



Notification to Ageas Retail Limited of a penalty under Section 130 of the Communications Act 2003

Notification served on Ageas Retail Limited (formerly known as Ageas 50 Limited) by the Office of Communications ("Ofcom")

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Notification to Ageas Retail Limited (formerly known as Ageas 50 Limited) of a penalty under Section 130 of the Communications Act 2003

Subject of this Notification

1. This Notification is addressed to Ageas Retail Limited, trading as RIAS and Castle Cover (“Ageas Retail”), registered company number **01324965** and registered address Ageas House Hampshire Corporate Park, Templars Way, Eastleigh, Hampshire, United Kingdom, SO53 3YA.
2. Ageas Retail was formerly known as “Ageas 50 Limited”. It was called the latter at the time of the events which are the subject of this Notification. [X], acting as the Company Secretary for Ageas Retail, informed Ofcom on 18 August 2014 that Ageas 50 Limited had changed its company name to Ageas Retail Limited with effect from 28 July 2014. For the purposes of this Notification, Ofcom refers to the company as “Ageas”.
3. It notifies Ageas of the imposition by the Office of Communications (“Ofcom”) of the following penalty under section 130 of the Communications Act 2003 (the “Act”):
 - a) A penalty of £10 000.
 - b) Ofcom imposes this penalty on Ageas, as it has, in one 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 21 July 2013 and 7 September 2013.

Background

4. Section 130 of the Act applies where:
 - a) a person has been given a notification under section 128 of the Act;
 - b) 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 9 April 2014 Ofcom issued to Ageas, under section 128 of the Act, a notification that Ofcom had reasonable grounds for believing that between 21 July 2013 and 7 September 2013 (the “Relevant Period”), Ageas had persistently misused an electronic communications network or electronic communications service (the “section 128 notification”). The section 128 notification is at Annex 1 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 Ageas had an opportunity of making representations about the matters notified in the section 128 notification. Ofcom received written representations from Ageas on 12 May 2014 (the “Representations”) in relation to the matters notified and an email sent to Ofcom on 24 June 2014 providing an update on the progress made by Ageas with the remedial actions detailed within the Representations (the “June 2014 email”). The Representations are at Annex 2 to this document and the June 2014 email is at Annex 3.
8. Ofcom carefully considered these representations. On 28 July 2014 Ofcom served on Ageas a notification of a possible penalty under section 130 of the Act (the “Provisional Notification”). The Provisional Notification set out Ofcom’s preliminary view that it should impose on Ageas a penalty of £10 000 as Ageas had, in one 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.
9. The reasons for Ofcom’s provisional determination were set out in the Explanatory Statement accompanying the Provisional Notification.
10. The Provisional Notification gave Ageas until 26 August 2014 to make written representations to Ofcom about matters set out in the accompanying Explanatory Statement. It also gave Ageas the opportunity to make oral representations to Ofcom in relation to these matters. On 18 August 2014, Ageas submitted its written representations to Ofcom (the “August 2014 Representations”) (Annex 13 to this Notification). The Representations included the statement that Ageas, “... *acknowledges and accepts failure in relation to the persistent misuse of an electronic communications network or electronic communications service during the ‘relevant period.’*”

Sections 128, 129, 130 and 131 of the Act

11. 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.
12. 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.

13. 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.
14. 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.
15. 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.
16. 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.
17. 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).
18. 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).

Determination made by Ofcom

19. For the reasons set out in the Explanatory Statement, Ofcom determines that, pursuant to section 130(2) of the Act, Ageas has, in one of the notified respects, persistently misused an electronic communications network or electronic communications service.
20. 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 4 of this document.
21. Having had regard to representations made to Ofcom by Ageas, steps taken by Ageas for securing that its misuse is brought to an end and not repeated; and steps taken by Ageas 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.

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>

22. 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 £10 000 on Ageas in relation to Ageas’s persistent misuse of an electronic communications network or service in one of the respects notified in the section 128 notification. The Penalty Guidelines are at Annex 5 of this document.
23. The reasons for Ofcom’s determination are set out in the following Explanatory Statement.

Interpretation

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

Nuala Cosgrove (Legal Director, Legal) and Neil Buckley (Director – Investigations, Competition Group) as decision makers for Ofcom.

9 September 2014

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 ("Notification") on Ageas Retail Limited (formerly known as "Ageas 50 Limited"), trading as RIAS and Castle Cover (and referred to as "Ageas" in this notification), under section 130 of the Communications Act 2003 (the "Act"). It sets out Ofcom's decision that such a penalty should be imposed on Ageas 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 dated 28 November 2013 (the "Information Request"⁵);
 - b) analysis of Ageas's response to the Information Request received on 13 December 2013 (the "Response"⁶) and subsequent clarifications confirmed in an email to Ofcom on 23 January 2014;
 - c) investigation into Ageas's compliance between the period 21 July 2013 and 7 September 2013 (the "Relevant Period") with section 128 of the Act, having regard to the principles set out in the policy statement⁷;
 - d) determination that there are reasonable grounds for believing that, during the Relevant Period, Ageas persistently misused an electronic communications network or electronic communications service;
 - e) service on Ageas on 9 April 2014 of a notification under section 128 of the Act (the "section 128 notification"⁸);
 - f) consideration of representations on the section 128 notification by Ageas dated 12 May 2014 (the "Representations")⁹ and an email sent to Ofcom on 24 June 2014 providing an update on the progress made by Ageas with the remedial actions that were detailed within the Representations (the "June 2014 email," included as Annex 3)¹⁰;
 - g) consideration of steps taken to secure that the misuse is brought to an end and not repeated, and to remedy the consequences of the misuse notified in the section 128 notification;
 - h) service on Ageas on 28 July 2014 of a provisional notification of a possible penalty under section 130 of the Act (the "Provisional Notification"¹¹), setting out, amongst other things, Ofcom's preliminary view:

⁵ Annex 7, Information Request dated 28 November 2013.

⁶ Annex 8, Response dated 13 December 2013.

⁷ See paragraph 2.16 below.

⁸ Annex 1, section 128 notification.

⁹ Annex 2, Representations.

¹⁰ Annex 3, the June 2014 email.

¹¹ Annex 12, Provisional Notification dated 28 July 2014.

- i) that we should impose on Ageas a penalty in respect of its persistent misuse of an electronic communications network or service between 21 July and 7 September 2013; and
 - ii) that penalty should be £10 000; and
 - i) Ageas's written representations of 18 August 2014, in respect of the Provisional Notification ("the August 2014 Representations"¹²).
- 1.3 Taking into account all the above, Ofcom's decision is that a financial penalty be imposed on Ageas as it has, in one 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 £10 000.
- 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 Response;
 - b) the Representations and the June 2014 email;
 - c) the number and nature of occasions on which Ageas was not compliant with the persistent misuse provisions, having regard to the policy statement;
 - d) steps taken by Ageas for securing that its misuse is brought to an end and is not repeated;
 - e) steps taken by Ageas for remedying the consequences of the notified misuse;
 - 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");¹³ and
 - g) the August 2014 Representations, including in particular the statement Ageas made in them that it, "... *acknowledges and accepts failure in relation to the persistent misuse of an electronic communications network or electronic communications service during the 'relevant period.'*"
- 1.5 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:
- a. that Ageas has, in one of the respects notified in the section 128 notification, persistently misused an electronic communications network or service during the Relevant Period by:
 - Making multiple abandoned calls during each of three separate 24 hour periods. Ofcom estimates on the basis of the evidence available that Ageas made approximately 148 abandoned calls in total on those days. Ofcom considers it appropriate to take enforcement action in respect of these periods because the abandoned call rate also exceeded three per cent of live calls.

¹² Annex 13, August 2014 Representations.

¹³ see <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

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 cause¹⁴.

- b. the central objective in imposing a penalty and determining its amount, set out in the Penalty Guidelines, is deterrence: setting the amount of any penalty to be sufficient to ensure that it will act as an effective incentive to compliance for Ageas, having regard to the seriousness of its infringement, and others to whom the persistent misuse provisions and the policy statement apply; and
- c. that whilst the total number of abandoned calls made in the three separate 24 hour periods was low compared to the other cases noted in this Notification, and therefore the overall level of harm was on the lower end of the scale in comparison, such persistent misuse is sufficiently serious as to warrant the imposition of a penalty in order to create a deterrent effect for Ageas, and for all those subject to regulation by Ofcom, in turn to help ensure widespread compliance with legislation and regulatory principles and to further the interests of citizens and consumers, as well as those of fair-dealing businesses harmed by the wrongdoing of competitors.

1.6 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.

¹⁴ Annex 4, the policy statement (A1.12-A1.13).

Section 2

Background

- 2.1 The following section sets out the background to Ofcom’s investigation into Ageas, both before and after the issue of the section 128 notification to Ageas on 9 April 2014.

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:

- 2.4 “(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.”

- 2.5 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.”

- 2.6 With section 3(3) in mind, Ofcom has published a statement of regulatory principles¹⁵. 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.

¹⁵ <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>

- 2.7 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

- 2.8 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.

- 2.9 Section 128(5) of the Act defines "misuse" as follows:

"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."

- 2.10 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."

- 2.11 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."

- 2.12 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.”

- 2.13 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.

- 2.14 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 £2,000,000¹⁶ 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

2.15 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.

2.16 This most recent statement is the *Revised statement of policy on the persistent misuse of an electronic communications network or service 2010*¹⁷, published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement*¹⁸ (the "policy statement") (see Annex 4).

2.17 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.

2.18 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

¹⁶ 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).

¹⁷ <http://www.legislation.gov.uk/ukxi/2010/2291/article/2/made>.

¹⁷ <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>

¹⁸ <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

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.”

- 2.19 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.
 - 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.
- 2.20 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

- 2.21 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 Ageas.
- 2.22 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 time¹⁹. The programme has been on-going since that time.
- 2.23 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.

¹⁹ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

- 2.24 Within this review of complaints, Ofcom noted complaints regarding abandoned and silent calls allegedly being generated for or on behalf of Ageas using the CLI (“Calling Line Identification”) number [redacted] between the period 21 July 2013 to 7 September 2013. Many of these complaints alleged that consumers had received two or more silent calls from this number during this time. Consequently, it was determined appropriate to conduct an investigation into Ageas’s compliance with the persistent misuse provisions in the Act having regard to the policy statement.
- 2.25 Ofcom’s investigation of Ageas’s compliance with the persistent misuse provisions of the Act, having regard to the policy statement, included:
- a) analysis of complaint data received by the CCT in relation to the Relevant Period;
 - b) issuing an information request to Ageas under section 135 of the Act (the “Information Request”²⁰) on 26 November 2013. This requested information in relation to Ageas’s processes and procedures in respect of its use of Automatic Calling Systems (“ACS”) and whether such processes and procedures were consistent with Ofcom’s policy statement; and
 - c) analysis by Ofcom of Ageas’s response to the Information Request (the “Response”²¹) received on 13 December 2013 and subsequent clarifications that were confirmed in an email to Ofcom on 23 January 2014.
- 2.26 Following the investigation, the section 128 notification was issued to Ageas²² on 9 April 2014. This notification 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, Ageas persistently misused an electronic communications network or service;
 - b) the specific use made of an electronic communications network or electronic communications services by Ageas that Ofcom considered constituted persistent misuse; and
 - c) the period during which Ageas had the opportunity to make representations about the matters notified.
- 2.27 In particular, 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. Evidence provided in the Response shows that Ageas 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 three separate 24 hour periods – 27 July, 10 August and 31 August 2013 – during the Relevant Period. Based on the available evidence, Ofcom calculated that the abandoned call rates on those dates were 8.57 per cent, 4.42 per cent and 10.64 per cent respectively.

²⁰ Annex 7, Information Request dated 28 November 2013.

²¹ Annex 8, Response dated 13 December 2013.

²² Annex 1, section 128 notification.

- 2.28 Accordingly, in the section 128 notification, Ofcom set out its reasonable grounds for believing that Ageas had exceeded an abandoned call rate of three per cent at the call centres it operated – as one single entity – in Bournemouth and Belfast²³. The notification also set out, having regard to other provisions of the policy statement, Ofcom’s determination that Ageas’s persistent misuse also comprised the inclusion of an inappropriate marketing message played in the event of an abandoned call.
- 2.29 Ageas had until 12 May 2014 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.

The representations submitted by Ageas

- 2.30 Ageas submitted its representations to Ofcom on the matters set out in the section 128 notification (the “Representations”)²⁴ on 12 May 2014.
- 2.31 The Representations set out:
- a) Ageas’s submissions as to why it considered that its actions during the Relevant Period did not constitute persistent misuse;
 - b) the remedial actions Ageas had implemented, or was in the process of implementing, since the Relevant Period; and
 - c) Ageas’s submissions on whether further enforcement action should be taken and mitigating factors.
- 2.32 In the Representations, Ageas did not dispute that the making of abandoned calls is liable to be misuse for the purposes of sections 128 – 130 of the Act, as set out in the section 128 notification. It also accepted that the abandoned call rate exceeded the three per cent threshold on those three days during the Relevant Period.
- 2.33 However, it argued that its activities should not be characterised as persistent. Ageas submitted that the circumstances of its case were very different to previous cases that Ofcom had investigated in terms of frequency of breaches and number of consumers affected. It went on to argue that, “*to avoid acting in a manner in which its discretion is fettered*²⁵, Ofcom must consider independently of the guidelines, whether the behaviour really is persistent²⁶”.
- 2.34 After carefully considering the relevant parts of the Representations, we disagree with the contention made by Ageas that its activities should not be characterised as persistent. Having regard to the Act and the policy statement, abandoned calls may be considered “*persistent*” if the misuse is repeated on a sufficient number of occasions for it to be clear that the misuse represents a, “*pattern of behaviour or practice*” or recklessness as to whether the behaviour may cause annoyance, inconvenience or anxiety. We agree that this must be determined on a case by case basis. Our regulatory judgment is that this requirement for persistence is met in this case for the following reasons.

²³ Annex 1, section 128 notification (1.49, Table 1: Abandoned call rates in excess of 3 per cent during the Relevant Period).

²⁴ Annex 2, Representations.

²⁵ An authority will be acting unreasonably where it refuses to hear applications or makes certain decisions without taking individual circumstances into account by reference to a certain policy.

²⁶ Annex 2, Representations (paragraph 48).

- 2.35 First, misuse meeting the definition of persistent may involve a larger or smaller number of instances of repetitive misuse. Our policy statement sets out our general policy view that any such pattern of behaviour or practice is likely to require a minimum of three instances of the conduct in question in order to be recognised as persistent²⁷.
- 2.36 Second, Ofcom estimates that overall Ageas made approximately 1 646 abandoned calls during the Relevant Period²⁸.
- 2.37 Third, the policy statement sets out factors Ofcom will use as a guide to determine the cases in which it should take action under sections 128 – 130 of the Act. In particular, factors going to questions of administrative priority determined by the level of consumer detriment involved and taking account of steps taken by ACS users to reduce the degree of consumer harm that abandoned or silent calls cause.
- 2.38 Fourth, in particular the statement sets out a formula for calculating a three per cent abandoned call rate per 24-hour period. It indicates that we are more likely to take action in respect of abandoned calls where this rate is exceeded. We are likely to regard such cases as serious²⁹. This provides operators with a margin for error in respect of misuse in respect of which we might take action for being persistent.
- 2.39 Fifth, in the present case, Ageas exceeded the specified three per cent on three separate 24 hour occasions, making a total of 148 abandoned calls on those three days³⁰. This comprises part of an overall pattern of misuse comprising approximately 1 646 abandoned calls in the Relevant Period. In light of the foregoing considerations, we are minded to consider that, in itself, this represents a pattern of behaviour or practice meeting the definition of persistent, even if this is a smaller number of instances of repetitive misuse than other cases and, in respect of which, having regard to the policy statement, we should take enforcement action.
- 2.40 Taking into account the findings in the section 128 notification, the Representations and the above points, we therefore determine that Ageas has in respect of the abandoned calls notified to it in the section 128 notification, engaged in persistent misuse such that it is liable to the possibility of a penalty under section 130 of the Act. In particular, that the effect or likely effect of Ageas's use of an electronic communications network or service was to cause the call recipients unnecessarily to suffer annoyance, inconvenience or anxiety and that this misuse was repeated on a sufficient number of occasions for it to be clear that the misuse represented a pattern of behaviour.
- 2.41 In reaching this decision we also take account that in the August 2014 Representations³¹ Ageas stated that it did, "...not with to make further representations," and that it, "*has considered the details of the Provisional Notification of a penalty under Section 130 of the Communications Act 2003, and acknowledges and accepts failure in relation to the persistent misuse of an electronic*

²⁷ Annex 4, the policy statement (A1.10).

²⁸ Annex 1, section 128 notification (Annex 3) and Annex 6.

²⁹ See e.g. Section 130 notification issued to TalkTalk

http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/FINAL_Non-confidential_TTG_1.pdf, paragraph 4.19

³⁰ In the section 128 notification Ofcom noted that there was a relatively low number of abandoned calls generated in two of the three 24 hour periods when – in footnotes 30 and 31 – we stated, "*Although this is a low number in absolute terms (reflecting a lower volume of calls being made by Ageas 50 on that Saturday), the abandoned call rate was in excess of 3 per cent.*"

³¹ Annex 13, August 2014 Representations.

communications network or electronic communications service during the 'relevant period'.

The inclusion of marketing content within the information message played in the event of an abandoned call alleged in the Section 128 Notification.

- 2.42 Based upon the evidence available to Ofcom at the time, we took the view in the section 128 notification that Ageas had included marketing content within the recorded message played in the event of an abandoned call. We have since revised that assessment, having carefully considered the Representations.
- 2.43 The policy statement sets out that in the event of an abandoned call, an information message must be played which identifies the company making the call, provides a contact phone number to call in order to decline to receive further marketing calls and should not include marketing content or be used as an opportunity to market to the called person. The purpose of playing an information message is to reduce consumer harm by informing the call recipient about who has called them and how they can return the call to decline to receive further calls.
- 2.44 During the Relevant Period, Ageas played the following recorded message in the event of each abandoned call:
- “Hello this is a recorded message from RIAS, we would like to provide you with a quotation for Home (Motor) insurance but we are currently unable to put you through to one of our advisors, we may attempt to call you again in three days however, if you prefer that we don't please call [☒]. We apologise for any inconvenience caused”.*
- 2.45 In the section 128 notification Ofcom took the view that the sentence, *“we would like to provide you with a quotation for Home (Motor) insurance...”*, was an attempt by Ageas to use the recorded information message to market to the recipient of the abandoned call and that this was inconsistent with A1.52 of the policy statement. It was our view that this message sought to draw attention to the service offered by Ageas, rather than simply to state its identity and contact telephone number as required by the policy statement.
- 2.46 In the Representations, Ageas disputed this assessment and stated that, *“the motivation in using this script was to make sure that the consumer was not left wondering what the call was about and, specifically, to avoid generating anxiety which could be caused by a call without a clear legitimate purpose³²”*. It further argued that there was no, *“marketing intention or value in this message³³”*. Ageas also noted that, *“Ofcom's guidance does not elaborate on what (in its view) constitutes marketing³⁴”*.
- 2.47 Ofcom considers this matter to be finely balanced in this particular case. Having carefully considered the Representations, we no longer take the view that the information message includes marketing content. This decision takes into account the neutral wording of the information message used during the Relevant Period, that the word *“quotation”* was used without any further details as to what the *“quotation”* would involve and the benefit of providing call recipients with some information about

³² Annex 2, Representations (paragraph 24).

³³ Annex 2, Representations (paragraph 57).

³⁴ Annex 2, Representations (paragraph 61).

the nature of the call to avoid generating anxiety. This is in contrast to the use of the phrase, "*potential savings*" in the npower case³⁵.

- 2.48 On these bases, we do not determine that, in this respect notified to it in the section 128 notification, Ageas persistently misused an electronic communications network or service such that it is liable to a penalty on that account under section 130 of the Act.

³⁵ http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/RWEnpower130.pdf

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 Ageas 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 Ageas 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 infringement³⁶."*
- 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 view that a penalty should be imposed on Ageas for the reasons we set out below.

No further action

- 3.8 If we were to determine that Ageas 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 action. Taking no further action is also an option open to Ofcom if we consider that,

³⁶ Annex 5, Penalty Guidelines (paragraph 3).

although Ageas 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, the Response and the Representations, Ofcom determines that Ageas has persistently misused an electronic communications network or service in one 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 61 per cent of participants received a silent call and 14 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 (71 per cent of such calls) and distressing (6 per cent of calls)³⁷.
- 3.11 On those bases, our judgment is that the making of abandoned calls, particularly where the rate at which a person makes them is above three per cent in a 24-hour period, has an inherent seriousness. 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 non-compliance with legislation and regulatory rules. This will protect citizens and consumers from the harm the evidence shows they suffer from persistent misuse in the form of abandoned calls.

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 Ageas a notification under section 129 of the Act. For the reasons set out, Ofcom's view is that it should not.
- 3.14 In order to issue a notification under section 129 of the Act, Ofcom must be 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) 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 not repeated; and
 - (ii) remedying the consequences of the notified misuse.³⁸

³⁷ Market Research published on 23 May 2014, <http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance-calls-research/>.

³⁸ Section 129(2) of the Act.

- 3.15 This option is open to Ofcom where, as in this case, we are satisfied that Ageas 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 persistent misuse and remedy that which has occurred. However, having considered the Response, the Representations and the June 2014 email, Ofcom's judgment is that Ageas has now taken all such appropriate steps.
- 3.16 In particular, Ageas has stated that, prior to the section 128 notification, it took action on its own initiative to amend call centre advisor behaviour following the abandoned call rate of 10.64 per cent on 31 August 2013³⁹. In the Response Ageas noted that the abandoned call rate above 3 per cent on this day was, "*caused by call centre agents advisors allocating the incorrect disposition codes to calls as a result of the change to the bonus structure.*" According to Ageas, this led to the dialler incorrectly calculating that fewer contacts were being made and that more advisors were available to receive calls.
- 3.17 Ageas stated that it was able to recognise this behaviour and address it "*straight away*⁴⁰". This appears to be the case as the abandoned call rate generated in this campaign on the following Saturday was recorded as 2.44 per cent. Ageas stated that it effected this change by issuing a briefing, "*to all teams reiterating the importance of allocating the correct disposition code and one advisor was issued with a formal warning.*"
- 3.18 We also take into account that all three 24 hour periods where Ageas exceeded an abandoned call rate of 3 per cent occurred on a Saturday and two of these 24 hour periods – 27 July 2013 and 10 August 2013 – were attributed to, "*unanticipated consequences related to Saturday shift patterns*⁴¹". In addition, in its Representations, Ageas also provided information on how it proposes to prevent persistent misuse from being repeated in the future under the title, '*Remedial action already implemented*⁴²':
- i) **Technical Calculations:** Daily reporting of call abandon rates is monitored through its dialler management team, but calculations have now been updated to incorporate the reasoned estimate of calls abandoned to an answer machine.
 - ii) **Training:** All Call Centre Managers have been re-briefed on guidance on regulations and all Team Managers and Advisors have been re-briefed on abandon rates, regulations and dispositioning of calls.
 - iii) **Strengthened reporting:** Disposition reports are sent out daily to Team Managers and they are now required to review the reports, identify any irregularities and take appropriate actions (through performance management) if any behavioural issues are identified; for example, incorrectly dispositioning calls.
 - iv) **Dialler Settings:** Following analysis of the dialler and campaign data Ageas identified that all three of the notifiable breaches occurred on a Saturday.

³⁹ This would have occurred sometime between 1 September 2013 and 13 December 2013.

⁴⁰ Annex 8, Response dated 13 December 2013.

⁴¹ Annex 2, Representations (paragraph 75).

⁴² Annex 2, Representations (paragraph 36).

Ageas amended the settings of the [X] dialler for RIAS to a setting called “cruise control” on Saturdays to slow the dialler down.

- 3.19 We note that Ageas stated that the above actions were considered to be the necessary steps to prevent any future breach. We note too, from the Representations, that, following a further occasion on which abandoned calls made by it exceeded a rate of three per cent, Ageas took further steps as follows:

Suspension: All outbound call centre activities on Saturdays with effect from 3rd May were suspended.

External review: a third party was engaged to validate the root cause of the breach on 26th April, to provide a clearer view of any additional actions to be taken to fully mitigate further breaches occurring.

- 3.20 We similarly take account of Ageas’s “*continuing investigations*” of the root cause of the breaches which were underway⁴³:

Independent validation: Ageas enlisted the services of [X] to carry out a full external audit of its dialler set up and abandoned call rate calculations.

Strengthening Training: Ageas also stated that it would build additional training into the “*onboarding*” training programme for new recruits, to ensure that the breaches are not repeated and that new recruits understand the importance of always following the approved procedures.

- 3.21 Likewise that, in the June 2014 email, Ageas provided further information relating to the suspension of dialling on a Saturday which it had originally noted in the Representations:

*“All outbound dialling activities on a Saturday have been suspended since 3rd May 2014. Ageas have been working with a third party to understand the root cause of the breach that occurred on 26th April 2014, including replicating the conditions of the dialling system, to understand whether a technical fault occurred on this day. This has proved inconclusive. Ageas have therefore increased the oversight of dialler management for a Saturday **and will run the system on a pre-view basis only** (emphasis added) commencing on the 28th of June 2014, until satisfied that a breach will not re-occur⁴⁴.”*

- 3.22 Ofcom notes the use of what Ageas refers to as initiating outbound dialling on a ‘*pre-view basis*’. Our understanding is that the term ‘*pre-view basis*’ refers to one of several forms of dialling where an agent is specifically allocated to a call from the outset⁴⁵. This is in contrast to ‘*predictive*’ dialling in which calls are initiated without the guaranteed presence of a live operator and which is the mode of dialling that would have been used throughout the Relevant Period. Dialling on a *pre-view basis* should prevent abandoned calls caused by a lack of live operators available to take calls.

- 3.23 On these bases, our judgment is that Ageas has now taken the appropriate steps to secure that its misuse is brought to an end and not repeated.

⁴³ Annex 2, Representations (paragraph 37).

⁴⁴ Annex 3, the June 2014 email.

⁴⁵ See footnote 147 TalkTalk s130 http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/FINAL_Non-confidential_TTG_1.pdf.

- 3.24 As to the steps Ageas 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.”

- 3.25 In the Representations Ageas set out the steps it intends to take to remedy the consequences of the notified misuse. Ageas stated that it, *“identified all the individuals who received an abandoned call during the notifiable period [§<]. Ageas will be writing to all affected customers in order to apologies, enclosing a Marks and Spencer voucher for their use by way of compensation.”*⁴⁶
- 3.26 On 18 June 2014 Ofcom also sent contact details of 16 consumers who had complained directly to our CCT during the Relevant Period (these consumers had given Ofcom their consent to share their details with third parties), as requested by Ageas. In the June 2014 email, Ageas stated that, *“Ageas are now progressing contact with these individuals to offer a £10 Marks and Spencer voucher as a means of apology.”*
- 3.27 It is therefore our view that Ageas is taking all such steps as Ofcom consider appropriate for remedying the consequences of the notified misuse.
- 3.28 Accordingly, based upon the action taken by Ageas to bring the notified misuse to an end and ensure it is not repeated and the actions taken to remedy the consequences of the notified misuse, Ofcom’s view is that we should not serve on Ageas a notification under section 129 of the Act.

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

- 3.29 The following is Ofcom’s consideration of whether any further enforcement action should involve imposing on Ageas a penalty under section 130 of the Act. Ofcom’s view is that we should do so. The reasons are as follows.
- 3.30 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

⁴⁶ Annex 2, Representations (paragraph 39).

- (c) the period allowed for the making of the representations has expired.”⁴⁷

3.31 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”.

3.32 As set out in paragraphs 2.30 – 2.41, Ofcom is satisfied that Ageas persistently misused an electronic communications network or electronic communications service. On this basis, Ageas may be liable for the imposition of a penalty under section 130 of the Act.

3.33 Taking account of the matters in paragraph 3.8 – 3.12 above, and that we are not minded 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 objective of furthering the interests of citizens and consumers. We make the regulatory judgment that it is necessary and appropriate to impose a penalty on Ageas so as to reflect the seriousness of making abandoned calls in respect of those 24 hour periods where the rate is above three per cent and to deter non-compliance with the persistent misuse provisions of the Act, having regard to the policy statement, by Ageas and others.

3.34 Accordingly, we impose a penalty on Ageas 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 Response made by Ageas;
- (b) the Representations made by Ageas (and the June 2014 email and the August 2014 Representations);
- (c) the number and nature of occasions on which Ageas was not compliant with the persistent misuse provisions, having regard to the policy statement
- (d) any steps taken by Ageas for securing that the notified misuse was brought to an end and not repeated;
- (e) any steps taken by Ageas for remedying the consequences of the notified misuse; and
- (f) other requirements of the Act, including that the penalty is appropriate and proportionate to the relevant misuse and has regard to the Penalty Guidelines.

⁴⁷ Section 130(1) of the Act.

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 Ageas. It explains why we consider the penalty to be appropriate and proportionate to the contravention in respect of which it is imposed. Likewise, the regard we have had in exercising our regulatory judgment to:
- a) the increased maximum level of penalty under the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010 No. 2291;
 - b) the Response, the Representations (and the June 2014 email, which provided an update on the progress made by Ageas with the preventative and remedial actions that were detailed within the Representations⁴⁸) and the August 2014 Representations;
 - c) steps taken by Ageas for securing that the notified misuse is brought to an end and not repeated;
 - d) steps taken by Ageas for remedying the consequences of the notified misuse; and
 - e) 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 respect. The applicable legal framework is set out in detail in section 2 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 was increased following an order⁴⁹ made by the Secretary of State under section 130(9) of the Act. The maximum level of penalty is now £2 million.
- 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*".⁵⁰ The Government decided to proceed 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*

⁴⁸ Annex 3, the June 2014 email.

⁴⁹ http://www.legislation.gov.uk/ukxi/2010/2291/pdfs/ukxi_20102291_en.pdf

⁵⁰ <http://www.bis.gov.uk/files/file53311.pdf>

where respondents had received calls and tried various methods to combat the problem".⁵¹

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*"⁵². 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*".⁵³

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"⁵⁴). 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 statement⁵⁵.

⁵¹ 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

⁵² Ibid, page 1,

⁵³ Ibid, page 5.

⁵⁴ Annex 5, Penalty Guidelines.

⁵⁵ Annex 4, the 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 Representations and the June 2014 email, steps taken by Ageas 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 Ageas (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 Ageas to prevent the contravention;
 - vi. whether Ageas 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 Ageas became aware of it; and
 - x. the extent to which the level of penalty is proportionate, taking into account the size and turnover of Ageas.
- 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. We have also considered whether Ageas has failed to co-operate fully with Ofcom's investigation.

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 Ageas addressed this penalty factor in the Representations, contending that, “... while we understand that, in a general sense Ofcom may wish to act to deter infringement, Ageas do not believe the deterrence test as set out in paragraph A1.85 of Ofcom’s guidance is engaged directly at all.⁵⁶” It also argued that the scale of non-compliance was small⁵⁷ and that the issues identified were “at the very lowest level that justified Ofcom action and should be treated accordingly.”⁵⁸ We have carefully considered these representations in reaching the following view.
- 4.14 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.
- 4.15 We also have regard to the numbers of abandoned calls and their effects on consumers. Similarly that abandoned and silent calls will almost invariably result in consumer harm, which may range from inconvenience and annoyance through to genuine anxiety⁵⁹. We give weight to the evidence to this effect in Ofcom’s market research, which most recently found that abandoned calls (in which the caller played an information message) were considered by consumers to be annoying (71 per cent of such calls) and distressing (6 per cent of calls)⁶⁰.
- 4.16 There is therefore, in our regulatory judgment, an inherent seriousness in persistent misuse by way of making abandoned calls, such as that by Ageas. There is a need for enforcement action, including appropriate and proportionate financial penalties, to provide Ageas, 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 caused⁶¹.
- 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 costs savings that these technologies allow on to consumers. However, if not robustly and properly managed, a side effect of these

⁵⁶ Annex 2, Representations (paragraph 67).

⁵⁷ Annex 2, Representations (paragraph 63)

⁵⁸ Annex 2, Representations (paragraph 66).

⁵⁹ Annex 4, policy statement (1.6).

⁶⁰ Market Research published on 23 May 2014, http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance_calls_research/.

⁶¹ Annex 4, policy statement (4.1).

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 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 Ageas’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 three separate 24 hour periods. Ofcom estimates, on the basis of the evidence available, that Ageas made approximately 148 such calls in total on those days and on which the abandoned call rate exceeded three per cent of live calls. It is, in our view, a relatively small and less serious example of what, in our regulatory judgment, is an intrinsically serious contravention.
- 4.22 Ofcom is minded to consider that this degree of seriousness should be reflected in the proposed penalty.

Degree of harm caused by the contravention

- 4.23 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. In doing so, we note that Ageas states in its Representations that the, “... *degree of harm – actual or potential – caused by the contravention, including any increased costs incurred by consumers or other market participants, was minimal*⁶².”
- 4.24 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 statement⁶³ 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 anxiety⁶⁴. This is supported by the evidence in Ofcom’s market research described elsewhere in this document.

⁶² Annex 2, Representations (paragraph 70).

⁶³ Annex 4, the policy statement (1.6).

⁶⁴ Annex 1, section 128 notification (1.5).

- 4.25 We also take account that, in our determination, Ageas made multiple abandoned calls. In doing so, it exceeded an abandoned call rate of three per cent of live calls over a 24 hour period on three separate occasions, making approximately 148 abandoned calls during these three 24 hour periods.
- 4.26 On that basis, Ageas would have generated actual or potential consumer harm during the Relevant Period in a significant number of those 148 relevant cases. However, Ofcom also acknowledges that when calls were abandoned, Ageas did play an information message that took account of paragraphs A1.51 and A1.52 of the policy statement. The level of harm was not therefore as high as it would have been if the calls had been silent or the recorded information message played in the event of an abandoned call was missing required information.
- 4.27 Accordingly, we are of the view that the effect or likely effect of Ageas's use of the Electronic Communications Network or Electronic Communications Service was that call recipients unnecessarily suffered annoyance, inconvenience or anxiety. Taking into account the scale of the contravention, Ofcom's view is that although the harm had a degree of seriousness, in this case that level of seriousness was at a lower end of the scale compared to the harm identified in some of Ofcom's most recent persistent misuse cases, such as HomeServe and TalkTalk (see below)⁶⁵.

The duration of the contravention

- 4.28 In relation to the issue of the duration of the convention, 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.
- 4.29 Ageas argued in its Representations that, "*The contravention was not of long duration. The three identified days on which the 3% threshold was breached were within a period of five weeks*⁶⁶." We have carefully considered this in the context of the limited Relevant Period we investigated. Having done so, our view is that the duration of the notified non-compliance is non-trivial as it occurred on three days (27 July, 10 August and 31 August 2013) across a five week period within the limited (seven week) period we assessed. In our judgment, this should be weighed alongside other relevant factors, such as the relatively limited harm and seriousness.

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

- 4.30 Ageas stated in its Representations that it, "*has not gained financially from its abandoned calls*⁶⁷." It goes on to argue that, "*on the contrary, on balance Ageas think it creates a negative response from consumers, particularly with the Ageas demographic. This is because consumers who receive an abandoned call are less likely to be pleased to receive a further call, and are likely to tell their friends and family.*"

⁶⁵ Annex 2, Representations (paragraph 64-66 and 70).

⁶⁶ Annex 2, Representations (paragraph 71).

⁶⁷ Annex 2, Representations (paragraph 72).

- 4.31 We note the point made by Ageas above concerning the potential for reputational damage but consider it possible that Ageas did make *some* gain by operating outside the principles set out in the policy statement and carrying out the persistent misuse⁶⁸. However, on the basis that we do not have direct evidence of such gain in this case, we have not taken this factor into account in the determination of the penalty amount.

Steps taken by Ageas to remedy the consequences of the contravention

- 4.32 Ofcom's view is that, as of the date of this Notification, Ageas has committed to take steps to remedy the consequences of the misuse notified to it under section 128 of the Act. In the Representations Ageas set out the steps it intends to take to remedy the consequences of the notified misuse. Ageas stated that it, "*identified all the individuals who received an abandoned call during the notifiable period [§<]. Ageas will be writing to all affected customers in order to apologies, enclosing a Marks and Spencer voucher for their use by way of compensation.*"⁶⁹
- 4.33 On 18 June 2014 Ofcom also sent contact details of 16 consumers who had complained directly to our CCT during the Relevant Period (these consumers had given Ofcom their consent to share their details with third parties), as requested by Ageas. In the June 2014 email, Ageas stated that, "*Ageas are now progressing contact with these individuals to offer a £10 Marks and Spencer voucher as a means of apology.*"
- 4.34 Accordingly, we have taken these steps into account in the determination of the penalty amount, giving Ageas due credit for them.

Whether Ageas has a history of contraventions

- 4.35 Ageas does not have a history of contraventions in respect of the persistent misuse provisions. Accordingly, we have taken the absence of a history of contraventions into account in the determination of the penalty amount.

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

- 4.36 In Ofcom's view, Ageas failed to take all appropriate steps to prevent the contravention.
- 4.37 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:
- (a) Ofcom published an open letter on 20 December 2010⁷⁰ 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.

⁶⁹ Annex 2, Representations (paragraph 39).

⁷⁰ Annex 9, First open letter to industry stakeholders dated 20 December 2010, http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/acs_users.pdf

- (b) Ofcom published another open letter on 21 May 2012⁷¹. 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.*"
- (c) Ofcom published another open letter on 20 March 2013⁷² in co-ordination with the Information Commissioners 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.
- 4.38 In this context, we attached some weight to the point that Ageas made in its Representations that it, "... *has operated call centres in conjunction with its business activities since 1992*". That being so, Ageas 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.
- 4.39 Ageas should have taken those steps. That the misuse occurred indicates that it did not do so, or only did so ineffectively. For one example, in the June 2014 email Ageas stated that when it resumes dialling on Saturdays, it intends to do so in '*pre-view basis*' only. It was open to it to have assessed the risks of particular dialler settings on days when call volumes were low, like Saturdays, and employed this same operating technique at an earlier date to help prevent exceeding an abandoned call rate of 3 per cent. For another, in its Representations, Ageas states that its dialler management team carries out daily reporting of abandoned call rates.⁷³ This did not, however, prevent the misuse.
- 4.40 In this regard, we also note particularly that Ageas stated that the breach that occurred on 31 August 2013 was caused by call centre advisors allocating the incorrect disposition codes to calls as a result of a change to the bonus structure. It does not appear, however, to have taken any steps to mitigate the risks of possible negative effects on abandoned call rates of changing its bonus structure before implementing the change. It could, for example, have re-briefed staff on regulatory requirements and/or the dispositioning of calls, or modified the dialler setting prior to the bonus structure change (both of which actions it took after the contraventions, as set out in the Representations). Such steps may have helped prevent or reduce the number of abandoned calls made.
- 4.41 Accordingly, our regulatory judgment is that Ageas 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.

⁷¹ Annex 10, Second open letter to industry stakeholders dated 21 May 2012, http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/Open_letter_to_stakeholders.pdf

⁷² Annex 11, Third open letter to industry stakeholders dated 20 March 2013, http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/ICO_Ofcom_letter_200313.pdf

⁷³ Annex 2, Representations (paragraph 36a).

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.

- 4.42 Our assessment is that the persistent misuse in this case did not occur intentionally, recklessly or with the knowledge of Ageas's senior managers. We therefore attach no weight to any such considerations in assessing the penalty.
- 4.43 Ageas explained to Ofcom in the Response that:
- "The high volume of abandoned calls on 31st of August was identified prior to receipt of your letter and was caused by call centre advisors allocating the incorrect disposition codes to calls as a result of a change to the bonus structure. The controls that we had in place allowed us to identify this issue and address it straight away. As a consequence of this behaviour the dialler sped up as it calculate that few contacts were being made and that more advisors were available to receive calls. A briefing was issued to all team reiterating the importance of allocating the correct disposition code and one advisor was issued a formal warning⁷⁴."*
- 4.44 That Ageas addressed the high volume of abandoned calls on 31 August 2013 "*straight away*"⁷⁵ demonstrates to Ofcom that this particular instance of misuse, though the product of a risk that could have been mitigated, was the unintended consequence of a change to its staff bonus structure. It was not an intentional action designed to operate outside the requirements of the policy statement.
- 4.45 With regard to the misuse that occurred on 27 July and 10 August 2013, the Representations stated that, "*The contravention was not intentional. Rather, it has arisen as a result of unanticipated consequences related to Saturday shift working patterns*"⁷⁶."
- 4.46 While we note above that Ageas could have done more to prevent the contravention, we accept this contention. Accordingly, it is our view that Ageas's contravention of the persistent misuse provisions did not occur intentionally.
- 4.47 As to recklessness, we consider this to mean being aware of risk in a course of action and deciding to take that course ignoring the risk, or paying no heed to whether any such risk exists. Following consideration of the Response and the Representations, our view is that Ageas's notified contravention was not reckless on this basis.
- 4.48 While we consider that not all steps were taken to prevent the notified misuse from occurring, we have no evidence as to the seniority of those involved in processes at Ageas and therefore no evidence that its senior managers knew, or ought to have known, that the misuse was occurring or would occur. The penalty amount would have been higher had we found evidence that senior managers at Ageas had, or ought to have had, this knowledge.

⁷⁴ Annex 8, Response dated 13 December 2013 (page 1).

⁷⁵ Annex 8, Response dated 13 December 2013 (cover letter).

⁷⁶ Annex 2, Representations (paragraph 75).

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

- 4.49 Ageas describes itself as, “*an insurance intermediary conducting general insurance business with retail consumers.*” The Representations stated that it has, “*just short of [X] customers*”. Its *Annual Report and Financial Statements: 31 December 2013* submitted to Companies House states that Ageas’s total comprehensive income in 2013 was £20.653m⁷⁷.
- 4.50 In Ofcom’s view, these factors indicate that Ageas is a sizeable business with a significant turnover. 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 take that into account in determining the proportionality of the penalty amount.

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

- 4.51 We have carefully considered the Representations, the Response and related correspondence. Our view is that, while Ageas took some steps to end the relevant misuse once it was aware, or should have been aware of it, it failed to take all appropriate steps in a timely and effective manner. This increases the penalty by a small amount.
- 4.52 We also have regard, in accordance with section 130 of the Act, to other steps taken by Ageas to secure that the misuse was brought to an end and not repeated. These include those set out in the Representations and further described in the June 2014 email, and referred to in paragraphs 3.16-3.22 above. We give Ageas due credit for these in our penalty assessment.
- 4.53 As to the steps Ageas took on becoming aware of the misuse, we note first that, with regard to the abandoned call rates generated on 27 July and 10 August 2013, Ageas has attributed the breaches to, “*unanticipated consequences related to Saturday shift working patterns.*” However, as we also note above, Ageas carries out daily reporting of abandoned call rates⁷⁸. This suggests it should have been aware of the high abandoned call rates on those dates. Despite that, it does not appear to have taken any action immediately after either of those days to prevent future occurrences (which on each occasion went on to occur). In the alternative, it would appear that Ageas did not have sufficient safeguards in place to prevent further excessive abandoned call rates being generated.
- 4.54 We also take into account that the abandoned call rate on 31 August 2013 was generated after the first two instances. We accept Ageas’s representation that this misuse was caused by call centre advisors allocating the incorrect disposition codes to calls as a result of a change to the bonus structure. Likewise, that, as previously noted, Ageas took action, “*straight away*” to address this issue (in the form of a briefing to all teams reiterating importance of allocating the correct disposition code and issuing one advisor with a formal warning). However, the fact that it was the product of a risk that Ageas could have mitigated, and occurred after two instances of misuse of which it should have been aware as a result of its daily reporting of

⁷⁷ See *Statement of profit of loss and other comprehensive income* (for the year ended 31 December 2013), page 7.

⁷⁸ Annex 2, Representations (paragraph 36a).

abandoned call rates, is another indication that Ageas did not take effective steps to end the misuse after it was (or should have been) aware of it.

- 4.55 We further have regard to the Representations which noted that, “As a result of the identified breaches during the notifiable period, the following actions had already been implemented...,” one of which was stated as:

“Dialler settings: Following analysis of the dialler and campaign data Ageas identified that all 3 of the notifiable breaches occurred on a Saturday. Ageas amended the settings of the [%<] dialler for RIAS to a setting called cruise control on Saturdays. This setting slows the dialler down and focuses on achieving a desired service level albeit less efficient regarding wait times between contacts.

The above actions were considered to be the necessary steps to prevent any future breach.”

- 4.56 The Representations, however, also indicated that despite these actions, a further instance of misuse, with an abandoned call rate of 8.27 per cent, occurred, albeit outside of the Relevant Period, on 26 April 2014⁷⁹. On this basis, it appears that the steps Ageas had earlier taken, including the decision to adopt a dialler setting referred to as, “cruise control,” was an ineffective step taken in response to the misuse on 27 July and 10 August 2013.
- 4.57 Each of these matters, in our regulatory judgment, tends to limit the credit Ageas should be given, in the penalty assessment, for the steps it took to address its failings. They tend to increase the penalty.

Failure to keep adequate records

- 4.58 Ofcom issued Ageas with an information request in its final form on 28 November 2013 and Ageas provided a response to Ofcom on 13 December 2013. Although there was some initial confusion about what Ofcom required (see below), Ofcom believes that Ageas has demonstrated an ability to keep adequate records. Accordingly, this has been taken into account in determining the penalty amount. In particular, the penalty amount has not been increased on account of any shortcomings in record-keeping.

Co-operation with Ofcom’s investigation

- 4.59 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, Ofcom’s Penalty Guidelines state that, “Ofcom may increase the penalty where the regulated body in breach has failed to cooperate fully with our investigation⁸⁰.” We have therefore considered the co-operation Ageas gave to Ofcom’s investigation of this matter.
- 4.60 In this case, Ageas was punctual in its response to Ofcom’s statutory information request and in the delivery of its Representations. It did make some errors in the information used to calculate its abandoned call rates during the Relevant Period. It

⁷⁹ Annex 2, Representations (paragraph 8). Please note that Ofcom has not taken this contravention into account in determining the amount of the penalty.

⁸⁰ Annex 5, Penalty Guidelines.

co-operated promptly with Ofcom to resolve the errors, however. We also take into account the acknowledgment and admission Ageas made in the August 2014 Representations.

- 4.61 Our overall assessment, therefore, is that Ageas co-operated with Ofcom in material respects. Accordingly, we do not propose to increase the penalty on this account.

Relevant precedents set by previous cases

- 4.62 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.
- 4.63 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 twelve companies since June 2006⁸¹.

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

- 4.64 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 legislation⁸² 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 weeks⁸³ and therefore the figures in respect of the number of abandoned/silent calls do not provide a helpful comparison; and
 - the penalty in each case is assessed against the circumstances of that particular case in the round.
- 4.65 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

⁸¹ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

⁸² http://www.legislation.gov.uk/ukxi/2010/2291/pdfs/ukxi_20102291_en.pdf

⁸³ Note the duration of the Relevant Period in a particular case may vary depending on the facts and circumstances of that case.

comprehensive analysis of each case as compared 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.⁸⁴
- Ofcom has held that the seriousness of harm is linked to the number of abandoned and/or silent calls made⁸⁵, with silent calls being particularly serious⁸⁶, but even a relatively small number of calls may be, “serious”⁸⁷.
- 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*”⁸⁸.
- 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 repeated⁸⁹.

Comparison and distinction between the present case and recent post 2011 persistent misuse cases: HomeServe PLC (“HomeServe”), RWE npower PLC (“npower”) and TalkTalk PLC (“TalkTalk”)

4.66 The most recent persistent misuse cases were determined on 18 March 2013, 19 April 2012 and 6 December 2012. The first imposed a penalty of £750 000 on HomeServe for its contravention of section 128 of the Act between 1 February 2011 and 21 March 2011. The second imposed a penalty of £60,000 on npower for its contravention of section 128 of the Act between 1 February 2011 and 21 March 2011. The third imposed a penalty of £750 000 on TalkTalk for its contravention of section 128 of the Act between 1 February 2011 and 21 March 2011.

4.67 These cases were determined:

- a) on the basis of the policy statement (published on 1 October 2010);
- b) on the basis of the 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;

⁸⁴ See, in particular, Complete Credit Management, March 2008.

⁸⁵ Annex 4, the policy statement (A1.84).

⁸⁶ See e.g. Barclaycard, September 2008 http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

⁸⁷ See e.g. Complete Credit Management, March 2008 http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

⁸⁸ Space Kitchens and Bedrooms (Holdings) Ltd, January 2007.

⁸⁹ See e.g. Equidebt Limited (December 2008), Abbey National Plc (March 2008), Complete Credit Management (March 2008).

- 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.

4.68 The key features of the HomeServe case, the npower case, the TalkTalk case and the present case are considered below in terms of the factors set out in the Penalty Guidelines.

Deterrence and seriousness of the contravention

- 4.69 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.
- 4.70 The contravention of section 128 during the seven week Relevant Period in 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 did not adhere to the 24 hour policy set out in the policy statement.
- 4.71 TalkTalk, meanwhile, amongst other compliance failures, 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 at the Teleperformance Cape Town call centre across at least one campaign, so these calls were in effect silent calls, which Ofcom considers to cause more serious harm than abandoned calls. It also persistently made 512 abandoned calls over 29 days at the McAlpine call centre. In the HomeServe case and in the TalkTalk case it was deemed appropriate to impose a penalty reflecting a serious contravention which would send a deterrent message to the notified party and to industry.
- 4.72 In the npower case, Ofcom found that the relevant conduct was serious but at the lower end of the scale. npower exceeded an abandoned call rate of three per cent of live calls over a 24 hour period on eight separate occasions during the Relevant Period. On those eight days, the volume of abandoned calls made was 1 756.
- 4.73 Given that Ageas exceeded an abandoned call rate of three per cent of live calls over a 24 hour period on three separate occasions during the Relevant Period, making 148 abandoned calls on those three days, our view is that this case is of a much lower level of seriousness than the cases above. Taking into account the lower volume of abandoned calls made in this case than HomeServe, TalkTalk and npower, as well as the fact that the three per cent threshold has been breached on fewer occasions and that an information message was played, in this particular case, our judgment, would suggest a much lower penalty.

Degree of harm caused by the contravention

- 4.74 Ofcom was of the view that HomeServe and TalkTalk 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. In contrast to the HomeServe and TalkTalk cases, neither npower nor Ageas

generated silent calls (which Ofcom considers cause more serious harm than abandoned calls), and both made smaller numbers of offending calls.

- 4.75 Ofcom therefore considers the degree of harm caused by Ageas to be much smaller than in these cases given the smaller number of abandoned calls made on the fewer days in which the 3 per cent abandoned call rate was exceeded. Again, this would tend to indicate a much lower penalty.

Duration of the contravention

- 4.76 In the HomeServe and npower cases a seven week period was considered, in itself, a substantial duration for a contravention of a provision designed to prevent persons unnecessarily suffering annoyance, inconvenience or anxiety.
- 4.77 Ofcom notes that there were three days when the 3 per cent abandoned call rate was exceeded over a 5 week period and holds that this is non-trivial as it occurred on three days (27 July, 10 August and 31 August 2013) across a five week period within the limited (seven week) period we assessed.

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

- 4.78 In the present case, similarly to the HomeServe, npower and TalkTalk cases, Ofcom considers that it is possible Ageas did derive *some* gain from its misuse, as described above. However, we do not have direct evidence of such gain and consequently this factor has not been taken into account in the level of the penalty.

Steps taken to remedy the consequences of the contraventions

- 4.79 HomeServe made representations regarding the steps it would take to remedy the consequences of its notified misuse. In summary, these stated that HomeServe would:
- a) provide compensation to a claimant upon HomeServe establishing from its records that the CLI of the claimant matched the CLI contacted while Answer Machine Detection technology was in operation;
 - b) issue a statement on its website about the offer of compensation;
 - c) communicated the offer of compensation in response to all press enquiries made to it; and
 - d) provide compensation to the individuals who lodged a complaint with Ofcom during the Relevant Period and to the individuals who had complained to HomeServe during the Relevant Period.
- 4.80 Ofcom concluded that HomeServe had committed to putting in place such steps as it considered appropriate for remedying the consequences of the notified misuse and this was taken into account in determining the penalty.
- 4.81 npower also took steps to remedy the consequences of its misuse. It stated that it would write to all those people who received abandoned calls on the eight relevant days and send them a £10 shopping voucher. npower was given due credit for this in Ofcom's determination of the penalty.

- 4.82 TalkTalk did not provide any evidence of steps taken to remedy the consequences of the contraventions (its representations denied liability in respect of the notified misuse). Accordingly, it was given no credit on this account in our assessment of the penalty imposed on it.
- 4.83 In the present case, Ageas has stated that it is taking steps to remedy the consequences of the notified misuse. Ofcom has given Ageas due credit, as in the HomeServe and npower cases, in respect of this factor in our determination of the penalty amount.

History of contravention

- 4.84 Neither Home Serve nor npower had a history of notification of contraventions in respect of the persistent misuse provisions. Consequently, in these cases, Ofcom did not consider this to be an aggravating factor in the penalty assessment. This is in contrast to TalkTalk whom Ofcom has penalised in respect of a previous persistent misuse contravention⁹⁰.
- 4.85 Consistently with those cases, in the present no previous persistent misuse contravention is to be taken into account in assessing any penalty imposed on Ageas.

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

- 4.86 In the HomeServe case Ofcom considered that HomeServe had failed to follow the policy statement's principles and procedures (or do so effectively and promptly), or take other appropriate steps for preventing the notified misuse. It considered that the absence or ineffectiveness of the procedures had demonstrated HomeServe's failure to take appropriate (and timely) steps to prevent its notified contravention.
- 4.87 Similarly, Ofcom found that npower failed to take all appropriate (and timely) steps in order to prevent its notified misuse. Ofcom did however acknowledge that npower had taken steps to bring itself into compliance.
- 4.88 TalkTalk maintained that prior to its investigation it had in place a number of steps to meet Ofcom's requirements and to prevent possible contraventions. Ofcom determined in that case that if TalkTalk had better compliance strategies in place during the relevant period, it would have been able to identify compliance weaknesses and then been able to take steps to prevent them.
- 4.89 In our penalty assessment in the present case, we have similarly taken into account that Ageas failed to take all appropriate steps to prevent the notified misuse before it occurred (see paragraphs 4.36 – 4.41 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.

- 4.90 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-

⁹⁰ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/carphonewarehouse/

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 rate significantly higher abandoned call rate than three per cent.

- 4.91 In npower Ofcom accepted that senior management did not know that a contravention was occurring or would occur. In the TalkTalk case there was no evidence to suggest that senior management would have been aware of the contraventions.
- 4.92 Our approach in the present case is consistent with these earlier ones. There is also no evidence to suggest that Ageas’s senior management would have been aware of the contraventions. The Representations stated that, *‘Daily reporting of call abandon rates is monitored through our dialler management team⁹¹’* but it is unclear as to whether this daily reporting was ever forwarded to senior management. Accordingly, our penalty assessment does not include an amount on this account.

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

- 4.93 Ofcom considered that HomeServe, npower and TalkTalk were all sizeable businesses with a significant turnover. In the present case, we make a similar assessment of Ageas.
- 4.94 In all of these cases the size and turnover is a relevant consideration in the determination of the proportionality of the penalty imposed.

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

- 4.95 In the HomeServe and npower cases, Ofcom took the view that:
- they had not taken timely steps that were effective in bringing them into compliance once they had become aware of their contraventions; and
 - this was another factor which added to the amount of any penalty imposed; but
 - that exacerbation was mitigated by certain steps they took after Ofcom informed them of the investigation.
- 4.96 We have made a similar assessment in Ageas’s case, as described above. In particular, that it took some steps to end the relevant misuse once it was aware, or should have been aware, of it, but it failed to take all the appropriate steps in a timely and effective manner. This increases the penalty by a small amount. Paragraphs 4.53 to 4.56 above describe how we have weighed these factors in our penalty assessment.

Record-keeping

- 4.97 In the TalkTalk case, unlike both HomeServe and npower, there was a failure to keep records and a failure to take appropriate steps to provide a robust reasoned estimate

⁹¹ Annex 2, Representations (paragraph 36a).

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.

- 4.98 We do not believe that the present case is similar to the TalkTalk case. In material respects, Ageas was ultimately able to provide Ofcom with accurate information. Therefore this has not been a factor Ofcom has taken into account in assessing the penalty amount.

Co-operation with Ofcom's investigation

- 4.99 Ofcom acknowledged that in general HomeServe had provided full co-operation with the investigation. It had promptly provided the information as required and Ofcom stated that it, *"had no reason to believe that the information provided was inaccurate in any way."*
- 4.100 Ofcom found that npower had not cooperated fully with the investigation due to inaccurate material presented to Ofcom and this was taken into account in the level of its fine.
- 4.101 TalkTalk was punctual in its responses to Ofcom's statutory information requests and in the delivery of its representations. However, it did not provide all the required information in respect of one aspect of the investigation until after Ofcom made a number of requests.
- 4.102 In the present case Ageas was punctual in its response to Ofcom's statutory information request and in the delivery of its Representations. We have noted above that, in the Response, it made errors in the information used to calculate its abandoned call rates during the Relevant Period. Unlike the npower case, however, these errors did not lead to the issuing of further statutory information requests. The re-issuing of these requests in that case led to delays recorded in months, rather than the days required in this case to resolve the errors with Ageas's co-operation. Ageas also made the acknowledgment and admission in the August 2014 Representations that is noted elsewhere in this Notification.
- 4.103 It is therefore our view is that Ageas cooperated in material respects with our investigation and this has been taken into account in assessing the level of penalty.

Ofcom's conclusions on the penalty amount

- 4.104 Any penalty Ofcom imposes on Ageas 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.
- 4.105 In particular, we have noted that Ageas 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 three separate occasions, making in our estimate 148 abandoned calls.
- 4.106 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:

- 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;
- there was a small degree of consumer harm likely to have arisen from Ageas's notified misuse;
- Ageas failed to take all appropriate steps to prevent the misuse before it occurred and end it once it became aware (or should have been aware) of it, particularly taking into account that it is a well-established ACS user which Ofcom would reasonably expect to have more effective compliance measures in place; and
- Ageas, is a sizeable business with a significant turnover and as such there is a need to ensure that the fine is significant enough to have a deterrent effect.

4.107 We also give due weight, however, to the points that, while persistent misuse is inherently serious, Ageas's misuse is an example at the lower end of the scales of seriousness and harm. Likewise, that Ageas had taken some steps to limit the relevant harm. These include playing an information message identifying one of its trading names, and the provision of an appropriate phone number within this message that call recipients could use to opt of future marketing calls. Similarly, it took and has taken some steps to prevent the misuse and its repetition and to remedy its consequences. There is also no evidence its misuse was deliberate or reckless or occurred with the knowledge of Ageas's senior management, and there are some grounds to distinguish this case from others in which Ofcom has imposed substantial financial penalties.

4.108 On the basis of these factors, Ofcom's regulatory judgment is that a penalty of £10 000 would be appropriate and proportionate. It would reflect that even relatively small cases of persistent misuse have an inherent seriousness that is liable to be met with a penalty, to deter Ageas and others from engaging in that conduct. It should also be sufficient to deter that conduct by a business of Ageas's substantial size. Taking all the relevant factors in the round, and giving credit where it is due in respect of the matters above, our regulatory judgment is that we should impose a penalty of £10 000.

Section 5

Table of Annexes

Annex 1	Section 128 notification issued to Ageas dated 9 April 2014.
Annex 2	Ageas representations to the section 128 notification (the "Ageas Representations") dated 12 May 2014.
Annex 3	Email from Ageas dated 24 June 2014 relating to the Ageas Representations.
Annex 4	The policy statement (the <i>Revised statement of policy</i> , and <i>Tackling abandoned and silent calls: Statement, October 2010</i>).
Annex 5	Ofcom Penalty Guidelines dated 13 June 2011.
Annex 6	Ofcom calculation of Ageas Abandoned Call Rates using Ageas data
Annex 7	Information request sent to Ageas Limited under section 135 of the Act on 28 November 2013 (the "Information Request")
Annex 8	Response from Ageas to the Information Request (the "Response" received on 13 December 2013).
Annex 9	First open letter to ACS users published on 20 December 2010.
Annex 10	Second open letter to ACS users published on 21 May 2012.
Annex 11	Third open letter to ACS users published on 20 March 2013.
Annex 12	Provisional Notification dated 28 July 2014.
Annex 13	Ageas representations to the Notification ("August 2014 Representations") dated 18 August 2014.