



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

Notification served on MYIML Limited by the
Office of Communications (“Ofcom”)

**This is the non-confidential
version.**

Confidential information has been
redacted.

Redactions are indicated by [X].

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

Subject of this Notification

1. This Notification is addressed to MYIML Limited, trading as MYIML (“MYIML”), registered company number **08679439**, and registered address 53 Fountain Street, Manchester, England, M2 2AN.
2. It notifies MYIML 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 £20,000.
 - b) Ofcom imposes this penalty on MYIML, as it has, in both 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 16 December 2013 and 3 February 2014 (the “Relevant Period”).

Background

3. 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.
4. 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.
5. On 28 July 2014 Ofcom issued to MYIML, under section 128 of the Act, a notification that Ofcom had reasonable grounds for believing that MYIML had persistently misused an electronic communications network or electronic communications service during the Relevant Period (the “section 128 notification”). The section 128 notification is at Annex 8 to this document.
6. Pursuant to section 128(3)(b) of the Act, Ofcom specified a period of not less than one month, during which MYIML had an opportunity of making representations about the matters notified in the section 128 notification. Ofcom received written representations from MYIML on 23 August 2014 (the “August Representations”) in relation to the matters notified. The August Representations are at Annex 10 to this document.
7. Ofcom carefully considered these representations. On 29 September 2014 Ofcom served on MYIML 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 a penalty of £20,000 as MYIML had, in one or more of the

notified respects set out in the section 128 notification, persistently misused an electronic communications network or electronic communications service during the Relevant Period. The Provisional Notification is at Annex 11 to this document.

8. The reasons for Ofcom's provisional determination were set out in the Explanatory Statement accompanying the Provisional Notification.
9. The Provisional Notification gave MYIML until 27 October 2014 to make written representations to Ofcom about matters set out in the accompanying Explanatory Statement. It also gave MYIML the opportunity to make oral representations to Ofcom in relation to these matters.
10. MYIML submitted written representations on 14 October 2014. We also consider that a phone call from [redacted] (a MYIML company director) on 14 October 2014, a letter received on 7 November 2014 and two follow-up emails on 10 and 11 November 2014 should also be treated as part of those representations. Together these are referred to as the "Representations on the Provisional Notification" (Annex 12 to this Notification).

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 17).

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, MYIML has, in both 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 policy statement on the persistent misuse of an electronic communications network or service 2010², published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement*³ (the “policy statement”). For ease of reference, a copy of the policy statement is at Annex 1 of this document.
21. Having had regard to: the August Representations; Representations on the Provisional Notification; steps taken by MYIML for securing that its misuse is brought to an end and not repeated; and steps taken by MYIML 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.
22. Specifically, having regard to sections 130(4) and (5) of the Act, as well as the Penalty Guidelines⁴ published on 13 June 2011, 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 £20,000 on MYIML

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

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

³ Annex 1, policy statement.

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

⁴ Annex 2, Penalty Guidelines, <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

in relation to MYIML's persistent misuse of an electronic communications network or service in both respects notified in the section 128 notification.

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.

Neil Buckley (Director of Investigations, Competition Group) and Chris Taylor (Director of Consumer Policy, CCEAG) as decision makers for Ofcom

2 December 2014

Section 1

Subject of this notification

- 1.1 This document is a notification of Ofcom's imposition of a financial penalty ("the Notification") on MYIML Limited, trading as MYIML ("MYIML"), under section 130 of the Communications Act 2003 (the "Act"). It sets out Ofcom's decision that such a penalty should be imposed on MYIML 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 7 March 2014 (the "First Information Request"⁵);
 - b) analysis of an email sent by MYIML to Ofcom on 5 March 2014 (the "5 March 2014 email")⁶;
 - c) analysis of MYIML's response to the First Information Request received on 24, 26 and 28 March 2014 (the "First Response"⁷);
 - d) investigation into MYIML's compliance between the period 16 December 2013 to 3 February 2014 (the "Relevant Period") with section 128 of the Act, having regard to the principles set out in the policy statement⁸;
 - e) determination that there are reasonable grounds for believing that, during the Relevant Period, MYIML persistently misused an electronic communications network or electronic communications service;
 - f) service on MYIML on 28 July 2014 of a notification under section 128 of the Act (the "section 128 notification"⁹);
 - g) consideration of representations to the section 128 notification by MYIML dated 23 August 2014 (the "August Representations")¹⁰;
 - h) information request under section 135 dated 9 September 2014 (the "Second Information Request")¹¹;
 - i) analysis of MYIML's response to the Second Information Request received on 17 September 2014 (the "Second Response"¹²);
 - j) 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;

⁵ Annex 6, First Information Request.

⁶ Annex 7, 5 March 2014 email.

⁷ Annex 8, First Response

⁸ See paragraph 2.16 below and Annex 3, policy statement.

⁹ Annex 8, section 128 notification.

¹⁰ Annex 10, August Representations.

¹¹ Annex 9, Second Information Request.

¹² Annex 10, Second Response.

- k) service on MYIML on 29 September 2014 of a provisional notification of a possible penalty under section 130 of the Act (the “Provisional Notification”), setting out, amongst other things, Ofcom’s preliminary view that we should impose on MYIML a penalty in respect of its persistent misuse of an electronic communications network or service between 16 December 2013 and 3 February 2014; and
 - l) MYIML’s written representations of 14 October 2014, a phone call from [§<] (a MYIML company director) on 14 October 2014, a letter from MYIML received on 7 November 2014 and two emails from MYIML with further clarifications received on 10 and 11 November 2014, (together the “Representations on the Provisional Notification”).
- 1.3 Taking into account all of the above, Ofcom’s decision is that a financial penalty be imposed on MYIML as it has, in both 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 £20,000.
- 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 August Representations;
 - b) the number and nature of occasions on which MYIML was not compliant with the persistent misuse provisions, having regard to the policy statement;
 - c) steps taken by MYIML for securing that its misuse is brought to an end and is not repeated;
 - d) steps taken by MYIML for remedying the consequences of the notified misuse;
 - e) 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
 - f) the Representations on the Provisional Notification.
- 1.5 As set out in the policy statement, in deciding whether to take enforcement action for persistent misuse caused by abandoned and silent calls in a particular case, we will be guided by a sense of administrative priority determined by the level of consumer detriment and will take 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.
- 1.6 The reasons for Ofcom’s decision and determination are set out in the following sections of this Notification. In particular, aspects of Ofcom’s decision and determination include:

¹³ see <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>

¹⁴ Annex 1, policy statement (A1.12 to A1.13).

- a) that MYIML has, in both of the respects notified in the section 128 notification, persistently misused an electronic communications network or service during the Relevant Period by:
- making multiple (and certainly more than three¹⁵) abandoned calls during each of 45 separate 24 hour periods. In total Ofcom estimates¹⁶ on the basis of the evidence available that MYIML made approximately 30,296 abandoned calls in total on those days. Ofcom considers it appropriate to take enforcement action in respect of these periods, having regard in particular to paragraphs A1.12 – A1.50 the policy statement, because the abandoned call rate exceeded three per cent of live calls in each of the 45 separate 24 hour periods; and
 - in the event of an abandoned call, failing to include details of a *Special Services* (080 – no charge) or a *Special Services* basic rate (0845 only) or a *Geographic Number* (01/02) or a *UK wide Number at a geographic rate* (03) number¹⁷ in the information message to enable the called person to return the call and decline further marketing calls from the company. Ofcom considers it appropriate to take enforcement action in respect of this aspect of persistent misuse, having regard in particular to paragraphs A1.51 – A1.52 of the policy statement.
- 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 MYIML, having regard to the seriousness of its infringement, and others to whom the persistent misuse provisions and the policy statement applies; and
- c) such persistent misuse is sufficiently serious as to warrant the imposition of a penalty in order to create a deterrent effect for MYIML, 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.

1.7 Ofcom's determination is that a penalty on MYIML of £20,000 would be appropriate and proportionate to the contravention for which it would be imposed.

1.8 The following sections of this Notification set out:

- a) the background detail to this matter, including the applicable statutory framework;

¹⁵ Ofcom's policy statement states that although what constitutes persistent behaviour or practice will need to be determined on a case by case basis, it is likely to require a minimum of three instances of the conduct in question (see paragraph A1.10 of the policy statement).

¹⁶ As explained in the Explanatory Statement accompanying this Notification, this figure is an estimate based on information provided by the company under investigation. The calculation of the number of abandoned calls involves subtracting from the total number of reported abandoned calls an estimate of the number of calls abandoned after being answered by an answering machine. As such the total number of abandoned calls referred to in this Notification is an estimated approximate figure.

¹⁷ As these terms are defined in the National Telephone Numbering Plan as published from time to time by Ofcom under section 56 of the Act. The version referred to in the policy statement has been updated. The current version is at:

<http://stakeholders.ofcom.org.uk/binaries/telecoms/numbering/numbering-plan201212.pdf>.

- b) Ofcom's analysis of the options open to it and the basis for our decision to impose a penalty; and
- c) Ofcom's determination of the amount of that penalty and the basis on which that determination is made.

Section 2

Background

- 2.1 The following section sets out the background to Ofcom's investigation into MYIML, both before and after the issue of the section 128 notification to MYIML on 28 July 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:

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

- a) to further the interests of citizens in relation to communications matters; and
- b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.”

- 2.4 Section 3(3) of the Act says that:

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

- a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
- b) any other principles appearing to OFCOM to represent the best regulatory practice.”

- 2.5 With section 3(3) in mind, Ofcom has published a statement of regulatory principles.¹⁸ 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.

¹⁸ <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>

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

Sections 128, 129 and 130 of the Act

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

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

"(5) For the purposes of this Chapter a person misuses an electronic communications network or electronic communications service if—

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

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

- 2.9 Section 128(6) of the Act defines what constitutes "persistent" misuse as follows:

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

(a) a pattern of behaviour or practice; or

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

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

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

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

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

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

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

“(1) This section applies where –

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

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

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

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

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

as may be specified in the notification.”

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

- 2.13 Under section 130 of the Act, Ofcom may impose a penalty, as well as or instead of, serving a notification under section 129. Section 130 provides as follows:

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

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

(c) the period allowed for the making of the 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 £2,000,000¹⁹ as OFCOM determine to be –

(a) appropriate; and

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

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

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

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

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

Ofcom's relevant guidelines

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

2.15 This most recent statement is the *Revised statement of policy on the persistent misuse of an electronic communications network or service 2010*²⁰, published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement*²¹ (the "policy statement").

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

2.17 The Penalty Guidelines provide that:

¹⁹ Section 130(4) of the Act as amended by the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010, SI 2010/2291, article 2(1).

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

²⁰ <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>

²¹ Annex 1, policy statement.

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

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

- 2.18 The Penalty Guidelines also set out examples of potentially relevant factors in the determination of a penalty, such as:
- i) The degree of harm, actual or potential, caused by the contravention.
 - ii) The duration of the contravention.
 - iii) Any gain (financial or otherwise) made as a result of the contravention.
 - iv) Any steps taken for remedying the consequences of the contravention.
 - v) Whether the regulated body in breach has a history of contraventions.
 - vi) Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention.
 - vii) The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, it was occurring or would occur.
 - viii) Whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it.
 - ix) The extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body.
- 2.19 Ofcom has had regard to the need for transparency in applying such guidelines, particularly as regards the weighting of the factors considered.

The investigation and findings

- 2.20 While reference is made to evidence received and made available to Ofcom (including representations, responses to statutory information requests and correspondence) and, in making this decision Ofcom has carefully considered this in its entirety, this Notification does not purport to be a comprehensive restatement of this evidence base. The documentary evidence is, however, annexed to this Notification and made available to MYIML.
- 2.21 On 22 June 2006 Ofcom opened an own-initiative programme of monitoring and enforcement in order to monitor compliance by companies with the persistent misuse provisions in the Act having regard to the principles set out in the policy statement as applicable from time to time²². The programme has been on-going since that time.
- 2.22 As part of the above programme, Ofcom reviews complaints data received by the Ofcom Consumer Contact Team to decide whether enforcement action is appropriate and if so, in respect of which companies.

²² http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

- 2.23 Ofcom received complaints about abandoned and/or silent calls allegedly being generated by or on behalf of MYIML. We received 31 complaints regarding the Calling Line Identification (“CLI”) number 08443760139 during the Relevant Period. These complaints alleged that some consumers had received abandoned and silent calls once while others had received them on a daily, weekly and monthly basis and also in some cases on multiple occasions during a single day.
- 2.24 In light of these complaints, it was determined appropriate to conduct an investigation into MYIML’s compliance with the persistent misuse provisions in the Act, having regard to the policy statement. Ofcom’s investigation of MYIML’s compliance with the persistent misuse provisions of the Act included:
- a) analysis of complaint data received by the Ofcom Consumer Contact Team in relation to the Relevant Period;
 - b) issuing the First Information Request²³ to MYIML on 7 March 2014. This requested information in relation to MYIML’s processes and procedures in respect of its use of ACS and whether such processes and procedures were consistent with Ofcom’s policy statement; and
 - c) analysis by Ofcom of MYIML’s First Response²⁴ to the First Information Request received on 24, 26 and 28 March 2014; and
 - d) analysis of an email sent by MYIML to Ofcom on 5 March 2014 which included correspondence from MYIML’s supplier of ACS services²⁵.
- 2.25 Following the investigation, the section 128 notification was issued to MYIML on 28 July 2014²⁶. 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, MYIML persistently misused an electronic communications network or service;
 - b) the specific use made of an electronic communications network or electronic communications services by MYIML that Ofcom considered constituted persistent misuse; and
 - c) the period during which MYIML had the opportunity to make representations about the matters notified.
- 2.26 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 First Response showed that MYIML 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 in every 24 hour period that it made outbound calls during the Relevant Period. Based on the available evidence, Ofcom calculated that the abandoned call rates during the

²³ Annex 3, First Information Request.

²⁴ Annex 5, First Response.

²⁵ Annex 4, Email from MYIML to Ofcom on 5 March 2014.

²⁶ Annex 8, section 128 notification.

Relevant Period ranged from 4.26 per cent to 15.21 per cent per twenty-four hour period²⁷.

- 2.27 In the event of an abandoned call, MYIML also failed to include details of a *Special Services* (080 – no charge) or a *Special Services* basic rate (0845 only) or a *Geographic Number* (01/02) or a *UK wide Number at a geographic rate* (03) number²⁸ in the information message played to enable a called person to return the call and decline further marketing calls from the company. Ofcom estimates, on the basis of the evidence available, that MYIML failed to include an appropriate information message on approximately 30,296 abandoned calls during the Relevant Period.
- 2.28 Accordingly, in the section 128 notification, Ofcom set out its reasonable grounds for believing that MYIML had exceeded an abandoned call rate of three per cent on 45 separate 24 hour periods at the call centre it operated. The notification also set out that MYIML's persistent misuse comprised the failure to play an appropriate information message in the event of an abandoned call throughout the Relevant Period.
- 2.29 MYIML had until 26 August 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 MYIML on the section 128 notification

- 2.30 MYIML submitted its representations²⁹ to Ofcom on the matters set out in the section 128 notification on 23 August 2014.
- 2.31 The August Representations set out that:
- a) MYIML accepted that it had persistently misused an electronic communications network or service but that it had not done so intentionally. MYIML said that it had *“not set out to persistently misuse the ACS, MYIML has consistently believed that their commercial service provider was providing safety and compliance and to this end MYIML is guilty of naivety”* ; and
 - b) MYIML had implemented a number of steps since the Relevant Period to bring the contravention to an end.
- 2.32 In the August Representations, MYIML did not dispute that it had exceeded the abandoned call rate on 45 days during the Relevant Period. It noted that a third party had supplied MYIML with all hardware, service, support, training and the proprietary software (“MYIML’s supplier” or “its supplier”). MYIML said that it was not looking to blame its supplier but noted that the software had been responsible for handing calls made by the ACS during the Relevant Period. MYIML reported that when it raised the issue, MYIML’s supplier had stated that, in its opinion, the three per cent abandoned call rate per 24-hour period had not been exceeded during the Relevant Period.

²⁷ See Table 1 of Annex 8.

²⁸ As these terms are defined in the National Telephone Numbering Plan as published from time to time by Ofcom under section 56 of the Act. The version referred to in the policy statement has been updated. The current version is at:

<http://stakeholders.ofcom.org.uk/binaries/telecoms/numbering/numbering-plan201212.pdf>.

²⁹ Annex 10, August Representations.

- 2.33 However MYIML then requested further investigation by an “alternative supplier of similar equipment” which advised that its supplier’s ACS software did not calculate the abandoned call rate accurately and therefore its calculations could not be relied upon for compliance purposes. MYIML stated that its supplier subsequently conceded that their calculations, “*were not the same as those determined to be acceptable by Ofcom.*”³⁰
- 2.34 Following this contact with its supplier, MYIML then stated that it “*immediately implemented its own procedure and policy to ensure that the drop rate was controlled externally from the ACS.*”
- 2.35 Ofcom’s policy statement sets out factors that Ofcom will use as a guide to determine the cases in which it should take action under sections 128 to 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.
- 2.36 The policy 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 serious³¹. This provides operators with a margin for error in respect of misuse in respect of which we might take action for being persistent.
- 2.37 In this case, MYIML exceeded the specified three per cent during each of 45 separate 24 hour periods during the Relevant Period, making a total of approximately 30,296 abandoned calls. In Ofcom’s opinion this represents a pattern of misuse meeting the definition of persistent misuse.
- 2.38 In its August Representations, MYIML accepted that it failed to play an appropriate information message when calls were abandoned during the Relevant Period. Specifically MYIML submitted that:
- i) Following contact from MYIML, its supplier discovered that “*for some reason the standard system default message was being played to dropped calls and not the specifically recorded message contained in the system. [MYIML’s supplier] blamed this omission on Human error immediately selecting the correct setting resolving the issue at that point.*”
 - ii) MYIML went on to note that had the correct message been played, the number broadcast would not have been appropriate as it was not a “*Special Services Number*”.
- 2.39 The aim of playing an information message in the event of an abandoned call is to prevent recipients from receiving silent calls when over-dialling occurs and there are insufficient call centre agents to handle a call which has been answered. Information messages with the correct content reduce harm by informing the recipient about who has called them and how they can return the call, without undue expense, to decline to receive further calls³².

³⁰ Annex 10, August Representations (Pages 1 and 2).

³¹ 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.

³² See paragraph 5.5 of the consultation statement at <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

- 2.40 Failure to include an appropriate number in the information message hinders the ability of abandoned call recipients to return the call and decline further calls. Ofcom was minded to consider that the failure to include an appropriate number in the information message amounts to misuse in respect of which we may take action. Ofcom noted that in total MYIML failed to do this across 45 days of dialling during the Relevant Period in respect of approximately 30,296 abandoned calls. We were minded to consider that this represents a pattern of behaviour or practice that meets the definition of persistent misuse.
- 2.41 Ofcom has also noted that, in the Second Response, MYIML stated that during the Relevant Period the actual message played in the event of an abandoned call was:
- “Sorry, we cannot connect your call. Please hang up.”³³*
- 2.42 Therefore in addition to failing to include an appropriate number, MYIML also failed to identify itself in the information message played in the event of an abandoned call during the Relevant Period³⁴. However, as this additional failure was not notified to MYIML in the s128 notification issued to MYIML (as it was not known about at the time), Ofcom has not taken it into account in setting the proposed penalty in this Notification under section 130 of the Act.
- 2.43 Having regard to the policy statement we considered it appropriate to take enforcement action in respect of both the notified respects set out in the section 128 notification.

Ofcom’s provisional determination in relation to MYIML’s persistent misuse notified in the section 128 notification

- 2.44 Taking into account the findings in the section 128 notification, the August Representations and the above points, we therefore provisionally determined on 29 September 2014 that MYIML had in one or more of the respects 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. Ofcom provisionally determined that the effect or likely effect of MYIML’s use of an electronic communications network or service was to cause 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.
- 2.45 MYIML was given until 27 October 2014 to make written representations to Ofcom about the matters set out in the Provisional Notification and the accompanying Explanatory Statement.

The representations submitted by MYIML on the Provisional Notification

- 2.46 The Representations on the Provisional Notification set out that:

³³ Annex 7, Second Response.

³⁴ The policy statement states at paragraph A1.52 that the information message must contain “the identity of the company on whose behalf the call was made (which will not necessarily be the same company making the call”, see Annex 3.

- a) MYIML had, *“co-operated fully and timeously at every stage with Ofcom, reacting swiftly to the initial complaint to fully investigate, understand and end all instance of non-compliance within hours of receiving the notification”*;
- b) there *“has been no intention or malice attached to this failure to comply”* and that it *“has accepted full responsibility for its actions”*. It also accepted that *“the issues during the “Relevant Period” were unacceptable and as such are likely to have caused annoyance, frustration and harm to consumers”*;
- c) it had *“on many occasions confirmed with the ACS supplier that the system was operating within the correct parameters”* and that the issues arose due to *“a technical fault which when reported was immediately rectified.”* It added that *“MYIML has taken numerous steps to ensure full and ongoing compliance with current legislation (...)”*;
- d) it disputed that MYIML had failed to provide Ofcom with information about how it intends to make regular checks to ensure that the correct information message is played when a call is abandoned and provided further detail on the checks that it now carries out prior to the start of each campaign;
- e) as it had no history of contraventions, it was unaware of what Ofcom considers to be an adequate remedy. Since receiving the Provisional Notification it has *“taken steps to write personally to all affected consumers that it can identify who experienced a dropped call during the relevant period”* and also said it would *“increase the compensation offered to those consumers who were caused such harm and annoyance as to take the time to complain to a £20 High Street gift voucher.”* However, in response to further clarification questions from Ofcom, MYIML explained that it had made an error in the August Representations.³⁵ MYIML's intention had been to send each individual that had complained to Ofcom a £10 High Street voucher; this followed internal discussions about cash flow and the availability of funds. MYIML had not meant to say in the August Representations that it would send complainants a £20 High Street voucher. MYIML went on to state that after careful consideration it had now agreed to increase the voucher to £20 and apologised that the August Representations' was not clear on this point. In an email of 11 November 2014 MYIML provided a copy of the letter that was sent to complainants with the £20 voucher. This letter apologised for any inconvenience caused and as a 'gesture of goodwill' provided a high street voucher as a form of compensation.
- f) MYIML also sent Ofcom a copy of a letter that [X] *“personally sent to potential recipients of Silent Calls during the Relevant Period, who did not complain directly to Ofcom”* on 7 November 2014. This letter explained to recipients that there had been a *“software issue”* in MYIML's dialling systems which resulted in silent calls³⁶, and that MYIML *“unreservedly apologise(d) for any distress caused...”* The letter went on to reassure the recipient that the issue had been resolved and that the recipient could contact MYIML at its

³⁵ Letter received by Ofcom on 7 November 2014, Annex 12 (Representations to the Provisional Notification).

³⁶ MYIML has however told Ofcom that a recorded message in the event of an abandoned call was played, as set out at paragraph 2.38 - 2.42 of this notification.

address to add their number to MYIML's "Do Not Call" list. MYIML also stated that this letter had been sent to 512 individuals.³⁷;

- g) a penalty would cause severe financial hardship for MYIML, specifically it stated that "[a]s Ofcom are aware MYIML is a new business in its first year of trading, any financial penalty is likely to have devastating and wide reaching consequences for the business, its future and those who depend on it for their income";
- h) it asked Ofcom to "re-consider its position with regard to a financial penalty in respect of MYIML" based on its "clarification of information previously submitted to Ofcom and the additional measures to contact personally as many customers affected during the "Relevant Period"; and
- i) MYIML would cease trading if the provisional penalty was issued in its entirety (this point was made by [X] in a phone call to Ofcom on 14 October). [X] added that if the final penalty was lower, MYIML may be in a position to secure additional funds through a bank loan and pay the penalty in instalments³⁸.

Ofcom's determination in relation to MYIML's persistent misuse notified in the section 128 notification

2.47 Ofcom has considered the points that MYIML made in the August Representations and the Representations on the Provisional Notification carefully. Ofcom notes that MYIML did not dispute within these representations that it persistently misused an electronic communications network or service during the Relevant Period. In the Representations on the Provisional Notification MYIML stated that it accepted full responsibility for its actions, which it recognised were likely to have caused "annoyance, frustration and harm to consumers" during the Relevant Period.

2.48 Therefore, we determine that MYIML has persistently misused an electronic communications network or electronic communications services during the Relevant Period by:

- making multiple (and certainly more than three) abandoned calls during each of 45 separate 24 hour periods. In total Ofcom estimates on the basis of the evidence available that MYIML made approximately 30,296 abandoned calls in total on those days. Ofcom considers it appropriate to take enforcement action in respect of these periods, having regard in particular to paragraphs A1.12 - A1.50 of the policy statement, because the abandoned call rate exceeded three per cent of live calls in each of the 45 separate 24 hour periods; and
- in the event of an abandoned call, failing to include details of a Special Services (080 - no charge) or a Special Services basic rate (0845 only) or a Geographic Number (01/02) or a UK wide Number at a geographic rate (03) number in the information message to enable the called person to return the call and decline further marketing calls from the company. Ofcom considers it appropriate to take enforcement action in respect of this aspect

³⁷ Email of 10 November 2014, Annex 12 (Representations to the Provisional Notification).

³⁸ Annex 12, Representations to the Provisional Notification (file note of a 14 October 2014 phone call with MYIML).

of persistent misuse, having regard in particular to paragraphs A1.51 - A1.52 of the policy statement.

- 2.49 We have taken into account all of MYIML's representations when considering whether it would be appropriate to impose a penalty on MYIML and if so, at what level any such penalty should be set.

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 MYIML 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 MYIML 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 infringement"³⁹.*
- 3.5 The imposition of an appropriate and proportionate punishment (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 MYIML for the reasons we set out below.

No further action

- 3.8 Ofcom would take no further action if we were to determine that MYIML had not, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications services during the Relevant Period. Taking no further action is also an option open to Ofcom if we consider that,

³⁹ Annex 2, Penalty Guidelines (paragraph 3).

although MYIML had, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service 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 First and Second Response, the August Representations and Representations on the Provisional Notification, Ofcom determines that MYIML has persistently misused an electronic communications network or service in both of the notified respects during the Relevant Period. In light of that determination, and for the following reasons, we also determine 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)⁴⁰.
- 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 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 MYIML a notification under section 129 of the Act. For the reasons set out, Ofcom's view is that it should not do so.
- 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.⁴¹

⁴⁰ Market Research published on 23 May 2014, <http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance-calls-research/>.

⁴¹ Section 129(2) of the Act.

- 3.15 This option is open to Ofcom where, as in this case, we are satisfied that MYIML 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 First and Second Responses, the August Representations and the Representations on the Provisional Notification, Ofcom's judgment is that MYIML has now taken a number of timely and appropriate steps to secure that its misuse is brought to an end and not repeated. However, we note that while the August Representations and the Representations on the Provisional Notification set out details of the compliance checks which MYIML carries out prior to the start of each campaign, they did not contain any information about how MYIML intends to make regular checks during a campaign to ensure that the correct information message is played when a call is abandoned.
- 3.16 MYIML stated in its August Representations that "*We have considerably reduced our outbound dialling campaign call volumes and our daily dialling strategy ensures our software operates at the optimum call to agent ratio in order to minimise the abandoned call rate and associated complaints.*"⁴²
- 3.17 In addition, in its August Representations and Second Response, MYIML also provided information on actions taken to prevent persistent misuse from being repeated in the future⁴³:
- i) *Dropped Calls:*
 - a) **Managers Dialler Compliance Manual:** In its August Representations, MYIML included a document entitled '*Vicidial Dialler Compliance Manual*' which notes that it "...*serves as the manual for the keeping the Vicidial Predictive Outbound calling system within the Ofcom regulatory framework for all Call Centres under operation by MYIML Limited.*" MYIML describes this document as "*a set of best practices that ensures managers effective(ly) know how to manage the drop rate to ensure MYIML remains within regulatory compliance.*"
 - b) **Drop Rate Calculator:** MYIML notes in the August Representations that it had supplied a *simple excel calculator and method statement to the Dialler Manager. This calculator accurately reflects the position of dropped calls at a number of given times during each 24 hour period.*" MYIML goes on to add that the Dialler Managers must send the calculation to the compliance managed at the end of each shift and that means that the drop rate is checked four times a day from Monday to Friday and twice a day on Saturdays. The Dialler Manager must also run "*... the outbound calling report which verifies the figures used on the Drop Calculator are factual and accurate, therefore validating the drop percentage as accurate. The report and drop calculator are combined and saved together for future verification and audit purposes.*" MYIML has also stated that the "*ACS internal Drop Rate ceiling was reduced on 12th March (2014) in order to maintain a compliant rate.*"
 - c) **Remote Agent Monitoring:** MYIML explained that "*remote monitoring is carried out continuously during each shift to ensure that agents are dispositioning all calls correctly...*".

⁴² Annex 10, August Representations (page 5).

⁴³ Annex 10, August Representations (paragraph 36).

- 3.18 The Second Response states that the steps (a) and (c) had all been put in place on 27 March 2014:
- i) *Special Services Number in the information message.* MYIML informed Ofcom that it has moved to using a 03 number in the following information message played in the event of an abandoned call: *"We apologise for not passing your call to a live agent, you have been called today by MYIML, to remove your details and receive no further calls please call 03 ..."*. MYIML is also working with its system provider to make it easier for call recipients to decline further calls. The Second Response states that the 03 number has been in use since 15 March 2014.
 - ii) *Daily Campaign Integrity Report.* MYIML told Ofcom that the *"dialler manager must complete a campaign integrity report before using any campaign, this integrity check ensures that all settings are correct before the campaign is set to live for that session. The integrity report is dated and signed by the Dialler manager and filed for future reference..."*. The Second Response states that this report has been in effect since 12 March 2014 and added that it is *"constantly updated"*.
 - iii) *Named Dialler Manager.* MYIML stated in the August Representations that it had created *"a separate role of Dialler Manger, this role focuses on ensuring that the equipment, systems and data are all managed in accordance with current legislation."* MYIML added that *"the Dialler Manager has the authority to stop any and call campaigns if in their opinion the campaign (is) not operating within the guidance set out in the dialler compliance manual."* The Second Response states that the separate Dialler Manger role was created on 24 March 2014.

3.19 In light of the above steps, MYIML said that it believes that it has *"made what we believe to be as full and comprehensive overhaul of our systems in order to meet Ofcom's guidelines as is humanly possible."*⁴⁴

3.20 The Representations on the Provisional Notification provided more details about the *Daily Campaign Integrity Report* that it had included in its August Representations:

As shown on the dialler integrity report there are a number of checks carried out prior to the start of each campaign. These checks include as detailed on the dialler integrity check list, ensuring that the correct message is played if and when abandoned calls have occurred, additionally the system is checked to ensure that the special services number is accurately displaying. The mechanism for checking these systems settings is both tested manually and automatically.

- 1) *Automatically, the dialler manager will make a call to a predefined internal number and allow the system to connect to that number whilst there are no agents available hence creating an abandoned call. This allows the cli to be checked and by redialling the number checks the integrity of the abandoned call message.*
- 2) *Manually, the dialler manager checks the system settings within the ACS to ensure that the correct status and recording are selected and the CLI setting is active and broadcasting the correct number.*

⁴⁴ Annex 10, August Representations (page 6).

These checks together with the others on the dialler integrity check list are completed prior to any live calls being made from any campaign, this is then signed and filed by the dialler manager.

3.21 Ofcom has taken the actions set out in the August Representations and the Representations on the Provisional Notification into account and considers that MYIML has taken a number of timely and appropriate steps to secure that its misuse is brought to an end and not repeated. However, we note that while the August Representations and Representations on the Provisional Notification set out details about the compliance checks that take place prior to the start of each campaign, they did not contain any information about how MYIML intends to make regular checks during a campaign to ensure that the correct information message is played when a call is abandoned.

3.22 As to the steps MYIML has taken to remedy the consequences of the misuse notified to it, we take account that section 129(7) of the Act provides:

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

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

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

3.23 In the August Representations MYIML set out the steps it intended to take to remedy the consequences of the notified misuse. MYIML said that, *“with regard to complaints and in an attempt to remedy the consequences of our actions in the past, we would like to make an offer of reasonable compensation in the form of a £20 high street voucher to each of the 31 complainants that felt the need to bring the matter of an abandoned call to Ofcom’s attention.”*

3.24 Affected consumers suffered harm as a result of MYIML’s actions evidenced by the complaints Ofcom received (as summarised at paragraph 2.23). In the Provisional Notification Ofcom stated that in addition to the consumers who complained to Ofcom directly, there was likely to be a large number of other consumers who had been affected and suffered harm. Ofcom therefore considered that the offer made by MYIML in the August Representations did not appear to be adequate given the likely harm caused, and MYIML should have considered taking additional appropriate steps to remedy the consequences of its contravention.

3.25 MYIML addressed the point above in the Representations on the Provisional Notification:

“MyIML apologises that Ofcom feels that the offer made as highlighted above is [in]adequate. As detailed by Ofcom in section 4.37 MyIML has no history of previous contraventions, subsequently MyIML has no understanding regarding what Ofcom feels to be adequate. However this does not diminish the responsibility that MyIML feels in regard to the likely harm caused to consumers.

On reflection and taking in to account Ofcom’s comments MyIML has taken steps to write personally to all affected consumers that it can identify who experienced a dropped call during the “relevant Period” in addition, MyIML will increase the compensation offered to those consumers who were

caused such harm and annoyance as to take the time to complain to a £20 High Street gift voucher.”

- 3.26 MYIML subsequently provided details of the letter sent to all customers that it could identify as potentially receiving an abandoned call (see Annex 12). As set out at paragraph 2.46(f), this included an apology “*for any distress caused...*”, sought to reassure the recipient that the issue had been resolved and let the recipient know how he or she could add their telephone number to MYIML’s “Do Not Call” list. This letter was sent to 512 potential recipients of silent calls who had not complained to Ofcom (see Annex 12)⁴⁵. Ofcom recognises that MYIML has now taken an additional step by writing to a wider group of affected individuals to apologise for any distress caused. However, Ofcom also notes that this step has fallen short of offering a wider group of individuals a payment by way of compensation for loss or damage suffered by that person or in respect of annoyance, inconvenience or anxiety to which he has been put, which is mentioned in section 129(7) of the Act.
- 3.27 In the Representations on the Provisional Notification, MYIML clarified that the original offer of a £20 High Street voucher to the 31 individuals who had complained to Ofcom during the Relevant Period (as set out in the August Representations) had been made in error and this should have instead been a £10 High Street voucher. MYIML went on to confirm however that the offer was now a £20 High Street voucher and provided an example of a letter sent to one of these complainants⁴⁶. The letter explained that the silent or abandoned call had been the result of a software error and included an apology for “*any inconvenience or distress that this may have caused*” along with the voucher. MYIML informed Ofcom on 7 November 2014 that “*all the vouchers have now been sent to those consumers who did complain to Ofcom, along with a letter which is also attached for your perusal*”⁴⁷.
- 3.28 As noted in the Provisional Notification, Ofcom considers that in addition to the 31 individuals who complained to Ofcom there is likely to be a large number of other consumers who have been affected and suffered harm. While the letter of apology to a further 512 individuals that MYIML believes may have received an abandoned call is a welcome step, that letter did not include a payment in respect of the annoyance, inconvenience or anxiety that those individuals may have suffered. Ofcom therefore considers that MYIML has taken some (albeit not all adequate) steps to remedy the consequences of the notified misuse.
- 3.29 Ofcom considers that it could issue a section 129 notification in this case, as the August Representations and the Representations on the Provisional Notification, as set out in paragraphs 3.15 and 3.21 above, did not contain any information about how MYIML intends to make regular checks during a campaign to ensure that the correct information message is played when a call is abandoned; and because MYIML has not taken all adequate steps for remedying the consequences of the notified misuse.
- 3.30 However, in light of the number of timely and appropriate steps that MYIML has to date taken to bring its misuse to an end and prevent this from happening again (as outlined at paragraphs 3.16 to 3.20 above) and some (but not all adequate) steps to

⁴⁵ Ofcom notes in this regard that MYIML has told Ofcom an information message was played in the event of an abandoned call.

⁴⁶ Annex 12, Representations on the Provisional Notification (email sent to Ofcom on 11 November 2014).

⁴⁷ Annex 12, Representations on the Provisional Notification (email from MYIML to Ofcom on 7 November 2014).

remedy the consequences of the notified misuse, our view is that it would not be a proportionate regulatory response to serve on MYIML a notification under section 129 of the Act.

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

- 3.31 The following is Ofcom's consideration of whether any further enforcement action should involve imposing on MYIML a penalty under section 130 of the Act. Ofcom's view is that we should do so. The reasons are as follows.
- 3.32 Ofcom may impose a penalty, as provided under section 130 of the Act, in circumstances, where -
- “(a) a person ("the notified misuser") has been given a notification under section 128;
 - (b) OFCOM have allowed the notified misuser an opportunity of making representations about the matters notified; and
 - (c) the period allowed for the making of the representations has expired.”⁴⁸
- 3.33 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”.
- 3.34 As set out in paragraphs 2.20 to 2.49, Ofcom is satisfied that MYIML persistently misused an electronic communications network or electronic communications service. On this basis, MYIML may be liable for the imposition of a penalty under section 130 of the Act.
- 3.35 Taking account of the matters in paragraph 3.8 to 3.12 above, and that we have decided not to take action under section 129 of the Act, we are of the view that the imposition of a penalty would help to secure Ofcom's 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 MYIML so as to reflect the seriousness of its conduct and to deter non-compliance with the persistent misuse provisions of the Act, having regard to the policy statement, by MYIML and others.
- 3.36 Accordingly, we are imposing a penalty on MYIML in this case under section 130 of the Act. The following section sets out Ofcom's determination of the penalty amount, which is a matter of regulatory judgment and includes taking account of:
- (a) the First and Second Responses, the August Representations and the Representations on the Provisional Notification;
 - (b) any steps taken by MYIML for securing that the notified misuse was brought to an end and not repeated;

⁴⁸ Section 130(1) of the Act.

- (c) any steps taken by MYIML for remedying the consequences of the notified misuse; and
- (d) other requirements of the Act, including that the penalty is appropriate and proportionate to the relevant misuse and has regard to the Penalty Guidelines.

Section 4

Determination of the amount of penalty

- 4.1 The following section of this document sets out Ofcom's determination of the amount of the penalty imposed on MYIML. 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 August Representations⁴⁹ and the Representations on the Provisional Notification⁵⁰, and the First and Second Response⁵¹;
 - c) steps taken by MYIML for securing that the notified misuse is brought to an end and not repeated;
 - d) steps taken by MYIML 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 order⁵² 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 entitled, "*Raising the maximum penalty for the persistent misuse of an electronic communications network or service, 2009*".⁵³ 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*

⁴⁹ Annex 10, August Representations.

⁵⁰ Annex 12, the Representations on the Provisional Notification.

⁵¹ Annex 7, Second Response.

⁵² [The Communications Act 2003 \(Maximum Penalty for Persistent Misuse of Network or Service\) Order 2010 No. 2291](#)

⁵³

<http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file53311.pdf>

*to consumers by silent and abandoned calls and this feeling was particularly strong where respondents had received calls and tried various methods to combat the problem”.*⁵⁴

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*”.⁵⁵ 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*”.⁵⁶

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 1998⁵⁷. 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 statement⁵⁸.

⁵⁴ 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

⁵⁵ Ibid, page 1,

⁵⁶ Ibid, page 5.

⁵⁷ Annex 2, Penalty Guidelines.

⁵⁸ Annex 1, policy statement (A1.100 to A1.104).

The Penalty Guidelines

- 4.9 As set out in our Penalty Guidelines, Ofcom considers all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of penalty. The regard we have had to these guidelines, in accordance with section 392 of the Act, is set out below.
- 4.10 The particular factors we have considered are set out below. In considering them, we have taken into account the maximum penalty that may be imposed (and the reasons for its setting at that level); the First and Second Responses, the August Representations, the Representations on the Provisional Notification; steps taken by MYIML; and the statutory requirements that a penalty is appropriate and proportionate. We have considered, in particular:
- i. That the Penalty Guidelines state 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.*”⁵⁹
 - ii. The following which appear to us to be relevant in this case in determining an appropriate penalty:
 - a. the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;
 - b. the duration of the contravention;
 - c. any gain (financial or otherwise) made by MYIML (or any connected body) as a result of the contravention;
 - d. any steps taken for remedying the consequences of the contravention;
 - e. whether in all the circumstances appropriate steps had been taken by MYIML to prevent the contravention;
 - f. whether MYIML has a history of contraventions;
 - g. 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;
 - h. whether there has been a failure to keep adequate records;
 - i. whether the contravention continued, or timely and effective steps were taken to end it, once MYIML became aware of it; and
 - j. the extent to which the level of penalty is proportionate, taking into account the size and turnover of MYIML.
- 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

⁵⁹ Annex 2, Penalty Guidelines (paragraph 3).

of the factors considered in making our determination. We have also considered the extent of MYIML's co-operation 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 In the August Representations, MYIML submitted that it "... understands that the definition contained in section 128 of the complaint relates to the number of occasions that calls were dropped during the "Relevant Period" but would ask that Ofcom views the actions taken to resolve the issues and ensure future compliance, together with the systems and procedures now in place provide comfort that MYIML is acting as a responsible user who had not intent or willingness to misuse"⁶⁰. This point was reiterated in the Representations on the Provisional Notification when MYIML stated: "MYIML accepts that the issues during the "Relevant Period" were unacceptable and as such are likely to have caused annoyance, frustration and harm to consumers." We have carefully considered the August Representations and the Representations on the Provisional Notification 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 electronic communication services.
- 4.15 We also have regard to the numbers of abandoned calls and their effects on consumers. Abandoned and silent calls will almost invariably result in consumer harm, which may range from inconvenience and annoyance through to genuine anxiety⁶¹. We give weight to the evidence to this effect in Ofcom's market research, which most recently found that abandoned calls with an information message were considered to be annoying (71 per cent of calls) and distressing (6 per cent of calls)⁶².
- 4.16 There is therefore, in our regulatory judgment, an inherent seriousness in persistent misuse by way of making abandoned and silent calls, such as that by MYIML. There is a need for enforcement action, including appropriate and proportionate financial penalties, to provide MYIML, 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

⁶⁰ Annex 10, August Representations, page 2.

⁶¹ Annex 1, policy statement (paragraph 1.6).

⁶² Market Research published on 23 May 2014, http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance_calls_research/

avoid making abandoned and silent calls; and that when such calls are made, steps are taken to reduce the degree of harm caused⁶³.

- 4.18 ACS technology is used by call centres to improve efficiency by maximising the amount of time call centre agents spend speaking to consumers. Persons using these technologies may pass the cost savings that these technologies allow on to consumers. However, if not robustly and properly managed, a side effect of these technologies may be the generation of abandoned and silent calls resulting in consumer harm.
- 4.19 Ofcom recognises that a balance is needed between the positive efficiency benefits of ACS on the one hand, and the potential for these technologies to cause consumer 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 liable to regard as serious because a margin for error has already been allowed and has been exceeded.
- 4.21 MYIML’s persistent misuse during the Relevant Period in respect of which Ofcom is taking this enforcement action included it making multiple abandoned calls during each of 45 separate 24 hour periods with abandoned call rates ranging from 4.26 to 15.21 per cent. On the basis of the available evidence, we estimate that MYIML made approximately 30,296 abandoned calls in total during the Relevant Period. Compared to other recent cases where we have taken enforcement action, this case may be considered as serious.
- 4.22 MYIML’s persistent misuse also involved the failure to include an appropriate number in the information message played in the event of an abandoned call. We estimate that it failed to do so on each of 45 days of dialling across the Relevant Period, in respect of which it made approximately 30,296 abandoned calls. MYIML conceded in the August Representations that despite the error which led to a ‘test message’ being played instead of the intended information message, “*the number broadcast* (in the intended message) *would have not been appropriate as it was not a “Special Services Number”*”. Ofcom considers the failure to play an appropriate information message in the event of an abandoned call to be a serious matter, as this would have hindered the ability of consumers to return the call and decline further marketing calls from MYIML.
- 4.23 Accordingly, Ofcom considers that in this case the contravention should be characterised as serious and considerable.

⁶³ Annex 1, policy statement (paragraph 4.1).

Degree of harm caused by the contravention

- 4.24 We have given consideration to the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants.
- 4.25 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 statement⁶⁴ 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 calls is to cause other persons to suffer unnecessary annoyance, inconvenience or anxiety⁶⁵. This is supported by the evidence in Ofcom’s market research described elsewhere in this document.
- 4.26 We also take into account that, in our determination, MYIML exceeded an abandoned call rate of three per cent of live calls over 45 separate 24 hour periods making a total of approximately 30,296 abandoned calls. It also made multiple abandoned calls where the information message included in the event of an abandoned call failed to include an appropriate number that the call recipient could use to opt out of future marketing calls. MYIML failed to do this in respect of approximately 30,296 abandoned calls during the Relevant Period.
- 4.27 Ofcom accepts however that whilst MYIML did not include an appropriate number within the information message played in the event of an abandoned call, it did present a CLI number. As a result, call recipients with caller display or those who dialled “1471” to obtain a number could have called to decline further calls.
- 4.28 On that basis, Ofcom considers that MYIML would have generated actual or potential consumer harm during the Relevant Period in a significant number of those relevant cases, and that the harm was likely to have been considerable.
- 4.29 Accordingly, we are of the view that the effect or likely effect of MYIML’s use of the electronic communications network or electronic communications service was that call recipients unnecessarily suffered annoyance, inconvenience or anxiety.

The duration of the contravention

- 4.30 In relation to the issue of the duration of the contravention, it is important to note that for the purposes of exercising its enforcement powers in an efficient, appropriate and proportionate manner and so that parties do not have to provide undue amounts of information, Ofcom may select a timeframe within which it bases an investigation. This timeframe is known as the relevant period and its duration is determined on a case by case basis. In the present case, a seven week period was selected as the relevant period, between 16 December 2013 and 3 February 2014.
- 4.31 Our view is that the duration of the notified non-compliance is significant because the abandoned call rate exceeded three per cent on 45 days across the Relevant Period, which is every day on which MYIML made outbound calls during the Relevant Period⁶⁶. MYIML also failed to play an information message in the event of an abandoned call that included an appropriate number that call recipients could dial to

⁶⁴ Annex 1, policy statement (paragraph 1.6).

⁶⁵ Annex 8, section 128 notification (paragraph 1.5).

⁶⁶ The exceptions being 24 - 26 December 2013 and 1 January 2014.

opt of future marketing calls from MYIML on all 45 days of dialling during the Relevant Period.

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

- 4.32 MYIML states in the Representations on the Provisional Notification that “*The circumstances surrounding the failure in compliance were not intentional, neither can they be attributed to a lack of willingness to comply and were in no way reckless or for financial gain.*”
- 4.33 MYIML’s failure to maintain an abandoned call rate of less than three per cent during 45 separate 24 hour period across the Relevant Period may have resulted in MYIML benefitting as a result of its failure to follow the principles set out in the policy statement and carrying out the persistent misuse. It may also have benefited by not including an appropriate number in the information message played in the event of an abandoned call in that this measure may have discouraged abandoned call recipients from contacting MYIML and opting out of future marketing calls. 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 MYIML to remedy the consequences of the contravention

- 4.34 As explained in paragraph 3.29 above, Ofcom’s view is that MYIML has taken some (but not all adequate) steps to remedy the consequences of the misuse notified to it under section 128 of the Act.
- 4.35 MYIML has told Ofcom that it has sent out £20 High Street vouchers together with an apology to the 31 individuals who complained to Ofcom during the Relevant Period. In addition, as noted in paragraph 3.28 above, the Representations on the Provisional Notification stated that MYIML has written to 512 potential recipients of silent calls to apologise for any distress caused. However, Ofcom notes that the letter of apology to the 512 individuals did not include any payment such as a gift voucher to recognise the annoyance, inconvenience or anxiety that may have been caused.
- 4.36 Therefore Ofcom considers that MYIML has taken some but not all adequate steps to remedy the consequences of the notified misuse. We have given MYIML some credit for taking these steps to remedy the harm. However the reduction of the penalty is limited given that in our view MYIML has not taken all adequate steps to remedy the harm.

Whether MYIML has a history of contraventions

- 4.37 MYIML 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. In particular, no previous persistent misuse contravention is to be taken into account in assessing any penalty that may be imposed on MYIML.

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

- 4.38 In Ofcom’s view, MYIML failed to take all appropriate steps to prevent the contravention.

- 4.39 We note that MYIML was incorporated on 5 September 2013 and it has therefore been trading only for a relatively short time. We consider that MYIML should nonetheless have been aware of the principles and practices set out in the policy statement as they relate specifically to MYIML's business practices through the use of a call centre. MYIML should therefore have been 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.
- 4.40 Ofcom notes that MYIML relied on its supplier to administer its call centre services during the Relevant Period. In the Representations on the Provisional Notification, MYIML noted that its supplier had provided the proprietary software which was responsible for handling all calls made by the ACS.⁶⁷ The Representations on the Provisional Notification went on to note that a director of its supplier *"had been asked on a number of occasions to confirm that the system was compliant and responded that it was and that we were operating within current guidance."* This point was reiterated in the Representations on the Provisional Notification as MYIML stated that they *"...had on many occasions confirmed with the ACS supplier that the system was operating within the correct parameters."*
- 4.41 Ofcom considers that all users of ACS should be expected to take reasonable steps to monitor and assess ongoing compliance with the persistent misuse provisions and the policy statement, including non-compliance that may be the result of a mistake. Therefore it is MYIML's responsibility to ensure that the abandoned call rate remains below three per cent per 24-hour period and that an appropriate information message is being played in the event of an abandoned call.
- 4.42 MYIML should have had processes in place to monitor and ensure that its abandoned call rate did not go above three per cent of live calls in any 24-hour period. This could have been achieved by ensuring that abandoned call rates were being calculated correctly, and that ACS use was being monitored and actively managed on a daily basis by personnel with appropriate training and experience and with additional oversight by senior personnel. This point was accepted by MYIML in the Representations on the Provisional Notification, which stated the following: *"Ofcom will undoubtedly and rightly argue that MYIML should have had its own internal procedures for checking, and as a new business we have had a very steep learning curve and potentially a critical financial penalty"*.
- 4.43 Acceptance of assurances from third parties, without the procuring party obtaining evidence on a continuous basis that the assurances are substantiated or that the contractual obligations are being consistently adhered to, falls short of a practice of ongoing monitoring and assessment. In this case, therefore, we consider that effective steps were not taken by MYIML to ensure the policy statement was followed, or to prevent the contravention itself.
- 4.44 Ofcom also notes that in the August Representations MYIML states: *"in Response to the omission of the "Special Services Number" this number lived within the pre-recorded message, which as detailed by [MYIML's supplier] was not active as a result of Human error, had it been active a number would have been available. MYIML concedes that even if the message had been active that the number broadcast would not have been appropriate as it was a not a "Special Services Number"*.

⁶⁷ Annex 10, August Representations (Page 1).

- 4.45 MYIML should have had a process in place to check regularly that an appropriate information message was being played in the event of an abandoned call. For the avoidance of doubt, the number to be included in the information message played in the event of an abandoned call is not limited to a 'Special Services Number (080 or 0845)'. A *Geographic number (01/02)* or a *UK wide Number at a geographic rate (03)* number can also be included. However, the statement by MYIML nevertheless presents a scenario whereby MYIML was not sufficiently aware of the steps ACS users need to take to reduce the harm generated by abandoned and silent calls and was therefore not in a position to take appropriate steps to prevent the contravention during the Relevant Period.
- 4.46 Accordingly, our regulatory judgment is that MYIML 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.

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.

- 4.47 Our assessment is that the persistent misuse in this case did not occur intentionally, recklessly or with the knowledge of MYIML's senior managers. We therefore attach no weight to any such considerations in assessing the penalty.
- 4.48 MYIML stated in the August Representations that:
- "...MYIML has not set out to persistently misuse the ACS, MYIML has consistently believed that their commercial service provider was providing safety and compliance and to this end MYIML is guilty of naivety".⁶⁸*
- 4.49 It added in the Representations on the Provisional Notification that "*... there has been no intention or malice attached to this failure to comply.*"
- 4.50 While Ofcom considers that MYIML could have done more to prevent the contravention, it is our view that MYIML's contravention of the persistent misuse provisions did not occur intentionally.
- 4.51 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 First Response, the August Representations and the Representations on the Provisional Notification, our view is that MYIML's notified contravention was not reckless on this basis.
- 4.52 While we consider that not all steps were taken to prevent the notified misuse from occurring (as set out at paragraphs 4.38 to 4.46), we have no evidence as to the seniority of those involved in processes at MYIML 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 MYIML had, or ought to have had, this knowledge.

⁶⁸ Annex 10, August Representations (Page 2).

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

- 4.53 MYIML stated in the Second Response that its turnover for the period 5 September 2013 to 31 August 2014 was £631 000⁶⁹. MYIML further noted that it *“has no direct employees, but draws services from a pool of registered agents on an ad-hoc basis on a self-employed agency agreement.”*
- 4.54 It further notes in the Representations on the Provisional Notification that *“As Ofcom are aware MYIML is a new business in its first year of trading, any financial penalty is likely to have devastating and wide reaching consequences for the business, its future and those who depend on it for their income.”*
- 4.55 Ofcom also received a phone call from [X] of MYIML on 14 October 2014 where she stated that MYIML was not in a position to pay the amount of the provisional penalty. She noted that she would have to cease operating if the proposed penalty amount was confirmed as the final penalty amount. [X] added that, *“if the penalty was lower, she may be able to secure funds from the bank and pay the penalty in instalments”⁷⁰.*
- 4.56 In Ofcom’s view, the level of MYIML’s turnover and its size indicates that MYIML is a small business. Any penalty Ofcom imposes must be an appropriate and proportionate penalty for the misuse involved in this case, such as would deter a business of that size from persistent misuse. We have taken this into account in determining the final penalty amount. If MYIML had been a sizeable business, the penalty level would have been significantly higher .

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

- 4.57 Following our careful consideration of the August Representations, the Representations on the Provisional Notification, the First and Second Response, Ofcom’s judgment is that MYIML has taken a number of timely and appropriate steps to bring the relevant misuse to an end once it was aware of it (as set out at paragraphs 3.16 to 3.20). However, we note that neither the August Representations nor the Representations on the Provisional Notification contain any information about how MYIML intends to make regular checks not just before but also during each campaign to ensure that the correct information message is played when a call is abandoned. We have given MYIML due credit for the steps it has taken in our determination of the penalty amount.

Whether there has been a failure to keep adequate records

- 4.58 Ofcom issued MYIML with two information requests on 7 March and 10 September 2014 and MYIML provided timely responses, with the information requested, to Ofcom on 24 and 26 March and 17 September 2014.
- 4.59 Ofcom notes that the data needed to calculate abandoned call rates were presented to it in the First Response and therefore Ofcom believes that MYIML 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.

⁶⁹ Annex 7, Second Response. MYIML stated that, *“Turnover is provisional from management accounts for the period 5th September 2013 to 31st August 2014 and it £631k.”*

⁷⁰ Annex 13, the October 2014 phone call.

Co-operation with Ofcom's investigation

- 4.60 Ofcom's ability to protect consumers and fair dealing businesses effectively, and to perform our statutory duties, is impeded if parties under investigation fail to provide accurate, and timely, co-operation with our investigations. In that light, the Penalty Guidelines state that "*Ofcom may increase the penalty where the regulated body in breach has failed to cooperate fully with our investigation*⁷¹." We have therefore considered the co-operation MYIML gave to Ofcom's investigation of this matter.
- 4.61 In this case, MYIML was punctual in its responses to Ofcom's statutory information requests and in the delivery of its representations. It has also co-operated promptly where Ofcom sought clarifications to the information provided. This point was highlighted by MYIML in the Representations on the Provisional Notification in which MYIML stated that it had, "*co-operated fully and timeously at every stage with Ofcom, reacting swiftly to the initial complaint to fully investigate, and understand and end all instances of non-compliance within hours of receiving the notification.*"
- 4.62 Our overall assessment, therefore, is that MYIML 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

- 4.63 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.
- 4.64 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 2006⁷².

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

- 4.65 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 legislation⁷³ 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;

⁷¹ Annex 2, Penalty Guidelines.

⁷² http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

⁷³ http://www.legislation.gov.uk/uksi/2010/2291/pdfs/ukxi_20102291_en.pdf

- 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 weeks⁷⁴ 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.

4.66 Accordingly, we do not consider the pre-2011 cases to be particularly relevant in light of the revised variables and this section does not therefore purport to be a comprehensive analysis of each case as compared 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.⁷⁵
- Ofcom has held that the seriousness of harm is linked to the number of abandoned and/or silent calls made⁷⁶, with silent calls being particularly serious⁷⁷, but even a relatively small number of calls may be “serious”⁷⁸.
- 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*”⁷⁹.
- 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 repeated⁸⁰.

⁷⁴ Note the duration of the Relevant Period in a particular case may vary depending on the facts and circumstances of that case.

⁷⁵ See, in particular, Complete Credit Management, March 2008.

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

⁷⁶ Annex 3, policy statement (A1.84).

⁷⁷ See e.g. Barclaycard, September 2008 http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/barclaycard/

⁷⁸ See e.g. Complete Credit Management, March 2008

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

⁷⁹ Space Kitchens and Bedrooms (Holdings) Ltd, January 2007

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

⁸⁰ See e.g. Equidebt Limited (December 2008), Abbey National Plc (March 2008), Complete Credit Management (March 2008) http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

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

4.67 The most recent persistent misuse cases for contraventions of section 128 of the Act were determined on 19 April 2012, 6 December 2012, 18 April 2013 and 9 September 2014. The first imposed a penalty of £750 000 on HomeServe; the second imposed a penalty of £60 000 on npower; the third imposed a penalty of £750 000 on TalkTalk; and the fourth imposed a penalty of £10 000 on Ageas.

4.68 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;
- 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.

4.69 The key features of the HomeServe case, the npower case, the TalkTalk case, the Ageas 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

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

4.71 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.

4.72 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 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 addition, TalkTalk did not adhere to the 24 hour policy set out in the policy statement. 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.

4.73 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 8 separate occasions during the Relevant Period. On those days, the volume of abandoned calls made was approximately 1 756. npower also included marketing content within the information message played in the event of an abandoned call.

- 4.74 In the Ageas case a three per cent abandoned call rate was exceeded on three separate occasions. Ofcom estimated, on the basis of the available evidence, that Ageas made approximately 148 abandoned calls in total on these days. Ofcom considered that this was a relatively small and less serious example of what, in Ofcom's regulatory judgment, is an intrinsically serious contravention.
- 4.75 We consider that the HomeServe and TalkTalk cases provide more informative precedents than npower and Ageas cases. HomeServe exceeded an abandoned call rate of three per cent in 36 separate 24 hour periods across a seven week relevant period. Whilst TalkTalk exceeded an abandoned call rate on at least four separate occasions during the relevant period, it did so with abandoned call rates being particularly high (12 to 29 per cent).

Degree of harm caused by the contravention

- 4.76 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. TalkTalk made approximately 9 000 silent calls, but it was not possible in the HomeServe case to quantify the number of silent calls resulting from AMD false positives, although this could have been significant. In contrast to the HomeServe and TalkTalk cases, npower did not generate silent calls (which Ofcom considers cause more serious harm than abandoned calls).
- 4.77 Ofcom is of the view that the harm caused by both npower and Ageas was of a lower level than that of HomeServe and TalkTalk. npower generated 1 756 abandoned calls during eight separate 24 hour periods where it exceeded an abandoned call rate of three per cent. It also included marketing content within its information message, although Ofcom did not consider the harm caused in respect of this particular misuse to be at a serious level. Ageas generated approximately 148 abandoned calls during three separate 24 hour periods where it exceeded an abandoned call rate of three per cent. Ofcom's concluded that npower and Ageas's conduct, although intrinsically serious, pointed to a relatively small and less serious contravention.
- 4.78 Ofcom considers the degree of harm caused by MYIML in this case is likely to be of a broadly similar level to that generated by HomeServe and TalkTalk. This is reflected in the level of the penalty.

Duration of the contravention

- 4.79 In the HomeServe, TalkTalk, npower and Ageas 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.
- 4.80 Ofcom holds a similar opinion with regard to the MYIML case, as set out above at paragraphs 4.30 to 4.31.

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

- 4.81 In the present case, and similar to the HomeServe, npower, TalkTalk and Ageas cases, Ofcom considers that it is possible that MYIML may have derived *some* limited gain from its misuse, as described above at paragraphs 4.32 and 4.33. 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

- 4.82 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) communicate 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.
- 4.83 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.
- 4.84 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 days and send them a £10 shopping voucher. npower was given due credit for this in Ofcom's determination of the penalty.
- 4.85 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.
- 4.86 Ageas identified all individuals who received an abandoned call during the relevant period and committed to providing them and those individuals who had complained to Ofcom during the relevant period with a £10 Marks and Spencer voucher."
- 4.87 As set out in paragraph 4.34 in the present case, MYIML has taken some (but not all adequate) steps to remedy the consequences of the notified misuse. We have therefore given MYIML some credit for taking these steps to remedy the harm. However, the reduction of the penalty is limited given that in our view MYIML has not taken all adequate steps to remedy the harm.

History of contravention

- 4.88 None of HomeServe, npower or Ageas had a history of notification of contraventions in respect of the persistent misuse provisions. Consequently, in those 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 contravention⁸¹.

- 4.89 Consistently with those cases, no previous persistent misuse contravention is to be taken into account in assessing any penalty that may be imposed on MYIML.

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

- 4.90 In the HomeServe case Ofcom considered that it 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.
- 4.91 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.
- 4.92 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.
- 4.93 Ofcom considered that Ageas, as an established ACS user, 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.
- 4.94 In our penalty assessment in the present case, we have similarly taken into account that MYIML failed to take all appropriate and timely steps to prevent the notified misuse before it occurred. We describe how at paragraphs 4.38 to 4.46. We have taken this into account in our determination of the penalty amount.

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

- 4.95 In HomeServe, the senior management had received a report (during the relevant period) from an independent body engaged to assist in a review of dialler operations. This report detailed findings and recommendations, and included a list of non-compliant matters. Ofcom stated that "*it is apparent to Ofcom that senior management, upon receipt of this report, would have been aware not only that the Guidelines were not being followed but also of the seriousness and extent of the contraventions*" and that notwithstanding this was the state of their knowledge, it was not until two months later that testing was conducted which revealed an abandoned call rate significantly higher than three per cent.
- 4.96 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

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

evidence to suggest that senior management would have been aware of the contraventions, and this was also Ofcom's view in the Ageas case.

- 4.97 Our approach in the present case is consistent with these earlier ones. There is no evidence to suggest that MYIML's senior management would have been aware of the contraventions. 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

- 4.98 Ofcom considered that HomeServe, npower, TalkTalk and Ageas were all sizeable businesses with a significant turnover. In the present case, we draw a distinction, as MYIML is a small company with a significantly lower turnover of around £631 000.
- 4.99 In all of these cases the size and turnover of the company concerned is a relevant consideration in the determination of the proportionality of the penalty imposed or proposed, as the case may be. However the significantly smaller size of MYIML's turnover when compared to HomeServe, npower, TalkTalk and Ageas would indicate a much lower penalty.

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

- 4.100 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.

- 4.101 In the Ageas case Ofcom took the view 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.

- 4.102 In the present case we consider that MYIML has taken a number of timely and appropriate steps to secure its misuse is brought to an end and not repeated, as described above at paragraph 3.16 to 3.20 although we noted that neither the August Representations nor the Representations on the Provisional Notification contained any information about how MYIML intends to make regular checks during a campaign to ensure that the correct information message is played when a call is abandoned in addition to checks made before a campaign starts.

- 4.103 MYIML has been given due credit for the steps it has taken in the determination of the penalty amount.

Record-keeping

- 4.104 In the TalkTalk case, unlike HomeServe, npower and Ageas, there was a failure to keep records and a failure to take appropriate steps to provide a robust reasoned estimate of AMD false positives which meant that Ofcom was unable to determine

the consistency of one call centre's actions with the policy statement. We regarded this as particularly serious.

- 4.105 We believe that the present case is similar to HomeServe, npower and Ageas as MYIML provided Ofcom with information which enabled MYIML's compliance with the policy statement to be assessed. Therefore, this has not been a factor Ofcom has taken into account in assessing the penalty amount.

Co-operation with Ofcom's investigation

- 4.106 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."*
- 4.107 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.
- 4.108 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.
- 4.109 Ageas did make some errors in the information used to calculate its abandoned call rates during the Relevant Period, but it co-operated promptly with Ofcom to resolve these errors.
- 4.110 In the present case MYIML was punctual in its responses to Ofcom's statutory information requests and in the delivery of its August Representations and the Representations on the Provisional Notification. It is therefore our view is that MYIML cooperated with our investigation and this has been taken into account in assessing the level of penalty.

Ofcom's conclusions on the penalty amount

- 4.111 Any penalty Ofcom imposes on MYIML 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.
- 4.112 In particular, we have noted that MYIML contravened the persistent misuse provisions during the seven week Relevant Period by: (a) exceeding an abandoned call rate of three per cent of live calls during each of 45 separate 24 hour periods, making in our estimate approximately 30,296 abandoned calls; and (b) failing to play an information message in the event of an abandoned call throughout the Relevant Period, that included a number that call recipients could use to opt of further marketing calls from MYIML.
- 4.113 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, in particular in cases where a person exceeds the margin for error in the three per cent abandoned call rate and where no information is played the event of an abandoned call;
- there was a degree of consumer harm likely to have arisen from MYIML's notified misuse;
- the duration of the notified non-compliance is significant as set out in paragraph 4.30 to 4.31 above; and
- MYIML failed to take all appropriate and timely steps to prevent the misuse before it occurred.

4.114 Ofcom's regulatory judgment is that the following factors tend to reduce the amount of an appropriate and proportionate penalty:

- That MYIML took a number of timely and appropriate steps to secure that the misuse was brought to an end and not repeated, although as we noted in paragraphs 3.15, 3.21 and 4.57 and 4.102, the August Representations and the Representations on the Provisional Notification did not contain any information about how MYIML intends to make regular checks during a campaign to ensure that the correct information message is played when a call is abandoned;
- MYIML is a small business with a turnover of around £631,000 in its first year of operation and, as such, there is a need to ensure that the penalty is proportionate to the size of the organisation; and
- MYIML has taken some steps to remedy the harm, however, the reduction of the provisional penalty is limited given that in our view MYIML has not taken all adequate steps to remedy the harm.

4.115 On the basis of these factors, Ofcom's regulatory judgment is that a penalty of £20,000 would be appropriate and proportionate. This reflects that Ofcom considers cases of persistent misuse to be serious, even where this results from a mistake, since appropriate compliance checks should have identified this at an early stage; and that this is liable to be met with a penalty, to deter MYIML and others from engaging in that conduct. We note that MYIML is a small business and the penalty would have been significantly higher if MYIML had been a more sizable business.

Section 5

Annexes

Annex 1	The <i>Revised statement of policy, and Tackling abandoned and silent calls: Statement</i> , October 2010). http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf
Annex 2	Ofcom Penalty Guidelines dated 13 June 2011 http://www.ofcom.org.uk/files/2010/06/penguid.pdf
Annex 3	First Information request sent to MYIML under section 135 of the Act on 7 March 2014 (the “First Information Request”) Published in Annex 1 of the Section 128 Notification - http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/MyIML_Limited.pdf
Annex 4	Email from MYIML to Ofcom on 5 March 2014. ✕
Annex 5	Response from MYIML to the First Information Request (the “First Response”) received on 22 and 26 March 2014. ✕
Annex 6	Second Information request sent to MYIML under section 135 of the Act on 9 September 2014 (the “Second Information Request”). See Annex 6 below.
Annex 7	Response from MYIML to the Second Information Request (the “Second Response”) received on 17 September 2014. ✕
Annex 8	Section 128 notification issued to MYIML dated 28 July 2014 (http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/MyIML_Limited.pdf) .
Annex 9	Ofcom calculation of MYIML Abandoned Call Rates using MYIML data. See Table 1 of section 128 notice - http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/MyIML_Limited.pdf
Annex 10	MYIML representations to the section 128 notification (the “August Representations”) dated 23 August 2014. ✕
Annex 11	Notification of a possible penalty under section 130 of the Act (the “Provisional Notification”) dated 29 September 2014. ✕

Annex 12	<p>MYIML representations to the Provisional Notification (the “Representations on the Provisional Notification”) comprising:</p> <ul style="list-style-type: none">• written representations submitted to Ofcom on 14 October 2014;• a file note of a phone call Ofcom had with [redacted] of MYIML on 14 October 2014;• an email from MYIML to Ofcom on 7 November 2014 that includes a letter sent to Ofcom about the remedy and also a letter sent to recipients of silent calls during the relevant period;• an email from MYIML to Ofcom on 10 November 2014 confirming the number of consumers sent letters regarding the receipt of silent calls during the Relevant Period; and• an email from MYIML to Ofcom on 11 November 2014 that included a sample letter sent to each of the 31 Relevant Period Ofcom complainants. [redacted]
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Annex 6

Second Information request sent to MYIML under section 135 of the Act on 9 September 2014 (the “Second Information Request”)

Definitions:

In this information request:

“MYIML” means the company in the UK whose registered number is **08679439**.

“relevant period” means 16 December 2013 to 3 February 2014, inclusive.

“You” and “your” means MYIML and of MYIML, respectively.

Representation clarification points

1. In your response to the 1st section 135 Notice, provided to Ofcom on 22 and 26 March 2014, you confirmed that within two seconds of a call being answered by an individual and before being terminated or released by the ACS, MYIML, in each call centre and for each campaign, provided the following recorded message (the “Recorded Message”):

“This is a call from MyIML. No agents are currently available to speak with you. We will phone you again soon. If you’d rather not receive another call from us, please call this number back and leave your name and number. Thank you.”

In your representations to the section 128 Notice you said that your supplier, [X], had discovered that, “for some reason the standard default message was being played to dropped calls and not the specifically pre-recorded message contained in the system”. You also set out in response to the omission of the Special Services Number that “this number lived within the pre-recorded message, which was not active as a result of human error”.

In light of the above, please confirm:

a. whether the specifically pre-recorded message to which you referred in your representations to the section 128 Notice was the same as the Recorded Message to which you referred in your response to the 1st section 135 Notice;

and provide the following:

b. the script for the standard default message which was played within two seconds of a call being answered by an individual and before being terminated or released by the ACS instead of the specifically pre-recorded message;

c. the dates during the relevant period on which the standard default message was played; and

d. the dates during the relevant period, if any, on which the specifically pre-recorded message was played.

2. In your representations to the section 128 Notice you said that as it was not possible to change the ACS algorithm which reports the drop rate to the control screen, MYIML immediately implemented its own procedure and policy to ensure that the drop rate was controlled externally from the ACS. Please provide the dates on which the actions concerning dropped calls and other measures outlined in the section entitled 'Actions' took place:

- a. *In relation to Dropped Calls, when were the Managers Dialler Compliance Manual, the Drop Rate Calculator and the Remote Agent Monitoring put in place?*
- b. *When did MYIML move to the Special Services Number?*
- c. *Since when has the new Recorded Message been played?*
- d. *Since when has the Daily Campaign Integrity Report been prepared? and*
- e. *When was the role of the Named Dialler Manager created?*

Financial information

3. Please provide details of MYIML's turnover for the financial year commencing on 5 September 2013, when MYIML was incorporated, and ending on 4 September 2014.

If audited turnover data for this period is not yet available, please provide the best information available from management accounting data. If you are unable to provide a turnover figure for the whole financial year, please provide turnover data for all of the months for which such data is available.

If any of the data provided in response to this question is unaudited or does not cover a full financial year, please explain the source and scope of the data provided.

Other information relating to size of the company

4. Please provide the number of full-time employees of MYIML during the relevant period. If the number of full-time employees changed at any time within that period, please identify the change and give the date.

5. Please provide the number of part-time employees of MYIML during the relevant period. If the number of part-time employees changed at any time within that period, please identify the change and give the date.