- i) The degree of harm, actual or potential, caused by the contravention.
- ii) The duration of the contravention.

¹⁸ 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, article 2(1).

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

¹⁹ Annex 3, <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>

²⁰ Annex 3, <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

- iii) Any gain (financial or otherwise) made as a result of the contravention.
 - iv) Any steps taken for remedying the consequences of the contravention.
 - v) Whether the regulated body in breach has a history of contraventions.
 - vi) Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention.
 - vii) 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.
 - viii) Whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it.
 - ix) The extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body.
- 2.19 Ofcom has had regard to the need for transparency in applying such guidelines, particularly as regards the weighting of the factors considered.

The investigation and findings

- 2.20 While reference is made to evidence received and made available to Ofcom (including representations, responses to statutory information requests and correspondence) and, in making this decision Ofcom has carefully considered this in its entirety, this Notification does not purport to be a comprehensive restatement of this evidence base. The documentary evidence is, however, annexed to this Notification and made available to DMD.
- 2.21 On 22 June 2006 Ofcom opened an own-initiative programme of monitoring and enforcement in order to monitor compliance by companies with the persistent misuse provisions in the Act having regard to the principles set out in the Policy Statement as applicable from time to time²¹. The programme has been on-going since that time.
- 2.22 As part of the above programme, Ofcom reviews complaints data received by the Ofcom Consumer Contact Team (“CCT”) to decide whether enforcement action is appropriate and if so, in respect of which companies.
- 2.23 Within this review of complaints, Ofcom noted 50 complaints regarding abandoned and silent calls allegedly being generated for or on behalf of DMD using the CLI number 01413600184 during the Relevant Period. Consequently, it was determined appropriate to conduct an investigation into DMD’s compliance with the persistent misuse provisions in the Act having regard to the Policy Statement.
- 2.24 Ofcom's investigation of DMD’s compliance with the persistent misuse provisions of the Act, having regard to the Policy Statement, included:

²¹ *Own-initiative investigation: Monitoring and enforcement of principles to reduce harm caused to consumers by silent and abandoned calls*(CW/00905/06/06)
http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

- (a) analysis of complaint data received by the CCT in relation to the Relevant Period;
 - (b) issuing two information requests to DMD under section 135 of the Act, the First²² and Second²³ Notices on 14 May 2014 and 28 July 2014 respectively; and analysis of the First and Second²⁴ received on 29 May 2014 and 11 August 2014 respectively.
- 2.25 Following the investigation, the section 128 Notification was issued to DMD on 18 May 2014²⁵. This set out:
- (a) Ofcom's determination pursuant to section 128(1) of the Act that there were reasonable grounds for believing that, during the Relevant Period, DMD persistently misused an electronic communications network or service;
 - (b) the specific use made of an electronic communications network or electronic communications services by DMD that Ofcom considered constituted persistent misuse; and
 - (c) the period during which DMD had the opportunity to make representations about the matters notified.
- 2.26 Ofcom took account that the Policy Statement sets out details of procedures that should be adopted to reduce the consumer detriment and/or the degree of concern that silent or abandoned calls cause. This includes monitoring the abandoned call rate using the formula set out in the Policy Statement to ensure that it does not exceed three per cent of live calls.
- 2.27 Evidence provided in the First and Second Responses shows that DMD failed to do this, as it did not ensure that its abandoned call rate, as calculated in accordance with the Policy Statement, remained below three per cent of live calls on 37 separate 24 hour periods during the Relevant Period. Ofcom calculated that the abandoned call rates on those dates were between 4.88 and 22.43 per cent²⁶.
- 2.28 DMD also failed to ensure that a live operator was on hand to take return calls that were made to numbers previously identified, within the same 24 hour period, by AMD equipment as being picked up by an answer machine ("24 hour policy"). We estimate on the basis of the evidence available that during the Relevant Period DMD also made approximately 427,765 such calls. This is likely to have generated repeat silent calls to individuals due to the use of AMD equipment resulting in AMD false positives.²⁷
- 2.29 DMD also failed to ensure that the information message played in the event of an abandoned call included an appropriate phone number to enable the call recipient to decline further marketing calls from DMD. DMD failed to do this across the Relevant Period in respect of approximately 1,436 relevant calls.

²² Annex 6, First Notice.

²³ Annex 8, Second Notice.

²⁴ Annexes 7 and 9 (First and Second Responses).

²⁵ Annex 12, Section 128 Notification.

²⁶ Annex 12, section 128 Notification, Table 2, DMD's abandoned call rates during the Relevant Period.

²⁷ 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.

- 2.30 In addition, DMD failed to suspend or adjust its dialler settings to reduce the risk of repeat abandoned and silent calls over seven separate 24 hour periods,²⁸ during which time it was trying to fix an error in the process for loading call data into the dialler. Evidence suggested that DMD was aware that this problem could lead to repeat calls within 24 hour periods to numbers that were loaded into the dialler multiple times. During this time, we estimated on the basis of evidence available, that DMD made approximately 87,275 repeat calls to the same CLI numbers following detection of an answer machine.
- 2.31 DMD had until 5pm on 15 June 2015 to make representations about the matters notified, to take steps for securing that the misuse was brought to an end and was not repeated, and to remedy the consequences of the notified misuse.
- 2.32 Ofcom did not receive any representations from DMD on the section 128 Notification.
- 2.33 On 23 July 2015 Ofcom served a provisional notification under section 130 of the Act (the “section 130 Provisional Notification”), setting out, amongst other things, Ofcom’s preliminary view that we should impose on DMD a penalty in respect of its persistent misuse of an electronic communications network or service between 9 March 2014 and 28 April 2014 .
- 2.34 DMD had until 5pm on 30 July 2015 to inform Ofcom whether it wished to have an oral hearing to discuss the matters notified to it. DMD did not respond.
- 2.35 DMD had until 5pm on 6 August 2015 to make representations on the matters notified to it in the section 130 Provisional Notification.
- 2.36 DMD responded by email on 31 July 2015, the Email in response to the section 130 Provisional Notification, stating that:

“As previously stated, XS Remarketing Limited is in the process of being dissolved. The company no longer trades, has no outstanding debts, has no funds and is not in a position to respond to your request or pay any penalty.”

Ofcom’s determination in relation to DMD’s persistent misuse notified in the section 128 Notification

- 2.37 Taking into account the findings in the section 128 Notification and the absence of any representations, we determine that DMD persistently misused an electronic communications network or electronic communications services during the Relevant Period (and in respect of which, taking account of our Policy Statement, it is appropriate for Ofcom to take action) by:
- (a) making multiple abandoned calls during each of 37 separate 24 hour periods. Ofcom estimates on the basis of the evidence available that DMD made approximately 55,193 abandoned calls in total on those days. Of these, approximately 53,757 were silent calls resulting from the use of AMD. Ofcom considers it appropriate to take enforcement action because the abandoned call rate exceeded three per cent of live calls in each of these 24 hour periods;
 - (b) making approximately 427,765 repeat calls to individual CLI numbers without the guaranteed presence of a live operator after the detection of an answer

²⁸ These were the seven days of dialling between 10 March 2014 and 18 March 2014 inclusive

machine. This is likely to have generated repeat silent calls to individuals due to the use of AMD equipment resulting in AMD false positives;

- (c) failing to ensure that an information message played in the event of an abandoned call included details of an appropriate phone number to enable recipients to decline to receive further calls. Ofcom estimates that DMD made 1,436 such calls during the Relevant Period; and
- (d) failing to suspend or adjust its dialler settings to reduce the risk of repeat abandoned and silent calls over seven separate 24 hour periods, during which time it was trying to fix an error in the process for loading call data into the dialler.

Section 3

Ofcom's decision on next steps

- 3.1 The following section sets out Ofcom's analysis of the options available to us in this matter, and our decision to impose a penalty on DMD under section 130 of the Act.
- 3.2 Ofcom's options are:
- (a) taking no further action;
 - (b) issuing a notification under section 129 of the Act; and
 - (c) imposing on DMD a penalty under section 130 of the Act, in addition to, or instead of, a notification under section 129.

Ofcom's approach

- 3.3 Ofcom considers each case on its merits. Our approach to enforcing compliance with the persistent misuse provisions contained in the Act having regard to the principles set out in the Policy Statement is as follows.
- 3.4 The purpose of imposing a penalty is set out in Ofcom's Penalty Guidelines:
- "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 infringement²⁹."*
- 3.5 The imposition of an appropriate and proportionate punishment of (penalty for) wrongful conduct, including in appropriate cases an element designed to have a proportionate deterrent effect, and the threat of such punishment (penalty) in future cases, should provide an incentive for compliance, and a corresponding deterrent to non-compliance. That would help to secure Ofcom's objective of furthering the interests of citizens and consumers, as well as those of fair-dealing businesses harmed by the wrongdoing of competitors, by helping to foster widespread compliance with legislation and regulatory rules.
- 3.6 Not taking action where it is appropriate and proportionate risks undermining not only the persistent misuse provisions but also the entire regulatory regime. It would mean that Ofcom was not providing appropriate incentive to compliance and deterrent to non-compliance.
- 3.7 Ofcom has considered the options available to us in the present case, in light of the above, in line with our statutory duties and powers. Having done so, we take the preliminary view that a penalty should be imposed on DMD for the reasons we set out below.

No further action

- 3.8 If we were to determine that DMD had not, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications services during the Relevant Period, Ofcom would take no further

²⁹ Annex 3, Penalty Guidelines (paragraph 3).

action. Taking no further action is also an option open to Ofcom if we consider that, although DMD had, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications services during the Relevant Period, it was not appropriate in all the circumstances of the case to take further steps.

3.9 Having carefully considered the evidence obtained during the investigation, Ofcom determines that DMD has persistently misused an electronic communications network or service in one or more of the notified respects during the Relevant Period. In light of that determination, and for the following reasons, we also determine in our regulatory judgment that further action is appropriate in order to further the interests of citizens, consumers and fair-dealing businesses.

3.10 Evidence in Ofcom's market research most recently found that 60 per cent of participants received a silent call and 17 per cent received an abandoned call (in which the caller played an information message). In addition it found that abandoned calls were considered by consumers to be annoying (82 per cent of such calls) and distressing (4 per cent of calls)³⁰. The research also reported that more silent calls were considered to be annoying (86 per cent of calls) and distressing (7 per cent of calls). Indeed, a higher proportion of silent calls were considered to be annoying compared to any other type of call.

3.11 On those bases, our judgment is that the:

- making of multiple abandoned calls where the rate at which a person makes them is above three per cent in a 24 hour period;
- failure to ensure that a live operator was on hand to take return calls made to individual CLI numbers previously identified as being picked up by an answer machine within the same 24 hour period;
- failure to ensure that the information message played in the event of abandoned calls contained an appropriate number to enable the call recipient to return the call; and
- failure by DMD to suspend or adjust its dialler settings to reduce the risk of repeat abandoned and silent calls over seven separate 24 hour periods while it was working to fix an error in its data import process;

are all serious contraventions of the provisions relating to persistent misuse. Our further judgment is that it would further the interests of citizens and consumers to take further action in cases where we determine that unlawful persistent misuse, in the form of such calls, has occurred.

3.12 Whilst any action must, of course, be appropriate and proportionate to the specific misuse in respect of which it is imposed, the taking of further action of one or more of the kinds available to Ofcom, should serve to deter more widespread non-compliance with legislation and regulatory rules. This is intended to protect citizens and consumers from the harm the evidence shows they suffer from persistent misuse in the form of abandoned calls.

³⁰ Market Research published on 23 May 2014, http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance_calls_research/.

Issuing a notification under section 129 of the Act

- 3.13 The following is Ofcom's consideration of whether any further enforcement action should involve serving on DMD a notification under section 129 of the Act. For the reasons set out, Ofcom's view is that it should not.
- 3.14 Ofcom may issue a notification under section 129 of the Act if it is satisfied that:
- (a) the notified misuser has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; and
 - (b) the notified misuser has not, since the giving of the notification, taken all such steps as Ofcom consider appropriate for-
 - (i) securing that this misuse is brought to an end and not repeated; and
 - (ii) remedying the consequences of the notified misuse.³¹
- 3.15 This option is open to Ofcom where, as in this case, we are satisfied that DMD has persistently misused an electronic communications network or electronic communications service, if we are also satisfied that it has not taken all the appropriate steps to stop and prevent the persistent misuse from being repeated and remedy that which has occurred.
- 3.16 As previously noted, DMD failed to submit any representations to the section 128 Notification and in its Third Response it informed Ofcom that it has ceased trading. As a result, DMD has not set out to Ofcom any steps that it took prior to ceasing trading, to ensure it included reasoned estimates of false positives within its abandoned call rate calculation to ensure that it kept its abandoned call rate at less than three per cent of live calls.
- 3.17 DMD also did not state the steps it took prior to ceasing trading to ensure full compliance with the 24 hour policy. Although DMD's dialler was set not to make repeat calls without the guaranteed presence of a live operator within 24 hours following the detection of an answer machine, this was overridden by an error in its data import process. In its email of 12 December 2014, DMD stated that on the weekend of 8 March 2014 it had become aware that duplicate data was not being removed from contact lists when it was imported into the dialler. This led to a number of records being loaded into the dialler multiple times. DMD stated that on 10 March 2014 it had notified its dialler supplier of the problem and worked with them to try and remedy the problem, by for example installing a manual workaround to limit the repeated instances of this happening. It considered that the database was "fully cleansed" by 19 March 2014.
- 3.18 However, while DMD was working to fix the problem between 10 March 2014 and 19 March 2014, it failed to suspend or adjust its dialling to reduce the risk of repeat abandoned and silent calls. It could have for example slowed the dialler down, switched off AMD or moved to a "pre-view" mode where calls are only attempted when an agent has been specifically allocated to the call from the outset.
- 3.19 Furthermore, evidence from the additional analysis carried out by Mott MacDonald³² on behalf of Ofcom shows that the database was not fully cleansed by 19 March

³¹ Section 129(2) of the Act.

2014. Specifically, it shows that DMD continued to make a very large number of repeat calls to the same numbers after AMD equipment had detected an answer machine within the same 24 hour period. Specifically, between 20 March 2014 to 28 April 2014 DMD made a further 328,888 such repeat calls. In fact, on 19 March 2014, the day DMD considered the issue had been resolved, it made a total of 11,632 repeat calls. Therefore the steps that DMD took between 12 March 2014 and 19 March 2014 were not sufficient to bring these repeat calls to an end.

- 3.20 In relation to the information message played by DMD in the event of an abandoned call, DMD stated in its email on 1 September 2014³³ that it had amended it with immediate effect as follows to include an appropriate CLI number for return calls:

“You have been called today by Debt Masters Direct. You do not need to return our call. If you would like your number removed please email us at; removenumber@debtmasterdirect.co.uk, alternatively you can call us on 0141 5651378 Thank you.”

- 3.21 On these bases, our judgement is that whilst DMD was still trading, it took some but not all steps required to ensure that the notified misuse is brought to an end and not repeated. However, in light of DMD’s Third Response we note that DMD has ceased trading and its misuse has now been brought to an end.
- 3.22 As to the steps DMD has taken to remedy the consequences of the misuse notified to it, we take account that section 129(7) of the Act provides:

“(7) References in this section to remedying the consequences of misuse include references to paying an amount to a person –

(a) by way of compensation for loss or damage suffered by that person; or

(b) in respect of annoyance, inconvenience or anxiety to which he has been put.”

- 3.23 We have taken account of DMD’s email of 12 December 2014 in which it told Ofcom that, due to the large number of calls to CLI [X] on 10 March 2014, the dialler manager had tried on 12 March 2014 to call this CLI number to offer an apology and compensation for the error that had occurred.

- 3.24 However, we also note that DMD has not told Ofcom what steps it has taken to remedy the consequences of the notified misuse for other affected consumers who suffered harm. Ofcom therefore considers that the steps taken by DMD to remedy the consequences of the misuse have been inadequate given the likely harm caused; and DMD should have considered taking additional appropriate steps to remedy the consequences of its contravention.

- 3.25 Ofcom considers that it could issue a notification under section 129 of the Act in this case as:

- While DMD was still trading it took some but not all appropriate steps to ensure that the misuse was brought to an end and not repeated. DMD has now told us that it ceased trading in the first quarter of this year and its misuse has now been brought to an end.

³² Annex 17, Table 4.1, Mott MacDonald additional analysis.

³³ Annex 10, email from DMD to Ofcom, 1 September 2014.

- DMD has not set out adequate steps for remedying the consequences of the notified misuse.

3.26 However, on balance, in light of the fact that DMD's misuse has now been brought to an end, our view is that it would not be an appropriate and necessary regulatory response to serve such a notification on DMD. Instead, we have reflected the failure to take all the necessary steps to bring the misuse to an end while DMD was still trading and to remedy the consequences of the misuse in the level of the penalty.

Further enforcement action: imposing a penalty under section 130 of the Act

3.27 The following is Ofcom's consideration of whether any further enforcement action should involve imposing on DMD a penalty under section 130 of the Act. Ofcom's judgment is that we should do so. The reasons are as follows.

3.28 Ofcom may impose a penalty, as provided under section 130 of the Act, in circumstances, 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.”³⁴

3.29 Under section 130(2) of the Act:

“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”.

3.30 As set out in paragraphs 2.20 to 2.33, Ofcom is satisfied that DMD persistently misused an electronic communications network or electronic communications service. On this basis, DMD is liable to the imposition of a penalty under section 130 of the Act.

3.31 DMD's Email in response to the section 130 Provisional Notification stated that DMD:

- is in the process of being dissolved,
- no longer trades,
- has no outstanding debts,
- has no funds; and
- would not be in a position to pay any penalty.

³⁴ Section 130(1) of the Act.

- 3.32 Ofcom has considered these points and has noted that DMD did not dispute Ofcom's provisional findings relating to DMD's persistent misuse. Ofcom also notes that notwithstanding that DMD is in the process of being dissolved, it still exists as at the date of this Notification. We understand that DMD will be struck off by the Registrar of Companies on 12 September 2015 provided no interested parties object to DMD's dissolution.
- 3.33 Taking account of the matters in paragraphs 3.8 to 3.12 above, and that we have decided not to take action under section 129 of the Act, we are of the view that the imposition of a penalty would help to secure Ofcom's objectives of deterrence and of furthering the interests of citizens and consumers. We make the regulatory judgment that it is necessary and appropriate to impose a penalty on DMD. This reflects the seriousness of making abandoned calls in respect of those 24 hour periods where the rate is above three per cent; making repeat calls to individual numbers without the guaranteed presence of a live operator after the detection by AMD equipment of an answer machine within the same 24 hour period; and shortcomings in respect of the playing of a recorded information message. It also reflects that DMD failed to suspend or adjust its dialler settings to reduce the risk of making repeat abandoned and silent calls while working to fix a problem with uploading data into its dialler. This should deter non-compliance with the persistent misuse provisions of the Act, having regard to the Policy Statement, by DMD and others.
- 3.34 Accordingly, we are imposing a penalty on DMD in this case under section 130 of the Act. The following section sets out Ofcom's determination of the penalty amount, which is a matter of regulatory judgment and includes taking account of:
- (a) the First, Second and Third Responses;
 - (b) clarifying emails;
 - (c) the Email in response to the section 130 Provisional Notification;
 - (d) the number and nature of occasions on which DMD was not compliant with the persistent misuse provisions, having regard to the Policy Statement;
 - (e) steps taken by DMD for securing that the notified misuse was brought to an end and not repeated; and
 - (f) the Penalty Guidelines.

Section 4

Determination of the amount of penalty

- 4.1 The following section of this document sets out Ofcom's determination of the amount of the penalty imposed on DMD. It explains why we consider the penalty to be appropriate and proportionate to the contravention in respect of which it is imposed. Likewise, this section sets out the regard we have had in exercising our regulatory judgment to:
- (a) the First, Second and Third Responses;
 - (b) clarifying emails;
 - (c) the Email in response to the section 130 Provisional Notification;
 - (d) the number and nature of occasions on which DMD was not compliant with the persistent misuse provisions, having regard to the Policy Statement;
 - (e) steps taken by DMD for securing that its misuse is brought to an end and is not repeated; and
 - (f) the Penalty Guidelines.

Legal framework

- 4.2 Ofcom may impose a penalty if a person notified under section 128 of the Act has persistently misused an electronic communications network or an electronic communications service in one or more notified respects. The applicable legal framework is set out in detail in section two of this document.
- 4.3 Sections 130(4) and 130(5) of the Act set out the maximum level of penalty that Ofcom may impose and the factors that Ofcom must have regard to when setting the level of the penalty.
- 4.4 The maximum level of penalty is currently £2 million, having been increased following an order³⁵ made by the Secretary of State under section 130(9) of the Act.
- 4.5 The upward revision of the maximum penalty followed a consultation by the Department of Business, Innovation and Skills ("BIS") entitled, "*Raising the maximum penalty for the persistent misuse of an electronic communications network or service, 2009*". The Government decided to increase the maximum penalty from £50,000 to £2 million to, "*broadly reflect the views of 126 respondents who felt that the maximum penalty should be increased to this level to deter persistent offenders. Most respondents felt that the current level failed to reflect the harm that was caused to consumers by silent and abandoned calls and this feeling was particularly strong*

³⁵ [The Communications Act 2003 \(Maximum Penalty for Persistent Misuse of Network or Service\) Order 2010 No. 2291](#)

*where respondents had received calls and tried various methods to combat the problem”.*³⁶

4.6 This increased penalty was, “*designed to act as a stronger deterrent to potential offenders of persistent misuse, which includes a range of behaviours including silent and abandoned calls*”.³⁷ In its impact assessment on the matter, the Government stated, “*the objective of the policy proposal is to minimise the number of silent and abandoned calls, which lead to anxiety and distress. To do that, full compliance with the current legislation needs to be incentivised by increasing the level of penalty that is applied to offending businesses. The current maximum penalty of £50,000 may be too low to act as an effective deterrent for companies where the productivity gains achievable by using predictive dialling technologies are very large*”.³⁸

4.7 Section 130 states:

“... ”

- (4) The amount of a penalty imposed is to be such amount not exceeding £2,000,000 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.”

4.8 As previously noted, in accordance with section 392 of the Act, Ofcom prepared and published a statement containing the guidelines it proposes to follow in determining the amount of penalties imposed by it under the provisions of the Act or any other enactment apart from the Competition Act 1998 (the “Penalty Guidelines”³⁹). By virtue of section 392(6) of the Act, Ofcom must have regard to the statement for the time being in force when setting the penalty amount. Issuing a penalty under section 130 is also referred to in the Policy Statement⁴⁰.

³⁶ Explanatory Memorandum to the Communications Act 2003 (Maximum penalty for persistent misuse of network or service) Order 2010, page 2:

http://www.legislation.gov.uk/ukxi/2010/2291/pdfs/ukxiem_20102291_en.pdf

³⁷ Ibid, page 1.

³⁸ Ibid, page 5.

³⁹ Annex 3, Penalty Guidelines.

⁴⁰ Annex 1, Policy Statement (A1.100 to A1.104).

The Penalty Guidelines

- 4.9 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 penalty. The regard we have had to these guidelines, in accordance with section 392 of the Act, is set out below.
- 4.10 The particular factors we have considered are as follows. In considering them, we have taken into account the maximum penalty that may be imposed (and the reasons for its setting at that level), the First, Second and Third Responses and the statutory requirements that a penalty is appropriate and proportionate:
- (a) that, "*The central object 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.*"
 - (b) the following which appear to us to be relevant in this case in determining an appropriate penalty:
 - i. the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;
 - ii. the duration of the contravention;
 - iii. any gain (financial or otherwise) made by DMD (or any connected body) as a result of the contravention;
 - iv. any steps taken for remedying the consequences of the contravention;
 - v. whether in all the circumstances appropriate steps had been taken by DMD to prevent the contravention;
 - vi. whether DMD has a history of contraventions;
 - vii. 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;
 - viii. whether there has been a failure to keep adequate records;
 - ix. whether the contravention continued, or timely and effective steps were taken to end it, once DMD became aware of it;
 - x. the extent of cooperation with Ofcom's investigation; and
 - xi. the extent to which the level of penalty is proportionate, taking into account the size and turnover of DMD.
- 4.11 We have also had regard to precedents set by previous cases, and to the need for transparency in applying the Penalty Guidelines, particularly as regards the weighting of the factors considered in making our determination.

Deterrence and seriousness of the contravention

- 4.12 As noted above, the Penalty Guidelines provide that, “*The central object 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.*”
- 4.13 We take account, first, that part of Ofcom’s principal duty is to further the interests of consumers in relevant markets. Section 128 of the Act provides Ofcom with enforcement powers so that it may take action to protect consumers and citizens from harm resulting from persistent misuse of an electronic communication network or an electronic communication service.
- 4.14 Ofcom set out at paragraph 3.33 that its regulatory judgement is that it is necessary to impose a penalty on DMD to deter non-compliance not just by DMD but also other ACS users.
- 4.15 We also have regard to the numbers of abandoned calls and their effects on consumers. Abandoned and silent calls will almost invariably result in consumer harm, which may range from inconvenience and annoyance through to genuine anxiety⁴¹. We give weight to the evidence to this effect in Ofcom’s market research, which most recently found that abandoned calls with an information message were considered to be annoying (82 per cent of calls) and distressing (4 per cent of calls). The research also reported that more silent calls were considered to be annoying (86 per cent of calls) and distressing (7 per cent of calls)⁴².
- 4.16 There is therefore, in our regulatory judgment, an inherent seriousness in persistent misuse by way of making abandoned and silent calls, as DMD made. There is a need for enforcement action, including appropriate and proportionate financial penalties, to provide DMD, and others, with an effective incentive to comply with the Act, having regard to the Policy Statement, and to deter non-compliance with the rules relating to such misuse to protect consumers from the relevant harm, pursuant to our principal duty.
- 4.17 Moreover, as set out in the Policy Statement, Ofcom’s approach when assessing whether to take enforcement action in respect of abandoned and silent calls has been, and continues to be, to ensure that users of ACS technology take steps to avoid making abandoned and silent calls, and that when such calls are made, steps are taken to reduce the degree of harm caused⁴³.
- 4.18 ACS technology is used by call centres to improve efficiency by maximising the amount of time call centre agents spend speaking to consumers. Persons using these technologies may pass the cost savings that these technologies allow on to consumers. However, if not robustly and properly managed, a side effect of these technologies may be the generation of abandoned and silent calls resulting in consumer harm.
- 4.19 Ofcom recognises that a balance is needed between the positive efficiency benefits of ACS on the one hand, and the potential for these technologies to cause consumer

⁴¹ Annex 1, Policy Statement (1.6).

⁴² Market Research published on 24 May 2015, http://stakeholders.ofcom.org.uk/binaries/telecoms/nuisance-calls-2015/Nuisance_calls_W3_report.pdf

⁴³ Annex 1, Policy Statement (4.1).

harm on the other. In recognition of the benefits of ACS when properly managed, Ofcom does not enforce the persistent misuse provisions of the Act against their use *per se*, but has put in place guidelines in respect of their use (the Policy Statement) so as to reduce the possibility of harm and to set out when we would prioritise enforcement.

- 4.20 For example, the Policy Statement sets out the “*abandoned call rate formula*” which provides that the abandoned call rate shall be no more than three per cent of live calls per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over a 24 hour period. This provides ACS users with a margin for error, balancing possible efficiencies with the need to protect consumers from harm. It also means, however, that, where this threshold is breached, there is intrinsically serious conduct that Ofcom is all the more likely to regard as serious because a margin for error has already been allowed and has been exceeded.
- 4.21 DMD’s persistent misuse during the Relevant Period in respect of which Ofcom is taking this enforcement action, involved it making multiple abandoned calls during each of 37 separate 24 hour periods. Ofcom estimates, on the basis of the evidence available, that DMD made approximately 55,193 such calls in total on those days and on which the abandoned call rate exceeded three per cent of live calls. Of these, approximately 53,757 were silent calls as the result of AMD false positives. Ofcom considers that silent calls are more likely to result in anxiety and distress than calls abandoned with an information message.
- 4.22 DMD also made approximately 427,765 repeat calls without the guaranteed presence of a live operator after the detection of an answer machine; and these are likely to have generated multiple repeat silent calls to some consumers because of AMD false positives.
- 4.23 DMD’s persistent misuse also involved it failing to ensure that the information message played in the event of an abandoned call contained an appropriate CLI number to enable the recipients to decline further calls. We estimate that DMD made approximately 1,436 such calls during the Relevant Period. Ofcom considers that the failure to include an appropriate CLI number in the information message would have hindered the ability of consumers to return the call and decline further marketing calls from DMD.
- 4.24 In addition, Ofcom also considers that when DMD became aware of the error in uploading data into its dialler, it should have suspended or adjusted its dialler settings to reduce the risk of making repeat abandoned and silent calls while working to fix the problem. During these seven separate 24 hour periods, Ofcom has estimated that DMD made approximately 87,275 such repeat calls to the same numbers within 24 hours following detection of an answer machine.
- 4.25 Our view is that in this case the contravention should be characterised as very serious and considerable.

Degree of harm caused by the contravention

- 4.26 We have given consideration to the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants.
- 4.27 We have regard to section 128(5) of the Act, which provides that a person misuses an electronic communications network or electronic communications service if the,

“... effect or likely effect of which is to cause another person to unnecessarily suffer annoyance, inconvenience or anxiety.” As set out in the Policy Statement⁴⁴ and in the section 128 Notification, and based on the evidence set out therein, 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 anxiety⁴⁵. This is supported by the evidence in Ofcom’s market research described elsewhere in this document.

- 4.28 We also take into account that, in our determination, DMD exceeded an abandoned call rate of three per cent of live calls over 37 separate 24 hour periods, making a total of approximately 55,193 abandoned calls. Of the 55,193 abandoned calls, approximately 53,757 were the result of AMD false positives, and the call recipient would have heard silence on answering the call. Ofcom considers that silent calls are more likely to cause distress and anxiety than calls where an information message is played.
- 4.29 We also take into account that DMD also made approximately 427,765 repeat calls without the guaranteed presence of a live operator after the detection of an answer machine within the same 24 hour period; and these are likely to have generated multiple repeat silent calls to some consumers because of AMD false positives.
- 4.30 In addition, DMD made multiple abandoned calls where the information message played in the event of an abandoned call failed to include an appropriate CLI number that the call recipient could use to opt out of future marketing calls. This was likely to have hindered call recipients’ abilities to limit the harm suffered. DMD failed to do this in respect of approximately 1,436 abandoned calls during the Relevant Period.
- 4.31 Ofcom acknowledges however that DMD did present a valid CLI number on its calls which would have enabled call recipients with caller display or who dialled “1471” to obtain a number and to then return the call to decline further calls; and so mitigate the harm caused.
- 4.32 On these bases, Ofcom considers that DMD would have generated a substantial degree of actual or potential consumer harm during the Relevant Period. That harm should be reflected in the penalty amount.

The duration of the contravention

- 4.33 In relation to the issue of the duration of the contravention, it is important to note that for the purposes of exercising its enforcement powers in an efficient, appropriate and proportionate manner and so that parties do not have to provide undue amounts of information, Ofcom may select a timeframe within which it bases an investigation. This timeframe is known as the relevant period and its duration is determined on a case by case basis. In the present case, a seven week period was selected as the Relevant Period, between 9 March 2014 and 28 April 2014.
- 4.34 Our view is that the duration of the notified non-compliance is significant because DMD’s abandoned call rate exceeded three per cent on each of the 37 days that it made outbound calls during the Relevant Period. It also failed to ensure adherence to the 24 hour policy on each of those 37 days of dialling during the Relevant Period. In addition, DMD failed to include in the information message played in the event of

⁴⁴ Annex 1, Policy Statement (1.6).

⁴⁵ Annex 11, section 128 Notification, paragraph 1.5.

an abandoned call, an appropriate number that the call recipient could use to decline further calls on each of the 37 days of dialling during the Relevant Period.

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

- 4.35 DMD may have benefitted from its failure to follow the principles set out in the Policy Statement and carrying out the persistent misuse.
- 4.36 However, we have not taken any gain, financial or otherwise, made by DMD as a result of the contraventions into account in the determination of the penalty amount because we do not have direct evidence of any such gain in this case.

Steps taken by DMD to remedy the consequences of the contravention

- 4.37 Ofcom's view is that, as of the date of this Notification, DMD made one phone call to an affected customer but took no other steps to remedy the consequences of the misuse notified to it under section 128 of the Act. We have taken this into account in our determination of the penalty amount.
- 4.38 When Ofcom highlighted to DMD, by way of example, that a significant volume of repeat calls had been made to the CLI number [§<] on 10 March 2014, DMD stated that its dialler manager had called this CLI number on 12 March to offer an apology and compensation for the error that had occurred.⁴⁶ In Ofcom's view, the other steps that DMD could have taken include identifying which other consumers received abandoned and silent calls from it during the Relevant Period, and establishing a process whereby financial compensation or some other redress was offered to those consumers.
- 4.39 Accordingly, in our regulatory judgment is that DMD did not take adequate steps to remedy the consequences of the contravention. We have not therefore given DMD credit on this account in our assessment of the penalty.

Whether in all the circumstances DMD took appropriate steps to prevent the contravention

- 4.40 In Ofcom's view, DMD failed to take all appropriate steps to prevent the contravention.
- 4.41 In reaching this view we have regard to the following factors. These include that over the following periods of time, in addition to the publication of the Policy Statement, Ofcom took the following actions to raise ACS users' awareness of the importance of compliance:
- i) Ofcom published an open letter on 20 December 2010⁴⁷ addressed to industry stating that enforcement action would be taken should the Policy Statement not be followed and that companies would be expected to be operating in accordance with it by 1 February 2011. In particular, it alerted industry to the increase in the maximum penalty for persistent misuse from its previous level of £50,000 to £2 million.

⁴⁶ Annex 10, email from DMD to Ofcom, 12 December 2014

⁴⁷ Annex 2, First open letter to industry stakeholders dated 20 December 2010, http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/acs_users.pdf

- ii) Ofcom published another open letter on 21 May 2012⁴⁸. This letter was again addressed to industry and set out Ofcom's current approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls. It described the steps we expect ACS users to take to avoid making these calls, and if such calls are made, to limit consumer harm. One of these steps was, "*ensuring an abandoned call rate ... of no more than 3 per cent of live calls per campaign.*"
 - iii) Ofcom published another open letter on 20 March 2013⁴⁹ in co-ordination with the Information Commissioner's Office. This letter was again addressed to industry and reinforced the importance of complying with the legal and regulatory measures in place to protect consumers from harm.
- 4.42 In this context we note that DMD was incorporated in the UK on 14 June 2004. Ofcom therefore believes that DMD should have been aware of these open letters as they related specifically to DMD's business practices through the use of a call centre contacting consumers in the UK. DMD should have been fully aware of the steps it, as an ACS user, should have taken to avoid persistently misusing electronic communications networks and services and the possible sanctions that may apply should it do so.
- 4.43 That the misuse occurred indicates that the steps taken to prevent the contravention were not effective. Ofcom considers that it is DMD's responsibility to take steps to monitor and assess on-going compliance with the law on persistent misuse (in light of Ofcom's Policy Statement), including non-compliance that may be the result of a mistake or third party error. Therefore, we consider that DMD should have taken account of false positives arising from its use of AMD when monitoring its abandoned call rate to ensure that this rate, when calculated in accordance with the Policy Statement, was kept below three per cent.
- 4.44 It should also have ensured adherence to the 24 hour policy set out in the Policy Statement. While Ofcom acknowledges that DMD's dialler was set not to make repeat calls without the guaranteed presence of a live operator within 24 hours following the detection of an answer machine, it failed to take appropriate steps to ensure that other factors did not override this.
- 4.45 Specifically it failed to suspend or adjust dialling when it became aware that, following an error in the process for loading data into its dialler, duplicate data records were not being removed so that a number of records were loaded into the dialler multiple times. This would have significantly increased the risk of multiple repeat calls to the same CLI numbers within a 24 hour period. DMD was aware of the problem but failed to suspend or adjust its dialler settings for seven 24 hour periods in March while it was working to fix it.
- 4.46 Furthermore, DMD stated that the database had been "fully cleansed" by 19 March 2014. However, evidence from the additional analysis carried out by Mott MacDonald⁵⁰ on behalf of Ofcom indicates that DMD continued to make a very large number of repeat calls after this date. In the period 20 March 2014 to 28 April 2014 DMD made a further 328,888 repeat calls to the same number after AMD equipment

⁴⁸ Annex 4, Second open letter to industry stakeholders dated 21 May 2012, http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/Open_letter_to_stakeholders.pdf

⁴⁹ Annex 5, Third open letter to industry stakeholders dated 20 March 2013, http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/ICO_Ofcom_letter_200313.pdf

⁵⁰ Annex 17, Table 4.1, Mott MacDonald additional analysis.

had detected an answer machine within the same 24 hour period. In fact, on 19 March 2014, the day DMD considered the issue had been resolved, it made a total of 11,632 repeat calls. It therefore should have taken additional steps to ensure that the problem had been fixed or to adjust its dialler settings to reduce the risk of such repeat calls.

- 4.47 DMD should have also had a process in place to check regularly that an appropriate information message was being played in the event of an abandoned call. This would have ensured that the information message contained an appropriate CLI number.
- 4.48 Accordingly, our regulatory judgement is that DMD did take some, but did not take sufficient effective steps, having regard to the Policy Statement, to prevent the relevant persistent misuse. We have taken this into account in our determination of the penalty amount.

Whether DMD has a history of contraventions

- 4.49 DMD does not have a history of contraventions in respect of the persistent misuse provisions. Accordingly, no previous contraventions have been taken into account in the determination of the penalty amount.

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.

- 4.50 Our assessment is that DMD's misuse was repeated on a sufficient number of occasions to represent "recklessness as to whether persons suffer annoyance, inconvenience or anxiety", as set out in section 128(6)(b) of the Act. The Policy Statement states that this will be need to be determined on a case by case basis; and evidence that the misuser was informed of the effect of his behaviour but continued with it could point to recklessness.
- 4.51 DMD told Ofcom of issues following an update to its dialler over the weekend of 8 March 2014, whereby duplicate data was not being removed from contact lists. Evidence suggests that DMD was aware that this could lead to repeat calls within 24 hours to CLI numbers that were loaded into the dialler multiple times. However for seven 24 hour periods DMD continued to dial as it had done previously while trying to fix the problem. Ofcom considers that DMD's failure to suspend or adjust the dialler settings (for example, to slow the dialler down, switch off AMD, or to move to a "pre-view" mode) to reduce the risk of repeat abandoned and silent calls points to a finding of recklessness. Given the size of the contravention, Ofcom considers that DMD's senior management should have been aware that the contravention was occurring and accordingly, we have reflected this in the level of the penalty.

Whether there has been a failure to keep adequate records

- 4.52 Ofcom issued DMD information requests on 14 May 2014, 28 July 2014 and 22 June 2015. DMD was able to provide detailed records from its ACS in order for Ofcom to assess its use of the dialler.
- 4.53 However, DMD was not able to provide a reasoned estimate of false positives based on its own calling data, based for example on live sampling on a per campaign basis or when material changes are made to an AMD, as set out in the Policy Statement. Instead DMD relied on an estimate that had been derived from data from a third party

that was operating in the same line of business, using the same dialler on the same setting and calling UK consumers that were a subset of DMD's consumers.

- 4.54 In Ofcom's judgment DMD should have been able to provide a reasoned estimate of false positives based on its own data and therefore in this regard it failed to keep adequate records. Accordingly, this has been taken into account in determining the penalty amount, which has been increased on account of these shortcomings in record-keeping.

Whether the contravention continued, or timely and effective steps were taken to end it, once DMD became aware of it

- 4.55 Following our careful consideration of the First and Second Responses and the clarifying emails, Ofcom's judgment is that DMD took some, but not all appropriate steps to bring the relevant misuse to an end once it became aware of it, as set out at paragraphs 3.13 to 3.26.
- 4.56 We have taken this into account in our determination of the penalty amount. This has increased the level of the penalty amount.

Co-operation with Ofcom's investigation

- 4.57 Ofcom's ability to protect consumers and fair dealing businesses effectively, and to perform our statutory duties, is impeded if parties under investigation fail to provide accurate, and timely, co-operation with our investigations. In that light, the Penalty Guidelines state that, "*Ofcom may increase the penalty where the regulated body in breach has failed to cooperate fully with our investigation*⁵¹."
- 4.58 In this case, DMD were punctual in their responses to Ofcom's First, Second and Third Notices. It also responded promptly where Ofcom sought clarifications to the information provided in response to those requests.
- 4.59 We also note that DMD did not make any representations on the section 128 Notification and the section 130 Provisional Notification. However, it was not obliged to do so.
- 4.60 Our overall assessment, therefore, is that DMD co-operated with Ofcom. Accordingly, we have not increased the penalty on this account.

The extent to which the level of penalty is proportionate, taking into account the size and turnover of DMD

- 4.61 On 22 June 2015, Ofcom issued the Third Notice to DMD, requiring DMD to provide:
- its turnover figures for the financial years ending 30 June 2013 and 30 June 2014; and
 - details of the number of full-time and part-time employees during the Relevant Period, including details of any changes to these within the Relevant Period.

⁵¹ Annex 4, Penalty Guidelines.

- 4.62 DMD responded by email to the Third Notice on 6 July 2015⁵². It stated that turnover for the financial years ending 30 June 2013 and 30 June 2014 was £[redacted] and £[redacted] respectively. DMD also stated that the number of number of employees during the Relevant Period was 114.
- 4.63 In Ofcom's view, the level of DMD's turnover and its size indicates that it is a relatively small business. Any penalty Ofcom imposes must be an appropriate and proportionate penalty for the misuse involved in this case such as would deter a business of that size from persistent misuse. We have taken that into account in determining the proportionality of the penalty amount.

Relevant precedents set by previous cases

- 4.64 The Penalty Guidelines also indicate that we will, in determining a penalty, have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and the context of each case. We have considered them here.
- 4.65 Under section 128 of the Act, Ofcom has taken action against companies for persistently misusing an electronic communications network or service, most notably in relation to the making of abandoned and/or silent calls. Under section 130 of the Act, Ofcom has imposed penalties for persistent misuse in respect of thirteen companies since June 2006⁵³.

Qualifications as to any weight which may be attached to the pre-2011 persistent misuse cases

- 4.66 While, as noted above, Ofcom imposed penalties for persistent misuse of an electronic communications network or service prior to 2011, we consider these pre-2011 precedents to be of limited assistance in the determination of this case for the following reasons:
- the pre-2011 cases were determined prior to the introduction of secondary legislation⁵⁴ increasing the maximum financial penalty in respect of persistent misuse from £50,000 to £2 million;
 - the pre-2011 cases were determined on the basis of Penalty Guidelines which have now been superseded by the current Penalty Guidelines;
 - the pre-2011 cases related to persistent misuse having regard to a policy statement which has now been superseded by the current Policy Statement;
 - the period of investigation (i.e. Relevant Period) has been reduced in duration, for the purposes of assisting efficient enforcement, from approximately seven months to seven weeks⁵⁵ and therefore the figures in respect of the number of abandoned/silent calls do not provide a helpful comparison; and

⁵² Annex 14, Third Response.

⁵³ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

⁵⁴ http://www.legislation.gov.uk/uksi/2010/2291/pdfs/uksi_20102291_en.pdf

⁵⁵ Note the duration of the Relevant Period in a particular case may vary depending on the facts and circumstances of that case.

- the penalty in each case is assessed against the circumstances of that particular case in the round.

4.67 Accordingly, we do not consider the pre-2011 cases to be particularly relevant in light of the revised variables and this section does not therefore purport to be a comprehensive analysis of each case as compared to and distinguished from the present case. Nevertheless, we note that:

- Ofcom has held that there is a need for penalties to act as a sufficient incentive to comply with section 128 of the Act, and having regard to the Policy Statement, across industry and for the target of the investigation specifically.⁵⁶
- Ofcom has held that the seriousness of harm is linked to the number of abandoned and/or silent calls made⁵⁷, with silent calls being particularly serious⁵⁸, but even a relatively small number of calls may be, “serious”⁵⁹.
- In the majority of pre-2011 cases, Ofcom found no direct evidence to suggest that senior management were aware or ought to have been aware of the respective contraventions.
- Ofcom has held that, “*it is the Company’s responsibility to ensure that its call centres comply with its legal obligations...In these circumstances, Ofcom does not consider that the Company’s contraventions can be attributed to circumstances beyond the Company’s control nor to the actions of a third party*”⁶⁰.
- In many of the pre-2011 cases, evidence was provided of steps taken to secure that the misuse was both brought to an end and not repeated⁶¹.

Comparison and distinction between the present case and post 2011 persistent misuse cases, HomeServe PLC (“HomeServe”), RWE npower PLC (“npower”), TalkTalk PLC (“TalkTalk”), Ageas Retail Limited (“Ageas”), Green Deal Savings Limited (“GDS”), MYIML Limited (“MYIML”) and Sambora Communications Incorporated (“Sambora”)

4.68 The most recent persistent misuse cases were determined as follows:

- | | | |
|-------------------|-----------|----------|
| • 18 March 2012 | HomeServe | £750,000 |
| • 6 December 2012 | npower | £60,000 |
| • 18 April 2013 | TalkTalk | £750,000 |
| • 1 October 2014 | Ageas | £10,000 |

⁵⁶ See, in particular, Complete Credit Management, March 2008.

⁵⁷ Annex 3, Policy Statement, A1.84.

⁵⁸ See e.g. Barclaycard, September 2008 http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

⁵⁹ See e.g. Complete Credit Management, March 2008

http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

⁶⁰ Space Kitchens and Bedrooms (Holdings) Ltd, January 2007.

⁶¹ See e.g. Equidebt Limited (December 2008), Abbey National Plc (March 2008), Complete Credit Management (March 2008).

- 1 December 2014 GDS £20,000
- 2 December 2014 MYIML £20,000
- 8 January 2015 Sambora £8,000.

4.69 These cases were determined:

- a) on the basis of the (current) Policy Statement (published on 1 October 2010);
- b) on the basis of the (current) Penalty Guidelines (published on 13 June 2011);
- c) after the introduction of secondary legislation increasing the maximum financial penalty in respect of persistent misuse from £50,000 to £2 million;
- d) in respect of a period of investigation (i.e. Relevant Period) of seven weeks; and
- e) in consideration of the circumstances of the case in the round.

4.70 The key features of the cases involving the companies listed in Paragraph 4.68 and the present case are considered below in terms of certain of the factors set out in the Penalty Guidelines.

Deterrence and seriousness of the contravention

4.71 Ofcom considered that the persistent misuse in the HomeServe and TalkTalk cases should be characterised as very serious. In both those cases, that seriousness was a significant factor in the substantial penalty imposed:

- the HomeServe case was significant, involving 42 separate 24 hour periods where it exceeded the three per cent abandoned call rate and generated 14,756 abandoned calls. Of those 42 days, 27 of them involved HomeServe making one or more calls to that specific number within the same 24 hour period, resulting in 36,218 calls which were inconsistent with the 24 hour policy set out in the Policy Statement.
- TalkTalk, exceeded an abandoned call rate of three per cent of live calls over a 24 hour period by a substantial amount on at least four separate occasions during the Relevant Period (1 February 2011 to 21 March 2011). This translated to approximately 9,000 calls. It also failed to ensure that an information message was always played in the event of an abandoned call so these calls were in effect silent calls. It also persistently made 512 abandoned calls over 29 days.

4.72 Ofcom also considered that the degree of harm caused by MYIML was likely to be of a broadly similar level to that generated by HomeServe and TalkTalk. This was reflected in the level of the penalty issued to MYIML (relative to the varying size of MYIML and both HomeServe and TalkTalk).

4.73 In this case, DMD:

- exceeded an abandoned call rate of three per cent of live calls over a 24 hour period on 37 separate occasions during the Relevant Period; making a total of

approximately 55,193 abandoned calls, of which approximately 53,757 were silent calls resulting from answer machine detection false positives.

- made approximately 427,765 repeat calls to individual CLIs without the presence of a live operator after the detection of an answer machine, which is likely to have resulted in some consumers suffering repeat silent calls, which we consider to be particularly serious.
- failed to ensure that the information message played in the event of an abandoned call included details of an appropriate number to enable call recipient to decline further calls.
- failed to suspend or adjust its dialler settings to reduce the risk of repeat abandoned and silent calls over seven separate 24 hour periods during which time it was trying to fix an error in the process for loading call data into its dialler.

4.74 In light of this we consider that the DMD case is at the higher end of the scale and is more serious than the HomeServe, TalkTalk and MYIML cases.

Degree of harm caused by the contravention

4.75 Ofcom was of the view that HomeServe, TalkTalk and MYIML generated a considerable degree of harm. It took into account the scale of the contravention and the harm suffered by recipients of the silent and abandoned calls during the Relevant Period.

4.76 In this case there is a significantly higher number of silent calls than in the other cases mentioned above. In addition, there was a significant number of contraventions of the 24 hour policy, which is likely to have resulted in repeat silent calls for some consumers. Ofcom therefore considers that the DMD case caused more harm than the HomeServe, TalkTalk and MYIML cases and this is reflected in the level of the penalty.

Steps taken to remedy the consequences of the contraventions

4.77 Neither TalkTalk nor GDS provided any evidence of steps taken to remedy the consequences of the contraventions. Accordingly, no credit was given on this account in our assessment of the penalty imposed in these cases.

4.78 In the present case, DMD called one recipient of a large volume of repeat calls to offer an apology and compensation for the error that had occurred. As noted in paragraphs 4.37 – 4.39, we consider that it did not take adequate steps to remedy the consequences. Accordingly, we are not giving DMD credit on this account in our assessment of the penalty.

4.79 This is in contrast to other cases, such as the HomeServe case, where the notified misuser committed to putting in place concrete steps for remedying the consequences of the notified misuse. In such cases, Ofcom took the steps taken by the notified misuser into account in determining the penalty.

History of contravention

- 4.80 Consistent with previous cases where there was no history of previous persistent misuse contraventions, this factor has not been taken into account in assessing the level of the penalty in this case.

Whether in all the circumstances appropriate steps were taken to prevent the contravention

- 4.81 In the HomeServe, npower, TalkTalk, GDS, MYIML and Sambora cases Ofcom found that there had been a failure to take all appropriate and timely steps to prevent the notified contraventions.
- 4.82 In our penalty assessment in the present case, we have similarly taken into account that DMD had failed to take all appropriate steps to prevent the notified misuse before it occurred (see paragraphs 4.39 - 4.47 above).

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.

- 4.83 In HomeServe, the senior management had received a report (during the Relevant Period) from an independent body engaged to assist a review of dialler operations. This report detailed findings and recommendations, and included a list of non-compliant matters. Ofcom stated that, *“it is apparent to Ofcom that senior management, upon receipt of this report, would have been aware not only that the Guidelines were not being followed but also of the seriousness and extent of the contraventions”* and that notwithstanding this was the state of their knowledge, it was not until two months later that testing was conducted which revealed a significantly higher abandoned call rate than three per cent.
- 4.84 As noted in paragraphs 4.49 to 4.51, Ofcom considers that DMD’s contravention included behaviour that was reckless over seven separate 24 hour periods. We also consider that, given the size of the contravention, DMD’s senior management should have been aware that a contravention was occurring. Therefore, this is a factor Ofcom has taken into account in assessing the penalty amount.

Whether the contravention continued, or timely and effective steps were taken to end it, once DMD became aware of it

- 4.85 In the Ageas case, Ofcom noted that it took some steps on its own initiative to end the relevant misuse once it was aware of it, but it failed to take all appropriate steps in a timely and effective manner. This was reflected in a higher penalty.
- 4.86 In the present case, we also consider that DMD took some, but not all appropriate steps to end the relevant misuse. This has increased the level of the penalty amount.

Co-operation with Ofcom’s investigation

- 4.87 GDS, MYIML and Sambora were punctual in their responses to Ofcom’s statutory information requests. It was therefore our view that GDS, MYIML and Sambora cooperated with our investigations and this was taken into account in assessing the level of penalties in these cases.

- 4.88 In the present case DMD was also punctual in its responses to Ofcom's statutory information requests. Therefore our view is that it cooperated with our investigation and we have not increased the penalty for this reason.

Record-keeping

- 4.89 In the TalkTalk case, in contrast to all of the other cases listed in paragraph 4.68 above, there was a failure to keep records and a failure to take appropriate steps to provide a robust reasoned estimate of AMD false positives which meant that Ofcom was unable to determine the consistency of one call centre's actions with the Policy Statement. We regarded this as particularly serious.
- 4.90 We consider that the present case has some similarities with the TalkTalk case in that DMD was not able to provide Ofcom with a reasoned estimate of false positives based on its own calling data. This case does differ in that DMD was able to provide a reasoned estimate based on the sampling of another company's data (as set out at paragraphs 4.52 – 4.54); and which Ofcom was able to use to determine a reasoned estimate of false positives. Ofcom has taken the fact that DMD was unable to provide a reasoned estimate of false positives based on its own calling data into account in setting the level of the penalty.

The extent to which the level of penalty is proportionate, taking into account size and turnover

- 4.91 In all of these cases the size and turnover is a relevant consideration in the determination of the proportionality of the penalty imposed. Ofcom considered that HomeServe, npower, TalkTalk and Ageas were all sizeable businesses with a significant turnover; whereas GDS, MYIML and Sambora were relatively small companies and this indicated a much lower penalty.
- 4.92 In the present case, we note that DMD is also a relatively small business, and consistent with the GDS, MYIML and Sambora cases, the penalty is set at a level taking this into account.

Ofcom's conclusions on the penalty amount

- 4.93 Any penalty Ofcom imposes on DMD must be appropriate and proportionate to the contravention in respect to which it is imposed. Ofcom's central objective in setting a penalty is deterrence. An appropriate penalty would be one that secures this objective in a proportionate way. We have set out above the particular factors relevant to those requirements.
- 4.94 In particular, we have noted (having regard to our Policy Statement) that DMD contravened the persistent misuse provisions during the seven week Relevant Period by exceeding an abandoned call rate of three per cent of live calls over a 24 hour period on 37 separate occasions, making in our estimate approximately 55,193 abandoned calls; made approximately 427,765 repeat calls to individual CLIs without the guaranteed presence of a live operator after the detection of an answer machine in the same 24 hours; and played an information message in the event of an abandoned call which failed to include an appropriate CLI to enable the consumer to opt out of receiving further marketing calls. It also failed to suspend outbound dialling or adjust its dialler settings to reduce the risk of repeat abandoned and silent calls over seven separate 24 hour periods during which time it was seeking to fix an error in its data loading process.

- 4.95 As regards the weighting of the factors considered, it is our regulatory judgment that the following factors are of particular importance in the circumstances of this case and tend to add to the amount of an appropriate and proportionate penalty:
- (a) persistent misuse is inherently serious, more so in cases where a person exceeds the margin for error in the three per cent abandoned call rate and where silent calls and repeat silent calls are made;
 - (b) we consider that this case to be more serious than the HomeServe, TalkTalk and MYIML cases;
 - (c) substantial consumer harm is likely to have arisen from DMD's notified misuse;
 - (d) the duration of the notified misuse is significant;
 - (e) DMD took some, but not sufficient, appropriate steps to prevent the misuse before it occurred and end it once it became aware (or should have been aware) of it;
 - (f) DMD's failure to keep adequate records resulted in DMD being unable to provide to Ofcom a reasoned estimate of false positives based on DMD's own calling data; and
 - (g) DMD's recklessness in failing to suspend or adjust its dialler settings over seven separate 24 hour periods to reduce the risk of repeat abandoned and silent calls.
- 4.96 Ofcom's regulatory judgment is that the following factor tends to reduce the amount of an appropriate and proportionate penalty: DMD is a relatively small business with a turnover in the last financial year of around £[redacted] and as such there is a need to ensure that the penalty is proportionate to the size of the organisation.
- 4.97 On the basis of these factors, Ofcom's regulatory judgment is that a penalty of £150,000 would be appropriate and proportionate. As set out in paragraph 3.32 above, notwithstanding that DMD is in the process of being dissolved, the dissolution of the company has not taken place as at the date of this Notification and could still be halted or reversed. We do not consider it appropriate to stop the regulatory process on the basis of a proposed but not yet completed voluntary striking off procedure. The decision to impose the penalty of £150,000 reflects that Ofcom considers cases of persistent misuse to be serious; and that this is liable to be met with a penalty, to deter DMD and others from engaging in that conduct. It also reflects each of the factors tending to increase the penalty. Our judgment is that it will help deter contraventions of the law on persistent misuse, in the interests of citizens and consumer and of fair-dealing businesses.

Section 5

Annexes

Annex 1	The Policy Statement (the <i>Revised statement of policy, and Tackling abandoned and silent calls: Statement, October 2010</i>). http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf
Annex 2	First open letter to ACS users published on 20 December 2010 http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/acs_users.pdf
Annex 3	Ofcom Penalty Guidelines dated 13 June 2011 http://www.ofcom.org.uk/files/2010/06/penguid.pdf
Annex 4	Second open letter to ACS users published on 21 May 2012 http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/Open_letter_to_stakeholders.pdf
Annex 5	Third open letter to ACS users published on 20 March 2013 http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/ICO_Ofcom_Letter_200313.pdf

Annex 6

Notice under section 135 to DMD, 14 May 2014 (the “First Notice”)

In preparing the specified information requested below, please note the following.

Scope of specified information

This notice requires XS-Remarketing to provide information to Ofcom. The specified information covers the period from **9 March 2014** to **28 April 2014** inclusive (the ‘Relevant Period’).

Your response should encompass all outbound calls to UK consumers during the Relevant Period, made either directly by XS-Remarketing or by a third party acting on behalf of or under instruction from XS-Remarketing, using an ACS.

Your response should therefore include any outsourced or other call centre(s) (including those located outside the UK), which were contracted by XS-Remarketing to make calls to UK consumers on behalf of XS-Remarketing during the Relevant Period.

Manner and form of provision of specified information

For the questions 1-5, 7-9 and 11, please provide your response in a Microsoft Word or Adobe Reader document that contains XS-Remarketing stationary and then email this document to [redacted].

Questions 6 and 10 request information based on templates. Please provide this information in a Microsoft Excel spread sheet and email this document to [redacted]. If the information is held in your records management systems in a form from which it is not possible to complete the templates, please provide the information requested in an alternative format, ensuring that it is electronically searchable and explaining how what you provide comprises the information requested.

The information must reach [redacted] by no later than **5pm (BST) on 29 May 2014**.

Explanation of terms

Section 3 of the policy statement provides an explanation of the terms used below and an explanation of the methodology which can be used when determining compliance with the policy statement.

Questions

Nature of XS-Remarketing's activity

- 1) Please provide a corporate structure chart for the group which includes XS-Remarketing. The structure chart should:
 - a. specify the full names of all subsidiaries and/or holding companies of XS-Remarketing; and
 - b. for each of the above, specify the nature of the activity undertaken (for example "claims management").

Call centres and campaigns

- 2) Please confirm whether calls using the CLI number **01413600184** were originated by XS-Remarketing or another member of its corporate group or connected person (in which case, please specify who) during the Relevant Period.
- 3) Please list all calls made by XS-Remarketing (or by one or more members of XS-Remarketing's corporate group or by a connected person) during the Relevant Period where the CLI number **01413600184** was presented. In each case, please state whether the call was made:
 - a. on behalf of XS-Remarketing;
 - b. on behalf of one or more members of XS-Remarketing's corporate group (and in which case, who); or
 - c. on behalf of one or more third parties (and, if so, who).
- 4) If the calls referred to in question 3 were made on behalf of one or more third parties, for each third party please provide:
 - a. its name;
 - b. its UK registered company number;
 - c. its postal address;
 - d. a contact name;
 - e. a contact telephone number;
 - f. an email address; and
 - g. a copy of any documents evidencing your contractual arrangement(s) with, and the scope of any authority to act conferred on you by, the third party.
- 5) For each campaign conducted during the Relevant Period, please confirm:
 - a. the campaign name or title; and
 - b. the call centre(s) that worked on the campaign.
- 6) Please provide:
 - a. the data as set out in both Templates 1 and 2 below, broken down by each 24 hour period during the Relevant Period. The data should be provided electronically by means of a Microsoft Excel spread sheet;
 - b. both one worksheet per call centre and one worksheet per campaign, making clear which campaign(s) or call centre/s the data refers to. Where AMD was not used, please disregard column D; and

- c. evidence to substantiate the reasoned estimate of AMD false positives incurred where AMD was used at a call centre⁶².

Template 1:

Call Centre X / all campaigns (and so on per call centre)

	A	B	C	D	E
	Date	Number of live calls passed to a live operator	Unadjusted total of abandoned calls	Actual AMD false positives figure or reasoned number of AMD false positives ⁶³	Number of calls passed to a live operator and classified as answered by an answer machine
1	x/x/14				
2	y/x/14				
3	z/x/14				

Template 2:

Campaign X / all call centres (i.e. that were involved in dialling within that campaign)

	A	B	C	D	E
	Date	Number of live calls passed to a live operator	Unadjusted total of abandoned calls	Actual AMD false positives figure or reasoned number of AMD false positives ⁶⁴	Number of calls passed to a live operator and classified as answered by an answer machine
1	x/x/14				
2	y/x/14				
3	z/x/14				

- 7) Please confirm whether and how XS-Remarketing reviews calls put through to its live operators to ensure these operators are correctly classifying 'live calls' and 'calls to answer machines' (thus ensuring live calls are not incorrectly disconnected). Please provide the results of any review(s) that were undertaken during the Relevant Period

⁶² Refer to A1.35 – A1.46 of the policy statement. 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.

⁶³ Refer to A1.35 – A1.46 of the policy statement.

⁶⁴ Refer to A1.35 – A1.46 of the policy statement.

(or closest to the Relevant Period if none were undertaken during the Relevant Period).

Recorded information message

- 8) Please confirm whether, within two seconds of a call being answered by an individual⁶⁵ and before being terminated or released by the ACS, XS-Remarketing provided a brief recorded information message. Your response should make it clear the extent to which this applied throughout the relevant period and in relation to each call centre and each campaign.
- 9) Please provide the script(s) of the recorded message referred to in Question 8, per call centre and per campaign.

24 hour policy

- 10) Please confirm what procedures, if any, XS-Remarketing 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 both per call centre and per campaign.

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

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

Template 3:

	A	B	C	D
	Date	Time of call	CLI dialled	Answerphone detected? (Y/N)
1	x/x/14			
2				
3				

⁶⁵ See A1.51 of the policy statement for an explanation of ‘within two seconds of the call being answered’.

Annex 7

DMD response to the First Notice, 29 May 2014.

[3<]

Annex 8

Notice under section 135 to DMD, 28 July 2014 (the “Second Notice”)

Call centres and campaigns

1. Please list **all CLI numbers** used by XS-Remarketing (or by one or more members of XS-Remarketing’s corporate group or by a connected person) as presentation numbers during the Relevant Period.

2. For **all outbound calls** made by XS-Remarketing (or by one or more members of XS-Remarketing’s corporate group or by a connected person) using an ACS during the Relevant Period, please state whether the calls were made:
 - a. on behalf of XS-Remarketing;
 - b. on behalf of one or more members of XS-Remarketing’s corporate group (and in which case, who); or
 - c. on behalf of one or more third parties (and, if so, who).

Please present this information by CLI number as set out in the table below.

	A	B
	CLI	Entity on whose behalf calls were made
1	0XXXX	
2	0XXXX	
3	0XXXX	

- 3) If any calls referred to in question 2 were made on behalf of one or more third parties, for each third party please provide:
 - a. its name;
 - b. its UK registered company number;
 - c. its postal address;
 - d. a contact name;
 - e. a contact telephone number;
 - f. an email address; and
 - g. a copy of any documents evidencing your contractual arrangement(s) with, and the scope of any authority to act conferred on you by, the third party.

- 4) For all **campaigns**⁶⁶ conducted during the Relevant Period, please confirm:
- the campaign name or title;
 - a brief description of the campaign purpose;
 - the call centre(s) that worked on the campaign; and
 - which CLI numbers were presented for each campaign.
- 5) Please provide:
- the data as set out in both Templates 1 and 2 below, broken down by each 24 hour period for **all outbound calls** during the Relevant Period. The data should be provided electronically by means of a Microsoft Excel spreadsheet;
 - both one worksheet per call centre and one worksheet per campaign, making clear which campaign(s) or call centre/s the data refers to. Where AMD was not used, please disregard column D;
 - evidence to substantiate the reasoned estimate of AMD false positives incurred where AMD was used at a call centre⁶⁷; and
 - an explanation of how the reasoned estimate of AMD false positives, and the resulting calculations, have been produced, including the dates and times of the calls analysed, as well as the CLI numbers presented. You should refer to A1.37 to A1.43 of the policy statement in preparing your answer.

Template 1:

Call Centre X / all campaigns (and so on per call centre)

	A	B	C	D	E
	Date	Number of live calls passed to a live operator	Unadjusted total of abandoned calls	Actual AMD false positives figure or reasoned number of AMD false positives ⁶⁸	Number of calls passed to a live operator and classified as answered by an answer machine
1	x/x/14				
2	y/x/14				
3	z/x/14				

Template 2:

⁶⁶ Refer to A1.21 of the policy statement.

⁶⁷ Refer to A1.35 – A1.46 of the policy statement. 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.

⁶⁸ Refer to A1.35 – A1.46 of the policy statement.

Campaign X / all call centres (i.e. that were involved in dialling within that campaign)

	A	B	C	D	E
	Date	Number of live calls passed to a live operator	Unadjusted total of abandoned calls	Actual AMD false positives figure or reasoned number of AMD false positives ⁶⁹	Number of calls passed to a live operator and classified as answered by an answer machine
1	x/x/14				
2	y/x/14				
3	z/x/14				

24 hour policy

- 6) Please supply the data, as set out in Template 3 below, on **all outbound calls** made using AMD technology for **each 24 hour period**⁷⁰ during the Relevant Period:
- Please either provide the information in chronological order or specify the time of each call; and
 - Please provide one worksheet per call centre per 24 hour period, making clear which campaign(s) the data refers to.

Template 3:

	A	B	C	D
	Date	Time of call	CLI dialled	Answerphone detected? (Y/N)
1	x/x/14			
2	y/x/14			
3	z/x/14			

⁶⁹ Refer to A1.35 – A1.46 of the policy statement.

⁷⁰ Refer to A1.16 of the policy statement.

Annex 9

DMD response to the Second Notice, 11 August 2014.

[~~ⓧ~~]

Annex 10

Email from DMD, 1 September 2014

[✂]

Annex 11

**Email from DMD, dated 12 December
2014**

[✂]

Annex 12

**Confidential section 128 issued to DMD,
18 May 2015**

[X]

Annex 13

Notice under section 135 to DMD, 22 June 2015 (the “Third Notice”)

Financial information

1. Please provide turnover figures for XS Remarketing for the financial years ending 30 June 2013 and 30 June 2014.

Other information relating to size

2. Please provide the number of full-time employees of XS Remarketing during the period from **9 March 2014** to **28 April 2014** inclusive (the ‘Relevant Period’). If the number of full-time employees changed at any time within the Relevant Period, please identify the change and give the date.

3. Please provide the number of part-time employees of XS Remarketing during the Relevant Period. If the number of part-time employees changed at any time during the Relevant Period, please identify the change and give the date.

Annex 14

**DMD response to the Third Notice, 6 July
2015**

[~~ⓧ~~]

Annex 15

**Section 130 Provisional Notification,
issued to DMD on 23 July 2015**

[X]

Annex 16

Email from DMD to Ofcom, 31 July 2015

[✂]

Annex 17

**Mott MacDonald report to Ofcom, 13
March 2015**

[✂]