



# Notice of Imposition of a Penalty under Section 130 of the Communications Act 2003

Issued to Equidebt Limited by  
the Office of Communications ('Ofcom')

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and data have been redacted.

Redactions are indicated by [§<]

Issue date: 16 December 2008

**Imposition of a penalty under section 130 of the Communications Act**

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# Notice of Imposition of a Penalty under Section 130 of the Communications Act 2003

## Background

1. Section 130 of the Communications Act 2003 (the 'Act') applies where a person has been given a notification under section 128 of the Act; has been given an opportunity to make representations; and the period allowed for making representations has expired.
2. 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.
3. A notification was issued to Equidebt Limited ("Equidebt"), company number 02686796 and whose registered address is Equity House, Ettington Road, Wellesbourne, Warwickshire, CV35 9GA, under section 128 of the Act, on 15 October 2008 (the 'section 128 notification').<sup>1</sup> Equidebt was given until 5pm on 17 November 2008 to make representations on the matters notified therein.
4. The section 128 notification stated that Ofcom may issue a further notification to Equidebt under section 129 of the Act if, by 5pm on 17 November 2008, the notified persistent misuse was not brought to an end and not repeated. Additionally, the section 128 notification stated that Ofcom may also impose a penalty on Equidebt under section 130 of the Act in respect of the persistent misuse notified by Ofcom.
5. Equidebt made representations to Ofcom on 17 November 2008 (the 'representations') in relation to the matters notified. Ofcom has considered the representations and sets out its determination below.

## Determination made by Ofcom

6. For the reasons set out in the section 128 notification, and having considered the evidence provided by Equidebt in the representations, Ofcom hereby determines that it is satisfied that, pursuant to section 130(2) of the Act, Equidebt has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; specifically by using an automated calling system to make and repeat, on a sufficient number of occasions so as to represent a pattern of behaviour or practice, an excessive number of abandoned calls including silent calls.
7. In making this determination, Ofcom has also had regard to the principles set out in its Statement of policy on the persistent misuse of an electronic communications network or service, published on 1 March 2006 in accordance with section 131 of the Act (the 'Persistent Misuse Guidelines').<sup>2</sup>

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<sup>1</sup> The section 128 notification can be found at [http://www.ofcom.org.uk/bulletins/comp\\_bull\\_index/comp\\_bull\\_ocases/open\\_all/cw\\_905/](http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_905/)

<sup>2</sup> Ofcom published a 'Revised statement of policy on the persistent misuse of an electronic communications network or service' on 10 September 2008 (the 'Revised Guidelines'). Equidebt's

8. Having had regard to our statutory duties and regulatory principles 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.
9. Specifically, having regard to sections 130(4) and (5) of the Act, the Penalty Guidelines published on 29 December 2003 under section 392 of the Act (the 'Penalty Guidelines')<sup>3</sup> and the Persistent Misuse Guidelines, Ofcom has decided to impose a penalty of £36,000 on Equidebt in relation to Equidebt's persistent misuse of an electronic communications network or service in one or more of the respects notified in the section 128 notification.
10. The reasons for Ofcom's determination are set out in the explanatory statement attached to this notice.

### Action required by Equidebt Limited

11. Equidebt has until **5pm on 16 January 2009** to pay to Ofcom thirty six thousand pounds (£36,000).

### Interpretation

12. Words or expressions used in this notification and/or the explanatory statement have the same meaning as in the Act and as otherwise defined in the section 128 notification.

**Neil Buckley**

**Director of Investigations**

**16 December 2008**

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conduct which has been the subject of Ofcom's investigation took place between 1 October 2006 and 31 March 2007. Accordingly Ofcom has considered this conduct in the context of the Persistent Misuse Guidelines, which were in place during this time, rather than the Revised Guidelines.

<sup>3</sup> <http://www.ofcom.org.uk/about/accoun/pg/penguid.pdf>

# Explanatory Statement

## Section 1

# Summary and background

## Ofcom's Decision

- 1.1 In order to address the problem of abandoned<sup>4</sup> and silent<sup>5</sup> calls in the context of section 128 of the Act, Ofcom opened an own-initiative programme of enforcement on 22 June 2006. Specifically, this programme investigated compliance with the principles set out in the Persistent Misuse Guidelines by organisations using an Automated Calling System ('ACS').<sup>6</sup>
- 1.2 As part of this investigation, Ofcom requested information from Equidebt on 19 April 2007 (the 'information request'). Equidebt responded to the information request on 24 April 2007.
- 1.3 Following its investigation, Ofcom concluded that it had reasonable grounds for believing that Equidebt persistently misused an electronic communications network or service and issued Equidebt with the section 128 notification on 15 October 2008.
- 1.4 The section 128 notification stated that Ofcom may issue a further notification to Equidebt under section 129 of the Act if, by 17 November 2008, the notified persistent misuse was not brought to an end and not repeated. Additionally, the section 128 notification stated that Ofcom may also impose a penalty on Equidebt under section 130 of the Act in respect of the persistent misuse notified by Ofcom.
- 1.5 Equidebt also had until 5pm on 17 November 2008 to make representations on the matters contained in the section 128 notification. That period has now expired. Equidebt made representations on 17 November 2008 (the 'representations').
- 1.6 For the reasons set out in the section 128 notification, and having considered the evidence provided by Equidebt in the representations, Ofcom determines that it is satisfied that, pursuant to section 130(2) of the Act, Equidebt has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; specifically by using an ACS to make and repeat, on a sufficient number of occasions so as to represent a pattern of behaviour or practice, an excessive number of abandoned calls including silent calls.
- 1.7 Having had regard to our statutory duties and regulatory principles, Ofcom has decided to impose a penalty under section 130 of the Act, taking into consideration the nature of the persistent misuse involved in this case.

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<sup>4</sup> A call usually terminated by an ACS after the called person answers it.

<sup>5</sup> A type of abandoned call where the called person hears nothing on answering the phone and has no means of establishing whether anyone is at the other end (see paragraph 6.11 of the Persistent Misuse Guidelines).

<sup>6</sup> Ofcom published a 'Revised statement of policy on the persistent misuse of an electronic communications network or service' on 10 September 2008 (the 'Revised Guidelines'). Equidebt's conduct which has been the subject of Ofcom's investigation took place between 1 October 2006 and 31 March 2007. Accordingly, Ofcom has considered this conduct in the context of the Persistent Misuse Guidelines, which were in place during this time, rather than the Revised Guidelines.

## **Imposition of a penalty under section 130 of the Communications Act**

- 1.8 Specifically having regard to sections 130(4) and (5) of the Act, the Penalty Guidelines and the Persistent Misuse Guidelines, Ofcom has decided to impose a penalty of thirty six thousand pounds (£36,000) on Equidebt in relation to Equidebt's persistent misuse of an electronic communications network or service in one or more of the respects notified in the section 128 notification.

## Section 2

# Ofcom's decision to impose a penalty

2.1 Section 130 of the Act applies in circumstances where:

“... ”

- (a) a person ("the notified misuser") has been given a notification under section 128;
- (b) OFCOM have allowed the notified misuser an opportunity of making representations about the matters notified; and
- (c) the period allowed for the making of the representations has expired.”<sup>1</sup>

2.2 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.”

2.3 Ofcom issued the section 128 notification to Equidebt on 15 October 2008 after concluding that it had reasonable grounds for believing that Equidebt persistently misused an electronic communications network or service. Equidebt was allowed the period until 17 November 2008 to make representations about the matters notified, the period which has now expired, and Equidebt responded on 17 November 2008. Ofcom is therefore satisfied that section 130 of the Act applies in relation to its assessment of Equidebt's conduct as each of the criteria in section 130(1) have been met.

2.4 For the reasons set out in the section 128 notification, and having considered the evidence provided by Equidebt in its representations, Ofcom hereby determines that it is satisfied that, pursuant to section 130(2) of the Act, Equidebt has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; specifically by using an ACS to make and repeat, on a sufficient number of occasions so as to represent a pattern of behaviour or practice, an excessive number of abandoned calls including silent calls.

2.5 Ofcom therefore considers that it may impose a penalty on Equidebt pursuant to section 130 of the Act.

2.6 Having considered the evidence gathered in its investigation as set out in the section 128 notification, having considered Equidebt's representations and having had regard to our statutory duties and regulatory principles, Ofcom has decided to impose a penalty in this case under section 130 of the Act. This decision takes into consideration the nature of the persistent misuse involved in this case; that is the use of ACS to make and repeat, on a sufficient number of occasions so as to represent a pattern of behaviour or practice, an excessive number of abandoned calls including silent calls. The Persistent Misuse Guidelines make it clear that it is undeniable that

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



even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety.<sup>2</sup>

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<sup>2</sup> Paragraph 6.15.

## Section 3

# Penalty Assessment

## Legal Framework

3.1 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. Section 130 states:

“... ”

- (4) The amount of a penalty imposed is to be such amount not exceeding £50,000 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.”<sup>3</sup>

3.2 Ofcom has also published the Penalty Guidelines which set out the factors it will generally take into consideration in determining the level of the penalty. These set out a series of both general and specific criteria which may be considered in arriving at a starting point for penalties and factors which tend to lead to an increase and/or decrease in the level of any penalty. In addition, factors relevant to an assessment of penalties are also discussed in the Persistent Misuse Guidelines. These include the degree of persistency; the number of people exposed to the misuse; and the seriousness of the misuse.

3.3 Ofcom sets out below its application of the issues relevant to the factors listed in paragraphs 3.1 and 3.2 above.

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<sup>3</sup> The maximum level of penalty in section 130(4) of the Act was increased from £5,000 to £50,000 on 6 April 2006, as a result of an order made by the Secretary of State pursuant to section 130(9) of the Act – see *The Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2006*, SI 2006/1032.

## Assessment

### Calculation of a starting point

3.4 The general criteria set out in the Penalty Guidelines state that in general, when setting a starting figure for a penalty, Ofcom is likely first to consider the following factors:

- the seriousness of the contravention;
- any precedents set by previous cases; and
- the need to ensure that the threat of penalties will act as a sufficient incentive to comply.

3.5 Ofcom considers that Equidebt's persistent misuse of an electronic communications network or electronic communications service, specifically by using ACS to make and repeat, on a sufficient number of occasions so as to represent a pattern of behaviour or practice, an excessive number of abandoned calls including silent calls, is a serious contravention of section 128 of the Act. This is for the following reasons.

- In determining the seriousness of the contravention by Equidebt, Ofcom has been guided by the degree of harm or likely harm to end-users which results from its misuse. In the case of abandoned calls, Ofcom considers that harm or likely harm is linked to the number of such calls which were made. In this case, Equidebt's submissions to Ofcom showed that the total number of abandoned calls it had made during the period under investigation, that is from 1 October 2006 to 31 March 2007 (the 'Relevant Period'), was [§<]. In this context, Ofcom notes that the Persistent Misuse Guidelines state that even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety.<sup>4</sup>
- In addition, as set out in the Persistent Misuse Guidelines, in deciding whether to take enforcement action in relation to section 128 of the Act, Ofcom will take account of certain steps taken by call centre operators to reduce the degree of concern that silent or abandoned calls cause.<sup>5</sup> Failure to take such steps will be taken into account in assessing the seriousness of an act of misuse and in relation to those steps in this case, Ofcom notes the following:
  - *Excessive number of abandoned calls* - The abandoned call rate shall be no more than 3% of live calls on each individual campaign over any 24 hour period. In this case, and as set out in the section 128 notification, on an aggregated basis Equidebt exceeded the 3% abandoned call rate on 105 of the 150 days on which it made calls during the Relevant Period. That is 70% of the days set out in Annex 2 of the section 128 notification.
  - *Abandoned calls which were silent* - A brief recorded information message shall be played within two seconds of the call being answered. In this case and as set out in the section 128 notification, a significant proportion ([§<]) of the total abandoned calls made by Equidebt were a type of abandoned call which are "silent calls", that is calls which the Persistent Misuse Guidelines

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<sup>4</sup> Paragraph 6.15.

<sup>5</sup> Paragraph 6.16.

describe as “almost certain to cause inconvenience” and “very likely to cause annoyance.”<sup>6</sup>

- 3.6 In light of the factors which are set out above, Ofcom considers that Equidebt’s misuse constitutes a serious contravention of the persistent misuse provisions of the Act.
- 3.7 In terms of precedents set by previous cases, Ofcom has imposed penalties for persistent misuse of an electronic communications network or service in relation to the making of abandoned calls in seven previous cases.<sup>7</sup> In those cases, the starting point of the penalties ranged from £5,000 to £50,000. Ofcom considers that whilst these precedents are useful to some degree, it is not appropriate to attach too much weight to those amounts as the starting point in each case is assessed against the circumstances of that particular case in the round.
- 3.8 In addition, Equidebt’s contravention in part occurred after four companies were fined in January 2007. Ofcom therefore considers that there is and remains a need to ensure that the threat of penalties will act as a sufficient incentive to comply with section 128 of the Act and the Revised Guidelines across industry and for Equidebt specifically.
- 3.9 In light of all of these considerations and the facts of this case, Ofcom considers that it is appropriate and proportionate to set the penalty starting point at £36,000. This level reflects the seriousness of Equidebt’s contravention; it is also appropriate and proportionate in terms of previous cases and the continued requirement to create incentives to comply.

### **Application of specific criteria, aggravating and mitigating factors**

- 3.10 The Penalty Guidelines state that certain specific criteria may be relevant in adjusting the starting figure of the penalty, depending on the type of contravention.<sup>8</sup> These include, but are not limited to:
- a) Any gain (financial or otherwise) made by the regulated body in breach (or any connected body);
  - b) The degree of harm caused, or increased cost incurred by consumers or other market participants;
  - c) Size and turnover of the regulated body;
  - d) The extent to which any contravention was caused by a third party, or any relevant circumstances beyond the control of the regulated body;
  - e) The duration of the contravention; and

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<sup>6</sup> Paragraph 6.11.

<sup>7</sup> In January 2007 Ofcom imposed penalties on Bracken Bay Kitchens Ltd, Space Kitchens and Bedrooms Ltd, Toucan Residential Ltd (formerly IDT Direct Ltd) and Carphone Warehouse plc; in March 2008 Ofcom imposed penalties on Abbey National plc and Complete Credit Management Ltd; and in September 2008 Ofcom imposed a penalty on Barclays Bank plc trading as Barclaycard. Each of these penalties was issued for contravening section 128 of Act by making an excessive number of abandoned calls. More information is available on the Competition and Consumer Enforcement Bulletin, which can be found at:

[http://www.ofcom.org.uk/bulletins/comp\\_bull\\_index/comp\\_bull\\_ocases/open\\_all/cw\\_905/](http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_905/)

<sup>8</sup> See paragraph 5 of the Penalty Guidelines.

- f) Whether a penalty in respect of the same conduct has already been imposed by Ofcom or another body.
- 3.11 Ofcom has no evidence to suggest that the calls made by Equidebt resulted in any gain (financial or otherwise) to Equidebt or any connected body. In light of this, no adjustment is made to the starting figure in relation to paragraph (a).<sup>9</sup>
- 3.12 In relation to paragraph (b), Ofcom has already considered the degree of harm in respect of Equidebt's contravention, as set out at paragraph 3.5 above. In light of this, no adjustment is made to the starting figure in relation to the degree of consumer harm. Ofcom also has no evidence of increased cost incurred by consumers or other market participants due to Equidebt's contravention. Ofcom does not consider any adjustment to the starting point is necessary in relation to this factor.
- 3.13 Turning to paragraph (c), Ofcom will consider whether the starting point is appropriate and proportionate for the misuse committed in light of the size and turnover of a company. According to the latest available financial information provided by Equidebt in its representations,<sup>10</sup> Equidebt's turnover for the year ending 30 April 2008 was £19.5 million. The level of penalty should be viewed in this context. Equidebt further stated that it made a pre-tax loss of £5.4 million in the same period, and asked that Ofcom take into account its "ability to pay". However the criterion refers specifically to size and turnover, rather than the ability of the misuser to pay the penalty. Therefore Ofcom does not consider that it is appropriate or proportionate to adjust the starting point under this criterion.
- 3.14 Paragraph (d) does not result in any adjustment to the starting point because there is no evidence of any third party involvement in this case.
- 3.15 In considering the issue of duration as set out in paragraph (e), Ofcom has already taken into account the fact that Equidebt's contravention continued even after Ofcom fined four companies for persistent misuse in January 2007.
- 3.16 Finally, paragraph (f) does not apply since neither Ofcom nor any other body has already imposed a penalty for the same conduct on Equidebt.
- 3.17 Following consideration of the specific criteria in the manner set out above, Ofcom considers that it would be appropriate and proportionate to make no adjustments to the starting point, and that it should remain at £36,000.
- 3.18 The Penalty Guidelines also set out factors that might lead to an increase in the level of any penalty which include:
- a) repeated contraventions;
  - b) continuation of the contravention after either becoming aware of the contravention or being notified of a contravention by Ofcom;
  - c) senior management knowledge of the contravention; and
  - d) the absence, ineffectiveness or repeated failure of internal procedures intended to prevent contravention.

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<sup>9</sup> Ofcom does note however that the use of ACS offers the possibility of initiating calls without the need for individual numbers to be dialled in turn and that this will often be for financial reasons.

<sup>10</sup> Equidebt Holdings Limited Director's report and consolidated financial statements 30 April 2008.

- 3.19 This is the first time that Ofcom has taken action against Equidebt in relation to its misuse of an electronic communications network or service so this is not a repeated contravention. Ofcom has not, therefore, increased the penalty on account of this factor.
- 3.20 Ofcom notified Equidebt on 15 October 2008 that it had reasonable grounds for believing that Equidebt persistently misused an electronic communications network or service, contrary to section 128 of the Act, specifically by using ACS to make and repeat, on a sufficient number of occasions so as to represent a pattern of behaviour or practice, an excessive number of abandoned calls including silent calls. Equidebt was therefore made aware at this point that Ofcom considered Equidebt to have contravened section 128 of the Act. Ofcom has no evidence at this stage that Equidebt has continued its contravention after 15 October 2008.
- 3.21 However, Ofcom considers that Equidebt failed to play an information message following each of its abandoned calls, and therefore made silent calls, after *becoming aware* that this constituted a contravention of the Persistent Misuse Guidelines. This is because:
- Ofcom understands that on 1 November 2006, Equidebt contacted the Information Commissioner's Office (the 'ICO') in order to determine whether it should play an information message in the event of an abandoned call.<sup>11</sup>
  - Ofcom therefore considers that Equidebt was aware that this factor is within the Persistent Misuse Guidelines from, at the latest, that date. It therefore follows that after 1 November 2006 and until 6 July 2007,<sup>12</sup> Equidebt knowingly contravened the Persistent Misuse Guidelines by failing to play an information message on some of its abandoned calls.
- 3.22 In light of this, we consider that it would be appropriate and proportionate to increase the penalty.
- 3.23 There is no evidence to suggest that Equidebt's senior management was aware that Equidebt was in contravention of section 128 of the Act during the Relevant Period. For this reason Ofcom has not increased the level of the penalty in relation to this factor.
- 3.24 However Ofcom is of the view that there was an absence of, ineffective or repeated failures of internal procedures to prevent contravention of section 128 during the Relevant Period. The representations illustrate that the absence of appropriate procedures was a particular issue at [3<] ([3<]). Examples given in the representations include:
- "agents failing to "log out" properly so that calls were routed to temporarily absent agents"; and

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<sup>11</sup> As set out in the section 128 notification, Equidebt did not implement an information message at one of its call centres (and hence made silent calls) due to data protection concerns. In particular it feared that the nature of its name may cause particular difficulties for debtors, in circumstances where a third party was the unintended recipient of an information message. The example given in the representations was that of a wife discovering a husband's debt by way of a message including the word 'Equidebt'. For this reason it sought advice from the ICO.

<sup>12</sup> Ofcom understands that the ICO responded to Equidebt on 15 March 2007, and Equidebt acted to implement a recorded message on all abandoned calls from 6 July 2007.

- “once they had logged out, then having insufficient agents to take connected calls, resulting in calls being abandoned.”<sup>13</sup>
- 3.25 However, the representations also make clear that during the Relevant Period Equidebt was in the process of identifying the issues which caused the contravention at [3<], and further took steps “without any Ofcom intervention” to put in place procedures to deal with them.<sup>14</sup> Equidebt provided evidence of these steps in the representations. Therefore although we consider that it is appropriate and proportionate to increase the penalty in relation to this factor, we take into account the evidence provided in the representations in determining the level of the increase.
- 3.26 Taking into account each of these factors, Ofcom considers that it is appropriate and proportionate to increase the level of penalty in relation to two factors, namely the continuation of the contravention after either becoming aware of it, and the absence ineffectiveness or repeated failure of internal procedures intended to prevent contravention. Therefore following consideration of these factors, Ofcom considers that the level of the penalty should be increased to £40,000.
- 3.27 Ofcom has also considered the factors set out in the Penalty Guidelines which tend to lead to a decrease in the level of any penalty. These include:
- a) the extent to which the body has taken steps to identify and mitigate external factors that might result in a contravention;
  - b) the extent and timeliness of any steps taken to end the contravention and remedy the consequences of the contravention; and
  - c) co-operation with Ofcom’s investigation.
- 3.28 In relation to paragraph (a), Ofcom is of the view that in order for this criterion to be met, a company must have independently and of its own volition taken such steps to identify and mitigate a potential contravention. In this case, it appears that Equidebt identified a potential contravention of the Persistent Misuse Guidelines, namely its failure to play an information message on some of its abandoned calls as set out at paragraph 3.21.
- 3.29 In this regard Ofcom notes Equidebt’s particular concerns regarding data protection, which are reiterated in the representations. Ofcom accepts that by seeking to obtain the ICO’s view on playing an information message, and doing so independently and of its own volition, Equidebt was trying to take steps to mitigate this aspect of its contravention, at least up to the point at which the ICO responded on 15 March 2007. Ofcom therefore considers that it is appropriate and proportionate to decrease the penalty in light of this factor.
- 3.30 In its representations, Equidebt has provided evidence of steps taken to end its contravention and to ensure ongoing compliance. The representations set out that Equidebt has taken steps which apply to the structure, technology, personnel, processes and best practice of the company. These can be summarised as follows:

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<sup>13</sup> Paragraph 27 of the representations

<sup>14</sup> The representations included a copy of an internal email sent on 3 March 2007 which indicated that one of the company’s diallers had been set at a 4% abandoned call rate, in breach of the Persistent Misuse Guidelines. A further email on 6 March 2007 confirmed that the dialler had been adjusted to ensure a maximum 3% abandoned call rate per 24 hour period. This correspondence occurred prior to Ofcom making Equidebt aware of its investigation by requesting data in April 2007.

### **Structure**

- [3<]. The result of this is that all call centre operations, and therefore outgoing calls, are now run from one site, to ensure closer and more direct management supervision;
- Equidebt has recruited more call centre agents to increase the likelihood of an agent being available to answer each connected call; and
- Equidebt has consolidated its call teams into one 'collections engine room'. As a result there is a greater number of agents available to answer connected calls.

### **Technology**

- A new dialler has been purchased which has improved Equidebt's ability to manage outbound calls and monitor any abandoned calls.

### **Personnel**

- A compliance manager and dialler manager have been recruited to ensure that the company remains focussed on monitoring and ensuring compliance.

### **Procedural**

- Process documents have been updated to ensure outbound calling remains compliant with the relevant factors set out in the Persistent Misuse Guidelines;
- Regular compliance reports are prepared and presented to senior management;
- Agent training has been improved so agents are better aware of the dialler operations and steps which can be taken to avoid abandoned calls; and
- A recorded information message is now left on all abandoned calls.

### **Ongoing best practice**

- Equidebt continues to ensure that it complies with all the relevant factors in the Persistent Misuse Guidelines; and
- Equidebt has chosen not to rely on the use of answer machine detection ('AMD') technology in its outbound calling operations.

3.31 Although Ofcom is satisfied that the extent and timeliness of these actions should be sufficient to end the contravention as stated in the section 128 notification and to ensure that it is not repeated, Ofcom considers that these steps should have been taken by Equidebt in any event in order to comply with section 128 of the Act and the Persistent Misuse Guidelines. Ofcom does not consider that it is appropriate or proportionate to decrease the penalty in light of compliance steps that Equidebt ought to have taken in any event.

3.32 The section 128 notification also stated that Equidebt should, among other things, remedy the consequences of its notified misuse. Equidebt makes reference in its representations to its "formalised complaints procedure", and notes that allowance is made for the payment of financial compensation in the event of a complaint. Equidebt notes that, during the Relevant Period, a goodwill gesture of £50.00 was made to one



individual as “compensation for any distress caused by the receipt of an incorrect “arrears letter”, “arrears calls” and any “silent calls””.<sup>15</sup> The representations make clear that if the company were to receive any fresh complaint regarding silent or abandoned calls which it made during the Relevant Period, it would be treated in the same way as a more recent complaint. Ofcom therefore considers that Equidebt’s policy in relation to compensation goes some way to remedying the consequences of its misuse.

- 3.33 However, as set out above, [redacted] of the abandoned calls made by Equidebt during the Relevant Period were silent calls. Ofcom will assess each case on its merits; and in this case, given that Equidebt has made silent as well as abandoned calls, Ofcom considers that it may be particularly difficult to remedy the consequences of the misuse. Ofcom therefore considers that although it is appropriate and proportionate to decrease the penalty on account of this factor, account must be taken of the fact that Equidebt made silent calls in determining the level of the decrease.
- 3.34 Equidebt co-operated with the investigation and responded adequately to statutory information requests. Equidebt additionally made representations in relation to the section 128 notification. However, we do not consider that it is appropriate or proportionate to reduce the penalty in light of such behaviour, which was not beyond that which would be expected.
- 3.35 Following consideration of factors which tend towards a decrease, we consider that the penalty level should be decreased in light of two factors above, namely steps taken to identify and mitigate the contravention, and steps taken to remedy the consequences of the contravention. Ofcom therefore considers that it is appropriate and proportionate to decrease the penalty level to £36,000.
- 3.36 Section 9 of the Persistent Misuse Guidelines contains discussion of penalties under section 130 of the Act. Specifically, paragraph 9.5 sets out three factors that Ofcom will take into account in setting the appropriate level of penalty in persistent misuse cases. The three factors are:
- the degree of persistency;
  - the number of people exposed to the misuse; and
  - the seriousness of the misuse.
- 3.37 The Persistent Misuse Guidelines further make clear that, other things being equal, an act of misuse that is repeated one thousand times will merit a higher penalty than an act repeated ten times.<sup>16</sup> Similarly, the greater the number of people affected by the misuse, the higher the level of penalty that it is appropriate to impose.<sup>17</sup>
- 3.38 Ofcom does not believe that additional consideration of these factors warrants any further adjustment to the penalty, as each of them have already been taken into account in paragraph 3.5 above.

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<sup>15</sup> Redacted compensation letter set out at Appendix 8 of the representations.

<sup>16</sup> See paragraph 9.6 of the Guidelines.

<sup>17</sup> See paragraph 9.7 of the Guidelines.

3.39 The Persistent Misuse Guidelines also set out some objective elements that Ofcom will take into consideration when assessing the seriousness of persistent misuse.<sup>18</sup> Specifically:

- Is it the misuser's first offence or do they have a previous history of persistent misuse? As noted above at paragraph 3.19, Equidebt has no history of previous persistent misuse.
- What was the intention of the misuser – was the misuse accidental or a scam motivated by greed? Ofcom has no evidence that the misuse was a scam motivated by greed. As set out above Ofcom has no evidence that Equidebt's senior management was aware that Equidebt was in contravention during the relevant period. In addition Equidebt stated in its representations that “[t]here is no benefit to Equidebt in ‘dropping calls’” and that “Equidebt are as keen (if not keener) than any organisation to ensure that calls are not abandoned.”<sup>19</sup>
- Has the misuser done everything required of him by the [enforcement] notification? As set out above, Ofcom considers that Equidebt has acted to end the contravention detailed in the section 128 notification and to remedy the consequences of that contravention.
- Has good faith in making amends been demonstrated? Paragraphs 3.30 to 3.32 explain how Ofcom has taken into account the actions taken by Equidebt to end the contravention and to remedy the consequences of its contravention. These actions appear to demonstrate good faith by Equidebt.
- How great is the damage/harm done? Ofcom has taken into account the number of abandoned calls made during the Relevant Period and considered the level of consumer harm in light of this in determining the seriousness of the case.
- Where does the misuse fall on the spectrum of distress that extends from inconvenience through irritation to anxiety? Ofcom has taken the spectrum of distress of the calls made in this case into account in assessing seriousness. As stated in paragraph 3.5, Ofcom considers that the misuse is serious in light of the number of abandoned calls made, the extent to which the abandoned call rate exceeded 3% during the Relevant Period, and the fact that a proportion of the abandoned calls made were silent calls.

3.40 Ofcom therefore considers that no adjustment to the penalty level is needed in light of the factors set out in the Persistent Misuse Guidelines. The penalty therefore remains at £36,000.

### **Final amount of penalty**

3.41 Having taken into account sections 130(4) and 130(5) of the Act, including the representations, the Penalty Guidelines and the Persistent Misuse Guidelines, and thereby taking into account all the relevant circumstances as required by paragraph 3 of the Penalty Guidelines, Ofcom concludes that it is appropriate and proportionate to impose a penalty of £36,000 on Equidebt in relation to its contravention of section 128 of the Act.

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<sup>18</sup> See paragraphs 9.8, 9.9 and 9.10 of the Guidelines.

<sup>19</sup> Paragraph 14 of the representations.

## Conclusion

- 3.42 Ofcom has concluded that the criteria in section 130 of the Act have been met and that it may impose a penalty on Equidebt in relation to its contravention of section 128 of the Act.
- 3.43 Having taken into account all the relevant circumstances, Ofcom has decided that it is appropriate and proportionate to impose on Equidebt a penalty of £36,000 in relation to Equidebt's contravention of section 128 of the Act.
- 3.44 Ofcom considers that it is reasonable to require that this penalty be paid by **5pm** on **16 January 2009**.