



# Notification to TalkTalk Telecom Limited of a penalty under Section 130 of the Communications Act 2003

Notification served on TalkTalk Telecom Limited by  
the Office of Communications ("Ofcom")

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# Contents

Section	Page
Notification to TalkTalk Telecom Limited of a penalty under Section 130 of the Communications Act 2003	2
1 Explanatory Statement	6
2 Background	11
3 Ofcom's decision on next steps	28
4 Determination of the amount of penalty	33
Annex	Page
Table of Annexes	59

# Notification to TalkTalk Telecom Limited of a penalty under Section 130 of the Communications Act 2003

## Subject of this Notification

1. This Notification is addressed to TalkTalk Telecom Limited, trading as TalkTalk ("TalkTalk"), registered company number 04633015 and whose registered address is 11 Evesham Street, London, W11 4AR.
2. It notifies TalkTalk 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 £750,000.
  - b) Ofcom imposes this penalty on TalkTalk, as it has, in one or more of the respects notified pursuant to a notification under section 128 of the Act, persistently misused an electronic communications network or electronic communications service between 1 February and 21 March 2011.

## 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 it is satisfied that he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.
5. On 12 October 2011 Ofcom issued to TalkTalk, under section 128 of the Act, a notification (the "section 128 notification") that Ofcom had reasonable grounds for believing that between 1 February and 21 March 2011 (the "Relevant Period"), TalkTalk had persistently misused an electronic communications network or electronic communications service. The section 128 notification is at Annex 1.
6. Pursuant to section 128(3)(b) of the Act, Ofcom specified a period of not less than one month, during which TalkTalk had an opportunity of making representations about the matters notified in the section 128 notification. Ofcom received written representations from TalkTalk on 14 November 2011 (the "TalkTalk Representations") in relation to the matters notified. Representations were also made by two third parties, Teleperformance Limited ("Teleperformance")<sup>1</sup> and McAlpine Marketing Limited

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<sup>1</sup> Company number is 2060289, and registered address is Spectrum House, Bond Street, Bristol, England BS1 3LG. During the Relevant Period, Teleperformance Limited was MM Teleperformance Limited.

(“McAlpine”)<sup>2</sup>. The TalkTalk Representations are included as Annex 2 within this document and the representations from the third parties, Teleperformance (the “First Teleperformance Representations”) and McAlpine (the “First McAlpine Representations”) are included as Annexes 16 and 17 respectively. Further representations by these third parties were made on 25 January 2013 and 28 January 2013. They are included as Annexes 31 and 32 of this document.

7. Ofcom considered these representations. On 5 April 2013 Ofcom served on TalkTalk a provisional notification of a possible penalty under section 130 of the Act (the “Provisional Notification”). The Provisional Notification set out Ofcom’s preliminary view that we should impose on TalkTalk a penalty of £750 000 under that section in respect of TalkTalk’s notified contravention of the persistent misuse provisions of the Act between 1 February and 21 March 2011.
8. The reasons for Ofcom’s provisional determination were set out in the Explanatory Statement accompanying the Provisional Notification.
9. The Provisional Notification gave TalkTalk until 3 May 2013 to make written representations to Ofcom about matters set out in the accompanying Explanatory Statement. It also gave TalkTalk the opportunity to make oral representations to Ofcom in relation to these matters. On 10 April 2013, TalkTalk submitted its written representations to Ofcom (the “April 2013 Representations”).

### **Sections 128, 129, 130 and 131 of the Act**

10. Section 128 of the Act applies where Ofcom determine 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.
11. 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.

12. 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

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<sup>2</sup> Company number is 06484720, and registered address is Wheeldon House Prime Enterprise Park, Prime Park Way, Derby, Derbyshire, United Kingdom, DE1 3QB.

- c) the period allowed for the making of the representations has expired.
13. 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.
14. 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.
15. 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.
16. 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).
17. 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 19).

## Determination made by Ofcom

18. For the reasons set out in the Explanatory Statement, Ofcom determines that it is satisfied that, pursuant to section 130(2) of the Act, TalkTalk has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.
19. In making this determination and in accordance with section 131 of the Act<sup>3</sup>, Ofcom has also had regard to the principles set out in its revised statement of policy on the persistent misuse of an electronic communications network or service 2010<sup>4</sup>, published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement*<sup>5</sup>. The revised statement of policy followed previous statements in 2006<sup>6</sup> and 2008<sup>7</sup> and was under consultation between 1 June 2010 and 27 July 2010<sup>8</sup>. For ease of reference, both these documents (the revised statement of policy, and *Tackling abandoned and silent calls: Statement*) are collectively referred to in this notification as the “Guidelines” and are included at Annex 3.

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<sup>3</sup> <http://www.legislation.gov.uk/ukpga/2003/21/section/131>

<sup>4</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>

<sup>5</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

<sup>6</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/misuse/statement/misuse\\_state.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/misuse/statement/misuse_state.pdf)

<sup>7</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/persistent\\_misuse/statement/misuse\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/persistent_misuse/statement/misuse_statement.pdf)

<sup>8</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/summary/condoc.pdf>

20. Having had regard to representations made to Ofcom by TalkTalk and other available evidence (including representations made by relevant third parties); steps taken by TalkTalk for securing that its misuse is brought to an end and not repeated; and steps taken by TalkTalk 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.
21. Specifically, having regard to sections 130(4) and (5) of the Act, the Penalty Guidelines published on 13 June 2011<sup>9</sup> under section 392 of the Act (the "Penalty Guidelines") and the Guidelines, Ofcom has decided to impose a penalty of £750,000 on TalkTalk in relation to TalkTalk's persistent misuse of an electronic communications network or service in one or more of the respects notified in the section 128 notification. The Penalty Guidelines are at Annex 4 of this document.
22. The reasons for Ofcom's determination are set out in the following Explanatory Statement.

## Interpretation

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

**Claudio Pollack (Group Director, Content, Consumer and External Affairs) for and on behalf of himself and Lynn Parker (Director of Consumer Protection) as decision makers for Ofcom**



**24 June 2013**

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<sup>9</sup> <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

# Explanatory Statement

## Section 1

### Subject of this notification

- 1.1 This document is a notification of Ofcom's imposition of a financial penalty ("Notification") on TalkTalk Telecom Limited, trading as TalkTalk ("TalkTalk"), under section 130 of the Communications Act 2003 (the "Act"). It sets out Ofcom's decision that such a penalty should be imposed on TalkTalk and our determination of what that penalty should be.
- 1.2 The issue of this Notification follows Ofcom's:
- a) investigation into TalkTalk's compliance between the period 1 February 2011 to 21 March 2011 (the "Relevant Period") with section 128 of the Act and the principles set out in the relevant guidelines<sup>10</sup>;
  - b) determination that there are reasonable grounds for believing that, during the Relevant Period, TalkTalk persistently misused an electronic communications network or electronic communications service;
  - c) service on TalkTalk on 12 October 2011 of a notification under section 128 of the Act (the "section 128 notification"<sup>11</sup>);
  - d) information request under section 135 dated 28 March 2011 (the "TalkTalk Information Request"<sup>12</sup>);
  - e) information requests under section 135 dated 16 March 2012 (the "McAlpine First Information Request"<sup>13</sup>), 14 May 2012 (the "McAlpine Second Information Request"<sup>14</sup>) and 18 October 2012 (the "McAlpine Third Information Request"<sup>15</sup>);
  - f) information request under section 135 dated 18 October 2012 (the "Teleperformance Information Request"<sup>16</sup>);
  - g) analysis of TalkTalk's response to the TalkTalk Information Request received on 14 April 2011 (the "TalkTalk Response"<sup>17</sup>);
  - h) analysis of McAlpine's responses to the McAlpine First Information Request ("McAlpine Response to First Information Request"<sup>18</sup>) dated 19 March 2012, the McAlpine Second Information Request ("McAlpine Response to Second Information Request"<sup>19</sup>) dated 21 May 2012, and the McAlpine Third Information

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<sup>10</sup> See paragraph 2.15 below.

<sup>11</sup> Included as Annex 1, Section 128 notification issued to TalkTalk dated 12 October 2011.

<sup>12</sup> Annex 10, the TalkTalk Information Request dated 28 March 2011.

<sup>13</sup> Annex 21, the First McAlpine Information Request dated 16 March 2012.

<sup>14</sup> Annex 23, the Second McAlpine Information Request dated 14 May 2012.

<sup>15</sup> Annex 28, the Third McAlpine Information Request dated 18 October 2012.

<sup>16</sup> Annex 26, the Teleperformance Information Request dated 18 October 2012.

<sup>17</sup> Annex 12, the TalkTalk Response dated 14 April 2011.

<sup>18</sup> Annex 22, McAlpine Response to First Information Request dated 19 March 2012.

<sup>19</sup> Annex 24, McAlpine Response to Second Information Request dated 21 May 2012.

Request (“McAlpine Response to Third Information Request<sup>20</sup>”) dated 26 October 2012;

- i) analysis of Teleperformance’s response to the Teleperformance Information Request dated 26 October 2012 (the “Teleperformance Response<sup>21</sup>”);
- j) consideration of representations to the section 128 notification by TalkTalk dated 14 November 2011<sup>22</sup> (the “TalkTalk Representations”);
- k) consideration of representations by Teleperformance (the “First Teleperformance Representations<sup>23</sup>”) and McAlpine (the “First McAlpine Representations<sup>24</sup>”) both received with the TalkTalk Representations on 14 November 2011;
- l) consideration of correspondence from McAlpine dated 15 November 2011 (the “McAlpine Correspondence<sup>25</sup>”);
- m) consideration of representations made on 25 January 2013 (the “Second McAlpine Representations”) and 28 January 2013 (the “Second Teleperformance Representations”) <sup>26</sup>;
- n) consideration of steps taken for securing the misuse is brought to an end and not repeated, and steps taken by TalkTalk for remedying the consequences of the misuse notified in the section 128 notification.
- o) service on TalkTalk on 5 April 2013 of a provisional notification of a possible penalty under section 130 of the Act (the “Provisional Notification<sup>27</sup>”), setting out, amongst other things, Ofcom’s preliminary view:
  - i) that we should impose on TalkTalk a penalty in respect of its persistent misuse of an electronic communications network or service between 1 February and 21 March 2011; and
  - ii) that penalty should be £750,000; and
- p) TalkTalk’s written representations of 10 April 2013, in respect of the Provisional Notification (the “April 2013 Representations<sup>28</sup>”).

1.3 Ofcom’s decision is that a financial penalty be imposed on TalkTalk as it has, in one or more of the notified respects set out in the section 128 notification, persistently misused an electronic communications network or electronic communications service during the Relevant Period. Ofcom’s determination is that the penalty will be £750,000.

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<sup>20</sup> Annex 29, McAlpine Response to Third Information Request dated 26 October 2012.

<sup>21</sup> Annex 27, Teleperformance Response to the Teleperformance Information Request received 26 October 2012.

<sup>22</sup> Annex 2, the TalkTalk Representations received on 14 November 2011.

<sup>23</sup> Annex 16, the First Teleperformance Representations received on 14 November 2011.

<sup>24</sup> Annex 17, the McAlpine Representations received on 14 November 2011.

<sup>25</sup> Annex 18, McAlpine correspondence dated 15 November 2011.

<sup>26</sup> Annex 31, the Second McAlpine Representations, and Annex 32, the Second Teleperformance Representations.

<sup>27</sup> Annex 33, Provisional Notification.

<sup>28</sup> Annex 34, the April 2013 Representations.



- 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) representations made to it by TalkTalk;
  - b) representations made to it by two third parties who made calls for or on behalf of TalkTalk during the Relevant Period;
  - c) steps taken by TalkTalk for securing that its misuse is brought to an end and is not repeated;
  - d) steps taken by TalkTalk for remedying the consequences of the notified misuse; and
  - 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")<sup>29</sup>.
- 1.5 The reasons for Ofcom's decision and determination, and the regard we have had to the matters in paragraph 1.4 in reaching them, are set out in the following sections of this Notification. In particular, aspects of Ofcom's decision and determination include that:
- a. TalkTalk has, in one or more of the respects notified in the section 128 notification, persistently misused an electronic communications network or service during the Relevant Period on the following basis by:
    - exceeding an abandoned call rate of three percent of live calls over a 24 hour period by a substantial amount on at least four separate occasions at a call centre operated by Teleperformance Limited ("Teleperformance")<sup>30</sup> at 11 Adderley Street, Cape Town, South Africa, 8000 (the "Teleperformance Cape Town call centre") across at least one campaign (defined as "[X]")<sup>31</sup>;
    - failing to ensure that an information message was played in the event of an abandoned call at the Teleperformance Cape Town call centre across at least one campaign (defined as "[X]"); and
    - persistently making abandoned calls at a call centre operated by McAlpine Marketing Limited ("McAlpine")<sup>32</sup> at Royal Court, Basil Close, Chesterfield, S4

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<sup>29</sup> On 17 December 2010, Ofcom published a document consulting on changes to its penalty guidelines under section 392 of the Act, which document included proposed new guidelines (see <http://stakeholders.ofcom.org.uk/consultations/penalty-guidelines/?a=0>). Ofcom decided to adopt the proposed new guidelines with some, but not material, changes and published that decision and the new guidelines on 13 June 2011 (see <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>). These are, therefore, the guidelines in force and applicable at the time Ofcom decided to impose a penalty on TalkTalk, and determined its amount, in this matter.

<sup>30</sup> Company number is 2060289, and registered address is Spectrum House, Bond Street, Bristol, England BS1 3LG. During the Relevant Period, Teleperformance Limited was MM Teleperformance Limited.

<sup>31</sup> Annex 14, Note prepared by TalkTalk Group dated 29 June 2011.

<sup>32</sup> Companies House records indicate that McAlpine Limited was referred to as McAlpine Marketing Limited during the Relevant Period but changed its name on 1 June 2011. Although the trading name is different from the one used during the Relevant Period, for ease of reference we refer to McAlpine throughout this document. McAlpine's company number is 06484720, and registered address is

7SL (the “McAlpine call centre”). 512 abandoned calls were generated across 29 days within a campaign defined as ‘Tiscali’. Ofcom considers it necessary to take enforcement action in relation to these calls because TalkTalk has failed to abide by our enforcement guidelines (*Revised statement of policy on the persistent misuse of an electronic communications network or service 2010*, published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement, (the “Guidelines”)*) in three respects in its use of Answer Machine Detection (“AMD<sup>33</sup>”) equipment in making calls from this call centre. Specifically, TalkTalk has:

- failed to provide a reasoned estimate of AMD false positives in respect of its use of AMD equipment to Ofcom<sup>34</sup>, specifically in respect of the McAlpine call centre’s use of AMD equipment across every campaign that this call centre was operating during the Relevant Period (“Mobile” and “Tiscali”);
- failed to keep adequate records that demonstrate compliance with the policy and procedures outlined in paragraphs A1.30 to A1.58 of the Guidelines, specifically in respect of the McAlpine call centre across every campaign that call centre was operating during the Relevant Period (“Mobile” and “Tiscali”); and
- failed to guarantee that when return calls were made within a 24 hour period to numbers previously identified by AMD equipment as having been picked up by an answer machine, a live operator was on hand to take the call (i.e. adherence to the 24 hour policy<sup>35</sup>). This occurred in one 24 hour period on 21 separate occasions during the Relevant Period (22 February 2011) in respect of the McAlpine call centre, across one campaign defined as “Mobile”.

As set out in the Guidelines, in deciding whether to take enforcement action for persistent misuse caused by abandoned and silent calls in a particular case, we will be guided by a sense of administrative priority determined by the level of consumer detriment and taking account of the steps that have been taken by

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Wheeldon House Prime Enterprise Park, Prime Park Way, Derby, Derbyshire, United Kingdom, DE1 3QB.

<sup>33</sup> AMD refers to technology used to maximise the amount of time call centre agents spend speaking to consumers (by filtering out calls to answer machines). AMD technology may generate abandoned and/or silent calls for example if it mistakenly identifies a call as being answered by an answer machine when it has in fact been answered by a live individual. If this occurs the AMD technology may disconnect a live call without playing a recorded information message – this is referred to as an “AMD False Positive”. AMD users must include a reasoned estimate of AMD false positives when calculating their abandoned call rate. This is on the premise that AMD false positives are abandoned calls and should be recorded as such (Annex 3, the Guidelines, A1.33).

<sup>34</sup> Annex 12, The TalkTalk Response, in relation to Ofcom’s request for evidence to substantiate the reasoned estimate of AMD false positives incurred where AMD was used at a call centre, stated, “*in order to take into account the false positives generated by McAlpine’s AMD, we have added a 5% false positive proportion to the abandoned call rates in our information request response. This reasoned estimate of false positives was arrived at by taking the statement from the Dialler Provider’s website on the accuracy of their dialler...*”. TalkTalk provided evidence that it had contacted McAlpine seeking data in order to respond to Ofcom’s statutory information request. TalkTalk’s response to Ofcom included an estimate of false positives. However, McAlpine maintained that no such estimate should have been applied despite their use of AMD. We therefore understand that although TalkTalk consulted with McAlpine in order to respond to the information request, the parties did not agree on whether an estimate of false positives should have been applied to the relevant data.

<sup>35</sup> Annex 3, the Guidelines, A1.55.

Automatic Calling System (“ACS”) users to reduce the degree of concern that silent or abandoned calls cause<sup>36</sup>.

- b. such persistent misuse is serious, and therefore warrants the imposition of a penalty in order to create a deterrent effect for it, 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; and
  - c. having regard to matters including:
    - the number and nature of occasions on which TalkTalk was not compliant with the Guidelines and the persistent misuse provisions;
    - the representations made by TalkTalk and third parties;
    - the steps TalkTalk have taken to secure that the misuse was brought to an end and was not repeated;
    - the steps TalkTalk have taken to remedy the consequences of its misuse; and
    - the central objective in imposing a penalty and determining its amount, set out in the Penalty Guidelines, of deterrence: setting the amount of any penalty to be sufficient to ensure that it will act as an effective incentive to compliance for TalkTalk, having regard to the seriousness of its infringement, and others to whom the persistent misuse provisions and the Guidelines applies.
- 1.6 A penalty on TalkTalk of £750,000 would be appropriate and proportionate to the contravention to which it would be imposed.
- 1.7 The following sections of this Notification set out:
- a) the background detail to this matter, including the applicable statutory framework;
  - b) Ofcom’s analysis of the options open to it and the bases for our decision to impose a penalty; and
  - c) Ofcom’s determination of the amount of that penalty and the bases on which that determination is made.

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<sup>36</sup> Annex 3, the Guidelines, A1.12-A1.13.

## Section 2

# Background

- 2.1 The following section sets out the background to Ofcom's investigation into TalkTalk, both before and after the issue of the section 128 notification to TalkTalk on 12 October 2011.

## The statutory framework

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

## Ofcom's duties and functions

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

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

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

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

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

- 2.6 With section 3(3) in mind, Ofcom has published a statement of regulatory principles.<sup>37</sup> 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.

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<sup>37</sup> <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>

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

### **Sections 128, 129 and 130 of the Act**

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

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

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

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

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

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

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

(a) a pattern of behaviour or practice; or

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

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

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

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

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

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

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

“(1) This section applies where –

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

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

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

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

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

as may be specified in the notification.”

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

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

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

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

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

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

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

(4) The amount of penalty imposed is to be such amount not exceeding £2,000,000<sup>38</sup> as OFCOM determine to be –

(a) appropriate; and

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

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

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

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

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

## Ofcom's relevant guidelines

2.15 In accordance with section 131 of the Act, Ofcom has published a statement of its general policy with respect to the exercise of its powers under sections 128 to 130 of the Act. As noted in 1.5(a), these are referred to as the Guidelines.

2.16 This most recent statement is the *Revised statement of policy on the persistent misuse of an electronic communications network or service 2010*,<sup>39</sup> published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement*.<sup>40</sup> The revised statement of policy followed previous statements in 2006<sup>41</sup> ("2006 Guidance") and 2008<sup>42</sup> ("2008 Guidance") and was under consultation between 1 June 2010 and 27 July 2010<sup>43</sup>. For ease of reference, both these

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<sup>38</sup> 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).

<sup>39</sup> <http://www.legislation.gov.uk/ukxi/2010/2291/article/2/made>.

<sup>40</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>

<sup>41</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

<sup>42</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/misuse/statement/misuse\\_state.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/misuse/statement/misuse_state.pdf)

<sup>43</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/persistent\\_misuse/statement/misuse\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/persistent_misuse/statement/misuse_statement.pdf)

<sup>43</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/summary/condoc.pdf>

documents (the *Revised statement of policy*, and *Tackling abandoned and silent calls: Statement*) are collectively referred to in this Notification as the “Guidelines”<sup>44</sup>.

- 2.17 Ofcom has also published penalty guidelines under section 392 of the Act. On 17 December 2010, Ofcom published a document consulting on changing them, and proposed a set of new penalty guidelines<sup>45</sup>. The consultation closed on 11 February 2011. Following consideration of the seven responses received, Ofcom adopted the proposed new guidelines with some, but not material, changes. We published that decision and the new guidelines on 13 June 2011 (the “Penalty Guidelines”).
- 2.18 The new guidelines were, therefore, in force and applicable at the time Ofcom decided to impose the penalty on TalkTalk, and determined its amount. Accordingly, Ofcom has had regard to them in making our determination, as set out in this Notification.
- 2.19 The Penalty Guidelines are at Annex 4 to this document. They provide that:
- “Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement.”*
- 2.20 The Penalty Guidelines also set out examples of potentially relevant factors in the determination of a penalty, such as:
- a) The degree of harm, actual or potential, caused by the contravention;
  - b) The duration of the contravention;
  - c) Any gain (financial or otherwise) made as a result of the contravention;
  - d) Any steps taken for remedying the consequences of the contravention;
  - e) Whether the regulated body in breach has a history of contraventions;
  - f) Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention;
  - 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 the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it; and
  - i) The extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body.
- 2.21 Ofcom has had regard to the need for transparency in applying such guidelines, particularly as regards the weighting of the factors considered.

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<sup>44</sup> Annex 3, the Guidelines.

<sup>45</sup> <http://stakeholders.ofcom.org.uk/consultations/penalty-guidelines/>



## The investigation and findings

- 2.22 While reference is made to documentary evidence received and made available to Ofcom (representations, responses to statutory information requests and correspondence) and this decision has considered these in their entirety, this Notification does not purport to be a comprehensive restatement of these. They are however, annexed to this Notification. In Annex 12, (Response from TalkTalk to the TalkTalk Information Request (the “TalkTalk Response” received on 14 April 2011)) we have not reproduced the spreadsheets included as part of the TalkTalk Response. However, they are part of the evidence base we have considered and rely upon, and are available to TalkTalk on request.
- 2.23 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 and the principles set out in the Guidelines<sup>46</sup>. The programme has been ongoing since that time.
- 2.24 As part of the above programme, Ofcom reviews complaints data received by the Ofcom Consumer Contact Team (the “CCT”) to decide whether enforcement action is appropriate and if so, in respect of which companies.
- 2.25 Within this review of complaints, Ofcom noted an increase in complaints regarding abandoned and silent calls allegedly being generated for or on behalf of TalkTalk by the CLIs (Calling Line Identification) 08456345810 and 08009886007. Consequently, on 10 May 2010<sup>47</sup>, Ofcom wrote to TalkTalk to alert it to these complaints and to impress upon TalkTalk the importance of compliance with the persistent misuse provisions and the then 2008 guidelines and the potential consequences of failure to comply. Ofcom also asked that TalkTalk set out what it was doing to ensure it was operating in accordance with the persistent misuse provisions and the 2008 guidelines. TalkTalk responded on 21 May 2010 setting out TalkTalk’s monitoring programme<sup>48</sup>.
- 2.26 Ofcom continued to monitor complaints generated by or on behalf of TalkTalk. Following monitoring from June to August 2010, Ofcom noted that complaints were being submitted in respect of calls generated by or on behalf of a subsidiary of TalkTalk (AOL<sup>49</sup>). Accordingly, on 9 August 2010, Ofcom wrote an email to TalkTalk informing it that Ofcom was continuing to receive complaints about abandoned or silent calls allegedly generated by or on behalf of TalkTalk’s subsidiary, AOL (in particular in respect of the CLI 01914237402)<sup>50</sup>. Ofcom asked if TalkTalk were aware of any factors which might be driving these complaints.
- 2.27 TalkTalk responded on 27 August 2010<sup>51</sup>. It stated that complaints against the relevant CLI in question, 01914237402, were, “...*attributed to activity carried out by a third party agency (BPS Contact Services) acting on our behalf of and dialling from the UK for agents handling calls in their Cape Town (SA) site*” and that it had undertaken an investigation into the cause of these complaints. It explained what it thought had happened and the actions that had been or would be taken.

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<sup>46</sup> [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_905/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/)

<sup>47</sup> Annex 5, Letter from Ofcom to TalkTalk dated 10 May 2010.

<sup>48</sup> Annex 6, Email from TalkTalk to Ofcom dated 21 May 2010.

<sup>49</sup> <http://www.aol.co.uk/> .

<sup>50</sup> Annex 7, Email from Ofcom to TalkTalk dated 9 August 2010.

<sup>51</sup> Annex 8, Email from TalkTalk to Ofcom dated 27 August 2010.

- 2.28 On 20 December 2010 (following the publication of the Guidelines on 1 October 2010), Ofcom published an open letter<sup>52</sup> about the new 24 hour policy, the threat of enforcement action should this and other elements of our persistent misuse policy not be complied with and the increased maximum penalty level for persistent misuse which came into effect on 25 September 2010<sup>53</sup>.
- 2.29 The CCT continued to receive complaints in respect of calls generated by or on behalf of TalkTalk. Consequently, it was determined appropriate and proportionate to conduct an investigation into TalkTalk's compliance with the persistent misuse provisions in the Act and the Guidelines.
- 2.30 TalkTalk was informed of Ofcom's intention to undertake an investigation into its compliance in a meeting between Ofcom and TalkTalk senior management on 10 March 2011<sup>54</sup>. Ofcom sent a draft information request to TalkTalk under section 135 of the Act on 23 March 2011, allowing TalkTalk the opportunity to comment.
- 2.31 Prior to issuance of the section 128 notification, Ofcom's investigation of TalkTalk's compliance with the persistent misuse provisions of the Act and with the Guidelines included:
- a) analysis of complaint data received by the CCT in relation to the Relevant Period;
  - b) issuance of an information request to TalkTalk under section 135 of the Act (the "TalkTalk Information Request"<sup>55</sup>) on 28 March 2011. This requested information in relation to TalkTalk's processes and procedures in respect of its use of ACS and whether such processes and procedures adhered to Ofcom's principles as set out in the Guidelines;
  - c) analysis by Ofcom of TalkTalk's response to the Information Request (the "TalkTalk Response"<sup>56</sup>) received on 14 April 2011; and
  - d) material presented to Ofcom by TalkTalk on 29 June 2011, including information in relation to live calls misclassified by call centre agents as answer machines<sup>57</sup>.
- 2.32 On 12 October 2011, Ofcom issued a section 128 notification to TalkTalk<sup>58</sup>. 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, TalkTalk persistently misused an electronic communications network or service;

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<sup>52</sup> Annex 9, Open letter to industry stakeholders dated 20 December 2010

[http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/acs\\_users.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/acs_users.pdf).

<sup>53</sup> Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010 No. 2291, ([http://www.legislation.gov.uk/ukxi/2010/2291/pdfs/ukxi\\_20102291\\_en.pdf](http://www.legislation.gov.uk/ukxi/2010/2291/pdfs/ukxi_20102291_en.pdf)).

<sup>54</sup> Annex 11, File note of Ofcom conversation between Ofcom and Dido Harding on 10 March 2011 dated 18 March 2011.

<sup>55</sup> Annex 10, The TalkTalk Information Request dated 28 March 2011.

<sup>56</sup> Annex 12, The TalkTalk Response.

<sup>57</sup> Annex 14, Note prepared by TalkTalk Group dated 29 June 2011.

<sup>58</sup> Annex 1, Section 128 notification issued to TalkTalk dated 12 October 2011.

- b) the specific use made of an electronic communications network or electronic communications services by TalkTalk that Ofcom considered constituted persistent misuse; and
  - c) the period during which TalkTalk had the opportunity to make representations about the matters notified.
- 2.33 TalkTalk had until 14 November 2011 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. A copy of the section 128 notification is at Annex 1.
- 2.34 Following issuance of the section 128 notification on 12 October 2011, Ofcom's investigation of TalkTalk's compliance with the persistent misuse provisions of the Act and with the Guidelines also included:
- a) information requests under section 135 dated 16 March 2012 (the "McAlpine First Information Request"), 14 May 2012 (the "McAlpine Second Information Request") and 18 October 2012 (the "McAlpine Third Information Request");
  - b) an information request under section 135 dated 18 October 2012 (the "Teleperformance Information Request");
  - c) analysis of McAlpine's responses to the McAlpine First Information Request ("McAlpine Response to First Information Request") dated 19 March 2012, the McAlpine Second Information Request ("McAlpine Response to Second Information Request") dated 21 May 2012, and the McAlpine Third Information Request ("McAlpine Response to Third Information Request") dated 26 October 2012;
  - d) analysis of Teleperformance's response to the Teleperformance Information Request (the "Teleperformance Response");
  - e) consideration of evidence in the form of representations to the section 128 notification made by TalkTalk dated 14 November 2011, and consideration of representations by Teleperformance and McAlpine both received with the TalkTalk Representations dated 14 November 2011;
  - f) consideration of correspondence from McAlpine dated 15 November 2011; and
  - g) consideration of representations by third parties made on 25 January 2013 (the "Second McAlpine Representations") and 28 January 2013 (the "Second Teleperformance Representations").

### **The representations submitted by TalkTalk**

- 2.35 On 14 November 2011, TalkTalk submitted its representations to Ofcom on the matters set out in the section 128 notification (the "TalkTalk Representations")<sup>59</sup>.
- 2.36 The TalkTalk Representations set out:

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<sup>59</sup> Annex 2, TalkTalk Representations.

- (a) TalkTalk's submissions as to why it considered that its actions did not constitute persistent misuse;
- (b) TalkTalk's submissions in respect of whether a penalty should be imposed and if imposed, the amount of any such penalty; and
- (c) a statement that [redacted] two of the seven outsourced call centres that made calls for or on TalkTalk's behalf during the Relevant Period – Teleperformance and McAlpine –, “[redacted].”<sup>60</sup>

2.37 Ofcom also received representations from Teleperformance (the “First Teleperformance Representations”)<sup>61</sup> and McAlpine (the “First McAlpine Representations”)<sup>62</sup>, which were followed by further representations made on 25 January 2013 (the Second McAlpine Representations)<sup>63</sup> and 28 January 2013 (the Second Teleperformance Representations)<sup>64</sup>. Teleperformance and McAlpine both operated call centres that made calls for or on TalkTalk's behalf during the Relevant Period.

2.38 On 10 April 2013, TalkTalk submitted its representations to Ofcom on the matters set out in the Provisional Notification (the “April 2013 Representations”). Ofcom has considered these representations in coming to this decision<sup>65</sup>.

## Grounds for finding persistent misuse following evidence and representations received post the section 128 notification

**We determine that TalkTalk has persistently misused an electronic communications network or electronic communications services by exceeding 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 at one third party call centre across at least one campaign during the Relevant Period<sup>66</sup>.**

2.39 In the Section 128 notification<sup>67</sup>, Ofcom set out our reasonable grounds for believing that TalkTalk had exceeded an abandoned call rate of three per cent at an outsourced call centre operated by Teleperformance. On the basis of the evidence provided, the abandoned call rate was exceeded as agents at this call centre had classified live calls as calls to answer machine calls when in fact they were live calls. After being unable to provide a definitive abandoned call rate at this call centre during the Relevant Period, TalkTalk had provided an estimate that this was on a daily basis between 12 and 29 per cent<sup>68</sup>).

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<sup>60</sup> Annex 2, TalkTalk Representations, page 1-2.

<sup>61</sup> Annex 16, the First Teleperformance Representations received on 14 November 2011.

<sup>62</sup> Annex 17, the First McAlpine Representations received on 14 November 2011.

<sup>63</sup> Annex 31, the Second McAlpine Representations received on 25 January 2013.

<sup>64</sup> Annex 32, the Second Teleperformance Representations received on 28 January 2013.

<sup>65</sup> Annex 34, the April 2013 Representations.

<sup>66</sup> TalkTalk estimated that between 12 and 29 per cent of calls originally classified by call centre agents as ‘answer machines’ at the Teleperformance Cape Town call centre during the Relevant Period were actually live calls which were disconnected. TalkTalk did not originally include these as abandoned calls in their response to the section 135 information request issued on 28 March 2011.

<sup>67</sup> Annex 1, Section 128 notification issued to TalkTalk dated 12 October 2011, 2.42(vii). This information was drawn from the TalkTalk Response (Annex 12).

<sup>68</sup> Annex 1, Section 128 notification issued to TalkTalk dated 12 October 2011. TalkTalk stated that the total number of calls passed to agents by the ACS in the period 1 February 2011 to 21 March 2011 was 692 191. In the same period, a total of 170 809 calls were classified as answer machine

- 2.40 We disagree with assertions made by TalkTalk and Teleperformance that live calls misclassified as calls to answer machines should not be considered as abandoned calls. An abandoned call is stated in the Guidelines to be, “... *where a connection is established but terminated by its originator in circumstances where the call is answered by a live individual.*”<sup>69</sup> A silent call is stated to be, “...*a form of an abandoned call where the person called hears nothing on answering the phone and has no means of establishing whether anyone is at the other end*”<sup>70</sup>. Therefore silent calls fall within the term “abandoned call” as they are simply a particular form of abandoned call. It should also be noted that silent and abandoned calls are only one example of misuse of an electronic communications network or service. The Guidelines provide the following example of an abandoned call, “...*where a call centre agent mistakes a consumer for an answer machine and disconnects a live call or when a consumer picks up their phone just as a call centre hangs up.*”<sup>71</sup>
- 2.41 Calls were generated by Teleperformance for or on TalkTalk’s behalf and although live persons answered the calls, they were disconnected. The effect or likely effect of TalkTalk’s use of the electronic communications network or service was to cause the call recipients unnecessarily to suffer annoyance, inconvenience or anxiety<sup>72</sup>. TalkTalk itself has stated, “*We accept that TalkTalk Group has generated calls to customers which were in effect silent and which would have risked causing anxiety and distress.*”<sup>73</sup> Consequently, we consider these calls fall within the definition of “misuse” as set out in 128(5) of the Act.
- 2.42 Ofcom has reconsidered the analysis provided by TalkTalk relating to its estimate of the abandoned call rate in light of its own and Teleperformance’s assertions. We are prepared to accept TalkTalk’s assertion that it has provided statistically robust results for each of the four days it sampled<sup>74</sup>. It has no incentive to overstate the volume of calls abandoned and its sampled analysis on 24 February 2011 is broadly corroborated by Teleperformance’s own statements having listened to all relevant calls that day<sup>75</sup>.
- 2.43 We therefore find that TalkTalk exceeded an abandoned call rate of three per cent by a substantial amount on at least four separate occasions. We consider that the misuse was repeated on a sufficient number of occasions for it to be clear that the misuse represented a pattern of behaviour.

**We determine that TalkTalk has persistently misused an electronic communications network or electronic communications services by failing to ensure that an information message was played in the event of an abandoned call at one call centre.**

- 2.44 The Guidelines require that in the event of an abandoned call, an information message must be played which identifies the company making the call and provides

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calls. TalkTalk stated that it believed between 12 and 29 per cent of these answer calls (numbers rounded by Ofcom) were actually live calls [§<] misclassified, and therefore did not include an information message identifying the caller to the call recipient.

<sup>69</sup> Annex 3, the Guidelines, A1.17

<sup>70</sup> Annex 3, the Guidelines, A1.28.

<sup>71</sup> Annex 3, the Guidelines, A1.14.

<sup>72</sup> We set out evidence for our position that silent and abandoned calls are likely to cause recipients to suffer annoyance, inconvenience and anxiety in our Consultation *Tackling abandoned and silent calls* (1 June 2010).

<sup>73</sup> Annex 14, Note prepared by TalkTalk Group dated 29 June 2011. TalkTalk went on to state that, “...[§<]”

<sup>74</sup> Annex 14, Note prepared by TalkTalk Group dated 29 June 2011.

<sup>75</sup> Annex 32, the Second Teleperformance Representations received on 28 January 2013.

a contact phone number to call in order to decline to receive further calls. The playing of information messages is in order to reduce consumer harm by informing the call recipient about who has called them and how they can return the call to decline to receive further calls. The evidence set out in the Section 128 notification<sup>76</sup> demonstrates that TalkTalk did not always do this during the Relevant Period.

- 2.45 The abandoned calls generated at the Teleperformance Cape Town call centre did not always include an information message as required by A1.51 – A1.52 of the Guidelines. Ofcom considers that where a connection is established and the call is answered by a live individual but it is terminated, it is an abandoned call, regardless of whether it is subsequently misclassified ([redacted] or otherwise) as a call to an answer machine. Therefore, Ofcom is of the view that, as these were abandoned calls, an information message was required to be played.
- 2.46 In the TalkTalk Representations, TalkTalk argued that it is, “...*inappropriate and in conflict with the Guidance (Guidelines)*” to find that it failed to abide by the policy of playing information messages in respect of these particular calls. It noted that, “[redacted]”<sup>77</sup>.
- 2.47 In the Teleperformance Response, Teleperformance argued that, “...[redacted]”<sup>78</sup>.
- 2.48 Our understanding based on the representations made is that the calls were not incorrectly identified but rather they were incorrectly recorded.
- 2.49 Teleperformance stated that the alleged instances of persistent misuse were the result of “[redacted]”<sup>79</sup>. The Teleperformance Response described how these alleged instances of persistent misuse occurred, “...[redacted]”<sup>80</sup>
- 2.50 Ofcom continues to believe that the calls were a form of persistent misuse, and an information message should be played (or, alternatively, the appropriate information be relayed by the agent). Consumers have suffered harm from this lack of an information message (as the calls were silent and therefore likely to have caused anxiety as well as inconvenience and annoyance), in addition to the harm from the call.
- 2.51 We consider that the misuse was repeated on a sufficient number of occasions for it to be clear that the misuse represented a pattern of behaviour.

**We determine that TalkTalk has persistently misused an electronic communications network or electronic communications services by persistently making abandoned calls at the McAlpine call centre.**

- 2.52 The evidence set out in the TalkTalk Response demonstrates that TalkTalk made abandoned calls at the McAlpine call centre<sup>81</sup>. As set out in our Guidelines, we

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<sup>76</sup> Annex 1, Section 128 notification issued to TalkTalk dated 12 October 2011, 2.42(viii).

<sup>77</sup> Annex 2, TalkTalk Representations, page 5, (viii).

<sup>78</sup> Annex 16, The First Teleperformance Representations received on 14 November 2011, page 6, 5.5.

<sup>79</sup> Annex 16, The First Teleperformance Representations received on 14 November 2011, page 1, 1.1.

<sup>80</sup> Annex 27, Response to the Teleperformance Information Request received 26 October 2012, page 10.

<sup>81</sup> See Annex 1, Section 128 notification, Annex 4. (Source: The TalkTalk Response, excel tab titled “Q3TTB – McAlpine-Tiscali”).

consider that abandoned calls, “*will almost invariably result in consumer harm, which may range from inconvenience and annoyance through to genuine anxiety*”<sup>82</sup>.

- 2.53 Such abandoned calls may be considered “persistent” if the misuse is repeated on a sufficient number for occasions for it to be clear that the misuse represents a “pattern of behaviour or practice” or recklessness as to whether the behaviour may cause annoyance, inconvenience or anxiety. Although this must be determined on a case by case basis, any such pattern is likely to require a minimum of three instances of the conduct in question in order to be recognised as such<sup>83</sup>. In this case, as the evidence in Annex 4 of the section 128 notification demonstrates, the conduct was repeated on 29 days within the Relevant Period and on 512 occasions.
- 2.54 As set out in the Guidelines, in deciding whether to take enforcement action for persistent misuse caused by abandoned and silent calls in a particular case, we will be guided by a sense of administrative priority determined by the level of consumer detriment and taking account of the steps that have been taken by ACS users to reduce the degree of concern that silent or abandoned calls cause<sup>84</sup>. TalkTalk was an ACS user in the Relevant Period at the McAlpine call centre.
- 2.55 Our Guidelines say that the abandoned call rate shall be no more than three per cent of live calls per campaign or per call centre over a 24 hour period. The evidence available means in our view that it is now not possible to determine the abandoned call rate (including a reasoned estimate of AMD false positives) during the Relevant Period.
- 2.56 McAlpine maintained throughout its representations that the AMD detection rates provided by TalkTalk in the TalkTalk Representations were premised on incorrect information. During the Relevant Period, McAlpine used Network Level Binary Matching (“NLBM”) based AMD technology. According to McAlpine, and the company (DXI) which supplied the NLBM based AMD technology, accuracy rates for NLBM based AMD technology are significantly higher than traditional AMD based on analysing an audio stream of a call. That is, there is less likelihood that AMD false positives are generated by using NLBM based AMD technology. McAlpine stated that NLBM based technology is 100 per cent accurate and does not produce AMD false positives<sup>85</sup>.
- 2.57 While we accept on the basis of the evidence provided that NLBM technology may be more accurate than other types of AMD technology, we consider the evidence provided to be inconclusive as to its accuracy rate overall during the Relevant Period and, in particular, we do not accept that the false positive rate was 0 per cent over the Relevant Period.
- 2.58 McAlpine provided DXI documentation with its representations included with the TalkTalk Representations that indicates that NLBM technology could not be completely accurate. The document titled ‘*Answer Machine Detection System*’ states, “... *the proportion of false positives is reduced to an insignificant or zero level*”<sup>86</sup>, “*NLBM provides for an improved AMD system with increased detection accuracy.*”

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<sup>82</sup> Annex 3, Guidelines (statement), paragraph 1.6.

<sup>83</sup> Annex 3, Guidelines, A1.10.

<sup>84</sup> Annex 3, Guidelines, A1.12-A1.13.

<sup>85</sup> See Annexes 15 to 17 and Annex 31.

<sup>86</sup> Annex 17, the First McAlpine Representations received on 14 November 2011, see *Answer Machine Detection System*, page 6.

*That is, the number of false positives is reduced ...<sup>87</sup> and, "... in certain embodiments the detection accuracy may approach or reach 100% ...<sup>88</sup>" (Ofcom underlining).*

- 2.59 Neither TalkTalk nor McAlpine have disputed the instances of abandoned calls being made, which were set out in the TalkTalk Response<sup>89</sup>. As set out above, we consider that these amount to persistent misuse under the Act.
- 2.60 Ofcom considers it necessary to take enforcement action in this case even though it is not possible to determine on the evidence available whether or not the abandoned call rate exceeded three per cent, because contrary to the Guidelines, TalkTalk has:
- failed to provide a reasoned estimate of AMD false positives in respect of its use of AMD equipment to Ofcom<sup>90</sup>, specifically in respect of the McAlpine call centre's use of AMD equipment across every campaign that this call centre was operating during the Relevant Period ("Mobile" and "Tiscali"); and
  - failed to keep adequate records that demonstrate compliance with the policy and procedures outlined in paragraphs A1.30 to A1.58 of the Guidelines, specifically in respect of the McAlpine call centre across every campaign that call centre was operating during the Relevant Period ("Mobile" and "Tiscali").
- 2.61 We consider that, at a minimum, to obtain a reasoned estimate of AMD false positives TalkTalk could have:
- a) re-created the calling conditions in which AMD technology was used to provide a reasoned estimate of AMD false positives; and/or
  - b) used raw data from the Relevant Period, or a period with similar calling characteristics, to form the basis of an estimate.
- 2.62 TalkTalk did neither of the above and stated that it, "...*supplied the best information available in the circumstances.*<sup>91</sup>"
- 2.63 In Ofcom's opinion, as TalkTalk did not use raw data to compile a reasoned estimate of AMD false positives it is uncertain whether the data used was relevant (testing based on actual "Mobile" and "Tiscali" campaign data) and whether it correctly

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<sup>87</sup> Annex 17, the First McAlpine Representations received on 14 November 2011, see *Answer Machine Detection System*, page 10.

<sup>88</sup> Annex 17, the First McAlpine Representations received on 14 November 2011, see *Answer Machine Detection System*, page 11.

<sup>89</sup> See Annex 1, Section 128 notification, Annex 4. (Source: The TalkTalk Response, excel tab titled "Q3TTB – McAlpine-Tiscali").

<sup>90</sup> Annex 12, The TalkTalk Response, in relation to Ofcom's request for evidence to substantiate the reasoned estimate of AMD false positives incurred where AMD was used at a call centre, stated, "*in order to take into account the false positives generated by McAlpine's AMD, we have added a 5% false positive proportion to the abandoned call rates in our information request response. This reasoned estimate of false positives was arrived at by taking the statement from the Dialler Provider's website on the accuracy of their dialler...*". TalkTalk provided evidence that it had contacted McAlpine seeking data in order to respond to Ofcom's statutory information request. TalkTalk's response to Ofcom included an estimate of false positives. However, McAlpine maintained that no such estimate should have been applied despite their use of AMD. We therefore understand that although TalkTalk consulted with McAlpine in order to respond to the information request, the parties did not agree on whether an estimate of false positives should have been applied to the relevant data..

<sup>91</sup> Annex 2, TalkTalk Representations, (v), Page 4.



factored in the operational environment (as noted in the Guidelines, the reasoned estimate should be calculated in an environment the same or materially same as that in which the regular calling occurs)<sup>92</sup>. Without correctly applying this testing methodology, Ofcom believes that ACS users are unable to adequately test the accuracy of AMD technology which could lead to a failure to detect AMD false positives and in turn, detect (and cease) harm generated as a result.

- 2.64 It is our view that the DXI documentation provided by McAlpine indicates that it would have been possible for TalkTalk to carry out appropriate testing so as to produce a reasoned estimate of AMD false positives. The DXI document titled, *Network Level Binary Matching* states that, “Ofcom will need proof that the NLBM can detect Answer Machine calls without producing ‘false positives’. The only sure way of achieving this is to listen to every call that got marked as an ‘Answer Machine’ and ensure it was a not a person answering the phone that got mistaken for a machine recording. Another program exists that allows the operator to hear both the call received, and the original message it was compared against. This ensures the matching database recording is also valid and not compared by mistake<sup>93</sup>.”
- 2.65 The document titled, *Network Level Binary Matching (NLBM) Instruction Manual*<sup>94</sup>, also states, “To accommodate Ofcom regulations confirming corruption has not been introduced, and prove the number of false positives generated is below acceptable levels, another routine (NLBM Test View) examines test results to ensure all calls that are marked as Answer Machines actually are, it can be used as evidence if there is any dispute over its accuracy.”
- 2.66 The same document goes on to add that, “To aid in reading the test results the NLBM Test Results View ... allows the user to listen to both the in-coming message that was considered to be an Answer Machine message by the NLBM and the full Answer Machine message recording of the signature sample that matched the call. Listening to these messages helps ensure that the marked call is ... not a ‘false positive’...”
- 2.67 McAlpine reconfirmed this in its response to the McAlpine Third Information Request when it stated, “The methodology referred to in the DXI document entitled ‘Network Level Binary Matching (NLBM) Data Maintenance and Test Pages Design Specification’ is currently only available to DXI. It would have been possible for TalkTalk, in conjunction with DXI, to use this methodology to carry out appropriate testing in order to confirm that a reasoned estimate of AMD false positives is zero. From discussion with DXI we understand that it is not possible to perform this testing retrospectively. As TalkTalk requested [McAlpine] to switch off the NLBM system on 10<sup>th</sup> March 2011 we presume they did not perceive it necessary to undertake further testing.”<sup>95</sup>
- 2.68 In this regard, it would appear that there was a methodology (details of which described in a DXI document titled *Network Level Binary Matching (NLBM) Data Maintenance and Test Pages Design Specification* with which to monitor calls during a particular campaign or other time period. This is supported by the DXI representation letter of 10 November 2011<sup>96</sup> which noted an answer machine

<sup>92</sup> Annex 3, the Guidelines, A1.41.

<sup>93</sup> Annex 25(a) *Network Level Binary Matching (Presentation)* under the page title ‘Examine the results of NLBM.’

<sup>94</sup> Annex 25(d) *Network Level Binary Matching (NLBM) Instruction Manual*, 1.1, page 3.

<sup>95</sup> Annex 29, McAlpine Response to the Third Information Request dated 26 October 2012.

<sup>96</sup> Annex 20, Representation letter from DXI easycall dated 10 November 2011, page 4.

'detection rate' at the McAlpine call centre of 21 per cent during the Relevant Period. It is therefore our view, that appropriate test and record keeping were technically possible to achieve, and we consider TalkTalk's failure to secure appropriate testing during the Relevant Period is unacceptable.

- 2.69 For this reason we believe that TalkTalk could have undertaken more rigorous testing of the accuracy of the AMD technology in use at the McAlpine call centre and should have provided a reasoned estimate of false positives based on tested raw data.
- 2.70 Finally, Ofcom considers TalkTalk's provision of a manufacturers' estimate in lieu of a reasoned estimate of AMD false positives is indicative that it had not maintained adequate records (required to demonstrate compliance with the policy and procedures outlined in the Guidelines). The Guidelines state that records should be kept for a minimum of 6 months<sup>97</sup>.
- 2.71 Adherence to the requirement to maintain records is part of an effective compliance strategy of monitoring and assessing compliance on an ongoing basis. Accurate record maintenance facilitates compliance with the Act and the Guidelines. It increases the likelihood of possible compliance failures being detected and prevented, thereby assisting to reduce the possibility of harm to consumers.
- 2.72 TalkTalk submitted that it, "...kept detailed records that demonstrate compliance with the policy and procedures outlined in paragraphs A1.30 to A1.58 of the Guidelines<sup>98</sup>". However in Ofcom's view, had it maintained up-to-date, adequate records it would have been in a position to know when AMD was in use and accurately to arrive at a reasoned estimate of AMD false positives. We consider it is reasonable to expect TalkTalk to have foreseen the possibility that AMD was, inadvertently or otherwise, turned on at its call centres and to have had a contingency plan to obtain a reasoned estimate of AMD false positives in such circumstances.
- 2.73 We therefore consider it necessary to take enforcement action against TalkTalk in relation to the persistent misuse by way of the persistent making of abandoned calls at the McAlpine call centre, even though it is not possible to demonstrate that the abandoned call rate exceeded three per cent.

**We determine that TalkTalk failed to guarantee that when return calls were made within a 24 hour period to numbers previously identified by Answer Machine Detection ("AMD") equipment as having been picked up by an answer machine, a live operator was on hand to take the call (i.e. adherence to the 24 hour policy).**

- 2.74 TalkTalk failed to adhere to the 24 hour policy during one 24 hour period. The 24 hour policy requires that when a call has been identified by AMD equipment as being picked up by an answering machine (including AMD false positives), any repeat calls to that specific number within the same 24 hour period may only be made with the guaranteed presence of a live operator<sup>99</sup>.
- 2.75 The evidence set out at in the Section 128 notification<sup>100</sup> demonstrates that TalkTalk failed to adhere to the 24 hour policy on 21 separate occasions at the McAlpine call centre during one 24 hour period (that is, it made 21 calls using AMD technology to numbers it had previously contacted that day and which had been identified as being

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<sup>97</sup> Annex 3, the Guidelines, A1.59.

<sup>98</sup> Annex 2, TalkTalk Representations, Page 4, (iv).

<sup>99</sup> Annex 3, the Guidelines, A1.55.

<sup>100</sup> Annex 1, Section 128 notification issued to TalkTalk dated 12 October 2011, 2.42(ii).

answered by an answer machine). AMD technology was in use at the McAlpine call centre during the Relevant Period.

- 2.76 The 24 hour policy was introduced to reduce silent calls (and tackle repeat silent calls) while preserving the efficiency benefits of AMD technology. The Guidelines state at A1.55 that, *“when a call has been identified by AMD equipment as being picked up by an answer machine (including AMD false positives), any repeat calls to that specific number within the same 24 hour period may only be made with the guaranteed presence of a live operator”*.
- 2.77 An AMD false positive is when an AMD device mistakenly identifies a call as being answered by an answering machine whereas, in reality, it has been answered by a live individual. Situations where the 24 hour policy applies include circumstances where calls have been identified as being made to answering machines when they have in fact been answered by live persons and/or where calls have been made to answering machines. The policy applies to a specific contact phone number. The party making the subsequent call would not be able to anticipate in advance whether the call would be answered by a person or an answer machine. Therefore, the relevant consideration is whether in actual fact the subsequent call was made without the guaranteed presence of a live operator and not whether the subsequent call was answered by a live individual or an answering machine.
- 2.78 Ofcom has identified that, at the McAlpine call centre on 22 February 2011 the 24 hour policy was not complied with on 21 occasions over a single 24 hour period.
- 2.79 TalkTalk submitted that it did not understand how Ofcom calculated it was non-compliant with the 24 hour policy on 21 occasions<sup>101</sup>. It stated that it, *“would accept that there was a minor breach of this rule on a total of only 9 occasions...”*.
- 2.80 On the basis of the evidence received, the nine occasions referred to by TalkTalk were only those where live calls (an individual answered the phone) were recorded after an earlier attempt had been recorded as picked up by an answer machine. There were also 12 occasions where the subsequent call was recorded as answered by an answer machine. On this basis, Ofcom finds that TalkTalk failed to abide by the 24 hour policy on 21 occasions.
- 2.81 In response to Ofcom identifying that TalkTalk had failed to abide by the 24 hour policy, McAlpine acknowledged that, *“Following further investigation it appears that this was the case on 22<sup>nd</sup> February 2011<sup>102</sup>.”* McAlpine added that it did not however consider that this, *“...can be regarded as ‘persistent misuse’ or a material issue.”*
- 2.82 The TalkTalk audit report produced for the McAlpine call centre identified how this contravention may have been facilitated, *“The recycle rule for contacting answering machines when AMD is enabled can be set below 24 hours without a warning message alerting the user that the change is in breach of a key Ofcom requirement”*. Upon discovery of this non-compliance during the audit of its operations by TalkTalk on 10 and 11 March 2011, McAlpine stated that, *“TalkTalk requested that our call centre switch to ‘preview’ mode from 17<sup>th</sup> March 2011. This request was complied with immediately.<sup>103</sup>”*

<sup>101</sup> Annex 2, TalkTalk Representations, page 4, 1(ii).

<sup>102</sup> Annex 17, the First McAlpine Representations received 14 November 2011.

<sup>103</sup> Annex 29, McAlpine Response to Third Information Request dated 26 October 2012. Ofcom understands that by requesting that McAlpine reset its dialling software, TalkTalk was aiming to ensure that non-compliance with the 24 hour policy did not occur again during the Relevant Period

- 2.83 Ofcom accepts that the number of occasions that TalkTalk was in contravention of the 24 hour policy at the McAlpine call centre on 22 February 2011 was relatively small. Consumer harm was also minimised by the fact that of those 21 calls, no one CLI received more than one call in contravention of the 24 hour policy. As set out above, on the evidence available it is not possible to demonstrate that TalkTalk's failure to abide by the 24 hour policy in this case amounts to a separate instance of persistent misuse in its own right, because the extent to which such calls were in fact likely to involve an AMD false positive is unclear. However, TalkTalk failed to abide by the policy and as a result failed to protect people from repeat silent calls in its use of AMD equipment, and we therefore consider it appropriate to take enforcement action against it in relation to the persistent misuse identified above.

## 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 TalkTalk under section 130 of the Act.
- 3.2 Ofcom's options were:
- (a) taking no further action;
  - (b) issuing a notification under section 129 of the Act; and
  - (c) imposing on TalkTalk 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 and the principles set out in the Guidelines 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."*
- 3.5 The imposition of an appropriate and proportionate punishment of (penalty for) wrongful conduct, including in appropriate cases an element designed to have a proportionate deterrent effect, and the threat of such punishment (penalty) in future cases, should provide an incentive for compliance, and a corresponding deterrent to non-compliance. That would help to secure Ofcom's objective of furthering the interests of citizens and consumers 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 TalkTalk for the reasons we set out below.

## No further action

- 3.8 This option would be available to Ofcom if it were to determine that TalkTalk had not, in one or more of the notified respects persistently misused an electronic communications network or electronic communications services during the Relevant Period, or if Ofcom considered that, although TalkTalk had persistently misused an electronic communications network or electronic communications services during the

Relevant Period, it was not appropriate in all the circumstances of the case to impose a penalty.

- 3.9 Based on the evidence obtained during the investigation, including TalkTalk's responses to information requests, together with consideration of the TalkTalk Representations and representations received from third party call centres that made calls for or on TalkTalk's behalf during the Relevant Period, Ofcom is of the view that TalkTalk has persistently misused an electronic communications network or service during the Relevant Period as set out in paragraphs 2.39-2.83 above. On this basis we consider that further action is necessary in order to further the interests of citizens and consumers.

### **Issuing a notification under section 129 of the Act**

- 3.10 The following is Ofcom's consideration of whether any further enforcement action should involve serving on TalkTalk a notification under section 129 of the Act. For the reasons set out, Ofcom's view is that it should not.

- 3.11 In order to issue a notification under section 129 of the Act, Ofcom must be satisfied that:

- (a) the notified misuse 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.<sup>104</sup>

- 3.12 As noted above, Ofcom considers that TalkTalk has in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service. However, having considered the representations made by TalkTalk, in addition to representations from Teleperformance and McAlpine (third parties who made calls on TalkTalk's behalf during the Relevant Period), together with an assessment of the complaint levels (complaints to Ofcom's CCT) following the issuance of the section 128 notification, Ofcom is of the view that TalkTalk has taken all such steps as we consider appropriate for securing that its notified misuse has been brought to an end.

- 3.13 We consider that appropriate steps were taken by TalkTalk for securing that its persistent misuse contravention was brought to an end, based on the following:

- (a) TalkTalk ceased dialling operations with both of the third party call centres concerned (the Teleperformance Cape Town call centre and the McAlpine call centre); and
- (b) there has been a reduction in the number of complaints received in relation to TalkTalk allegedly generating abandoned and silent calls.

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<sup>104</sup> Section 129(2) of the Act.

- 3.14 TalkTalk has not provided any information about how it proposes to prevent persistent misuse from being repeated in the future at any of the call centres which it uses. Its representations state that [redacted] Teleperformance and McAlpine, [redacted]" and that, "*TalkTalk has an extensive compliance programme in place intended to ensure that our outsourced suppliers in particular adhere to the Guidance ...*". Ofcom notes that this programme was in place during the Relevant Period yet failed to prevent consumer harm being caused. TalkTalk has not provided information about any new measures to prevent persistent misuse from being repeated (including for example if a new supplier is used by TalkTalk to generate calls on its behalf).
- 3.15 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.*
- 3.16 TalkTalk has not detailed any steps for remedying the consequences of the notified misuse, and our view is therefore that it has taken none.
- 3.17 Following Ofcom's direct contact on 9 August 2010<sup>105</sup> (informing TalkTalk of complaints received in respect of calls allegedly made for or on behalf of TalkTalk), TalkTalk, by email dated 27 August 2010 stated that it would, "*Identify affected account holders from the information you have provided and contact them to apologise for any distress or inconvenience they feel they have experienced*<sup>106</sup>".
- 3.18 However, TalkTalk's Representations did not say whether it did in fact contact the complainants referred to in its email dated 27 August 2010. Related to this point it should be noted generally that not all recipients of silent and/or abandoned calls lodge complaints with Ofcom's CCT. Therefore complainants to the CCT may not be the only consumers harmed.
- 3.19 We consider that Ofcom could issue a section 129 notification in this case.

### **Ofcom's view on whether to serve a section 129 notification**

- 3.20 Ofcom's view is that we should not serve on TalkTalk a notification under section 129 of the Act.
- 3.21 Our position is that although we do not have evidence that TalkTalk has taken steps for remedying the consequences of notified misuse or that it has taken steps for securing that the misuse is not repeated, it is not necessary to issue a section 129 notice in this case. In coming to this view, we have placed weight on our finding that that TalkTalk has brought the misuse to an end<sup>107</sup>, identifying and addressing issues at the McAlpine call centre in the 10/11 March 2011 audit<sup>108</sup>, and ceasing dialling at

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<sup>105</sup> Annex 7, Email from Ofcom to TalkTalk dated 9 August 2010.

<sup>106</sup> Annex 8, Email from TalkTalk to Ofcom dated 27 August 2010.

<sup>107</sup> See by contrast the case of Ultimate Credit Services Limited, in which misuse continued after the issue of the section 128 notification: [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_905/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/).

<sup>108</sup> Annex 30, McAlpine Marketing (McAlpine), Chesterfield, *Dialler Operations Compliance Audit*, dated 10/11 March 2011.

the Teleperformance Cape Town call centre on 25 March 2011 once it discovered that live calls [redacted]<sup>109</sup>.

- 3.22 Although we are not satisfied that TalkTalk has taken steps to secure that the conduct is not repeated, we do not consider it appropriate to issue a section 129 notification in this respect, since TalkTalk no longer dials from the call centres concerned. Unusual circumstances – [redacted] – were a contributing factor to the occurrence of the contravention<sup>110</sup> and there appears to be a dispute (which we do not consider it necessary to resolve) between McAlpine and TalkTalk about whether it was told that AMD was being used at that call centre<sup>111</sup>. In the circumstances, we consider that the fact of having incurred a financial penalty (which we consider necessary to impose for the reasons set out below) will be a sufficient incentive for TalkTalk to consider what (if any) changes need to be made to its systems, training or procurement to ensure future compliance.
- 3.23 Affected consumers and citizens suffered loss or damage as a consequence of TalkTalk's actions, evidenced by complaints received detailing the harm (annoyance, inconvenience or anxiety) caused by the abandoned and silent calls. Ofcom considers it to be more appropriate for the misuser actively to remedy the consequences of its contravention than to place the burden on consumers to seek out redress themselves.
- 3.24 Ofcom believes that it would not have been inappropriate for TalkTalk to acknowledge the harm suffered by way of remedying the consequences of the contravention, and that a gesture of compensation would have gone some way to acknowledging that its conduct caused harm<sup>112</sup>. In this case, however, we do not consider that the circumstances are such as to require that Ofcom order TalkTalk to offer redress.

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

- 3.25 The following is Ofcom's consideration of whether any further enforcement action should involve imposing on TalkTalk a penalty under section 130 of the Act. Ofcom's view is that we should do so. The reasons are as follows.
- 3.26 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

<sup>109</sup> Annex 14, Note prepared by TalkTalk Group dated 29 June 2011.

<sup>110</sup> Annex 13, Note provided by TalkTalk to Ofcom received on 20 May 2011.

<sup>111</sup> See Annex 12 (Q3 (ii)) and Annex 22 (Q6), and the analysis in paragraphs 4.51 to 52 below.

<sup>112</sup> See section 4, precedents section, of this document which discusses the Equidebt Limited investigation conducted by Ofcom in December 2008, in which Equidebt offered complainants financial compensation in the event of a complaint.



- (c) the period allowed for the making of the representations has expired.”<sup>113</sup>

3.27 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”.

3.28 As set out in paragraphs 2.39 – 2.83, Ofcom is satisfied that TalkTalk persistently misused an electronic communications network or electronic communications service. On this basis, TalkTalk is liable for the imposition of a penalty under section 130 of the Act. We consider that the imposition of a penalty would help to secure Ofcom’s objective of furthering the interests of citizens and consumers. We are of the view that it is necessary and appropriate to impose a penalty on TalkTalk so as to reflect the seriousness of its conduct and to deter non-compliance with the persistent misuse provisions of the Act and the Guidelines by TalkTalk and others.

3.29 Accordingly, we have decided to impose a penalty in this case under section 130 of the Act.

3.30 The following section sets out Ofcom’s determination of the penalty amount, which includes taking account of:

- (a) any representations made by TalkTalk, McAlpine and Teleperformance;
- (b) any steps taken by TalkTalk for securing that the notified misuse was brought to an end and not repeated; and
- (c) any steps taken by TalkTalk for remedying the consequences of the notified misuse.

3.31 The penalty is for TalkTalk’s behaviour and any penalty levied will be levied in respect of TalkTalk.

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<sup>113</sup> Section 130(1) of the Act.

## Section 4

# Determination of the amount of penalty

4.1 The following section of this document sets out Ofcom's determination of the amount of the penalty imposed on TalkTalk. It explains why we consider a penalty to be appropriate and proportionate to the contravention in respect of which it is imposed. Likewise, the regard we have had in reaching that view 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 TalkTalk Representations;
- c) the First and Second Teleperformance Representations;
- d) the First and Second McAlpine Representations
- e) the McAlpine Correspondence
- f) responses to information requests sent to Teleperformance and McAlpine;
- g) steps taken by TalkTalk for securing that the notified misuse is brought to an end and not repeated;
- h) steps taken by TalkTalk for remedying the consequences of the notified misuse; and
- i) 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. 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 order<sup>114</sup> made by the Secretary of State under section 130(9) of the Act. The maximum level of penalty is now £2 million.

4.5 The upward revision of the maximum penalty followed a consultation by the Department of Business, Innovation and Skills ("BIS") entitled "Raising the maximum penalty for the persistent misuse of an electronic communications network or service, 2009".<sup>115</sup> The Government decided to proceed to increase the maximum penalty from

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<sup>114</sup> [The Communications Act 2003 \(Maximum Penalty for Persistent Misuse of Network or Service\) Order 2010 No. 2291](#)

<sup>115</sup> <http://www.bis.gov.uk/files/file53311.pdf>

£50,000 to £2 million to, “broadly reflect the views of 126 respondents who felt that the maximum penalty should be increased to this level to deter persistent offenders. Most respondents felt that the current level failed to reflect the harm that was caused to consumers by silent and abandoned calls and this feeling was particularly strong where respondents had received calls and tried various methods to combat the problem”.<sup>116</sup>

- 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”.<sup>117</sup> 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”.<sup>118</sup>

- 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 follows in determining the amount of penalties imposed by it under the provisions of the Act or any other enactment apart from the Competition Act 1998 (the “Penalty Guidelines”<sup>119</sup>). By virtue of section 392(6) of the Act, Ofcom must have regard to the statement for the time being in

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<sup>116</sup> 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](http://www.legislation.gov.uk/ukxi/2010/2291/pdfs/ukxiem_20102291_en.pdf)

<sup>117</sup> Ibid, page 1,

<sup>118</sup> Ibid, page 5.

<sup>119</sup> Annex 4, Ofcom Penalty Guidelines dated 13 June 2011.

force when setting the penalty amount. Issuing a penalty under section 130 is also referred to in the Guidelines.<sup>120</sup>

## 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.
- 4.10 The particular factors we have considered are:
- a) that, “*The central object of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement.*”
  - b) the following which appear to us to be relevant in this case in determining an appropriate penalty:
    - i. the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;
    - ii. the duration of the contravention;
    - iii. any gain (financial or otherwise) made by TalkTalk (or any connected body) as a result of the contravention;
    - iv. any steps taken for remedying the consequences of the contravention;
    - v. whether in all the circumstances appropriate steps had been taken by TalkTalk to prevent the contravention;
    - vi. whether TalkTalk has a history of contraventions;
    - vii. the extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, it was occurring or would occur;
    - viii. the failure to keep adequate records;
    - ix. whether the contravention continued, or timely and effective steps were taken to end it, once TalkTalk became aware of it; and
    - x. the extent to which the level of penalty is proportionate, taking into account the size and turnover of TalkTalk.
- 4.11 We have also had regard to precedents set by previous cases, and to the need for transparency in applying the Penalty Guidelines, particularly as regards the weighting of the factors considered in making our determination. We have also considered whether TalkTalk has failed to co-operate fully with Ofcom’s investigation.

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<sup>120</sup> Annex 3, the Guidelines, A1.100 to A1.104.

## Deterrence and seriousness of the contravention

- 4.12 Part of Ofcom's principal duty is to further the interests of consumers in relevant markets. Abandoned and silent calls will almost invariably result in consumer harm, which may range from inconvenience and annoyance through to genuine anxiety<sup>121</sup>.
- 4.13 Harm caused by abandoned and silent calls may be compounded when individuals receive a number of calls over a short period of time. In the case of silent calls, multiple calls of this nature over a short period may lead to an individual believing they are being targeted or harassed. Section 128 of the Act provides Ofcom with enforcement powers so that it may take action to protect consumers and citizens from harm resulting from persistent misuse of an electronic communication network or an electronic communication service.
- 4.14 Our decision is that it is appropriate and proportionate to the persistent misuse to impose a penalty that will provide TalkTalk, and others, with an effective incentive to comply with the Act and the Guidelines. The threat of penalties for persistent misuse has been in the public domain since the Act came into force in 2003. Ofcom has also fined a number of companies<sup>122</sup>. We consider that there remains a need to ensure that the threat of penalties will act as a sufficient incentive to comply with the persistent misuse provisions of the Act and the Guidelines. There must be a relationship between the size and seriousness of TalkTalk's contravention and the amount of the penalty in order that the penalty both:
- a) appropriately and proportionately penalises TalkTalk's contravention; and
  - b) creates an appropriate and proportionate deterrent effect for both TalkTalk and other parties using electronic communications networks or electronic communications services.
- 4.15 As set out in paragraphs 2.39 to 2.83 above, TalkTalk's contravention during the Relevant Period involved:
- i) Exceeding an abandoned call rate of three per cent of live calls by a substantial amount over a 24 hour period on at least four separate occasions at one third party call centre across one campaign during the Relevant Period<sup>123</sup>. After being unable to provide a definitive abandoned call rate at this call centre, TalkTalk provided an estimate that this was on a daily basis between 12 and 29 per cent; [X]. This translates to approximately 9,000 abandoned and silent calls on those four days;
  - ii) Failing to ensure that an information message was played in the event of an abandoned call at one call centre;
  - iii) Persistently making abandoned calls (512 calls) across 29 days at the McAlpine call centre in circumstances where, in its use of AMD equipment, TalkTalk had failed to adhere to the Guidelines in three respects:

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<sup>121</sup> Annex 3, the Guidelines, 1.6.

<sup>122</sup> [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_905/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/)

<sup>123</sup> Annex 14, Note prepared by TalkTalk Group dated 29 June 2011.

- Failing to provide a robust reasoned estimate of AMD false positives in respect of its use of AMD equipment;
  - Failing to keep adequate records that demonstrate compliance with the policy and procedures outlined in paragraphs A1.30 to A1.58 of the Guidelines; and
  - Failing to abide by the 24 hour policy during one 24 hour period. The 24 hour policy requires that when a call has been identified by AMD equipment as being picked up by an answering machine (including AMD false positives), any repeat calls to that specific number within the same 24 hour period may only be made with the guaranteed presence of a live operator<sup>124</sup>.
- 4.16 As set out in the Guidelines, 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 (including AMD technology) take steps to avoid making abandoned and silent calls; and that when such calls are made, steps are taken to reduce the degree of harm caused<sup>125</sup>.
- 4.17 ACS technology and AMD technology, which technologies were both used in this case, are used by call centres to improve efficiency by maximising the amount of time call centre agents spend speaking to consumers. Persons using these technologies may pass the costs savings that these technologies allow on to consumers. However, if not robustly and properly managed, a side effect of these technologies may be the generation of abandoned and silent calls resulting in consumer harm.
- 4.18 Ofcom recognises that a balance is needed between the positive benefits of ACS and AMD on the one hand, and the potential for these technologies to cause consumer harm on the other. In recognition of the benefits of ACS and AMD technology when properly managed, Ofcom does not enforce the persistent misuse provisions of the Communications Act against their use *per se*, but has put in place guidelines in respect of their use (the Guidelines) so as to reduce the possibility of harm and to set out when we would prioritise enforcement.
- 4.19 For example, the Guidelines set 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. Where ACS users fail to abide by this three per cent threshold, we are likely to consider the persistent misuse to be serious.
- 4.20 As stated above, we consider that in this case, the contravention is properly characterised as serious.

### **Degree of harm caused by the contravention**

- 4.21 We have given consideration in this case to the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants.
- 4.22 Section 128(5) of the Act provides that a person misuses an electronic communications network or electronic communications service if the *effect or likely*

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<sup>124</sup> Annex 3, the Guidelines, A1.55.

<sup>125</sup> Annex 3, the Guidelines, 4.1.

*effect of which is to cause another person to unnecessarily suffer annoyance, inconvenience or anxiety.* As set out in the Guidelines<sup>126</sup> and in the section 128 notification, and based on the evidence set out there, it is Ofcom's view that the effect or likely effect of making abandoned and silent calls is to cause other persons to suffer unnecessary annoyance, inconvenience or anxiety.

- 4.23 We are of the view that TalkTalk generated a considerable degree of actual or potential consumer harm as follows. It 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 at the Teleperformance Cape Town call centre. The abandoned call rates suggest that it made approximately 9,000 silent and abandoned calls on those days; TalkTalk has said that, "*the person who received the call heard nothing when they answered their phone*"<sup>127</sup>. Ofcom considers that silent calls are more detrimental than abandoned calls<sup>128</sup>.
- 4.24 In addition, TalkTalk persistently made abandoned calls at the McAlpine call centre on 29 days during the Relevant Period.
- 4.25 The effect or likely effect of TalkTalk's use of the electronic communications network or service was that call recipients unnecessarily suffered annoyance, inconvenience or anxiety.
- 4.26 In failing to ensure that an information message was played in the event of an abandoned call at the Teleperformance Cape Town call centre, TalkTalk potentially caused harm to consumers because the call recipient was likely to have heard nothing on answering the phone and had no means of establishing whether anyone was at the other end. We consider any type of silent call to be almost certain to cause inconvenience and to be very likely to cause annoyance to the called person<sup>129</sup>. During discussion with Ofcom about potential consumer harm prior to the Relevant Period, TalkTalk itself stated, "*We accept that TalkTalk Group has generated calls to customers which were in effect silent and which would have risked causing anxiety and distress.*"<sup>130</sup> Our view is that silent calls are likely to cause anxiety.

### **The duration of the contravention**

- 4.27 In relation to the issue of the duration of the convention, it is important to note that for the purposes of exercising its enforcement powers in an efficient, appropriate and proportionate manner and so that parties do not have to provide limitless 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.
- 4.28 In the present case, a seven week period was selected as the Relevant Period.

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<sup>126</sup> Annex 3, the Guidelines, 1.6.

<sup>127</sup> Annex 14, Note prepared by TalkTalk Group dated 29 June 2011.

<sup>128</sup> See for example paragraph 1.6, *Statement on tackling abandoned and silent calls*, Annex 3, the Guidelines.

<sup>129</sup> See paragraph 2.10, *Statement on tackling abandoned and silent calls*, Annex 3, the Guidelines.

<sup>130</sup> Annex 14, Note prepared by TalkTalk Group dated 29 June 2011, page 4.

- 4.29 TalkTalk was formally on notice of the period of investigation when Ofcom sent a draft copy of the TalkTalk Information Request on 23 March 2011<sup>131</sup>.
- 4.30 Prior to the investigation, Ofcom took the following actions to raise TalkTalk's awareness of the importance of compliance:
- (a) Ofcom wrote to TalkTalk directly on 10 May 2010, approximately 38 weeks prior to the commencement of the Relevant Period following complaints in relation to calls allegedly being generated by TalkTalk from two CLIs.
  - (b) Ofcom wrote to TalkTalk again on 9 August 2010 as the CCT had received complaints about a particular CLI<sup>132</sup>. Following this contact, TalkTalk investigated matters and identified an issue regarding how dialling activity and actual performance were communicated between BPS Contract Services and a call centre it operated in Cape Town. As a result of this issue, TalkTalk listed a summary of the actions that TalkTalk were, or would be, taking as a result of its investigation<sup>133</sup>; and
  - (c) Ofcom published an open letter on 20 December 2010<sup>134</sup> addressed to industry stating that enforcement action would be taken should the Guidelines not be complied with and that companies would be expected to be in compliance with these new Guidelines by 1 February 2011 ("implementation period"). In particular, it alerted industry to the increase in the maximum penalty for persistent misuse from its previous level of £50,000 to £2 million. The letter also made explicit reference to the introduction of the 24 hour policy from 1 February 2011<sup>135</sup>. This letter was emailed directly by Claudio Pollack, Consumer Group Head, to key industry stakeholders, one of whom was TalkTalk.
- 4.31 Notwithstanding the above explicit actions to raise TalkTalk's awareness of the importance of compliance with the Act and the Guidelines and additionally the allowance of an implementation period to ensure that compliance, TalkTalk was still found in contravention after this time.
- 4.32 The infringement we have found relating to calls made by McAlpine extended across 29 days. We make findings of persistent misuse in relation to calls made by Teleperformance in relation to four days scattered widely within the Relevant Period.
- 4.33 It is difficult, in the circumstances, to characterise the duration of the infringement. At the McAlpine call centre, 512 abandoned calls were made over 29 days within the Relevant Period, the first being on the first day of the period and the last being 39 days later, but the principal reason why Ofcom considers it necessary to enforce against the persistent misuse at this call centre is the lack of records which would enable us to determine the full extent of the infringement. At the Teleperformance Cape Town call centre, the infringement took place on at least four days, which are scattered widely within the Relevant Period.

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<sup>131</sup> TalkTalk were first informally on notice of an investigation when Ofcom met TalkTalk managers on 10 March 2011.

<sup>132</sup> The CLI being 01914237402 – Annex 7, Email from Ofcom to TalkTalk dated 9 August 2010.

<sup>133</sup> As previously noted, we acknowledge that TalkTalk was not required to comply with the 24 hour policy until it took effect from 1 February 2011, however TalkTalk was, at the time of Ofcom's engagement with it, required to ensure it was compliant with the persistent misuse provisions of the Act.

<sup>134</sup> Annex 9, Open letter to industry stakeholders dated 20 December 2010.

<sup>135</sup> Annex 9, Open letter to industry stakeholders dated 20 December 2010, 'Use of AMD technology'.



- 4.34 Our view is that in the circumstances of this case it is more appropriate to place weight on other factors in determining the appropriate penalty.

### **Any gain (financial or otherwise) made by TalkTalk as a result of the contravention**

- 4.35 We consider it likely that TalkTalk did make *some* gain by operating outside the principles set out in the Guidelines and carrying out the persistent misuse. However, on the basis that we do not have direct evidence of such gain in this case, we have not taken this factor into consideration in the determination of any penalty amount.

### **Steps taken by TalkTalk to remedy the consequences of the contravention**

- 4.36 Ofcom's view is that as of the date of this Notification, TalkTalk has not taken any steps to remedy the consequences of the contravention. Accordingly, we cannot take such steps into account in any penalty amount to be imposed.

### **Whether TalkTalk has a history of contraventions**

- 4.37 TalkTalk has a history of contraventions in respect of the persistent misuse provisions. TalkTalk was founded in 2003 as a subsidiary of the Carphone Warehouse and was demerged as a standalone company in March 2010. In 2007, Ofcom fined Carphone Warehouse Group Plc ("Carphone Warehouse") £35,000 for persistent misuse of an electronic communications network or service.
- 4.38 This investigation revealed that 50 per cent of its call centres/ campaigns (for which call data was supplied) had at least one 24 hour period in which an excessive number of abandoned calls was made (i.e. in excess of three per cent of live calls)<sup>136</sup>.
- 4.39 The TalkTalk Representations referred to this previous penalised contravention. It argued that non-compliance in the present case, "*...is much less severe...*"<sup>137</sup> and this should be reflected in any financial penalty imposed upon TalkTalk as a result of this investigation.
- 4.40 It further submitted that the financial penalty levied against Carphone Warehouse should only be a, "*yardstick*" for any financial penalty imposed upon it and that, "*...it would be plainly wrong to consider the 2007 fine to be an aggravating factor in this case.*" According to TalkTalk, the, "*... previous breach clearly related to an entirely different set of circumstances that took place a long time ago... [and] ... partially related to the dialler activities of Carphone Warehouse and not solely to the TalkTalk division of that company.*"<sup>138</sup>
- 4.41 Although the contravention in the Carphone Warehouse case was considered on the basis of now superseded persistent misuse guidelines and penalty guidelines and prior to the introduction of secondary legislation increasing the maximum financial penalty for persistent misuse from £50,000 to £2 million, it did still concern provisions of legislation within Ofcom's regulatory remit and evidences that TalkTalk has a history of contravention. We acknowledge however that in some respects the

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<sup>136</sup> Page 15, [http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_905/carphone.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/carphone.pdf) See point 6, 'Reasons for Ofcom's determination that the Company has engaged in persistent misuse.'

<sup>137</sup> Annex 2, TalkTalk Representations, page 7, 2(ii).

<sup>138</sup> Annex 2, TalkTalk Representations, page 7, 2(iii).

contravention in the Carphone Warehouse case was more serious than in the present case.

- 4.42 We consider that the contravention relating to persistent misuse is relevant and we have taken this into account in Ofcom's determination of the penalty amount.

### **Whether in all the circumstances TalkTalk took appropriate steps to prevent the contravention**

- 4.43 In Ofcom's opinion, TalkTalk failed to take appropriate steps to prevent the contravention. In the case of the McAlpine call centre, we have considered not only whether the contravention itself could have been avoided, but also the failure to abide by Guidelines that has made it necessary for Ofcom to take enforcement action.

- 4.44 The notified contravention in this case occurred following:

- (a) Ofcom writing to TalkTalk directly on 10 May 2010 (approximately 38 weeks prior to the commencement of the Relevant Period) and on 9 August 2010 following complaints in relation to abandoned and/or silent calls allegedly being generated by TalkTalk<sup>139</sup>;
- (b) Ofcom's open letter to industry on 20 December 2010 which specified that companies were expected to be in compliance with the Guidelines by 1 February 2011 (the implementation period) and made explicit reference made to the introduction of the 24 hour policy<sup>140</sup>; and
- (c) the expiry of the implementation period.

- 4.45 TalkTalk was therefore alerted to concerns that it was making calls which generated a level of complaints sufficient to cause concern prior to Ofcom commencing its investigation.

- 4.46 Compliance in respect of the persistent misuse provisions set out in the Act and the principles set out in the Guidelines is a fundamental and ongoing obligation. That compliance is within a company's own control and responsibility, companies must have processes for compliance as part of their ordinary course of business. Ofcom's Guidelines explain the following in relation to the engagement of a third party to use the network or service on behalf of another company:

- (a) *"Section 128 of the Communications Act 2003 applies where 'a person has persistently misused an electronic communications network or electronic communications services'. In Ofcom's view, such misuse may be either direct or indirect. This means a person may be caught by section 128 either where they are misusing a network or services themselves, or where they have engaged another person to use the network or service on their behalf."*<sup>141</sup>
- (b) *"An example of this may arise in the context of network or service misuse by a call centre. Where a person engages representatives, such as a third party call centre to contact UK consumers on its behalf, that person may be the*

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<sup>139</sup> Annex 5, Letter from Ofcom to TalkTalk dated 10 May 2010 and Annex 7, Email from Ofcom to TalkTalk dated 9 August 2010.

<sup>140</sup> Annex 9, Open letter to industry stakeholders dated 20 December 2010.

<sup>141</sup> Annex 3, the Guidelines, A1.7.

*target of an investigation and ultimately action under the Act for persistent misuse by its representatives. This includes where the representative is an offshore centre.*<sup>142</sup>

- (c) *“To be clear, there may be circumstances where the representatives are also persons who are misusing a network or service in their own right. In those circumstances, Ofcom may also consider investigating these individuals or companies. This decision would be taken on a case by case basis.”*<sup>143</sup>

4.47 A party procuring a third party company to act for or on its behalf in the generation of calls, is expected to take reasonable steps to monitor and assess ongoing compliance by that third party with the persistent misuse provisions and the Guidelines. Acceptance of assurances and/or the imposition of contractual obligations on a third party in respect of compliance, without the procuring party seeking regular evidence 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.

4.48 TalkTalk acknowledged its responsibilities in relation to third parties in its 21 May 2010 response to Ofcom’s letter of 10 May 2010, *“We are acutely aware that we are accountable for the activity that any third party undertakes on our behalf and we remain committed to ensuring that we adhere to The revised ‘Statement of policy on Persistent Misuse of an Electronic Communications Network or Service’ by making Silent or Abandoned Calls, issued by Ofcom 10<sup>th</sup> September 2008 [the then applicable guidelines].”*<sup>144</sup>

4.49 TalkTalk set out measures it took prior to the Relevant Period in its correspondence dated 21 May 2010. These included:

- i) Producing, *“... a set of dialling rules, which cover the main aspects of Ofcom’s revised policy plus additional business requirements on our part, all internal departments and third party agencies that make outbound calls using automated calling systems on our behalf have signed up to these rules and understand the consequences of non compliance.”*
- ii) Conducting a, *“... minimum of one audit visit per year, additional visits can be scheduled if required although this is extremely rare”* in respect of all internal departments and third party agencies making outbound calls using ACS on behalf of TalkTalk. It noted that, *“A dialler audit will take anything from a single day to five days, depending on the size and complexity of the operation being reviewed; these are carried out by a team trained in the dialler rules and dialler operations. Following the site visit an audit report is distributed to the relevant senior managers within the TalkTalk Group and the agency concerned. The audit programme allows us to gain onsite visibility of the levels of expertise employed and the diligence with which management controls are exercised.”*

These audits examined and reported on the Guidelines and TalkTalk’s own dialler rules and a non-exhaustive list of areas covered by such audits included:

<sup>142</sup> Annex 3, the Guidelines, A 1.8.

<sup>143</sup> Annex 3, the Guidelines, A1.9.

<sup>144</sup> Annex 6, Email from TalkTalk to Ofcom dated 21 May 2010.

- a) *“Abandonment rate<sup>145</sup> and, where applicable, AMD False Positive calculations;*
- b) *Recorded message information in the event of an abandoned call;*
- c) *CLI recycle rules, in particular relating to the disposition outcomes ‘Abandoned Call’ and ‘Do Not Call’;*
- d) *Valid CLIs being in place;*
- e) *Minimum ring time;*
- f) *Return call management, including recorded messages;*
- g) *Records retention;*
- h) *DNC management;*
- i) *Dialler history;*
- j) *Agent knowledge and awareness of manual disposition codes<sup>146</sup>; and*
- k) *Management controls and general access to dialler functionality.”*

*TalkTalk stated that, “The most recent audit of the South Africa contact centre from where calls were generated that prompted Ofcom to write to TalkTalk, was in September ‘09, this was a satisfactory audit and as a result the next visit is due later this year, sometime between August and September. Should an audit identify issues giving rise to concern that the likelihood of excessive silent/abandoned calls being made is unacceptably high, the agency/dept. in question would be required to dial in ‘Preview’ mode<sup>147</sup> until corrective actions have been taken, thus preventing any further abandoned/ silent calls. Where necessary, follow up visits take place to ensure corrective actions have been undertaken.”*

- iii) *“Weekly dialler performance reporting – all internal departments and third party agencies that make outbound calls using automated calling systems on our behalf must accurately report their dialler performance every week, this must include a reasoned estimate of AMD False Positives, where answering machine*

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<sup>145</sup>The ‘abandonment rate’ refers to the requirement in the Guidelines (A1.30) 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 (an abandoned call is where a connection is established but terminated by its originator in circumstances where the call is answered by a live individual – their impact on consumers is discussed in the Guidelines between 1.6 and 1.8). The Guidelines (5.57) states that, “Ofcom considers that where a company is operating multiple campaigns simultaneously from one or more call centres, it may be appropriate to calculate the abandoned call rate using an aggregation of data across all call centres and/or all campaigns run by or on behalf of the company. This will provide Ofcom with an overall picture of the performance of a company’s outbound dialling activity operations (whether run internally or outsourced).” Paragraph 5.58 states that “Where Ofcom has aggregated a company’s call data and proposes to rely on those figures for the purpose of a notification issued under section 128 of the Act, Ofcom may also set out the underlying information on a disaggregated basis (that is by call centre and/or campaign)...”

<sup>146</sup> ‘Disposition’ generally refers to the outcome of the call attempt. For example, No Answer, Busy, Call Connected.

<sup>147</sup> Our understanding is that the term ‘Preview’ mode refers to one of several forms of dialling where an agent is specifically allocated to the call from the outset.

*detection is used. The weekly reporting is a declaration of the agency/dept's abandonment rate as a percentage and includes:*

- a) A declaration of whether AMD is being used or is switched off;*
- b) The number of connected (live) calls;*
- c) The number of attempted calls;*
- d) The number of known abandoned calls;*
- e) The actual percentage of abandoned calls;*
- f) The average number of agents dialling that week;*

*And additionally for those using AMD;*

- g) The number of dialler dispositioned answer machines;*
  - h) The number that are categorised as False Positives.”*
- iv) “Raw data checks – to ensure that each agency/dept reports their performance accurately, we carry out random checks on raw dialling data. What this means is that we select a range of dates from an agency's dialling history and match this to previously declared performance for the same range of dates.”*
  - v) “AMD False Positive declaration checks” – “All internal departments and third party agencies that make outbound calls using automated calling systems on our behalf and have AMD switched on must declare a reasoned estimate of how many of the calls dispositioned by the dialler as ‘Answer Machine’ have actually connected to a live individual and therefore resulted in a silent call. For any operation where we are not satisfied, either with the declaration of False Positives or the explanation as to how it has been arrived at, we will conduct our own testing using their raw data and call recordings. This usually involves selecting a statistically representative number of cases that have been dispositioned by the dialler as ‘Answer Machine’, listening to these calls and arriving at how many have been dispositioned correctly, giving an AMD accuracy percentage which either aligns with the previous declaration or corrects it.”*
  - vi) “Dialler Communication Days – On 11<sup>th</sup> May [2010] we conducted the TalkTalk Group's second Dialler Communications day, where we invited our partners and internal departments to attend an all day presentation and workshop which was designed to cover all aspects of the dialler rules and educate and reiterate the responsibilities of all those who outbound dial on behalf of the TalkTalk Group<sup>148</sup>.”*

4.50 TalkTalk told us that *prior* to the Relevant Period:

- i) “We require each supplier to report back to us with specific dialler statistics on a weekly basis which our dialler audit team analyse to make sure the Guidance has been adhered to.*

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<sup>148</sup> Annex 6, Email from TalkTalk to Ofcom dated 21 May 2010.

- ii) *We require each supplier to confirm in writing that they understand the Guidance and that their operations will comply with the same at all times.*
- iii) *We carry out regular onsite audits of each of our suppliers where we analyse in detail the operation of the dialler and the management procedures followed by the suppliers to comply with the Guidance."*

- 4.51 TalkTalk provided us with a template for its weekly dialler statistics reports, showing the template for the period before and the period after the Guidelines came into effect. Each report contained the heading "Preview / Predictive AMD off", (not posed as a question)<sup>149</sup>. McAlpine provided us with a completed template for 29 November 2010 to 3 December 2010, which it said was a 'copy' of the reports provided during the Relevant Period<sup>150</sup>. This contained no such headings. It included a confirmation re: "*Reasoned Estimate: whenever AMD is used an estimate/average sum of AMD calls is taken into account when calculating abandoned calls percentage. Suggestions how to arrive at a reasoned estimate are detailed separately and should be followed*". McAlpine denies that the weekly report asked whether AMD was switched off.
- 4.52 We do not consider it necessary to determine which of the two versions of the weekly report was being used in the Relevant Period. If the version provided by TalkTalk was that being used, the template does not appear to have contained a question for the call centre to complete about whether AMD was switched on. If the version that McAlpine provided is correct, TalkTalk ought to have recognised that AMD appeared to be in use. The failure to abide by the Guidelines which occurred in the Relevant Period might have been avoided had greater attention been paid to how the template was constructed (in the first case) or completed (in the second).
- 4.53 TalkTalk carried out an audit at the McAlpine call centre on 10 and 11 March 2011<sup>151</sup>.
- 4.54 This audit revealed a myriad of problems that resulted in non-compliance at the McAlpine call centre being identified by the auditor during the Relevant Period. These problems included but were not limited to risks of failure to abide by the Guidelines which we have identified (i.e. the failure to provide a reasoned estimate of AMD false positives, failure to prevent contraventions of the 24 hour policy and the lack of adequate record keeping). This was in contrast to the dialler rules that TalkTalk has stated it required all of its independent partners who were dialling on its behalf be aware of.
- 4.55 TalkTalk told us it carries out audits a minimum of once per year<sup>152</sup>. McAlpine said it was audited once during the course of the telesales campaign<sup>153</sup>, on 10/11 March 2011. TalkTalk told us it had written dialling rules covering the main aspects of the Guidelines and required its call centres to sign these. McAlpine provided a copy of its written confirmation dated 7 February 2011 that it had, "*read and understood*" this document. However, McAlpine said no one from McAlpine had been invited to any of TalkTalk's 'Dialler communication days' and the audit report it provided suggests that the level of onsite dialler expertise was a concern<sup>154</sup>. TalkTalk has suggested that a

<sup>149</sup> Annex 2, TalkTalk Representations, see TalkTalk Dialler Rules.

<sup>150</sup> Annex 29, McAlpine Response to Third Information Request dated 26 October 2012.

<sup>151</sup> Annex 30, McAlpine Marketing (McAlpine), Chesterfield, *Dialler Operations Compliance Audit*, dated 10/11 March 2011.

<sup>152</sup> Annex 12, The TalkTalk Response, Q10.

<sup>153</sup> Annex 29, McAlpine Response to Third Information Request dated 26 October 2012, Q4.

<sup>154</sup> Annex 29, McAlpine Response to Third Information Request dated 26 October 2012, Q4 and Q8.

Dialler communication day took place only before the appointment of McAlpine, and has not suggested it took any steps other than requiring a signature to satisfy itself that McAlpine had indeed understood and correctly applied the Ofcom Guidelines or TalkTalk rules. In Ofcom's view, in light of the fact that McAlpine was appointed in November 2010, it would have been appropriate for checks to have been carried out earlier and more rigorously. Had this been done, it is more likely that the Guidelines would have been complied with.

- 4.56 [redacted]<sup>155</sup>.
- 4.57 The First Teleperformance Representations annexed a document entitled, "*Dialler Operations Compliance Audit*"<sup>156</sup> which stated, "[redacted]". The TalkTalk Representations stated that, "...[redacted]"<sup>157</sup>.
- 4.58 Teleperformance also maintained that [redacted], Teleperformance stated that, to the best of its knowledge, "...[redacted]"<sup>158</sup>. It also went on to argue that it had no reason to "...[redacted]". Teleperformance suggested that Ofcom may, "...[redacted]..."
- 4.59 TalkTalk procured the Teleperformance Cape Town call centre to act for or on its behalf in the generation of calls, and we therefore expect TalkTalk to have taken reasonable steps to monitor and assess ongoing compliance by that call centre with the persistent misuse provisions and the Guidelines. We consider that in circumstances [redacted] it was reasonably foreseeable that heightened vigilance by TalkTalk was required to ensure compliance. We have no evidence to suggest that TalkTalk knew [redacted], so we do not suggest that TalkTalk could have prevented the contravention occurring altogether. However, had it taken other steps such as requiring Teleperformance to monitor live calls and taken steps to audit these at a time when heightened vigilance would have been appropriate, we consider that it would have been in a position to identify when the contravention first began and could have taken steps to ensure that it did not recur.
- 4.60 In this case, therefore, we consider that effective steps were not taken by TalkTalk to ensure the Guidelines were followed, or to prevent the contravention itself.
- 4.61 This has been taken into account in Ofcom's 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.**

- 4.62 In Ofcom's view, there is no evidence that TalkTalk's contravention of the persistent misuse provisions occurred intentionally.
- 4.63 In a note sent to Ofcom on 20 May 2011, TalkTalk explained to Ofcom that with regard to the Teleperformance Cape Town call centre, "[redacted]"<sup>159</sup> With regards to AMD, TalkTalk claimed within its Representations that, "*TalkTalk ... had no reason to believe that or suspect anything but that AMD was switched off*"<sup>160</sup>. McAlpine has

<sup>155</sup> Annex 2, TalkTalk Representations. The notice was served on TP South Africa.

<sup>156</sup> Annex 16, The First Teleperformance Representations received on 14 November 2011.

<sup>157</sup> Annex 2, TalkTalk Representations, page 6, 2(i).

<sup>158</sup> Annex 16, The First Teleperformance Representations received on 14 November 2011, 1.2.

<sup>159</sup> Annex 13, Note provided by TalkTalk to Ofcom received on 20 May 2011.

<sup>160</sup> On the basis that McAlpine had, in the words of TalkTalk, "... accepted our dialler requirements in writing in February 2011 and subsequently reported on a weekly basis that there were no false positives." Annex 2, TalkTalk Representations, 1(vi), page 4.

however disputed that TalkTalk were unaware of its AMD usage at the McAlpine call centre<sup>161</sup>.

- 4.64 The strict legal definition of recklessness means 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 representations and information provided, our view is that TalkTalk's notified contravention was not reckless on the basis of the strict legal definition of recklessness.
- 4.65 While (as set out above) we consider that the contravention ought to have been prevented, we have no evidence as to the seniority of those involved in processes at TalkTalk and therefore no evidence that senior managers at TalkTalk knew, or ought to have known, that a contravention was occurring or would occur. The penalty amount would have been higher had we found evidence that senior managers at TalkTalk knew, or ought to have known, that a contravention was occurring or would occur.

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

- 4.66 TalkTalk is a provider of fixed line broadband, voice telephony and mobile services to consumers and business users. TalkTalk serves 5 million customers across the UK under the TalkTalk, AOL Broadband and TalkTalk Business brands. Its statutory reporting accounts as at June 2012 submitted to Companies House, disclosed a turnover of £1.687 billion<sup>162</sup>.
- 4.67 In Ofcom's view, these factors indicate that TalkTalk is a sizeable business with a significant turnover. In accordance with our Penalty Guidelines, we consider that TalkTalk's size and turnover is a relevant consideration in this case to any penalty imposed and has been taken account of in determining the proportionality of any penalty amount.

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

- 4.68 Following our consideration of all the representations, responses to information requests, correspondence and CCT complaint data<sup>163</sup>, our view is that TalkTalk did take timely steps that were effective in bringing it into compliance once it became aware of its contravention.
- 4.69 In relation to the McAlpine call centre, TalkTalk stated that once it, "*...discovered that AMD had been used...requested that this be immediately switched off.*" In relation to Teleperformance, it noted that, "[<]." It went on to add that, "*TalkTalk has ended its*

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<sup>161</sup> See Annex 29, McAlpine Response to Third Information Request dated 26 October 2012 (paragraph 12).

<sup>162</sup> Annual Report, 2012 (page 1)  
<http://www.talktalkgroup.com/~media/Files/T/TalkTalk/pdfs/reports/2012/talktalk-ar12-web-ready-v2.pdf> .

<sup>163</sup> Ofcom's CCT complaints for a time period following the Relevant Period, 22 March 2011 to 11 October 2011 showed that there was one complaint recorded on 12 June 2011 concerning one CLI, 08452860607, used by the McAlpine call centre and three complaints in respect of a CLI used at the Teleperformance Cape Town call centre, 01914237401, recorded on 24 and 25 March 2011. So although the CCT has received complaints regarding silent and/or abandoned calls allegedly being generated by or on behalf of TalkTalk since the Relevant Period ended, this number has fallen steadily. It should be noted that complaints to CCT are merely indicative of possible non-compliance.



*relationship with Teleperformance and [McAlpine] respectively following these incidents.*<sup>164</sup> This was confirmed by both Teleperformance<sup>165</sup> and McAlpine<sup>166</sup>.

- 4.70 We consider that TalkTalk's action to end the contravention is relevant to any penalty imposed and we have taken it into account in determining the penalty amount.
- 4.71 Section 130 of the Act also requires us to have regard to any steps taken by TalkTalk to secure that the contravention is not repeated. As set out in paragraphs 3.14-3.16, we have no evidence that any such steps have been taken. Accordingly, there are no steps to take into account here in any penalty amount to be imposed.

### **Failure to keep adequate records**

- 4.72 Ofcom considers TalkTalk's provision of a manufacturers' estimate in lieu of a reasoned estimate of AMD false positives is indicative that it had not maintained adequate records (required to demonstrate compliance with the policy and procedures outlined in the Guidelines). This occurred after AMD technology was used at the McAlpine call centre during the Relevant Period.
- 4.73 TalkTalk has stated in both its response to an informal enforcement letter dated 10 May 2010 and its Response that, "*For any operation where we are not satisfied, either with the declaration of False Positives or the explanation as to how it has been arrived at, we will conduct our own testing using their raw data and call recordings.*" It also stated in its Response that it had carried out random checks on raw dialling data from the McAlpine call centre during the period 1 February 2011 to 21 March 2011.
- 4.74 Nonetheless TalkTalk failed to provide a reasoned estimate of AMD false positives based on actual calls made at the McAlpine call centre. Instead it used a manufacturer's estimate and stated in its Representations that it had, "*... supplied the best information available in the circumstances.*" This is on the basis that it was unaware that AMD technology was being used at the McAlpine call centre during the Relevant Period<sup>167</sup>.
- 4.75 In its Representations, TalkTalk submitted that it, "*...kept detailed records that demonstrate compliance with the policy and procedures outlines in paragraphs A1.30 to A1.58 of the Guidelines*<sup>168</sup>". However in Ofcom's view, the ability to maintain up-to-date records was available to it, and had it applied this ability, it would have been in a position to know when AMD was in use and accurately to arrive at a reasoned estimate of AMD false positives. We also consider it is reasonable to expect TalkTalk to have foreseen the possibility that AMD was, inadvertently or otherwise, turned on at its call centres and to have had a contingency plan to obtain a reasoned estimate of AMD false positives in such circumstances.
- 4.76 As previously noted, adherence to the requirement to maintain records is part of an effective compliance strategy of monitoring and assessing compliance on an ongoing basis. Accurate record maintenance facilitates compliance with the Act and the Guidelines. It increases the likelihood of possible compliance failures being detected and prevented, thereby assisting to reduce the possibility of harm to consumers.

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<sup>164</sup> Annex 2, TalkTalk Representations, Page 6.

<sup>165</sup> Annex 27, Teleperformance Response to Teleperformance Information Request received on 26 October 2012.

<sup>166</sup> Annex 29, McAlpine Response to Third Information Request dated 26 October 2012.

<sup>167</sup> This point is disputed by McAlpine (see Annex 29, McAlpine Response to Third Information Request dated 26 October 2012, paragraph 12).

<sup>168</sup> Annex 2, TalkTalk Representations, Page 4, (iv).

- 4.77 The failure to keep adequate records has been taken in account in Ofcom's determination of the penalty amount.

### **Co-operation with Ofcom's investigation**

- 4.78 Ofcom's Penalty Guidelines state, "*Ofcom may increase the penalty where the regulated body in breach has failed to cooperate fully with our investigation*<sup>169</sup>." We have considered the possible impact on the amount of any penalty of the co-operation TalkTalk gave to Ofcom's investigation of this matter.
- 4.79 TalkTalk was punctual in its responses to Ofcom's statutory information requests and in the delivery of its representations. However, in the TalkTalk Response (submitted on 14 April 2011), it failed to include as abandoned calls the live calls misclassified as calls to answer machines for the Teleperformance Cape Town call centre<sup>170</sup>. This only became apparent during a meeting Ofcom had with TalkTalk on 10 May 2011. Following a number of requests from Ofcom for a more detailed statistical analysis of the live calls disconnected by call centre agents<sup>171</sup>, this information was provided on 29 June 2011.
- 4.80 TalkTalk provided evidence that it had contacted McAlpine seeking data in order to respond to Ofcom's statutory information request. TalkTalk's response to Ofcom included an estimate of false positives. However, McAlpine maintained that no such estimate should have been applied despite their use of AMD. We therefore understand that although TalkTalk consulted with McAlpine in order to respond to the information request, the parties did not agree on whether an estimate of AMD false positives should have been applied to the relevant data submitted to Ofcom.
- 4.81 Ofcom's ability to protect consumers effectively and perform our statutory duties is impeded by the failure of parties under investigation to provide accurate, and timely, information.
- 4.82 Whilst TalkTalk generally cooperated with our investigation, we were particularly concerned by its failure to fully consult McAlpine in the preparation of its response to our statutory information request. In this regard, we consider that TalkTalk did not cooperate fully with our investigation. Accordingly, this has been taken into account in Ofcom's determination of the penalty amount.

### **Relevant precedents set by previous cases**

- 4.83 Ofcom's Penalty Guidelines, published on 13 June 2011, 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.
- 4.84 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

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<sup>169</sup> Annex 4, Ofcom Penalty Guidelines dated 13 June 2011.

<sup>170</sup> On what appears to be the basis that TalkTalk did not believe that these calls were actually abandoned calls.

<sup>171</sup> A phone conversation between Matthew Chapman of Ofcom and Steve Thompson of TalkTalk on 18 May 2011 and an email from Matthew Chapman to Steve Thompson on 8 June 2011.

Act, Ofcom has imposed penalties for persistent misuse in respect of ten companies since June 2006.<sup>172</sup>

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

4.85 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 legislation<sup>173</sup> 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 published on 13 June 2011;
- the pre-2011 cases related to non-compliance in respect of persistent misuse guidelines which have now been superseded by the current Guidelines published on 1 October 2010;
- 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 weeks<sup>174</sup> 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.

4.86 We do not consider the pre-2011 cases to be particularly relevant in light of the revised variables and therefore this section does not purport to be a comprehensive analysis of each case as compared and distinguished from the present case. However, we note in particular 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 the Guidelines across industry and for the target of the investigation specifically.<sup>175</sup>
- Ofcom has held that the seriousness of harm is linked to the number of abandoned and/or silent calls made<sup>176</sup>, with silent calls being particularly serious<sup>177</sup>, but even a relatively small number of calls may be “serious”<sup>178</sup>.

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<sup>172</sup> [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_905/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/)

<sup>173</sup> [http://www.legislation.gov.uk/ukxi/2010/2291/pdfs/ukxi\\_20102291\\_en.pdf](http://www.legislation.gov.uk/ukxi/2010/2291/pdfs/ukxi_20102291_en.pdf)

<sup>174</sup> Note the duration of the relevant period in a particular case may vary depending on the facts and circumstances of that case.

<sup>175</sup> See, in particular, Complete Credit Management, March 2008.

<sup>176</sup> Annex 3, the Guidelines, A1.84.

<sup>177</sup> See e.g. Barclaycard, September 2008.

<sup>178</sup> See e.g. Complete Credit Management, March 2008.

- 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”*<sup>179</sup>.
- 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 repeated<sup>180</sup>.
- None of the pre-2011 cases concerned companies with a previous history of persistent misuse. In 2007, Ofcom fined Carphone Warehouse £35,000 for persistent misuse.

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

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

4.88 These cases were determined:

- a) on the basis of the Guidelines 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.

4.89 The key features of the HomeServe case, the npower 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*

4.90 Ofcom considered that the contravention in HomeServe was properly characterised as serious. The contravention of section 128 during the seven week Relevant Period, was significant, involving 42 x 24 hour periods where it exceeded the three percent 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

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<sup>179</sup> Space Kitchens and Bedrooms (Holdings) Ltd, January 2007.

<sup>180</sup> See e.g. Equidebt Limited (December 2008), Abbey National Plc (March 2008), Complete Credit Management (March 2008).

the same 24 hour period, resulting in 36,218 calls which did not adhere to the 24 hour policy set out in the Guidelines.

- 4.91 Ofcom considers the contravention in TalkTalk to be serious. TalkTalk, amongst other compliance failures, exceeded an abandoned call rate of three percent of live calls over a 24 hour period by a substantial amount on at least four separate occasions during the Relevant Period (1 February 2011 to 21 March 2011). This translates to approximately 9,000 calls. It also failed to ensure that an information message was always played in the event of an abandoned call at the Teleperformance Cape Town call centre across at least one campaign, so these calls were in effect silent calls, which Ofcom considers to cause more serious harm than abandoned calls. It also persistently made 512 abandoned calls over 29 days at the McAlpine call centre. In the HomeServe case and in the present case it has been deemed appropriate to impose a penalty reflecting a serious contravention which would send a deterrent message to the notified party and to industry.
- 4.92 We consider the npower case a less informative precedent. In that case, we found that the relevant conduct was serious but at the lower end of the scale. The volume of abandoned calls made was 1,756 over a seven-week period (demonstrably so, because adequate records had been kept). By contrast, the volume of silent and abandoned calls made by TalkTalk was approximately 9,000 in four days, and adequate records were not kept.

*Degree of harm caused by the contravention*

- 4.93 Ofcom was of the view that HomeServe generated a considerable degree of harm. It took into account the scale of the contravention and the harm suffered by recipients of the silent and abandoned calls during the relevant period.
- 4.94 Ofcom considered the level of harm to be evident from the extent to which HomeServe exceeded the three percent abandoned call rate and further emphasised by the number of calls made which did not adhere to the 24 hour policy. In HomeServe, a call centre acting for HomeServe produced an aggregated abandoned call rate above the three per cent abandoned call rate specified in the Guidelines<sup>181</sup> and HomeServe's failure to adhere to the 24 hour policy resulted in, "*instances the same telephone number was called five times after it had initially been classified as picked up by an answer machine*".
- 4.95 It was Ofcom's view that the recipients of the abandoned and silent calls generated for or on behalf of HomeServe during the relevant period had suffered harm.
- 4.96 Similarly, in npower, Ofcom considered the contravention to have caused harm.
- 4.97 We do not consider it particularly helpful or appropriate to compare the level of harm caused by the contraventions in these cases. The circumstances of the misuse in each case are rather different, particularly in relation to the numbers of silent calls.

*Duration of the contravention*

- 4.98 In HomeServe and npower a seven week period was considered, in itself, a substantial duration for a contravention of a provision designed to prevent persons

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<sup>181</sup> The pro-rata false positive rate when added to the number of abandoned calls made during the relevant period produced this aggregated abandoned call rate.

unnecessarily suffering annoyance, inconvenience or anxiety. In this case, we do not consider it possible or appropriate to place weight on findings as to duration.

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

- 4.99 In the present case, as in HomeServe and npower, Ofcom considers that it is likely that TalkTalk did derive *some* gain by operating outside the principles set out in the Guidelines. However, Ofcom does 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*

- 4.100 HomeServe made representations regarding the steps it would take to remedy the consequences of its notified misuse<sup>182</sup>. 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 AMD was in operation;
- b) issue a statement on its website about the offer of compensation;
- c) communicated the offer of compensation in response to all press enquiries made to it; and
- d) provide compensation to the individuals who lodged a complaint with Ofcom during the Relevant Period and to the individuals who had complained to HomeServe during the Relevant Period.

- 4.101 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.

- 4.102 Similarly, npower has taken and is taking steps to remedy the consequences of its misuse.

- 4.103 In the present case, 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).

*History of contravention*

- 4.104 Neither Home Serve nor npower had a history of notification of contraventions in respect of the persistent misuse provisions. Consequently, in these cases, Ofcom did not consider this to be an aggravating factor.

- 4.105 This is in contrast to TalkTalk whom Ofcom has penalised in respect of a previous persistent misuse contravention (as referred to at paragraph 4.37-4.42) In this case, the previous persistent misuse contravention is to be taken into account in any penalty.

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<sup>182</sup> These representations were made following issuance of the provisional section 130 notification in the case.

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

- 4.106 In HomeServe, it was Ofcom's view that HomeServe should have and could have (given its knowledge of the problems and their causes, and the timeframe over which it was aware of them) taken appropriate steps to prevent the notified contravention from occurring.
- 4.107 Prior to commencing its investigation, Ofcom had alerted HomeServe to concerns that it was generating abandoned and silent calls. Also prior to investigation, Ofcom published the Guidelines which clarified the methodology in respect of testing the AMD false positive rate yet HomeServe continued to rely on an unaccepted method of arriving at the AMD false positive rate.
- 4.108 While Ofcom acknowledged that HomeServe had been given an assurance from its call centre that the call centre was operating compliantly when in fact it was not, Ofcom considered that this compliance failure would have become apparent to HomeServe had it had an effective compliance strategy in which it monitored and assessed ongoing compliance. Ofcom stated, *"A party procuring a third party company to act for or on its behalf in the generation of calls, is expected to take reasonable steps to monitor and assess ongoing compliance by that third party with the Guidelines and the persistent misuse provisions. Acceptance of assurances that the third party is compliant without the procuring party seeking evidence that the assurances are substantiated, falls short of a practice of monitoring and assessment."*
- 4.109 Ofcom acknowledged that HomeServe had of its own volition contracted an independent body to assist its review of its dialling operations and also carried out due diligence of each of third party call centre prior to engaging them. HomeServe submitted evidence that the due diligence exercise included assessment (such as reporting, Ofcom compliance audits and independent audits) of the adequacy of the compliance arrangements at the third party call centres.
- 4.110 However Ofcom considered that HomeServe had failed to follow the Guidelines' principles and procedures (or do so effectively and promptly), or take other appropriate steps for preventing the notified contravention. 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. This was taken into account in the determination of the penalty amount.
- 4.111 Similarly, Ofcom found that npower failed to take all appropriate (and timely) steps in order to prevent its notified contravention. Ofcom did however acknowledge that npower had taken steps to bring itself into compliance.
- 4.112 TalkTalk maintained that prior to the investigation it had in place a number of steps to meet Ofcom's requirements and to prevent possible contraventions including contractual obligations imposed on third parties acting for or on its behalf. Ofcom in the present case is of the view that, had TalkTalk had better compliance strategies in place, it would have been able to identify compliance weaknesses and then been able to take steps to prevent them.

*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.*

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

4.114 In npower Ofcom accepted that senior management did not know that a contravention was occurring or would occur.

4.115 In TalkTalk there is no evidence to suggest that senior management would have been aware of the contraventions.

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

4.116 Ofcom considered that HomeServe and npower each had a sizeable business with a significant turnover<sup>183</sup>.

4.117 At the time of Ofcom’s decision, HomeServe’s turnover was £467.1m (2011) and npower’s was £3.130bn.

4.118 Likewise, in the present case, TalkTalk is deemed to be a sizeable business.

4.119 In all cases the size and turnover is a relevant consideration in the determination of the proportionality of the penalty imposed.

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

4.120 In HomeServe and npower, 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.

4.121 In the present case, Ofcom considers that TalkTalk took steps to end the contravention and bring itself into compliance with the Guidelines straightaway, in that it required McAlpine to cease using AMD technology and ended the campaign at the Teleperformance Cape Town call centre which was causing problems. However

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<sup>183</sup> Its statutory reporting accounts as at May 2011, disclosed a turnover of £467.1m and a profit of £104.8m.



TalkTalk has not indicated how it would prevent future instances of persistent misuse from occurring.

*Record-keeping*

- 4.122 In the present case, unlike both HomeServe and npower, there was a failure to keep certain records and a failure to take appropriate steps to provide a robust reasoned estimate of AMD false positives which made it impossible for Ofcom to determine whether or not one call centre had followed the Guidelines. We see this as particularly serious.

*Co-operation with Ofcom's investigation*

- 4.123 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.*"
- 4.124 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.
- 4.125 TalkTalk was punctual in its responses to Ofcom's statutory information requests and in the delivery of its representations. However, it did not initially provide all the required information in respect of one aspect of the investigation until after Ofcom made a number of requests. We also noted that whilst TalkTalk did consult with McAlpine in relation to the response to the information request, TalkTalk and McAlpine did not agree on whether an estimate of AMD false positives should have been applied to the relevant data submitted to Ofcom<sup>184</sup>.
- 4.126 Our preliminary view is that TalkTalk has not fully cooperated with our investigation and this has been taken into account in the level of penalty.

*Relevant precedents*

- 4.127 At the time a decision was taken to impose a penalty in the HomeServe case, there had been no previous cases which were determined on the basis of the current Penalty Guidelines and the current Guidelines; and following the introduction of the increased statutory maximum penalty in respect of persistent misuse.
- 4.128 Consequently, in the absence of a more relevant precedent, the TalkTalk Telecom Limited and Tiscali U.K. Limited case (the "TalkTalk General Condition 11.1 case"), was considered to be instructive, or at least more so than the pre-2011 cases. However, the TalkTalk General Condition 11.1 case was still observed to be limited in its usefulness and distinguishable in a number of respects, including primarily that it concerned a different conduct and different provisions of the Act.
- 4.129 In the present case, HomeServe and npower are considered to be more relevant precedents for the reasons set out above.

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<sup>184</sup> Annex 15 and Annex 18.

## Ofcom's conclusions on the penalty amount

4.130 Any penalty Ofcom imposes on TalkTalk 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.

4.131 In particular, we have noted that TalkTalk contravened the persistent misuse provisions during the seven week Relevant Period by:

- (a) exceeding an abandoned call rate of three percent of live calls over a 24 hour period by a substantial amount on at least four occasions;
- (b) failing to include information messages in the event of abandoned call; and
- (c) persistently making abandoned calls in circumstances where, in its use of AMD equipment, TalkTalk had failed to adhere to the Guidelines in three respects:
  - a. Failing to provide a robust reasoned estimate of AMD false positives in respect of its use of AMD equipment;
  - b. Failing to keep adequate records that demonstrate compliance with the policy and procedures outlined in paragraphs A1.30 to A1.58 of the Guidelines; and
  - c. Failing to abide by the 24 hour policy during one 24 hour period. The 24 hour policy requires that when a call has been identified by AMD equipment as being picked up by an answering machine (including AMD false positives), any repeat calls to that specific number within the same 24 hour period may only be made with the guaranteed presence of a live operator.

4.132 As regards the weighting of the factors considered, it is our view that the following factors are of particular importance in the circumstances of this case and in the consideration of an appropriate and proportionate penalty amount:

- the contraventions were serious. TalkTalk exceeded an abandoned call rate of three per cent by a substantial amount on at least four of the 24 hour periods that it dialled in at the Teleperformance Cape Town call centre. It also failed to keep adequate records or to take steps to provide an appropriately robust reasoned estimate in relation to AMD use at the McAlpine call centre. We consider this to be a very serious aspect of this case;
- the degree of harm likely to have arisen from TalkTalk's notified misuse was considerable. In particular, it made approximately 9,000 abandoned and silent calls within four days. TalkTalk has said that "the person who received the call heard nothing when they answered their phone"<sup>185</sup>. Ofcom considers that silent calls cause more serious harm than abandoned calls;
- TalkTalk took steps to end the contravention once it became aware of it;

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<sup>185</sup> Annex 14, Note prepared by TalkTalk Group dated 29 June 2011.

- TalkTalk has a previous history of contravention concerning the persistent misuse provisions;
- TalkTalk failed to take all appropriate (and timely) steps to prevent the contravention. Ofcom had alerted TalkTalk to concerns it had about it apparently generating abandoned and silent calls. TalkTalk was also made aware of the Guidelines which clarified the methodology in respect of testing the AMD false positive rate, yet it relied on an unacceptable method of arriving at the AMD false positive rate.
- TalkTalk, is a sizeable business with a significant turnover and as such there is a need to ensure that the fine is significant enough to have a deterrent effect; and
- TalkTalk did not co-operate fully with our investigation. Although for the most part it behaved in a cooperative way, it did not act as we expect in responding to our information request. It initially failed to include the live calls which were misclassified as calls to answering machines in its response to our information request and also submitted data relating to the McAlpine call centre which included an estimate of false positives where McAlpine's own stated position was that a 0 per cent estimate of AMD false positives should be applied.

4.133 However, we acknowledge that the seriousness of TalkTalk's contravention and the harm involved was mitigated by the fact that TalkTalk had taken some steps to limit the harm caused by abandoned and silent calls during the Relevant Period, for example playing an information message identifying TalkTalk for the majority of calls made on its behalf during the Relevant Period, and terminating calls after ringing for between 15 and 32 seconds (including 30 seconds at both the Teleperformance Cape Town call centre and the McAlpine call centre).

4.134 Taking account of all the circumstances of the case in the round and the factors above, we would suggest, in Ofcom's view, a penalty of £750,000 (37.5 per cent of the maximum penalty level). To impose a fine of £2 million would be the maximum amount that could be imposed, and would suggest the contravention was the most severe and damaging contravention of the persistent misuse provisions. Ofcom does not consider TalkTalk's contravention to be at this level.

**Section 5**

## Table of Annexes

Annex 1	Section 128 notification issued to TalkTalk dated 12 October 2011.
Annex 2	TalkTalk representations to the section 128 notification (the "TalkTalk Representations") dated 14 November 2011.
Annex 3	The Guidelines (the <i>Revised statement of policy, and Tackling abandoned and silent calls: Statement, October 2010</i> ).
Annex 4	Ofcom Penalty Guidelines dated 13 June 2011.
Annex 5	Letter from Ofcom to TalkTalk dated 10 May 2010.
Annex 6	Email from TalkTalk to Ofcom dated 21 May 2010.
Annex 7	Email from Ofcom to TalkTalk dated 9 August 2010.
Annex 8	Email from TalkTalk to Ofcom dated 27 August 2010.
Annex 9	Open letter to industry stakeholders dated 20 December 2010.
Annex 10	The TalkTalk Information Request dated 28 March 2011.
Annex 11	File note of Ofcom conversation between Ofcom and Dido Harding on 10 March 2011.
Annex 12	Response from TalkTalk to the TalkTalk Information Request (the "TalkTalk Response" received on 14 April 2011).
Annex 13	Note provided by TalkTalk to Ofcom received on 20 May 2011.
Annex 14	Note prepared by TalkTalk Group dated 29 June 2011.
Annex 15	Email from David Brookes, McAlpine, to Ofcom, received on 1 November 2011.
Annex 16	The First Teleperformance Representations received on 14 November 2011.
Annex 17	The First McAlpine Representations received on 14 November 2011.
Annex 18	Correspondence from McAlpine to Ofcom dated 15 November 2011.
Annex 19	Letter from David Brookes, McAlpine, to Chris Collinson, TalkTalk, dated 11 November 2011.
Annex 20	Representation letter from DXI easycall dated 10 November 2011.

Annex 21	The First McAlpine Information Request dated 16 March 2012.
Annex 22	McAlpine Response to First Information Request dated 19 March 2012.
Annex 23	The Second McAlpine Information Request dated 14 May 2012.
Annex 24	McAlpine Response to Second Information Request dated 21 May 2012.
Annex 25	<p>Additional documentation provided with McAlpine Response to Second Information Request dated 21 May 2012:</p> <ul style="list-style-type: none"> <li>(a) Network Level Binary Matching (Presentation)</li> <li>(b) Network Level Binary Matching (Description)</li> <li>(c) Network Level Binary Matching (NLBM) system</li> <li>(d) Network Level Binary Matching (NLBM) Instruction Manual</li> <li>(e) Network Level Binary Matching for Answer Machine Detection Design Specification</li> <li>(f) Network Level Binary Matching (NLBM) Data Maintenance and Test Pages Design Specification</li> <li>(g) Network Level Binary Matching Specification</li> </ul>
Annex 26	The Teleperformance Information Request dated 18 October 2012.
Annex 27	Teleperformance Response to Teleperformance Information Request received on 26 October 2012.
Annex 28	The Third McAlpine Information Request dated 18 October 2012.
Annex 29	McAlpine Response to Third Information Request dated 26 October 2012.
Annex 30	McAlpine Marketing (McAlpine), Chesterfield, <i>Dialler Operations Compliance Audit</i> , dated 10/11 March 2011.
Annex 31	The Second McAlpine Representations received on 25 January 2013.
Annex 32	The Second Teleperformance Representations received on 28 January 2013.
Annex 33	Provisional Notification issued to TalkTalk on 5 April 2013.
Annex 34	Representations to Provisional Notification made by TalkTalk on 10 April 2013 (April 2013 Representations).