



Notification to HomeServe PLC of a penalty under Section 130 of the Communications Act 2003

Notification served on HomeServe PLC by the
Office of Communications (“Ofcom”)

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

Subject of this Notification

1. This Notification is addressed to HomeServe plc, trading as HomeServe (“HomeServe”), registered company number 02648297 and whose registered address is Cable Drive, Walsall, WS2 7BN.
2. It notifies HomeServe of the imposition by the Office of Communications (“Ofcom”) of the following penalty under section 130 of the Communications Act 2003 (the “Act”):
 - i) A penalty of £750,000.
 - ii) Ofcom imposes this penalty on HomeServe, 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 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.
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 6 July 2011 Ofcom issued to HomeServe, 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, HomeServe 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 HomeServe had an opportunity of making representations about the matters notified in the section 128 notification. The deadline for HomeServe’s representations was 10 August 2011. Ofcom received written representations from HomeServe on 8 August 2011 (the “August 2011 Representations”) in relation to the matters notified.
7. The section 128 notification stated that Ofcom may issue a further notification to HomeServe under section 129 of the Act if, by 5pm on 10 August 2011, Ofcom is satisfied that HomeServe has:
 - in one or more of the notified respects, persistently misused an electronic communications network or electronic communications services;

- has not, since the giving of the notification, taken all such steps as Ofcom considers appropriate for securing that the misuse is brought to an end and is not repeated; and
 - has not, since the giving of the notification, taken all such steps as Ofcom considers appropriate for remedying the consequences of the notified misuse.
8. Additionally, the section 128 notification stated that Ofcom may also impose a penalty on HomeServe under section 130 of the Act, if HomeServe has, in one or more of the ways set out in that notification, persistently misused a network or services.
 9. Ofcom considered the August 2011 Representations. On 26 January 2012 Ofcom served on HomeServe 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 HomeServe a penalty of £800,000 under that section in respect of HomeServe's notified contravention of the persistent misuse provisions of the Act between 1 February and 21 March 2011.
 10. In making the provisional determination, Ofcom had regard to: the August 2011 Representations made by HomeServe; the steps taken by HomeServe for securing that its persistent misuse was brought to an end and not repeated; the steps taken for remedying the consequences of the notified misuse; the principles set out in Ofcom's Guidelines¹; and the penalty guidelines published on 13 June 2011² under section 392 of the Act (the "Penalty Guidelines").
 11. The reasons for Ofcom's provisional determination were set out in the Explanatory Statement accompanying the Provisional Notification.
 12. The Provisional Notification gave HomeServe until 23 February 2012 to make written representations to Ofcom about the matters set out in the accompanying Explanatory Statement. It also gave HomeServe the opportunity to make oral representations to Ofcom in relation to these matters. On 23 February 2012, HomeServe submitted its written representations to Ofcom (the "February 2012 Representations"). On 2 March 2012 HomeServe informed Ofcom that it did not wish to make oral representations.

Sections 128, 129, 130 and 131 of the Act

13. 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.
14. 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 has persistently misused an electronic communications network or an electronic communications service; and they have not taken all such steps as Ofcom

¹ The 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 (<http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>). For ease of reference, both these documents are collectively referred to in this notification as the "Guidelines". The Guidelines follow previous statements in 2006 and 2008 and were under consultation between 1 June 2010 and 27 July 2010

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

² <http://www.ofcom.org.uk/files/2010/06/penquid.pdf>

consider appropriate for securing that its misuse is brought to an end and not repeated; and has not remedied the consequences of the notified misuse. Compliance with an enforcement notice under section 129 is enforceable in civil proceedings by Ofcom.

15. Section 130 of the Act applies where-
 - a) a person (“the notified misuser”) has been given a notification under section 128;
 - b) Ofcom have allowed the notified misuser an opportunity of making representations about the matters notified; and
 - c) the period allowed for the making of the representations has expired.
16. 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.
17. Section 130 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.
18. 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) that the misuse is brought to an end and not repeated; and
 - c) any steps taken by him for remedying the consequences of the notified misuse.
19. 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).
20. 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 10).

Determination made by Ofcom

21. Having taken account of the available evidence in this case, HomeServe’s representations, the steps taken by it for securing that its misuse is brought to an end and not repeated and for remedying the consequences of the notified misuse, the Guidelines, and our Penalty Guidelines, Ofcom has decided to impose on HomeServe a penalty under section 130 of the Act.
22. This penalty is imposed in respect of HomeServe’s persistent misuse of an electronic communications network or electronic communications service from the period 1 February to 21 March 2011.
23. The penalty amount to be imposed is £750,000. HomeServe must pay the penalty imposed on it to Ofcom no later than 30 days after the giving of this Notification.

24. The reasons for Ofcom's decision and determination are set out in the following Explanatory Statement.

Interpretation

25. 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, Consumer Group) for and on behalf of himself and Neil Buckley (Director of Investigations) as decision makers for Ofcom

18 April 2012

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 HomeServe plc ("HomeServe"), under section 130 of the Communications Act 2003 (the "Act"). It sets out Ofcom's decision that such a penalty is to be imposed on HomeServe and our determination of what that penalty will be.
- 1.2 The issue of this Notification follows Ofcom's:
- a) investigation into HomeServe'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 guidelines³;
 - b) determination that there are reasonable grounds for believing that, during the Relevant Period, HomeServe persistently misused an electronic communications network or electronic communications service;
 - c) service on HomeServe on 6 July 2011 of a notification under section 128 of the Act (the "section 128 notification");
 - d) subsequent consideration of representations made by HomeServe on 8 August 2011 (the "August 2011 Representations"), steps taken for securing the notified misuse is brought to an end and not repeated, and steps taken by HomeServe for remedying the consequences of the misuse notified in the section 128 notification;
 - e) service on HomeServe on 26 January 2012 of a provisional notification of a possible penalty under section 130 of the Act (the "Provisional Notification"),⁴ setting out, amongst other things, Ofcom's preliminary view:
 - i) that we should impose on HomeServe a penalty in respect of its persistent misuse of an electronic communications network or service between 1 February and 21 March 2011;
 - ii) that penalty should be £800,000; and
 - f) HomeServe's written representations of 23 February 2012, in respect to the Provisional Notification (the "February 2012 Representations").⁵

³ 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 section 128 to 130 of the Act. The most recent statement is the *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*. 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".

⁴ Annex 14, Provisional Notification.

⁵ Annex 15, February 2012 Representations.

- 1.3 Ofcom's decision is that a financial penalty be imposed on HomeServe 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.
- 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 HomeServe;
 - b) steps taken by HomeServe for securing that its misuse is brought to an end and is not repeated;
 - c) steps taken by HomeServe for remedying the consequences of the notified misuse;
 - d) the Guidelines; 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").⁶
- 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:
- i) HomeServe 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 on 42 separate occasions during the relevant period; and
 - where a call has been identified by Answer Machine Detection ("AMD") equipment as being picked up by an answer machine (including AMD false positives), making one or more repeat calls to that specific number within the same 24 hour period on 27 x 24 hour periods during the relevant period;
 - ii) 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

⁶ 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>). The consultation closed on 11 February 2011. Ofcom received seven responses, which it has considered. 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/>). They are, therefore, the guidelines in force and applicable at the time Ofcom decided to impose a penalty on HomeServe, and determined its amount, in this matter.

iii) having regard to matters including:

- the number of occasions that HomeServe was not compliant with the Guidelines and the persistent misuse provisions;
- the steps HomeServe took to secure that the persistent misuse was brought to an end and was not repeated;
- the steps HomeServe took to remedy the consequences of its persistent 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 HomeServe, having regard to the seriousness of its infringement, and others to whom the persistent misuse provisions and Guidelines applies,

a penalty on HomeServe of £750,000, would be appropriate and proportionate to the contravention to which it would be imposed.

1.6 The following sections of this Notification set out:

- a) the background detail to this matter, including the applicable statutory framework;
- b) Ofcom's analysis of the options open to it and the 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.

Section 2

Background

- 2.1 The following section sets out the background to Ofcom's investigation into HomeServe, both before and after the issue of the section 128 notification to HomeServe on 6 July 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:

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

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

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

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

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

- 2.5 With section 3(3) in mind, Ofcom has published a statement of regulatory principles.⁷ 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.

⁷ <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>

- 2.6 Ofcom's relevant functions, for present purposes, in performing which, we must fulfil the duties above, the powers we have to perform those functions are as follows.

Sections 128, 129 and 130 of the Act

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

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

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

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

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

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

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

(a) a pattern of behaviour or practice; or

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

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

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

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

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

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

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

“(1) This section applies where –

(a) a person (“the notified misuser”) has been given a notification under section 128;

(b) OFCOM have allowed the notified misuser an opportunity of making representations about the matters notified; and

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

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

(a) that he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; and

(b) that he has not, since the giving of the notification, taken all such steps as OFCOM consider appropriate for –

(i) securing that his misuse is brought to an end and is not repeated; and

(ii) remedying the consequences of the notified misuse.

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

(a) securing that his misuse is brought to an end and is not repeated, and

(b) remedying the consequences of the notified misuse,

as may be specified in the notification.”

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

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

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

(a) a person (“the notified misuser”) has been given a notification under section 128;

(b) OFCOM have allowed the notified misuser an opportunity of making representations about the matters notified; and

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

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

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

(4) The amount of penalty imposed is to be such amount not exceeding £2,000,000⁸ as OFCOM determine to be –

(a) appropriate; and

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

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

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

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

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

Ofcom's relevant guidelines

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

2.15 This most recent statement is the *revised statement of policy on the persistent misuse of an electronic communications network or service 2010*,⁹ published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement*.¹⁰ The revised statement of policy followed previous statements in 2006¹¹ (“2006 Guidance”) and 2008¹² (“2008 Guidance”) and was under consultation between 1 June 2010 and 27 July 2010¹³. For ease of reference, both these documents (the *revised statement of policy*, and *Tackling abandoned and*

⁸ 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, section 2(1).

⁹ <http://www.legislation.gov.uk/ukxi/2010/2291/article/2/made>.

¹⁰ <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>

¹¹ <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

¹² http://stakeholders.ofcom.org.uk/binaries/consultations/misuse/statement/misuse_state.pdf

¹³ http://stakeholders.ofcom.org.uk/binaries/consultations/persistent_misuse/statement/misuse_statement.pdf

¹³ <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/summary/condoc.pdf>

silent calls: Statement) are collectively referred to in this Notification as the “Guidelines”.¹⁴

- 2.16 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.¹⁵ 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”).
- 2.17 The new guidelines were, therefore, in force and applicable at the time Ofcom decided to impose the penalty on HomeServe, and determined its amount. Accordingly, Ofcom has had regard to them in making our determination, as set out in this Notification.
- 2.18 The Penalty Guidelines are at Annex 3 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.”*
- 2.19 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.
- 2.20 The Penalty Guidelines also require Ofcom to have regard to the need for transparency in applying such guidelines, particularly as regards the weighting of the factors considered.

¹⁴ Annex 2.

¹⁵ <http://stakeholders.ofcom.org.uk/consultations/penalty-guidelines/>

The investigation and findings

- 2.21 On 22 June 2006 Ofcom opened an own-initiative programme of monitoring and enforcement in order to monitor compliance by companies with the principles set out in the Guidelines.¹⁶ The programme has been ongoing since that time.
- 2.22 As part of the Programme, Ofcom reviewed complaints data received by the Ofcom Consumer Contact Team (the “CCT”) to decide whether enforcement action was appropriate and if so, in respect of which companies.
- 2.23 As part of this review of complaints, Ofcom noted an increase in complaints regarding abandoned and silent calls allegedly being generated by or on behalf of HomeServe. Consequently, on 7 May 2010, Ofcom wrote to HomeServe to alert them of these complaints and to impress upon HomeServe the importance of compliance with the then 2008 guidelines and the potential consequences of failure to do so. Ofcom also asked that HomeServe respond to Ofcom’s letter and provide comment on what HomeServe was doing to ensure it was operating in accordance with the 2008 Guidelines.¹⁷
- 2.24 On 20 May 2010, HomeServe’s Senior Legal Counsel, [redacted], responded to Ofcom and stated that “*HomeServe takes its responsibilities with respect to abandoned calls seriously and we have put in place various safeguards to ensure that we are within the revised guidelines.*”¹⁸ According to HomeServe these safeguards included that:
- “*HomeServe uses a False Positive Rate estimate of 2.6%, being the FPR [false positive rate] recommended by [redacted], the manufacturer of the AMD¹⁹ equipment used by HomeServe*”;
 - “*the dialler is configured to play a brief information message within 2 seconds of an individual beginning to speak*”;
 - “*our policy is to exclude any numbers identified as having received an abandoned call from any outbound call campaign activity for a minimum of 72 hours following the call being abandoned to ensure this guideline is complied with*”;
 - “*The CLI [caller line identification] [redacted] is provided on all outbound calls*”;
 - “*the minimum 15 second ring time before terminating an outbound call is configured within the dialler and so is always complied with*”;
 - “*an automated message “you were called today by HomeServe. We will try again later” is provided on the contact number to inform the caller of the company identity. No attempt is made to market products or services on that line*”;
 - “*HomeServe retains records for up to 1 year.*”

¹⁶ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

¹⁷ Annex 4, letter from Ofcom of 7 May 2010 to HomeServe.

¹⁸ Annex 5, letter from HomeServe to Ofcom, 20 May 2010.

¹⁹ Answer Machine Detection technology.

- 2.25 HomeServe also said in this letter that *“it regularly audits its outsourcer providers to ensure they also maintain effective controls to ensure compliance”* and that it *“requires outsourced providers to provide a daily data feed regarding call abandonment performance (including estimates for AMD false positives) which we amalgamated with our internal figures to produce an overall performance summary for the outbound sales channel”*.
- 2.26 On 20 May 2010, Ofcom confirmed receipt of HomeServe’s letter and advised that it would respond in due course. Following this, Ofcom continued to monitor complaints allegedly received in respect of HomeServe and after monitoring from June to August, noted that complaints were still being submitted in respect of calls generated by or on behalf of HomeServe (an average of 9 a month). Accordingly, on 16 August 2010, Ofcom wrote an e-mail to HomeServe informing it that Ofcom was continuing to receive complaints about silent and abandoned calls allegedly generated by or on behalf of HomeServe (in particular in respect of the CLI [§]). This e-mail requested responses from HomeServe to the following questions:²⁰
- Was HomeServe still using the false positive rate recommended by [§] and whether this estimate matched HomeServe’s internal figure?
 - What was the nature of its campaigns – marketing or collections?
 - Whether HomeServe played the message heard on [§] in the event of an abandoned call.
- 2.27 Ofcom’s e-mail of 16 August 2010 also stated that, *“we noted in our recent consultation, Tackling abandoned and silent calls, that in the event of an investigation we would not accept manufacturers’ claims regarding testing as the sole basis of a reasoned estimate of AMD false positives. Paragraph 4.32-66 of the consultation outlines how companies can produce their own reasoned estimate of AMD false positives. We note in 4.47 that testing should be undertaken whenever campaign data was changed to an extent that it could materially change AMD accuracy rates.”*²¹
- 2.28 On 23 August 2010, [§], on behalf of HomeServe, replied saying that he would respond shortly. On 31 August 2010, Ofcom e-mailed [§] to determine whether the issues had been discussed and whether he could provide Ofcom with an update.
- 2.29 On 1 September 2010,²² [§] responded to the effect that he was awaiting publication of Ofcom’s revised statement of policy which he believed would be published in September and HomeServe would seek to be compliant with that statement. He also stated HomeServe was carrying out trials of a particular testing methodology on HomeServe’s internal outbound operations and that tests were being run shortly to establish internal false positive rates and that this would be rolled out to outsourced operations.
- 2.30 In response to Ofcom’s question regarding whether HomeServe was still using the manufacturer’s false positive rate, he stated: *“We have previously used the manufacturer recommendation, but following publication of the consultation document in June are in the process of establishing robust testing processes to establish the False Positive rate both internally and at our outsourcer partners,*

²⁰ Annex 6, e-mail dated 16 August 2011 from Ofcom to HomeServe.

²¹ Annex 7, “Tackling abandoned and silent calls consultation”, 1 June 2010.

²² Annex 8, e-mail dated 1 September 2011 from [§] to Ofcom.

including establishing the 'false negative' volumes that need to be deducted to establish the 'live calls passed to a live operator' part of the measure. We believe that the proposed introduction of the '24 hour policy' regarding calls where an answer machine has been reached will also impact the False Positive rate so we are working with our suppliers to enforce the '24 hour policy' requirement before the False Positive tests begin."

- 2.31 On 20 December 2010 (following the publication of the revised guidance on 1 October 2010), Ofcom published an open letter²³ 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 2010.²⁴
- 2.32 Ofcom continued to receive complaints in respect of calls generated by or on behalf of HomeServe. Accordingly, Ofcom determined it was appropriate and proportionate to conduct an investigation into HomeServe's compliance with the persistent misuse provisions in the Act and the Guidelines.
- 2.33 The investigation included:
- (a) analysis of complaint data in respect of the Relevant Period received by the CCT;
 - (b) issuance of an information request to HomeServe under section 135 of the Act (the "First Information Request"²⁵). This requested information about HomeServe's processes and procedures in respect to 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 HomeServe's response to the First Information Request;
 - (d) issuance of a second information request to HomeServe under section 135 of the Act (the "Second Information Request"); and
 - (e) analysis by Ofcom of HomeServe's response to the Second Information Request.
- 2.34 On 6 July 2011, Ofcom issued the section 128 notification to HomeServe.²⁶ 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, HomeServe persistently misused an electronic communications network or service;
 - (b) the specific use made of an electronic communications network or electronic communications services by HomeServe that Ofcom considered constituted persistent misuse; and
 - (c) the period during which HomeServe had the opportunity to make representations about the matters notified.

²³ http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/acs_users.pdf

²⁴ Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010 No. 2291, (http://www.legislation.gov.uk/uksi/2010/2291/pdfs/ukxi_20102291_en.pdf)

²⁵ Annex 1, section 128 Notification, Annex 2.

²⁶ Annex 1, section 128 Notification.

- 2.35 HomeServe had until 10 August 2011 to make representations about the matters notified and to take steps for securing that the misuse was brought to an end and was not repeated and remedying the consequences of the notified misuse.
- 2.36 A copy of the section 128 notification, which sets out in full the matters referred to here, and an explanatory statement containing the reasons for Ofcom's actions and our determination, is at Annex 1 of this document.

The representations submitted by HomeServe

- 2.37 On 8 August 2011, HomeServe submitted its representations to Ofcom on the matters set out in the section 128 notification (the "August 2011 Representations").²⁷
- 2.38 The August 2011 Representations set out:
- (a) the steps HomeServe asserted it had taken in order to adhere to the Guidelines;
 - (b) HomeServe's submissions as to why it considers that its actions did not constitute persistent misuse;
 - (c) HomeServe's submissions in respect of whether a penalty should be imposed and if imposed, the amount of any such penalty.
- 2.39 HomeServe stated in the August 2011 Representations that it had taken a number of steps and actions to comply with the Guidelines, including details as to the timing of such steps and actions. In particular, HomeServe made the following submissions:
- (i) following publication of the Guidelines on 1 October 2010, HomeServe "*commenced a review of its call centre operations*" and "*as a first step, HomeServe decided to appoint an independent body to assist with the review*" and "*on 10 December, HomeServe appointed [redacted]*" ["[redacted]"];
 - (ii) "*as part of this review [of its call centre operations], [redacted] visited [redacted] premises [[redacted], "[redacted]] on 27 January 2011*" [one of the 6 call centres which made calls on behalf of HomeServe];
 - (iii) during the onsite visit at [redacted], [redacted] determined that the [redacted] call centre "*may have been utilising an incorrect reasonable estimate of AMD false positives*²⁸" and "*advised [redacted] that to be compliant with Ofcom's Policy statement,*²⁹ *it should either use a reasonable false positive estimate if it intended to keep AMD switched on, or, alternatively [redacted] should switch off AMD altogether.*"³⁰ HomeServe also stated in the Representations that "[redacted] advised [redacted] that it would need to implement a solution that was compliant with the 24 hour rule".
 - (iv) "*So far as HomeServe is aware, an internal e-mail at [redacted] was sent to all relevant persons advising that AMD be switched off immediately*". HomeServe further stated that "*it is clear from the last paragraph of an e-mail*

²⁷ Annex 9, HomeServe's Representations of 8 August 2011.

²⁸ Annex 9, paragraph 3.6, the August 2011 Representations.

²⁹ This is referred to as the Guidelines in this document.

³⁰ Annex 9 paragraph 3.7, the August 2011 Representations.

from [redacted] Head of Compliance and Process Management on 31 January 2011, that AMD was to remain switched off:

‘Please note: This information does not supersede the current controls surround our use of AMD – This is still not to be used on any campaign...’;

- (v) *“HomeServe subsequently discovered that AMD was switched on during the Relevant Period at [redacted]”. It further stated that it “understands that [redacted] mistakenly altered the configuration on the dialler settings for the system which would otherwise ensure that no call back could be made to a number identified as an answer machine within a period of 28 hours (4 hours more than Ofcom’s Policy Statement);”*
- (vi) *On 9 February 2011, “[redacted] verbally reported its findings to HomeServe” and that “this was followed up by a written report issued to HomeServe the following day. In its report [redacted] identified, and made a number of recommendations as to how HomeServe could further ensure compliance with Ofcom’s Policy Statement and strengthen its procedures”. HomeServe further stated that it “engaged [redacted] to assist in implementing its recommendations on 7 March 2011 following internal sign off”;*
- (vii) *“One of the proposals put forward by [redacted] was the appointment of an independent auditor to test the false positive rate at the in-house and [redacted] centres to ensure ongoing compliance with the Abandoned Call Rate rule. Homeserve therefore appointed [redacted] on 9 March 2011 to carry out this task”;*
- (viii) *“[redacted] tested the performance of the in-house [redacted] dialler and subsequently tested [redacted] dialler on 8 April 2011. In accordance with paragraph A1.38 of Ofcom’s Policy Statement, data was used from live dialler campaigns. AMD therefore had to be switched on...”*
- (ix) *“[redacted] found that the in-house dialler was operating within the 3% threshold as it was running at a rate of 0.53% based on estimated false positives. However, the [redacted] false positive rate was 8.01%, leading to a rate that was significantly higher than the permitted 3% threshold under the Abandoned Call Rate rule”;*
- (x) *“HomeServe understands that [redacted] relied on an estimate from the equipment manufacturer, [redacted]. As a result of using this estimate, the AMD equipment was used for a greater period than it should have been (it was used for around 61% of each 24 hour period), leading to an increase in the abandoned call rate above the 3% threshold (a pro-rata rate of [redacted])”;*
- (xi) *“[redacted] verbally notified HomeServe of its findings on 18 April 2011. In addition, [redacted] visited [redacted] premises on 18 April and explained the issue to [redacted] Operations Manager. [redacted] switched off AMD in March 2011 and as a consequence, its abandoned call rate was below the 3% tolerance level. [redacted] issued its written report to HomeServe on 21 April 2011. It is clear from [redacted] report following up on its recommendations that [redacted] is now operating in compliance with Ofcom’s Policy Statement”;*
- (xii) *“As part of the implementation of the recommendations, [redacted] also reviewed HomeServe’s existing compliance policies and procedures to ensure that HomeServe was complying with Ofcom’s Policy Statement. These were*

brought together into a new single umbrella document entitled ‘Compliance Standards for Outbound Calling’ which “sets out the standards which HomeServe and its outsource partners are required to follow when using ACS and AMD to make outbound calls to UK recipients”.

2.40 The August 2011 Representations further set out HomeServe’s reasoning as to why it considered it had not engaged in persistent misuse. In summary, HomeServe stated the following:

- (i) *“HomeServe disputes Ofcom’s allegation that it has ‘persistently misused an electronic communications network or electronic communications services’ in breach of section 128 of the Act”.*
- (ii) *“There was no pattern of behaviour or practice on the part of HomeServe” and that “Ofcom’s approach should be flexible and take into account the individual circumstances on a case by case basis.”*
- (iii) *“In HomeServe’s case, Ofcom should take into account the fact that:*
 - the allegations only relate to one call centre ([REDACTED]) out of six;*
 - the relevant period of investigation was a short duration of 42 days and the facts of this case are distinguishable from Abbey National³¹, where Abbey’s one instance of misuse lasted for a significantly greater period of 12 months;*
 - the abandoned call rates at HomeServe’s in-house operation and its other four call centres³² were well below the 3% rate (between 0.5% and 1.2% in the Relevant Period). Across all of HomeServe’s call centres, the abandoned call rate was on average 1.3%;*
 - As regards the one-off instance [at the [REDACTED] call centre]...this was as a result of the AMD equipment being used for too long a duration within a 24 hour period. If the AMD equipment had been used for a shorter period, then the actual reported rates of abandoned calls for the relevant period were not above the 3% tolerance level. It was the retrospective use of an estimated false positive estimate of 4.9% that resulted in the 3% tolerance level being breached. Until the review by [REDACTED], [REDACTED] believed that its operation was compliant during the Relevant Period;*
 - the 24 hour policy allegation cannot be said to involve ‘a pattern of behaviour or practice’ implying persistent misuse. All of the 36,218 calls made in breach of the 24 hour policy (on 27 days) were a result of the dialler management team’s actions at [REDACTED]; and*
 - HomeServe had received assurances from all of its outsourced call centres that they were complying with the Guidelines. It then took steps to immediately rectify the situation upon discovering this was not the case.*

³¹ On 19 March 2008, Ofcom imposed a financial penalty of £30,000 on Abbey National plc, for its persistent misuse of an electronic communications network or service in one or more of the respects set out in the section 128 notification issued to it on 29 November 2007. This case, and other persistent misuse cases where Ofcom has imposed a financial penalty, are discussed further in section 4 of this document.

³² [REDACTED], [REDACTED], [REDACTED] and [REDACTED].

(iv) *HomeServe's use was not reckless because:*

- *It took immediate steps to rectify any breaches...as soon as they came to light. For example upon [X] recommendation, and prior to the start of the relevant period, [X] advised [X] that it should either use a reasonable false positive estimate if it intended to keep AMD on, or alternatively, [X] should switch off AMD altogether. It is therefore simply not the case that HomeServe 'was informed of the effect of [its] behaviour but continued with it, being an example of the type of behaviour that Ofcom considers points to recklessness';*
- *HomeServe's call centre hours of operation (Monday-Friday, 9:00am-8:30pm, Saturday 9:00am-4:00pm and no calls on Sundays or certain public holidays) could not lead to a customer being repeatedly contacted in the middle of the night, which is cited as another example of recklessness;*
- *HomeServe put in place a number of policies and procedures to address any potential harm that its call centre operations could cause and has, in some cases, exceeded requirements in the Guidelines."*

2.41 The August 2011 Representations also contained submissions by HomeServe in regard to the imposition of a financial penalty and the amount of such penalty, should Ofcom be minded to impose one on HomeServe.

2.42 HomeServe submitted that Ofcom "*should carefully consider the level of any penalty (if a penalty is to be imposed) and that any penalty should be towards the lower end of the scale, and significantly below the new statutory maximum of £2 million which HomeServe contends should be reserved for the most serious types of infringement*".³³

2.43 HomeServe further listed factors it considered were mitigating factors that should be taken into account by Ofcom.³⁴ These included the following:

- that HomeServe had "*immediately implemented timely and effective measures to remedy the issues leading to the Abandoned Call Rate Allegation and the 24 Hour Policy Allegations*". That it had done so "*voluntarily, without delay and had commenced this process prior to any intervention from Ofcom*". It further stated that "*HomeServe should therefore not be penalised on the grounds of deterrence as otherwise there appears to be little incentive for HomeServe, or any other ACS user, to voluntarily take remedial steps in the absence of intervention by Ofcom.*" And that "*this is a key consideration that Ofcom should be mindful of when setting the level of any penalty to be imposed on it*";
- that it had "*taken a number of steps to remedy any harm that may have been caused in connection with the allegations, namely the use of a CLI number so that customers were able to contact HomeServe, if necessary, and the implementation of improvements to the complaints handling system*";

³³ Annex 9, paragraph 5.4 of the August 2011 Representations.

³⁴ Annex 9, paragraphs 5.5.1 to 5.5.15 of the August 2011 Representations.

- that it had “*contemplated offering financial compensation to customers but has decided not to do so in this instance as it does not believe that any customer has suffered direct financial loss as a result of its actions*”,³⁵
- that it was “*unaware of having received any complaints from customers about silent and abandoned calls made by it. In the event of receiving such a complaint, it would take the matter seriously and act appropriately*”;
- that “*the Relevant Period of the contravention referred to in the section 128 notification was short*”;
- that “*HomeServe had in place policies and procedures to ensure that it met the requirements of the Guidelines (and in some cases exceeded them) so as to prevent the circumstances giving rise to the allegations*”;
- that the “*circumstances surrounding the Abandoned Call Rate Allegation and the 24 Hour Policy Allegation did not occur as a result of any intention or recklessness on the part of HomeServe*”. It stated that “*As noted above, prior to the review by [§<], HomeServe had received assurances from all of its outsourced call centre operations that they were complying with the Ofcom Policy Statement*”³⁶. It also stated that “*senior management at HomeServe were informed regularly of the steps that the business was taking to ensure compliance with the Ofcom Policy Statement. They were also kept up to date with measures being implemented in line with [§<] recommendations following the original review*”;³⁷
- HomeServe also stated “*Commensurate with the duration of the contravention, the degree of actual or potential harm caused in HomeServe’s case was limited, as evidenced by the small number of complaints made to Ofcom (38) relative to the number of complaints Ofcom would, on average, receive regarding silent calls over a 7 week period (around 1200), and the total number of calls made by HomeServe and its outsourced operations during the relevant period.*” It also stated that “*consumers and other market participants have not faced any increased costs as a result of HomeServe’s conduct in this regard*”;³⁸
- that “*HomeServe has not made any direct financial gain as a result of the alleged breaches, and nor have these involved any direct cost to the customer*”;
- that it was the “*first time that HomeServe has been the subject of such an investigation by Ofcom*”;
- that “*any penalty imposed on HomeServe should be proportionate to the nature of the allegations, noting that these only relate to [§<] of all calls made by HomeServe and its outsourced operations during the relevant period*”; and
- that it “*should be borne in mind that HomeServe has fully cooperated with Ofcom’s investigation in a timely manner*”.

³⁵ Annex 9, paragraph 5.5.4 of the August 2011 Representations.

³⁶ Annex 9, paragraph 5.5.8, of the August 2011 Representations.

³⁷ Annex 9, paragraph 5.5.9 of the August 2011 Representations.

³⁸ Annex 9, paragraph 5.5.10 and 5.5.11, of the August 2011 Representations.

Second section 135 Notice issued to HomeServe

- 2.44 Following consideration of the August 2011 Representations, Ofcom determined that further information was required, and issued the Second Information Request to HomeServe on 29 September 2011.³⁹ Ofcom sought information regarding the following:
- (i) identification of the call centres which made calls to U.K. consumers on HomeServe's behalf during the Relevant Period;
 - (ii) whether or not HomeServe carried out due diligence with respect to the call centre(s) prior to it making calls on HomeServe's behalf, and if so, the nature of the due diligence, including reasons for selecting the call centre, whether the call centre had acted on behalf of HomeServe previously, steps HomeServe took to satisfy itself as to the adequacy of the compliance arrangements in place at the call centre, and HomeServe's knowledge of the call centre's compliance history;
 - (iii) further clarification of HomeServe's August 2011 Representations in relation to the services provided by [redacted], in particular:
 - a. a copy of the [redacted] final summary report provided to HomeServe on 10 February 2011 (referred to at paragraph 3.10 of the August 2011 Representations);
 - b. the nature and form of assurances in relation to compliance received from outsourced call centres and any documentation evidencing same (referred to at paragraph 3.5 of the August 2011 Representations);
 - c. a copy of the final version e-mail (as sent) circulated within [redacted] which HomeServe understands to have been sent to all relevant persons at [redacted] advising that AMD should be switched off immediately and any subsequent e-mail chain response;
 - d. correspondence from HomeServe requesting confirmation that compliance concerns raised in January 2011 in respect of [redacted] had been rectified and correspondence from [redacted] providing such confirmation;
 - e. how and when HomeServe subsequently discovered that AMD was in actual fact switched on during the Relevant Period, including a full description of the communication received informing HomeServe of this and the provider of such communication (referred to at paragraph 3.9 of the August 2011 Representations);
 - f. reasons for the delay between [redacted] attendance at the [redacted] call centre on 27 January 2011 and receipt of the [redacted] report detailing non compliance on 10 February 2011 (the "[redacted] Report");
 - g. reasons for the delay between receipt of the report by [redacted] on 10 February 2011 and the engagement of [redacted] on 7 March 2011 to assist in implementation of the report's recommendations;

³⁹ Annex 10, the Second Information Request.

- h. steps taken, if any, by HomeServe to implement the recommendations made in the [redacted] report dated 10 February 2011 (other than arrangements to engage [redacted] to implement the report's recommendations) between receipt of the report on 10 February and 7 March 2011;
 - i. reasons for the delay between the appointment of [redacted] on 9 March 2011 and their testing of the [redacted] dialler on 8 April 2011;
- (iv) information regarding steps taken by HomeServe in respect of compliance responsibility and consumer complaints in the period from 6 July 2011 to 7 August 2011 inclusive (the "Compliance Progress Period").

HomeServe's response to the Second Information Request

- 2.45 On 12 October 2011, HomeServe responded to the Second Information Request.⁴⁰
- 2.46 HomeServe confirmed that third party call centre companies made calls to U.K. consumers acting on behalf of or within the control of HomeServe during the Relevant Period. The five companies providing outsourced call centre services on behalf of or within the control of HomeServe were:
- [redacted]
 - [redacted]
 - [redacted]
 - [redacted]
 - [redacted]
- 2.47 It further stated that extensive due diligence was carried out in relation to each of the third party call centre companies prior to making any calls on behalf of HomeServe. HomeServe further detailed due diligence undertaken in relation to [redacted] and confirmed that a similar process had been used for all the other third party call centre companies making calls on behalf of or within the control of HomeServe.
- 2.48 HomeServe stated that its procurement decisions were based on a combination of factors, including operating experience and expertise, financial stability and track record, and the price offered.
- 2.49 It stated that its assessment of the adequacy of the compliance arrangements in place at the call centres comprised of: (i) due diligence (ii) receipt and review of daily reporting statistics from all outsourcers (iii) central collation and calculation of abandoned call rate (iv) periodic compliance audits (the most recent one was conducted in December/January 2011) (v) following its own independent compliance regime as set out in the document entitled "*Compliance Standards for Outbound Calling*" (vi) and independent quarterly audits carried out by [redacted].
- 2.50 HomeServe stated that none of the third party call centre companies undertaking calling in the Relevant Period had been engaged previously by HomeServe to

⁴⁰ Annex 11, HomeServe's response to the Second Information Request.

undertake outbound calling and that it was not aware of any regulatory breaches by any of the third party companies.

- 2.51 HomeServe provided Ofcom with a copy of the final summary report prepared by [X] and submitted to HomeServe on 10 February 2011.⁴¹ HomeServe said that it received assurances in relation to compliance from the third party call centre companies as follows: during due diligence, from internal audits conducted by HomeServe and from receipt and review of daily reporting statistics from all outsourcers, central collation and calculation of abandoned call rate.
- 2.52 HomeServe provided Ofcom with a copy of the final version e-mail which HomeServe understands to have been sent to relevant personnel at [X] advising that AMD should be switched off immediately. HomeServe also provided Ofcom with an e-mail dated 31 January 2011 from [X] to [X] employees, which *“together address the two areas of the operation within which issues were discovered in the relevant period (the use of AMD without False Positive Estimate and the new 24 hour rule)”*. It stated that *“had these clear instructions from senior management been applied within the [X] operation during the relevant period, we believe it would have been fully compliant to all of the guidelines.”*⁴²
- 2.53 HomeServe did not provide correspondence from it to [X] referred to in the August 2011 Representations as containing a request for confirmation from [X] that the compliance concerns raised in January 2011 had been resolved. Nor did it provide any correspondence from [X] to HomeServe containing such confirmation. Instead, HomeServe stated that *“its intention was to address all ongoing compliance concerns through a structured project under the direction of [X]. After a standard procurement process was undertaken, this was commenced on 7 March 2011 and during that project all compliance risks were addressed”*. HomeServe also said *“as stated in our [August 2011] Representations at paragraph 3.16, it is clear from [X] report following up on its recommendations that [X] is now operating in compliance with Ofcom’s Policy Statement.”*
- 2.54 In response to the issue of how and when HomeServe discovered that AMD was switched on during the Relevant Period, HomeServe stated that *“As part of their ongoing work (commenced 7 March⁴³) [X] visited the [X] operation on 22 March. During this visit and discussions with the [X] Head of IT, it became apparent that AMD had been switched on. This was finally clarified directly between HomeServe and [X] on 5 April 2011”*.⁴⁴
- 2.55 HomeServe stated, in relation to the delay between [X] attendance at the [X] call centre on 27 January 2011 and receipt of [X] report detailing non-compliance on 10 February 2011, *“the visit to [X] on 27 January 2011 was part of a series of audit steps within a structured audit process running from 12 January to 10 February... The period between 27 January and 10 February involved business activities related to the project – these included: further site visits; chasing up of outstanding data requests; analysis of findings; report writing, editing and review. The time lapsed is not in any way unusual and, we believe, should not be described as a ‘delay’*.⁴⁵

⁴¹ Annex 11, HomeServe’s response to the Second Information Request.

⁴² Annex 11, page 7, HomeServe’s response to the Second Information Request.

⁴³ We understand this to be a reference to 2011.

⁴⁴ Annex 11, page 8, HomeServe’s response to the Second Information Request.

⁴⁵ Annex 11, page 8, HomeServe’s response to the Second Information Request.

- 2.56 In respect of the delay between receipt of the [X] report on 10 February 2011 and the engagement of [X] on 7 March 2011, HomeServe said that *“it considered the best way to address the identified compliance risks was with a structured project”*. It stated that it asked [X] immediately to pitch for the work and it submitted a proposal on 10 February 2011, the same day as the finalised report was received. HomeServe said it accepted the proposal immediately but that a formal procurement process had to be followed and that this was completed on 7 March 2011. It stated *“the time lapse is not in any way unusual and, we believe, should not be described as a ‘delay’.”*⁴⁶
- 2.57 With regard to steps HomeServe took to implement recommendations made in [X] report, HomeServe said that its *“intention was to address the identified compliance risks within a structured project and that implementation of most of the recommendations was left until [X] were formally appointed.”*⁴⁷ It further stated that *“abandoned call messages had been further investigated and clipped where appropriate to ensure compliance to the 2 second rule and the handling of return abandoned calls was improved”*. It said that *“it is worth noting, however (with the exception of the breaches at [X] due to the over-riding of policies from senior management) our operation had been retrospectively shown to have been compliant during the Relevant Period.”*⁴⁸
- 2.58 HomeServe said that the time period between the appointment of [X] on 9 March 2011 and the testing of the [X] dialler on 8 April 2011 was due to the following:
- [X] could not start on the HomeServe activity until 17 March;
 - the lead time involved in purchasing recording hardware to use to test the [X] dialler;
 - the time taken to carry out the test (the in-house test was undertaken first, and because there was only one recorder, multiple tests could not be carried out. This applied to analysis time also);
 - data protection concerns that involved the testing process having to be cleared with relevant departments; and
 - [X] had switched off AMD and had to obtain the necessary approvals before AMD could be switched back on.
- 2.59 HomeServe stated that it had developed and implemented the procedures detailed in the document entitled *“Compliance Standards for Outbound Calling”*.⁴⁹ It said evidence of ongoing compliance would be achieved through: appointing a full time Compliance Officer to undertake audits internally and at third party call centres; ongoing engagement with [X] who will be completing full independent audits each quarter; and a further programme of internal audits. It also stated that sign-off of daily reporting had been implemented fully as had monthly and quarterly reporting procedures.
- 2.60 HomeServe further stated that it had received written confirmation from each third party call centre company that AMD would not be used on any HomeServe

⁴⁶ Annex 11, page 8, HomeServe’s response to the Second Information Request.

⁴⁷ Annex 11, page 9, HomeServe’s response to the Second Information Request.

⁴⁸ Annex 11, page 9, HomeServe’s response to the Second Information Request.

⁴⁹ Annex 9, attachment included in the August 2011 Representations.

campaign at any point in the future without the express consent of HomeServe. And that [§<] had continued their quarterly audits, the most recent audit taking place at the end of July 2011 which showed that AMD was not in use in any call centre and that all operations were compliant with the Guidelines.

- 2.61 HomeServe stated that, as required by the Financial Services Authority, it has fully documented complaints handling procedures. It provided details regarding the procedures in place to handle complaints, including removing customer details from its database when necessary.

Provisional Notification of a possible penalty

- 2.62 Ofcom considered HomeServe's response to the Second Information Request. In the light of that and, having taken account of:

- a) the available evidence;
- b) HomeServe's August 2011 Representations;
- c) the steps taken for securing the persistent misuse is brought to an end and not repeated and for remedying the consequences of the notified misuse;
- d) the Guidelines; and
- e) the Penalty Guidelines,

Ofcom took the preliminary view that it should impose on HomeServe, a penalty under section 130 of the Act in respect of its persistent misuse of an electronic communications network or service between 1 February to 21 March 2011.

- 2.63 Accordingly, on 26 January 2012 we issued to HomeServe the Provisional Notification of the possible penalty. The Provisional Notification set out that Ofcom had taken the preliminary view that a penalty of £800,000 be imposed on HomeServe.
- 2.64 Ofcom's preliminary view, explained in the Provisional Notification, was that this penalty would be appropriate and proportionate to the contravention in respect of which it would be imposed. The reasons for Ofcom's preliminary view and provisional determination of the possible penalty were set out in the Provisional Notification and accompanying Explanatory Statement.⁵⁰
- 2.65 The Provisional Notification gave HomeServe until 23 February 2012 to make written representations to Ofcom about the matters set out in it and the Explanatory Statement. It also gave HomeServe the opportunity to make oral representations to Ofcom in relation to these matters.

HomeServe's representations on the Provisional Notification

- 2.66 On 23 February 2012, HomeServe submitted its written representations to Ofcom (the "February 2012 Representations"⁵¹).

⁵⁰ Annex 14, Provisional Notification

⁵¹ Annex 15, written representations submitted on 23 February 2012.

- 2.67 HomeServe did not request an oral hearing and therefore it did not make oral representations to Ofcom. In this regard, HomeServe's Chief Executive Officer [X] wrote to Ofcom on 2 March 2012 and set out his reasons for not requiring an oral hearing.⁵²
- 2.68 In particular, [the CEO] [X] stated that "*as HomeServe were not intending to raise any supplementary arguments or provide additional evidence*" he concluded that it would be more time efficient if he were to send a letter to Ofcom "*setting out steps which HomeServe has taken to ensure that any contravention does not happen again and that senior management are kept informed*". He then stated that HomeServe had taken the following steps in this regard:
- "*AMD had been permanently disabled*";
 - HomeServe had "*stopped using outsourcers for outbound activity*";
 - HomeServe had "*implemented all of the remedial action identified by [X] in their audit of February last year*";
 - HomeServe had "*engaged [X] to undertake ongoing quarterly Ofcom compliance audits*; and
 - HomeServe had "*adopted the 'Compliance Standards for Outbound Calling' document and implemented the processes it specifies, which includes real time, daily, weekly, monthly and quarterly controls to ensure ongoing compliance with Ofcom guidelines*".
- 2.69 The CEO [X] also stated that "*the process of change was commenced following the issuing of [X] report in February 2011*". And that "*whilst we were not aware that our instructions to turn off AMD were not complied with, the steps outlined above should ensure that this will not happen in future.*"
- 2.70 In the February 2012 Representations, HomeServe categorised its submissions as follows:
- a) submissions on liability;
 - b) submissions on penalty;
 - c) aggravating factors;
 - d) other submissions on penalty; and
 - e) additional information.

Submissions on liability

- 2.71 HomeServe submitted that it disagreed with Ofcom's provisional decision that its actions constituted "persistent misuse". HomeServe stated that it "*maintains its submission that the evidence does not point to a "pattern of behaviour or practice" of misuse on the part of HomeServe*" and that "*whilst HomeServe accepts that there were a number of instances of conduct in breach of Ofcom's Policy Statement, in HomeServe's view there would need to have been intention to breach*

⁵² Annex 16, letter from HomeServe CEO, dated 2 March 2012.

*on its part for the misuse to constitute a 'pattern of behaviour or practice'.*⁵³
HomeServe further submitted that “Ofcom seems to accept this was not HomeServe’s intention” and “there is therefore no justification for Ofcom to take any enforcement action against it, or to impose a penalty upon it.”

Submissions on penalty

2.72 HomeServe stated that in the alternative, it made the following submissions on penalty:

*“HomeServe is pleased to note that Ofcom has acknowledged that its contravention does not warrant a fine at or near the level of the £2 million cap. HomeServe is however disappointed to note that Ofcom is currently minded to impose a fine of £800,000 upon it, being 40% of the statutory maximum and therefore mid-range of the Ofcom Penalty Range.”*⁵⁴

“In this regard, HomeServe notes that Ofcom suggested that the penalty should be in the region of £600,000 to £800,000 but has provisionally concluded that the presence of aggravating factors merit a fine of £800,000.

*For the reasons set out below, HomeServe considers that the proposed level of penalty should be reduced to an amount which is at the low end of the Ofcom Penalty Range. HomeServe suggests that an appropriate penalty would be £400,000, 20% of the statutory maximum.”*⁵⁵

Aggravating Factors

2.73 HomeServe made submissions in relation to the three aggravating factors identified by Ofcom in the Provisional Notification; namely that i) HomeServe did not take all such steps to remedy the consequences of the notified misuse; ii) HomeServe failed to take all appropriate (and timely) steps to prevent the contravention; and iii) the awareness of senior management of the relevant contravention and that at least for a significant part of the time they were aware, did not take the matter sufficiently seriously (nor was action expedited) to ensure that HomeServe was compliant.

Did not take all such steps to remedy the consequences of the notified misuse

2.74 HomeServe stated that “in relation to the 42 occasions where Ofcom states that HomeServe exceeded the abandoned call rate of 3% of live calls over a 24 hour period [redacted].

2.75 [redacted]

2.76 HomeServe then submitted that “Nevertheless, HomeServe wishes to offer compensation as a gesture of goodwill to any customer who can demonstrate that they received an abandoned or silent call over the Relevant Period. HomeServe intends to invite such persons to seek redress at the time that Ofcom makes public its final decision in this matter (as awareness amongst potential claimants will be maximised at this point) and will do so in an appropriate format.”

⁵³ Annex 15, paragraph 2.1, of the February 2012 Representations.

⁵⁴ The Ofcom Penalty Range is HomeServe’s definition of the penalty range of £0-£2million as referred to at paragraph 1.2 of the February 2012 Representations.

⁵⁵ Annex 15, paragraph 3.1-3.3 of the February 2012 Representations.

2.77 HomeServe submitted that it will “*also pay compensation of £10 to the 38 individuals who lodged complaints with Ofcom and will work with Ofcom to contact these individuals.*” HomeServe also stated that it had received 10 complaints which related to silent or abandoned calls (although none related to the [X] operated call centre) and that it had taken action to address each of these complaints to the satisfaction of each individual and was offering each a goodwill gesture of £10 compensation.⁵⁶ HomeServe provided additional information to clarify its representations on remedying the consequences of its contravention and this is detailed further below.⁵⁷

Failed to take all appropriate (and timely) steps to prevent the contravention

2.78 In the February 2012 Representations, HomeServe noted that “*Ofcom states that HomeServe only took such steps to end the contravention after (HomeServe’s emphasis) Ofcom had informed HomeServe that it would be investigated.*” It then submitted that “*we contend that this is not the case as HomeServe had taken steps to address its compliance with the forthcoming Ofcom Policy Statement in the summer of 2010.*”

2.79 HomeServe further stated that it had “*put in place a plan in July 2010 to conduct testing of the false positive rate, including seeking external input from [X]. HomeServe then conducted tests over the summer 2010 but was unable to glean any meaningful results (as the false positive rate was less than zero).*”

2.80 It submitted that “*following discussions with [X] of [X], HomeServe became aware that there was an error in Ofcom’s proposed methodology for calculating the false positive rate. HomeServe therefore took the decision to await clarification of the methodology upon the publication of Ofcom’s Policy Statement on 1 October 2010. In the circumstances, HomeServe considers that this was a considered and reasonable decision.*”

2.81 HomeServe submitted that it “*undertook a review of all of its call centre operations as explained in its response to Ofcom’s Section 128 Notification dated 8 August 2011, which included instructing [X]. It therefore took these steps towards achieving compliance with the Ofcom Policy Statement prior to being notified that Ofcom was commencing an investigation (into breaches of the Ofcom Policy Statement) on 28 March 2011.*”

2.82 As to the timeliness of the steps taken by HomeServe to prevent the contravention, HomeServe submitted that “*As explained previously, HomeServe had to undertake a formal procurement process prior to implementing the recommendations from [X]. This type of delay is therefore to be expected. Ofcom also recognised in its Consultation Statement that it may take companies time to comply with the proposals and clarifications in the Ofcom Policy Statement and so proposed to give industry two months within which to do so. In the circumstances, HomeServe submits that it did act with due expedition.*”⁵⁸

The awareness of senior management of the relevant contravention and that at least for a significant part of the time they were aware, did not take the matter sufficiently seriously (nor was action expedited) to ensure that HomeServe was compliant

⁵⁶ Annex 15, paragraph 4.3-4.7 of the February 2012 Representations.

⁵⁷ Annex 17, correspondence from HomeServe to Ofcom dated 22 March, 3 April and 10 April 2012.

⁵⁸ Annex 15, paragraphs 4.8-4.12 of the February 2012 Representations.

- 2.83 In the February 2012 Representations, HomeServe said that it “*took the decision to employ external consultants to implement steps to conduct audits and suggest proposal to remedy the contravention. It stated that “this is in line with Ofcom’s Policy Statement which notes that there are ‘call centre consultants who specialise in helping organisations optimise their outbound calling campaign’”. HomeServe also submitted that “Ofcom also states that it would take into account ‘the use of an independent auditor when assessing AMD accuracy’ but that ‘AMD users are ultimately responsible for the quality of this audit and producing an accurate reasoned estimate of AMD false positives’”. HomeServe therefore had to ensure that any offering would be high quality and credible’”. HomeServe then stated that it was aware that both [X] and [X] had “such regulatory standing” and that it therefore initiated appointing [X] and [X].*
- 2.84 HomeServe also submitted that “*following receipt of [X] report of 10 February 2011, the original timescale for completing Phase 2 remedial steps was scheduled for the end of February 2011. Due to the nature of the procurement process, the Phase 2 work commenced on 12 March 2011. HomeServe does not consider that this led to undue delay in the circumstances in terms of ensuring that HomeServe was compliant. All of these preliminary steps therefore occurred prior to the commencement of Ofcom’s investigation on 28 March 2011.*”⁵⁹

Other submissions on penalty – deterrence and seriousness of the contravention

- 2.85 HomeServe submitted that in making its judgment on ensuring the penalty will act as an effective incentive to compliance, having regard to the seriousness of the infringement, Ofcom should “*consider all the circumstances in the round to determine the appropriate and proportionate amount of any penalty.*” HomeServe then summarised the circumstances of its case:
- (i) “*HomeServe has now taken steps to remedy the contravention*”;
 - (ii) “*HomeServe took appropriate and timely steps to prevent the contravention **before** (HomeServe’s emphasis) Ofcom’s involvement in the case. Ofcom should be encouraging operators to take such steps (rather than waiting until an investigation forces them to do so) and therefore this should be recognised in an appropriate downwards adjustment of the penalty for HomeServe*”;
 - (iii) “*action was taken without undue delay by HomeServe to ensure compliance*”;
 - (iv) “*the abandoned call rates at HomeServe’s in-house operation and its four other call centres were well below the 3% rate (between 0.5% and 1.2%) in the Relevant Period. Therefore across all of HomeServe’s call centres, the abandoned call rate was on average 1.3%, being significantly below the 3% threshold*”;
 - (v) “*HomeServe takes its obligations under the Act very seriously and has strived to instil standards amongst both its own employees and its outsource partners which exceed those of Ofcom. Indeed, as set out in HomeServe’s August Response [August 2011 Representations], Ofcom’s 128 Notification dated 6 July 2011, recognised that HomeServe had complied with the majority of the obligations in Ofcom’s Policy Statement,*

⁵⁹ Annex 15, paragraphs 4.13-4.15 of the February 2012 Representations.

and in some cases, even exceeded them. This is reflected by the fact that the contravention only relates to one call centre out of six (the [X] call centre)";

- (vi) *"the desire to ensure compliance was reflected in the tone of HomeServe's policies and procedures. This also led to the appointment of [X] and [X]";*
- (vii) *"[X] is a regulated provider of call-centre services on whom HomeServe undertook a full due diligence exercise and imposed conditions of compliance with all of Ofcom's obligations. [X] actions should be borne in mind when determining the level of penalty"; and*
- (viii) *"HomeServe had put in place new internal procedures to ensure compliance and HomeServe has reviewed its outbound calling business and from October 2011 has ceased using third party suppliers in relation to all of its outbound sales activity. This was on the basis that, on balance, the risks associated with using this channel are too high. This type of activity is now only undertaken in-house."*

2.86 HomeServe concluded its submissions on deterrence and seriousness by stating that *"the associated negative press coverage has already had a deterrent effect on its business"*⁶⁰ and *"a penalty of £800,000 does not reflect all of the mitigating factors in this case and suggests that an amount at the low end of the Ofcom Penalty Range would be more appropriate."*⁶¹

Degree of harm caused by the contravention

2.87 In the February 2012 Representations HomeServe stated that *"it did not dispute that silent and abandoned calls may lead to harm in the form of annoyance, inconvenience or anxiety."* It said *"HomeServe notes that Ofcom has however acknowledged that it has no direct evidence of consumers suffering harm in the form of financial loss in this case"*.

2.88 In the Provisional Notification Ofcom noted that customers may, in an effort to prevent calls from HomeServe, have incurred expenditure on devices such as [X], HomeServe submitted that *"it would be unlikely that a customer would go to such lengths purely as a consequence of receiving calls from HomeServe alone. Rather, such a purchase is more likely to be made following the receipt of calls from a number of companies or unwanted malicious calls from an individual. It would therefore be anomalous for such customers to then purchase a device with the aim of specifically blocking calls from HomeServe"*.

2.89 HomeServe also submitted that Ofcom's statement that HomeServe asserted that call recipients did not experience harm as call centre hours of operation are not in the middle of the night, is incorrect. It stated *"this is incorrect, HomeServe was using this example to demonstrate that its misuse was not 'reckless', a point that Ofcom appears to have accepted."*

Any gain made by HomeServe as a result of the contravention

⁶⁰ Annex 15, paragraph 5.2 of the February 2012 Representations.

⁶¹ Annex 15, paragraphs 5.1-5.3 of the February 2012 Representations.

- 2.90 HomeServe stated that it *“notes Ofcom has not taken this factor into consideration when determining the level of penalty as Ofcom does not have any direct evidence of any financial gain on the part of HomeServe as a result of the contravention.”*

Duration of the contravention

- 2.91 In the February 2012 Representations, HomeServe noted that in the Provisional Notification Ofcom had stated that *“the particular timeframe selected as the Relevant Period does not necessarily cover the entire period within which contraventions occurred”*. HomeServe submitted that *“prior to 1 February 2011, the 24 hour rule was not in force so there would be not possibility of HomeServe contravening it”*.
- 2.92 It further stated that *“as to Ofcom’s references to contact with HomeServe as far back as May 2010, HomeServe considers that this has little relevance as the Guidelines subsequently changed following the publication of Ofcom’s Policy Statement on 1 October 2010 (and Ofcom did not assert that HomeServe was not in compliance with the 2008 guidelines). This included changes to the application of the 3% abandoned call rate rule which is the focus of this investigation.”*
- 2.93 HomeServe made further representations on this point and stated *“HomeServe encountered difficulties in determining the correct false positive estimate in order to ensure that it was compliant in advance of Ofcom’s Policy Statement. HomeServe therefore submits that it was taking action to bring itself into compliance with the forthcoming guidelines following the publication of the consultation documentation in the summer of 2010.”* It concluded this point by stating *“Moreover Ofcom accepts that HomeServe took steps to ensure compliance and did, in fact, achieve compliance after the end of the Relevant Period. Therefore, Ofcom cannot take into account any (unproved) contravention after 21 March 2011 in determining the appropriate penalty to impose on HomeServe.”*⁶²

Additional Information

- 2.94 HomeServe submitted additional information surrounding the circumstances of the use of AMD at the [redacted] call centre during the Relevant Period.
- 2.95 HomeServe highlighted it was of the view that AMD had been turned off during the Relevant Period as a result of the work by [redacted] (including its visit to [redacted] on 27 January 2011) and an oral instruction issued by HomeServe’s Outsourcing Business Unit Manager, [redacted], on 2 February 2011. However, HomeServe stated that *“it was told by [redacted] in an e-mail dated 5 April 2011 that an Outsourcing Business Unit Manager at HomeServe, ([redacted]) had requested AMD to be turned on during the Relevant period in relation to the first run of a new mailcode.”* It further stated that *“in light of the Notification and the seriousness of the allegations in this e-mail, HomeServe has investigated the matter with [redacted]. He has no recollection of issuing any such instructions to [redacted]. His recollection is that he never instructed [redacted] to turn AMD on and in fact, he recalls that he gave an oral instruction on 2 February 2011 that AMD should remain switched off. HomeServe is satisfied from its internal investigation that [redacted] did not therefore instruct [redacted] to switch AMD back on.”*⁶³

⁶² Annex 15, paragraphs 5.8-5.12, of the February 2012 Representations.

⁶³ Annex 15, paragraphs 6.1-6.5, of the February 2012 Representations.

2.96 It concluded that “*Although this does not alter the underlying circumstances, HomeServe wished to bring this issue to Ofcom’s attention as HomeServe takes its duty to co-operate with the investigation seriously.*”⁶⁴

Conclusions

2.97 HomeServe concluded its February 2012 Representations stating that “*For the reasons set out above, HomeServe submits that there is no justification for Ofcom to take any enforcement action against it, or to impose a penalty upon it.*” It then stated “*In the alternative, HomeServe considers that the proposed level of penalty should be reduced to an amount which is at the low end of the Ofcom Penalty Range. HomeServe suggests that an appropriate penalty would be £400,000, 20% of the statutory minimum.*”⁶⁵

Additional information from HomeServe regarding remedying of the consequences of its persistent misuse

2.98 Following Ofcom’s consideration of HomeServe’s February 2012 Representations, it was determined that additional clarification was required, specifically how HomeServe intended to remedy the consequences of its contravention of the persistent misuse provisions of the Act.⁶⁶

2.99 HomeServe confirmed to Ofcom that it would do the following:

- HomeServe would offer £10 compensation to a claimant upon HomeServe establishing from its records that the CLI of the claimant is a match of a CLI contacted while AMD was in operation; it would issue a statement on its website that included this offer; and it would communicate this offer to all press enquiries made to it;
- HomeServe would establish a dedicated telephone number for claimants to call for an initial period of one month (to be reviewed and extended if appropriate); and
- HomeServe would offer £10 compensation to the 38 individuals who had lodged a complaint with Ofcom during the Relevant Period and to the 11 individuals who had complained to HomeServe during the Relevant Period.

⁶⁴ Annex 15, paragraph 6.6, of the February 2012 Representations.

⁶⁵ Annex 15, paragraphs 7.1-7.2, of the February 2012 Representations.

⁶⁶ Annex 17, correspondence from HomeServe to Ofcom dated 22 March, 3 April and 10 April 2012.

Section 3

Ofcom's decision to impose a penalty

- 3.1 The following section sets out Ofcom's decision to impose a penalty on HomeServe under section 130 of the Act.
- 3.2 Ofcom's options in this case are as follows:
- (a) taking no further action;
 - (b) issuing a notification under section 129 of the Act; and
 - (c) imposing on HomeServe a penalty under section 130 of the Act, additionally 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 the 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 HomeServe for the reasons we set out.

No further action

- 3.8 This option would be available to Ofcom if it were to determine that there were not reasonable grounds for believing that HomeServe had persistently misused an electronic communications network or electronic communications services during the Relevant Period.

- 3.9 Based on the evidence obtained during the investigation, including HomeServe's response to information requests, together with consideration of HomeServe's August 2011 and February 2012 Representations, Ofcom is of the view that:

HomeServe 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 on 42 separate occasions during the relevant period; and
- where a call has been identified by AMD equipment as being picked up by an answer machine (including AMD false positives), making one or more repeat calls to that specific number within the same 24 hour period on 27 x 24 hour periods during the Relevant Period, resulting in the making of 36,218 calls in breach.

- 3.10 We do not accept HomeServe's contention in the August 2011 Representations (and maintained in the February 2012 Representations) that its misuse was not persistent because "*there was no pattern of behaviour or practice on the part of HomeServe*". We maintain the view that the misuse is persistent misuse as the misuse was repeated on a sufficient number of occasions for it to be clear that the misuse represented a pattern of behaviour or practice as set out in section 128(6)(a) of the Act.

- 3.11 As set out in the section 128 Notification, HomeServe exceeded the abandoned call rate on 42 separate occasions and failed to comply with the 24 hour policy for 27 x 24 hour periods. The fact that this misuse occurred "*only in relation to one call centre out of six*" and that "*across all of HomeServe's call centres, the abandoned call rate was on average 1.3%*" and that "*the AMD equipment was used for too long a duration*" is irrelevant to the finding of persistent misuse (Ofcom's position in relation to these points is discussed in more detail in section 4 of this document).

- 3.12 We also do not accept HomeServe's contention in the February 2012 Representations that "*there would need to have been intention to breach on its part for the misuse to constitute a 'pattern of behaviour or practice'*". Section 128(6)(a) of the Act does not require intention to establish persistent misuse. The Penalty Guidelines which provide guidance in determining the *penalty level*, consider the extent to which the contravention occurred intentionally or recklessly. However, this factor is for the purpose of assessing the level of penalty and not to establish the existence of persistent misuse. Further, Ofcom has taken this penalty factor into account in section 4 in its determination of the level of penalty.

- 3.13 Accordingly, we consider that taking no further action in this case would not be appropriate, particularly given the scale of HomeServe's contravention, and that further action is necessary in order to further the interests of citizens and consumers.

Issuing a notification under section 129 of the Act

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

- 3.15 In order to issue a notification under section 129 of the Act, Ofcom must be satisfied that: (i) the notified misuse has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; that he has not, since the giving of the notification; (ii) taken all such steps as Ofcom consider appropriate for securing that his misuse is brought to an end and not repeated; and (iii) remedied the consequences of the notified misuse.⁶⁷
- 3.16 As noted above, Ofcom considers that HomeServe has in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service. However, having considered all of the representations made by HomeServe, together with assessing the complaint levels following the issuance of the section 128 notification, Ofcom is of the view that Home Serve has taken all such steps as we consider appropriate for securing that its notified misuse has been brought to an end. Although, as set out in section 4 of this document, we do not consider that HomeServe took timely steps to end the contravention, once it became *aware* of it. This is a separate issue and discussed in detail in Ofcom's analysis of the relevant penalty factors at section 4.
- 3.17 We consider that appropriate steps were taken by HomeServe for securing that its persistent misuse contravention was brought to an end and not repeated, based on the following:
- (a) HomeServe has retained [X] to implement its recommendations following its report of 10 February 2011 (including carrying out quarterly audits of all outbound operations);
 - (b) [X] has conducted independent audits of the [X] and [X] outsourced call centres and both were determined compliant with the Guidelines as of July 2011 by [X];
 - (c) [X] has reviewed HomeServe's existing compliance procedures and compiled a compliance standards document ("*Compliance Standards for Outbound Calling*") which HomeServe's outsource partners are required to follow when using ACS and AMD; and
 - (d) complaints received by the CCT in relation to HomeServe allegedly generating abandoned calls has fallen notably since the section 128 notification issued (from 38 complaints during the seven week Relevant Period to 10 complaints during the Compliance Progress Period and a total of 12 from July to November 2011).
- 3.18 In respect of remedying the consequences of its notified misuse, Ofcom makes the following comments.
- 3.19 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.*

⁶⁷ Section 129(2) of the Act.

- 3.20 The steps HomeServe stated in the August 2011 Representations,⁶⁸ that it had taken, are as follows:
- (a) *“the use of a CLI [caller line identification] number so that customers are able to contact HomeServe, if necessary”*;
 - (b) implementation of improvements to the complaints handling system;
 - (c) contemplation of offering financial compensation, but decided not to *“as it does not believe that any customer has suffered direct financial loss as a result of its actions”*; and
 - (d) in the event of receiving any complaints from customers about silent and abandoned calls made by it, *“it would take the matter seriously and act appropriately”*.
- 3.21 Ofcom considered these steps and determined in the Provisional Notification that they were not all such steps as were appropriate for remedying the consequences of the notified misuse, particularly given that some were contained in the Guidelines and therefore were required for basic compliance.
- 3.22 In the February 2012 Representations following the issuance of the Provisional Determination, HomeServe made submissions on remedying the consequences of its contravention of the persistent misuse provisions. It also provided additional information to clarify these submissions in subsequent correspondence.⁶⁹
- 3.23 The submissions set out that HomeServe would do the following:
- HomeServe would offer £10 compensation to a claimant upon it establishing from its records that the CLI of the claimant is a match of a CLI contacted while AMD was in operation; it would issue a statement on its website that included this offer; and it would communicate this offer in response to all press enquiries made to it;
 - HomeServe would establish a dedicated telephone number for claimants to call for an initial period of one month (to be reviewed and extended if appropriate); and
 - HomeServe would offer £10 compensation to the 38 individuals who lodged a complaint with Ofcom during the Relevant Period and to the 11 individuals who had complained to HomeServe during the Relevant Period.
- 3.24 On the basis of this information, Ofcom is of the view that HomeServe has committed to put in place such steps as we consider appropriate for remedying the consequences of the notified misuse, and for securing that its persistent misuse has been brought to an end and is not repeated.
- 3.25 A notification under section 129 of the Act would require both a failure to remedy and a failure to bring an end to, and not repeat, the persistent misuse. It is our view that serving such a notification would be a bigger regulatory intervention than is required in this case. Having considered all the circumstances of the case in the round, we consider the imposition of a financial penalty would both adequately and

⁶⁸ Annex 9, 5.5.3-5.5.5, the August 2011 Representations.

⁶⁹ Annex 17, correspondence from HomeServe to Ofcom dated 22 March, 3 April and 10 April 2012.

proportionately achieve our enforcement objectives by having a deterrent effect, and the threat of such enforcement action in future case should provide an incentive for compliance, and a corresponding deterrent to non-compliance.

- 3.26 Accordingly, it is Ofcom's decision that in this case it is not appropriate to serve on HomeServe, a notification under section 129 of the Act.

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

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

- 3.28 Ofcom may impose a penalty, as provided under section 130 of the Act, in circumstances, where-

“... ”

- (a) a person (“the notified misuser”) has been given a notification under section 128;
- (b) OFCOM have allowed the notified misuser an opportunity of making representations about the matters notified; and
- (c) the period allowed for the making of the representations has expired.”⁷⁰

- 3.29 Under section 130(2) of the Act:

“Ofcom may impose a penalty on the notified misuser if he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service”.

- 3.30 As previously set out, Ofcom served a section 128 notification on HomeServe on 6 July 2011. We allowed HomeServe the opportunity of making representations on the matters notified and this period has now expired. On 8 August 2011 HomeServe submitted its representations on the matters notified.

- 3.31 Also, as set out in this document, for the reasons contained in the section 128 notification, and having taken account of HomeServe's August 2011 and February 2012 Representations, Ofcom is satisfied that HomeServe persistently misused an electronic communications network or electronic communications service. It did so by exceeding the abandoned call rate on 42 separate occasions and failing to adhere to the 24 hour policy on 27 x 24 hour periods which resulted in the making of 36,218 calls in breach, over a seven week period.

- 3.32 On this basis, HomeServe is liable to the imposition of a penalty under section 130 of the Act and our decision is that we should impose a penalty on HomeServe.

- 3.33 We consider that the imposition of a penalty would help to secure Ofcom's objective of furthering the interests of citizens and consumers by helping to foster widespread

⁷⁰ Section 130(1) of the Act.

compliance with legislation and regulatory principles, and be proportionate and targeted at a case in which that action is needed.

- 3.34 We are of the view that HomeServe's level of non-compliance is serious and that it is necessary and appropriate to impose a penalty on it so as to give HomeServe and other companies sufficient incentive to comply with the persistent misuse provisions of the Act, and to follow the requirements set out in the Guidelines, and to deter non-compliance, thereby protecting and furthering the interests of citizens and consumers.
- 3.35 Accordingly, we have decided to impose a penalty in this case under section 130 of the Act.
- 3.36 The following section sets out Ofcom's determination of the penalty amount, which includes taking account of:
- (a) any representations made by HomeServe;
 - (b) any steps taken by HomeServe for securing that the notified misuse was brought to an end and not repeated;
 - (c) any steps taken by HomeServe for remedying the consequences of the notified misuse; and
 - (d) the Penalty Guidelines.

Section 4

Determination of the amount of penalty

- 4.1 The following section of this document sets out Ofcom's determination of the amount of any penalty imposed on HomeServe. 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 August 2011 and February 2012 Representations⁷¹ HomeServe has made to us;
 - c) steps taken by HomeServe for securing that the notified misuse is brought to an end and not repeated;
 - d) steps taken by HomeServe for remedying the consequences of the notified misuse; and
 - e) the Penalty Guidelines.

Legal framework

- 4.2 Ofcom may impose a penalty if a person notified under section 128 of the Act has persistently misused an electronic communications network or an electronic communications service. 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 order⁷² 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*".⁷³ After consideration of 137 responses, the Government decided to proceed to increase the maximum penalty from £50,000 to £2 million to "*broadly reflect the views of 126 respondents who felt that the maximum penalty should be increased to this level to deter persistent offenders. Most respondents felt that the current level failed to reflect the harm that was caused to consumers by silent and abandoned calls and this feeling was particularly strong where*

⁷¹ including the information provided by HomeServe in its correspondence to Ofcom of 22 March, 3 April and 10 April 2012.

⁷² [The Communications Act 2003 \(Maximum Penalty for Persistent Misuse of Network or Service\) Order 2010 No. 2291](#)

⁷³ <http://www.bis.gov.uk/files/file53311.pdf>

respondents had received calls and tried various methods to combat the problem".⁷⁴

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*".⁷⁵ 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*".⁷⁶

4.7 Following the consultation and impact assessment, the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010 No. 2291 was enacted. Consequently, Ofcom may now impose a penalty of up to £2 million.

4.8 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."

4.9 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

⁷⁴ 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

⁷⁵ Explanatory Memorandum to the Communications Act 2003 (Maximum penalty for persistent misuse of network or service) Order 2010, page 1:

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

⁷⁶ http://www.legislation.gov.uk/ukxi/2010/2291/pdfs/ukxiem_20102291_en.pdf, page 5.

enactment apart from the Competition Act 1998 (the “Penalty Guidelines”⁷⁷). By virtue of section 392(6) of the Act, Ofcom must have regard to the statement for the time being in force when setting the penalty amount. Issuing a penalty under section 130 is also referred to in the Guidelines.⁷⁸

- 4.10 The effect of section 130 is that Ofcom may impose a penalty that it considers to be appropriate and proportionate to the persistent misuse on HomeServe.
- 4.11 In deciding the amount of an appropriate and proportionate penalty to be imposed on HomeServe, we must have regard to the representations made to us by HomeServe. Likewise, to the steps HomeServe has taken towards complying with the persistent misuse provisions and remedying the consequences of its contravention. And, we must have regard to our Penalty Guidelines.
- 4.12 The maximum amount of any penalty we may impose on HomeServe is £2,000,000 for the Relevant Period.
- 4.13 Ofcom sets out below its application of the issues relevant to the factors identified in paragraph 4.16.

The penalty guidelines and relevant factors

- 4.14 The particular factors we have considered in our determination of the penalty, including those in the Penalty Guidelines, are set out below.
- 4.15 Ofcom considers all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of penalty.
- 4.16 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, giving 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, that secures the objectives and purposes referred to, and is proportionate to the contravention in respect of which it is imposed:
 - i. the degree of harm, actual or potential, caused by the contravention;
 - ii. the duration of the contravention;
 - iii. any gain (financial or otherwise) made by HomeServe as a result of the contravention;
 - iv. whether in all the circumstances HomeServe took appropriate steps to prevent the contravention;
 - v. whether HomeServe has a history of contraventions;

⁷⁷ Annex 3.

⁷⁸ Annex 2, The Guidelines, Annex 1, A1.100 to A1.104.

- vi. 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;
- vii. whether the contravention continued, or timely and effective steps were taken to end it, once HomeServe became aware of it;
- viii. the extent to which the level of penalty is proportionate, taking into account the size and turnover of HomeServe;
- ix. steps taken by HomeServe for securing that its misuse is brought to an end and is not repeated; and
- x. steps taken by HomeServe for remedying the consequences of the notified misuse.

4.17 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. Likewise to the level of co-operation HomeServe has given to Ofcom's investigation.

Deterrence and seriousness of the contravention

- 4.18 Abandoned and silent calls will almost invariably result in consumer harm, which may range from inconvenience and annoyance through to genuine anxiety.⁷⁹
- 4.19 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.
- 4.20 In this case, our view is that HomeServe has contravened section 128 of the Act, during the Relevant Period, in a serious way. As a result, our decision is that it is appropriate and proportionate to the persistent misuse to impose a penalty that will help provide HomeServe, and others, with effective incentive to comply with the Act and the Guidelines with the object of deterrence to non-compliance. This is so as to protect citizens' and consumers' interests.
- 4.21 This is one key consideration in our determination of the appropriate amount of any penalty. Another, particularly in light of the requirement of proportionality and the representations made, is the need for the penalty to reflect the seriousness of the contravention. Ofcom is mindful of the need to strike a fair balance between those considerations. Ofcom has taken these considerations to mean the following.
- 4.22 There must be a relationship between the size and seriousness of HomeServe's contravention and the amount of the penalty. But, that is not necessarily a linear relationship. Some factors weigh more heavily than others in Ofcom's determination, as set out in this document. And, for the purposes of deterrence, in certain cases, the penalty may include an element on top of the penalty that would be based only on the seriousness of the relevant contravention.

⁷⁹ Annex 2, the Guidelines, Section 1, paragraph 1.6.

- 4.23 These points are so in order that:
- a) the penalty both appropriately and proportionately penalises HomeServe's contravention notified to it in the section 128 notification; and
 - b) creates an appropriate and proportionate deterrent effect for both HomeServe and other companies using electronic communications networks or electronic communications services.
- 4.24 HomeServe's contravention of section 128 for which Ofcom may impose a penalty is its contravention of that section during the Relevant Period. This contravention involved 42 separate occasions whereby HomeServe exceeded the abandoned call rate of three percent and furthermore, 27 out of those 42 days involved HomeServe making one or more repeat calls to specific numbers within the same 24 hour period, resulting in 36,218 calls which did not adhere to the 24 hour policy set out in the Guidelines.
- 4.25 As stated above, we consider that in this case, the contravention is properly characterised as serious.
- 4.26 In reaching our decision in respect of the imposition of a penalty, we have noted, and taken account of the representations made by HomeServe. Including the statement in the August 2011 Representations that "*Ofcom should carefully consider the level of any penalty (if a penalty is to be imposed upon it) and that any penalty should be towards the lower end of the scale, and significantly below the new statutory maximum of £2 million which HomeServe contends should be reserved for the most serious types of infringement*".⁸⁰ And that "... *any penalty imposed upon it should be proportionate to the nature of the allegations, noting these only relate to 1.2 per cent of all calls made by HomeServe and its outsourced call operations during the relevant period*".⁸¹ Further, as required by our Penalty Guidelines and requested by HomeServe in its February 2012 Representations, we have considered all the circumstances in the round to determine the appropriate and proportionate amount of any penalty.⁸²
- 4.27 For the purposes of the persistent misuse provisions in the Act, section 128(5) provides that a person misuses an electronic communications network or electronic communications service if the effect or likely effect of the use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety; or 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.
- 4.28 Persistent misuse is not based on an assessment of the overall use of the electronic communications network or electronic communications service by the party concerned so that it includes use which is proper use. Rather, the persistent misuse provisions refer only to persistent misuse and matters are narrowed further as it is the effect or likely effect of that misuse which is relevant. Therefore we consider the overall percentage of calls generated by HomeServe and third parties acting for or on behalf of HomeServe (which include calls where there was proper use of the network or service) to only be relevant for the purposes of calculations to expose any persistent misuse and provide Ofcom with a picture of the performance

⁸⁰ Annex 9, 5.4, the August 2011 Representations.

⁸¹ Annex 9, 5.5.14, the August 2011 Representations.

⁸² Annex 15, February 2012 Representations.

of outbound dialling activity, and not as a significant consideration itself in respect of the level of any penalty.

- 4.29 The further factors that are relevant to that determination, and to the proportionality of the penalty are as follows.

Degree of harm caused by the contravention

- 4.30 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.
- 4.31 Section 128(5) of the Act provides that a person misuses an electronic communications network or electronic communications service if the *effect or likely effect of which is to cause another person to unnecessarily suffer annoyance, inconvenience or anxiety*. As set out in the Guidelines⁸³ and in the section 128 notification, 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.
- 4.32 Firstly, we are of the view that HomeServe generated a considerable degree of consumer harm by:
- i) exceeding an abandoned call rate of three percent of live calls over a 24 hour period on 42 separate occasions during the Relevant Period; and
 - ii) failing to ensure that where a call has been identified by AMD equipment as being picked up by an answer machine (including AMD false positives), making one or more repeat calls to that specific number within the same 24 hour period on 27 x 24 hour periods during the Relevant Period.
- 4.33 Secondly, we consider that the level of harm is evident from noting the extent to which HomeServe exceeded the three percent abandoned call rate. As set out in the section 128 notification, with respect to the [X] call centre company, [X] testing of the AMD false positive estimate revealed a pro-rata false positive rate of [X] and that when this was added to the number of abandoned calls made during the Relevant Period, the aggregated abandoned call rate at [X] was [X]. This rate is nearly double the three percent abandoned call rate specified in the Guidelines.
- 4.34 The August 2011 Representations state that HomeServe understood that when [X] used AMD technology during the Relevant Period, it relied on an estimate from the manufacturer of the equipment, [X], to calculate a reasoned estimate of false positives. However, the Guidelines state "*An ACS user undertaking its own testing is also important because we will not accept manufacturers' claims regarding AMD accuracy as the sole basis of a reasoned estimate of AMD false positives.*"⁸⁴ This is because from the available evidence, external factors relevant to an individual ACS user⁸⁵ are not taken into account in a manufacturers' claims regarding AMD accuracy. Ofcom also made it clear in its correspondence to HomeServe in August

⁸³ Annex 2, paragraph 1.6 of the Guidelines.

⁸⁴ Annex 2, paragraph 4.39 of the Guidelines.

⁸⁵ External factors such as the telephone type called (fixed, mobile or VoIP), consumer locations (where the consumer is likely to be at the time of the call and associated background noise), how a call is answered and the type of consumer called (demographic factors such as the age group being called) will contribute to what sounds are on the line when an AMD device makes an assessment and therefore how accurate the detection is (see 4.37-8, Guidelines).

2010, that in the event of an investigation, Ofcom would not accept manufacturers' claims regarding testing as the sole basis of a reasoned estimate of AMD false positives.⁸⁶

- 4.35 In respect to HomeServe's failure to adhere to the 24 hour policy as set out in the Guidelines, HomeServe submitted in the August 2011 Representations that it "*subsequently discovered that [X] mistakenly altered the configuration on the dialler settings for the system which would otherwise ensure that no call back could be made to a number identified as an answer machine within a period of 28 hours (4 hours more than Ofcom's Policy Statement⁸⁷). This refreshed the lists of telephone numbers. This was contrary to the instructions of [X] Head of Compliance and Process Management on 31 January and the advice of [X].*"⁸⁸
- 4.36 As a result of this error, a total of 36, 218 calls across 27 x 24 hour periods were made by [X] in contravention of the 24 hour policy during the Relevant Period. These calls were made within campaigns titled, "Acquisition", "Cross-sell" and "Acquisition – Financial Services."
- 4.37 In Ofcom's view, the degree of harm caused by HomeServe's contravention of section 128 is further emphasised by the fact that the number of calls made which did not adhere to the 24 hour policy was 36,218, and in some instances the same telephone number was called five times after it had initially been classified as picked up by an answer machine.
- 4.38 HomeServe in the August 2011 Representations submitted that "*commensurate with the duration of the contravention, the degree of actual or potential harm caused in HomeServe's case was limited, as evidenced by the small number of complaints made to Ofcom (38) relative to the number of complaints Ofcom would, on average, receive regarding silent calls over a 7 week period (around 1200), and the total number of calls made by HomeServe and its outsourced operations during the relevant period.*"
- 4.39 The duration of the convention is dealt with in greater detail further below. The particular timeframe selected as the Relevant Period does not necessarily cover the *entire* period within which contraventions may have occurred.⁸⁹
- 4.40 Ofcom regulates, among other matters, electronic communications networks and services for the *entire* United Kingdom. We consequently receive complaints from, and in respect of, a large number of parties. Therefore, even if the number of HomeServe related complaints were relatively small in comparison to the number of silent and abandoned call complaints received overall by Ofcom in a particular seven week period, we do not consider such comparison as an appropriate or adequate indicator of the degree of harm.
- 4.41 Furthermore, the number of complaints received by Ofcom does not necessarily reflect the actual number of citizens and consumers harmed by HomeServe's contravention of section 128. In fact, the CCT complaints data is only considered by Ofcom as an indicator of a potentially greater problem that may require attention and investigation.

⁸⁶ Annex 6, Ofcom e-mail to HomeServe dated 16 August 2010.

⁸⁷ Referred to in this document as the Guidelines.

⁸⁸ Annex 9, 3.9, the August 2011 Representations.

⁸⁹ Although we acknowledge that the persistent misuse concerns raised in relation to HomeServe before the Relevant Period would not have related to the 24 hour policy as this did not come into effect until 1 February 2011.

- 4.42 Our view is that the recipients of abandoned and silent calls generated for or on behalf of HomeServe during the Relevant Period suffered annoyance, inconvenience or anxiety unnecessarily. We consider such harm to be compounded by the fact that the recipients had no element of control over receiving them. Further in respect of the repeat silent calls we highlight the research set out in the June 2010 consultation⁹⁰ which stated that *“although the majority of the population do not suffer from repeat silent calls, the impact on those who do, is significant. For example, 20% of those who received two or more silent calls in the last 6 months had received more than 10 silent calls.”*
- 4.43 In addition to suffering harm in the form of annoyance, inconvenience or anxiety, citizens and consumers may have also experienced a financial cost as a result of HomeServe’s actions. In Ofcom’s view it is possible that citizens and consumers in an effort to prevent further calls from HomeServe, may have purchased devices such as [X] or the [X] service (referred to in the Guidelines at paragraph 2.2.7) which come at a financial cost. HomeServe in the August 2011 Representations⁹¹ contended that there was no financial cost to consumers or citizens as a result of its actions. Further, in the February 2012 Representations it submitted that *“it would be unlikely that a customer would go to such lengths [to purchase a device] purely as a consequence of receiving calls from HomeServe alone. Rather, such a purchase is more likely to be made following the receipt of calls from a number of companies or unwanted malicious calls from an individual. It would be anomalous for such customers to then purchase a device with the aim of specifically blocking calls from HomeServe.”*⁹² Ofcom accepts that it does not have direct evidence of financial cost incurred. However, similarly, HomeServe does not have direct evidence that such costs were *not* experienced. It cannot be definitively stated that there was no financial loss. In any event, we consider that harm was suffered regardless of whether that harm did or did not include financial harm.
- 4.44 We do however note that HomeServe did adhere to the Guidelines during the Relevant Period in respect to playing a recorded message that identified HomeServe and providing a 0845 number for the call recipient to use in order to decline further calls from HomeServe. This is, however, counterbalanced by the fact that recorded messages would not have been left for the 4.9% of calls made by [X] during the Relevant Period.⁹³ These were the number of calls estimated by HomeServe to have actually been AMD false positives.⁹⁴
- 4.45 We also acknowledge that calls were terminated after ringing no less than 18 seconds and it was verified by [X] that HomeServe had complied with the 72 hour policy (when an abandoned call, other than an AMD false positive, has been made to a particular number, any repeat calls to that number in the following 72 hours are only to be made with the guaranteed presence of a live operator⁹⁵).
- 4.46 Taking account of the above considerations, including the scale of the contravention, the annoyance, inconvenience and anxiety suffered by the recipients of the silent and abandoned calls during the Relevant Period, together with the fact

⁹⁰ Annex 7, June 2010, “Tackling abandoned and silent calls consultations”, page 19-21.

⁹¹ Annex 9, 5.5.11, the August 2011 Representations.

⁹² Annex 15, February 2012 Representations.

⁹³ Calls abandoned as a result of AMD false positives are unlikely to be accompanied by an information message. This is because ACS users who do leave a message on answer machine calls have received complaints from customers regarding the high number of messages left on a daily basis. These calls are therefore likely to be silent calls (paragraph 2.18, the Guidelines, Annex 2).

⁹⁴ 14,756 (reasoned estimated number of false positives)

⁹⁵ Annex 2, A1.54 the Guidelines.

that these recipients had no control over receiving the calls, Ofcom's decision is that the degree of harm arising out of HomeServe's notified contravention of section 128 was considerable.

The duration of the contravention

- 4.47 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 manner, Ofcom may select a timeframe within which it bases an investigation. This timeframe is known as the relevant period. The determination of parameters in an investigation is also beneficial to the party concerned, as they do not have to provide limitless information. The particular timeframe selected in an investigation as the relevant period will not necessarily cover the *entire* period in which contraventions may have occurred. For example, contraventions may continue following issuance of a section 128 notification if the party concerned did not take all the steps appropriate for securing the notified misuse was brought to an end and not repeated.
- 4.48 In this case, and as previously noted in section 3, Ofcom is of the view that Home Serve did take all such steps as we consider appropriate for securing that its notified misuse was brought to an end.
- 4.49 In the February 2012 Representations, HomeServe submitted that "*prior to 1 February 2011, the 24 hour rule was not in force so there would be no possibility of HomeServe contravening it*". To clarify, Ofcom acknowledges that any persistent misuse which may have taken place before the Relevant Period would not have been in relation to the 24 hour policy as companies were not expected to follow the principles until 1 February 2011. We further do not make any assertion that persistent misuse contraventions occurred before the Relevant Period as we have not investigated this period of time. It is noted however, that companies were required to comply with the persistent misuse provisions since the provision came into force in 2003 and so therefore, compliance with the provisions was required irrespective of the fact that the Guidelines were consulted on in July 2010 and amended in October 2010 (discussed further below).
- 4.50 Ofcom had been in direct contact with HomeServe in May 2010 following concerns regarding silent and abandoned calls being made by or on behalf of HomeServe. HomeServe's notified persistent misuse of an electronic communications network or electronic communications services, occurred from 1 February 2011 until 21 March 2011 (as previously defined as the Relevant Period).
- 4.51 In the August 2011 Representations, HomeServe stated that the Relevant Period of the contravention referred to in the section 128 notification was "*short*".⁹⁶
- 4.52 First, we consider a seven week period which is the duration of the notified non-compliance with section 128 in this case, is, in itself, a substantial duration for a systemic contravention of a provision designed to protect persons unnecessarily suffering annoyance, inconvenience or anxiety.
- 4.53 Within the Relevant Period of seven weeks, there was a significant volume of calls made in contravention of the 24 hour policy across the Relevant Period – 36, 218 over 27 x 24 hour periods – and in some instances, the same number was called five times after it had been initially been classified as being picked up by an answer machine.

⁹⁶ Annex 9, 5.5.6, the August 2011 Representations.

- 4.54 The seven week period pertained only to the period of Ofcom's investigation. It appears that based on [§<] finding of 27 January 2011, [§<] was utilising an incorrect estimate of AMD false positives since at least January 2011 and therefore prior to the commencement of the Relevant Period.
- 4.55 Second, in May 2010, and approximately 38 weeks prior to the commencement of the Relevant Period, Ofcom contacted HomeServe directly in order to alert it to Ofcom's concerns regarding silent and abandoned calls complaints received by the CTT. Ofcom had reasonably expected that following such contact, HomeServe would take the necessary action to ensure it was compliant with the persistent misuse provisions in the Act. The February 2012 Representations contended that Ofcom's reference to its engagement with HomeServe from May 2010 "*has little relevance as the guidelines subsequently changed following the publication of Ofcom's Policy Statement on 1 October 2010 (and Ofcom did not assert that HomeServe was not in compliance with the 2008 guidelines)*"⁹⁷. Ofcom accepts that the investigation did not cover compliance with the 2008 guidelines and this Notification does not cover this earlier period, nor have we used this earlier contact as an aggravating factor. Irrespective of whether the guidelines changed, HomeServe was still required to comply with the persistent misuse provisions of the Act.
- 4.56 Indeed, Ofcom published an open letter on 20 December 2010 addressed to industry stating that enforcement action would be taken should the Guidelines not be complied with. In particular, it alerted industry to the new 24 hour policy set out in the Guidelines and notified industry that the Government had increased the maximum financial penalty for persistent misuse from its previous level of £50,000 to £2 million. This letter was e-mailed directly by Claudio Pollack, Consumer Group Head, to key industry stakeholders, one of whom was [§<], Senior Legal Counsel, of HomeServe. Notwithstanding Ofcom's explicit actions to raise HomeServe's awareness of the importance of compliance it was still found in contravention after this.
- 4.57 Our view is that the duration of the notified non-compliance with section 128, is, in itself, a substantial period of time for contravention of the persistent misuse provisions to occur, and is a relevant factor in determining the amount of any penalty imposed on HomeServe.

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

- 4.58 In the representations HomeServe stated that it had not made any direct financial gain as a result of the alleged breaches, and that these involved any direct cost to the customer.⁹⁸
- 4.59 ACS technology is used by call centres to improve efficiency by maximising the amount of time call centre agents spend speaking to consumers. Use of AMD technology further improves this efficiency by disconnecting calls that go through to consumers' answer machines.⁹⁹ Companies using ACS and AMD may pass on to

⁹⁷ As previously noted, we acknowledge that HomeServe was not required to comply with the 24 hour policy until it took effect from 1 February 2011, however HomeServe was, at the time of Ofcom's engagement with it, required to ensure it was compliant with the persistent misuse provisions of the Act.

⁹⁸ Annex 9, 5.5.12, the August 2011 Representations.

⁹⁹ Annex 7, paragraph 1.8.

consumers the cost savings that these technologies allow.¹⁰⁰ However, if not robustly and properly managed, a side effect of this technology may be the generation of abandoned and silent calls, resulting in consumer harm.

- 4.60 Ofcom recognised that a balance was needed between the positive benefits of ACS and AMD technology on the one hand, and the potential failure of these technologies to achieve total accuracy, resulting in a negative impact for some consumers on the other. In recognition of the benefits of ACS and AMD when properly managed, Ofcom did not prohibit their use and put in place strict parameters for the use of these technologies.
- 4.61 An example of one such parameter is the 24 hour policy set out in the Guidelines. In this case, HomeServe did not observe this policy in its use of AMD as it continued to call consumers it had not been able to get in contact with earlier that day and in so doing could have potentially benefitted from additional efficiency gains afforded to it by using AMD technology in an unrestrained way. We note that the particular campaigns concerned were sales campaigns (entitled “[X]”, “[X]” and “[X]”), and consider that the continued calling may have given rise to scope for a gain (financial or otherwise) by HomeServe in increased take-up of HomeServe services.
- 4.62 Although HomeServe asserted that it did not make any direct financial gain, we consider that it is likely that it did make *some* additional gain by operating outside the principles set out in the Guidelines. However, on the basis that we do not have direct evidence of such additional gain in this case, we have not taken this factor into consideration in the determination of any penalty amount.

Steps taken by HomeServe to remedy the consequences of the contravention

- 4.63 In the August 2011 Representations HomeServe stated that it had “*taken a number of steps to remedy any harm that may have been caused in connection with the allegations, namely the use of a CLI number so that customers are able to contact HomeServe, if necessary...*”¹⁰¹
- 4.64 Ofcom notes that the Guidelines state “*For each outbound call a Caller Line Identification (CLI) number is presented to which a return call may be made which is either a geographic number or a non-geographic number...*”¹⁰² This principle has been in place since the 2006 guidelines and is not new. Ofcom expects all users of ACS to have these in place whenever dialling occurs. This step is not sufficient in Ofcom’s view.
- 4.65 HomeServe also stated in the August 2011 Representations that it had implemented improvements to the complaints handling system.¹⁰³ In its response to the Second Information Request it detailed its complaints handling procedures.¹⁰⁴
- 4.66 HomeServe stated that “*in instances of a complaint related to the receipt of telemarketing calls including silent calls...the agents within HomeServe are able to remove these customer details from further calling with immediate effect. If the customer complains whilst in communication with one of our outsource partners,*

¹⁰⁰ Annex 7, paragraph 1.9.

¹⁰¹ Annex 9, 5.5.3, the August 2011 Representations.

¹⁰² Annex 2, paragraph A1.56 of the Guidelines.

¹⁰³ Annex 9, 5.5.3, the August 2011 Representations.

¹⁰⁴ Annex 11, page 10, HomeServe’s response to the Second Information Request.

the customer's data record is flagged and then uploaded into the HomeServe system over night removing the customer from all further telemarketing".

- 4.67 HomeServe also stated that *"if the customer complaint is in connection with the receipt of silent and abandoned calls the Customer Relations team initiate an investigation that requests call history data via the Operations team who then co-ordinate receipt of the data from the internal dialler and outsource partners call history. The Operations team will ensure that the customer record is updated to receive no further telemarketing with immediate effect. The call history is then shared with the customer as well as the actions undertaking to resolve the complaint."*
- 4.68 Having considered the information HomeServe provided regarding improvements to HomeServe's complaint handling procedures, we consider that while this is an important step towards future compliance (and indicates that future recipients of silent and abandoned calls made by or on behalf of HomeServe are more likely to have their complaints addressed adequately) it is not a *remedy* for those citizens and consumers who received silent and abandoned calls during the Relevant Period.
- 4.69 In the August 2011 Representations, HomeServe submitted that *"it had contemplated offering financial compensation to customers but has decided not to do so in this instance as it does not believe that any customer has suffered direct financial loss as a result of its actions"*.¹⁰⁵
- 4.70 Ofcom does not agree that it can be definitively asserted that the individuals harmed through HomeServe's actions did not incur any direct financial loss. As noted at paragraph 4.43, those citizens and consumers who were affected by the contravention may have, in an effort to prevent further calls from HomeServe, purchased devices, which come at a financial cost. However, we do not have direct evidence that such costs were incurred.
- 4.71 Ofcom does not prescribe methods for which the notified misuser may remedy the consequences of their contravention, but rather, places the onus on the notified misuser to select the appropriate remedy in the circumstances and then once selected, to implement it. Put a different way, we expect notified misusers to acknowledge the harm suffered and remedy that harm.
- 4.72 Section 129(7) of the Act provides a useful indicator of one form of remedy. It states that remedying the consequences of persistent misuse includes paying an amount to a person by way of compensation for loss or damage suffered by that person; or, in respect of annoyance, inconvenience or anxiety to which he has been put. Although compensation is not the sole way in which a notified misuser may remedy the consequences of its contravention, we recognise it as one way in which the notified misuser may discharge its obligation to remedy the consequences of a contravention.
- 4.73 As noted in section 3, Ofcom took the preliminary view in the Provisional Notification that the steps HomeServe said it had taken in the August 2011 Representations were not all such steps as were appropriate for remedying the consequences of the notified misuse.

¹⁰⁵ Annex 9, 5.5.4, the August 2011 Representations.

- 4.74 Following the issuance of the Provisional Notification to HomeServe, it made representations regarding the steps it would take to remedy the consequences of the notified misuse. In summary, these were as follows:
- HomeServe would offer £10 compensation to a claimant upon it establishing from its records that the CLI of the claimant is a match of a CLI contacted while AMD was in operation; it would issue a statement on its website that included this offer; and it would communicate this offer in response to all press enquiries made to it;
 - HomeServe would establish a dedicated telephone number for claimants to call for an initial period of one month (to be reviewed and extended if appropriate); and
 - HomeServe would offer £10 compensation to the 38 individuals who lodged a complaint with Ofcom during the Relevant Period and to the 11 individuals who had complained to HomeServe during the Relevant Period
- 4.75 Taking account of the representations made by HomeServe after the Provisional Notification, it is Ofcom's view that HomeServe has committed to put in place such steps as we consider appropriate for remedying the consequences of the notified misuse. Accordingly, Ofcom does not consider this to be an aggravating factor that should increase the level of penalty.

Whether HomeServe has a history of contraventions

- 4.76 HomeServe does not have a history of notification of contraventions in respect of the persistent misuse provisions or any other provisions of legislation falling under Ofcom's regulatory jurisdiction. Accordingly, Ofcom does not consider this to be an aggravating factor that should be reflected in an increased penalty.

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

- 4.77 Ofcom's view is that HomeServe failed to take all appropriate (and timely) steps in order to prevent its notified contravention.
- 4.78 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 in place processes for compliance as part of their ordinary course of business.
- 4.79 In Ofcom's opinion, HomeServe did not have an effective compliance strategy in place to prevent its notified contravention. 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. While we acknowledge that [redacted] provided an assurance that it was operating compliantly when in fact it was not, we consider that this compliance failure would have become apparent to HomeServe had it had an effective compliance strategy which monitored and assessed ongoing compliance.

- 4.80 Ofcom initiated contact with HomeServe, in May, August and September 2010. Ofcom contacted HomeServe about a number of complaints regarding abandoned calls allegedly generated by HomeServe from the telephone number [redacted] (set out in detail above in section 2). The purpose of this contact was to bring this concern to its attention, impress upon it the importance of compliance with Ofcom's (then) guidelines and the potential consequences of a failure to comply. During the course of this engagement, Ofcom highlighted it would not accept manufacturers' claims regarding testing as the sole basis of a reasoned estimate of AMD false positives and that testing should be undertaken whenever campaign data was changed to an extent that it could materially change AMD accuracy rates.¹⁰⁶
- 4.81 However, compliance failures continued and HomeServe continued to rely on manufacturers' claims in respect of reasoned estimates of AMD false positives.
- 4.82 In the February 2012 Representations, HomeServe contended that it "*had taken steps to address its compliance with the forthcoming Ofcom Policy Statement in the summer of 2010*" and that it was not the case that HomeServe only took steps to end the contravention after it was informed of Ofcom's decision to investigate.
- 4.83 HomeServe further submitted "*in line with the proposed changes to the false positive rate, HomeServe put in place a plan in July 2010 to conduct testing of the false positive rate, including seeking external input from [redacted]. HomeServe then conducted tests over summer 2010 but was unable to glean any meaningful results (as the false positive rate was less than zero)*". HomeServe then stated "*Following discussions with [redacted] of [redacted], HomeServe became aware that there was an error in Ofcom's proposed methodology for calculating the false positive rate. HomeServe therefore took the decision to await clarification of the methodology upon the publication of Ofcom's Policy Statement on 1 October 2010.*"¹⁰⁷
- 4.84 Firstly, Ofcom recognises that HomeServe carried out testing of the false positive rate, of its own volition, in the summer of 2010. Secondly, by 1 October 2010, Ofcom had rectified the erroneous definition and example in the July consultation (how an abandoned call rate could be calculated when using AMD technology). As HomeServe itself notes, the methodology was made clear from 1 October 2010 when the Guidelines were published. Yet HomeServe did not take steps to resume the false positive testing; continued to use AMD technology; and continued to rely on the manufacturer's estimate. In Ofcom's view, given the difficulties encountered by HomeServe in calculating the false positive rate, it should have ensured the AMD technology was turned off until it had properly calculated the false positive rate (post publication of the Guidelines). However, it was not until late January 2011 that HomeServe gave instructions to [redacted] to turn the AMD technology off. Further, HomeServe's February 2012 Representations show that even at this point there was confusion as to whether AMD was on or off during the Relevant Period as evidenced by the conflicting recollections of staff at [redacted] and HomeServe.¹⁰⁸
- 4.85 In Ofcom's view, turning off the AMD technology immediately upon realisation that HomeServe was unable to accurately calculate the false positive rate (and ensuring it was in fact turned off) would have been an appropriate and timely step to prevent the contravention.

¹⁰⁶ Annex 6, e-mail from Ofcom to HomeServe dated 16 August 2010.

¹⁰⁷ Annex 15, 4.8-4.10, February 2012 Representations.

¹⁰⁸ See Annex 15, paragraphs 6.1-6.6 of the February 2012 Representations.

- 4.86 We note that despite being informed on 9 February 2011 by [X] that [X] was using an incorrect false positive estimate and that the compliance environment at [X] was “*weak*”, amongst other things, it was not until 9 March 2011 that HomeServe appointed [X] to test the false positive rate and 8 April 2011 that the actual testing was carried out.¹⁰⁹
- 4.87 HomeServe were alerted to concerns that it was generating silent and abandoned calls prior to Ofcom commencing its investigation. There were nearly two and half months between [X] informing HomeServe of the problems at [X] to action being taken in respect of those problems. It is Ofcom’s view that points like this indicate 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.
- 4.88 We do, however, acknowledge that HomeServe did, of its own volition, on 10 December 2010, contract the services of [X] to review its dialling operations. We further acknowledge that it carried out due diligence of each of the third party company call centres prior to engaging them to act for or on its behalf (as set out in its response to the Second Information Request).¹¹⁰ According to HomeServe’s response to the Second Information Request, the due diligence exercise included assessment (such as reporting, Ofcom Compliance Audits and independent audits) of the adequacy of the compliance arrangements in place at the third party company call centres. We note that the [X] compliance audit carried out in December 2010, within which HomeServe “*checked that a False Positive estimate was being included in [X] internal reporting calculations*”, did not identify that the manufacturer’s estimate of the false positive rate was being used at the call centre, contrary to the Guidelines. This was not identified until [X] site visit to [X] on 27 January 2011.
- 4.89 Taking account of the above, we consider that HomeServe failed to follow the Guidelines’ principles and procedures (or do so effectively and promptly), or take other appropriate steps for preventing the notified contravention, as evidenced by the scale of the contravention in the Relevant Period. The absence or ineffectiveness of the procedures demonstrates HomeServe’s failure to take appropriate (and timely) steps to prevent its notified contravention. 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.

- 4.90 In the August 2011 Representations, HomeServe stated that the circumstances surrounding Ofcom’s allegations “*did not occur as a result of any intention or recklessness on the part of HomeServe*”¹¹¹. It further stated that prior to the review by [X], HomeServe had received assurances from all of its outsourced call centre operations that they were complying with the Guidelines. The August 2011 Representations continue to state that “*senior management at HomeServe were informed regularly of the steps that the business was taking to ensure compliance with Ofcom’s Policy Statement.*”¹¹² They were also kept up to date with the

¹⁰⁹ Annex 11, HomeServe’s response to the Second Information Request.

¹¹⁰ Annex 11, pages 2-7, HomeServe’s response to the Second Information Request.

¹¹¹ Annex 9, 5.5.8, the August 2011 Representations.

¹¹² Referred to as the Guidelines in this document.

measures being implemented in line with [X] recommendations, following the original review".¹¹³

- 4.91 However, we note following the review of HomeServe's outbound calling activity, [X] verbally informed HomeServe of its findings on 9 February 2011 and on 10 February 2011, it submitted a report¹¹⁴ detailing such findings and recommendations. Page 7 of this report contains an extensive list of issues identified by [X], including "*there are significant errors with the collation, calculation and reporting of data... Your reporting is currently non-compliant and cannot be relied on to provide a true view of your abandon rate*", "*where AMD technology is being used no valid reasoned estimates of False Positives have been created. These operations (in-house and [X]) are currently non-compliant*" and "*on every day that we sampled at least one internally reported calling list had an abandoned call rate of above the 3% rule*".
- 4.92 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. Notwithstanding that this was the state of their knowledge, it was not until 8 April 2011 that [X] tested the [X] dialler, which revealed a false positive rate of [X] leading to a rate that was significantly higher than the permitted 3% abandoned call rate.¹¹⁵
- 4.93 In its response to the Second Information Request, HomeServe's audit of [X] in December 2010 did not check whether or not [X] was using the manufacturer's estimate of AMD false positive rates. Instead the audit report stated that "*AMD setting is adjusted depending on the file run (dial mobile campaigns). The AMD False positive figure is set by the IT & Compliance team – set at [X]*".¹¹⁶ This issue was however identified by [X] report of 10 February 2011 which clearly stated [X] were using the manufacturer's estimate on accuracy. As previously stated, Ofcom does not accept AMD false positive estimates calculated solely on the basis of manufacturer's figures. HomeServe were aware of this, as Ofcom had informed HomeServe directly in its August 2010 correspondence.
- 4.94 In May, August and September 2010, Ofcom contacted HomeServe's Senior Legal Counsel and during the course of this contact Ofcom raised its concerns about a number of silent and abandoned calls complaints it had received. This suggests to Ofcom that senior management were aware at this time, that Ofcom had concerns regarding HomeServe's compliance with the persistent misuse provisions.
- 4.95 In Ofcom's view, HomeServe's contravention of the persistent misuse provisions did not occur intentionally.
- 4.96 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 responses to information requests, we agree with HomeServe that its notified contravention was not reckless on the basis that they did not ignore the risk, or pay no heed to the existence of such risk.

¹¹³ Annex 9, the August 2011 Representations.

¹¹⁴ Annex 11, the [X] 2011 Report provided in HomeServe's response to the Second Information Request.

¹¹⁵ Annex 9, paragraph 3.14 of the August 2011 Representations.

¹¹⁶ Annex 11, page 3 of "*Ofcom Audit for [X]*" Report, provided by HomeServe in its response to the Second Information Request.

- 4.97 However, we nevertheless maintain the view, having considered all of HomeServe's representations, that:
- a) members of HomeServe's senior management were aware of the relevant contravention;
 - b) it continued for some time after they were so aware;
 - c) for at least a significant part of the time they were so aware, HomeServe did not take the matter sufficiently seriously (nor was action expedited) and take enough care to ensure it was in compliance; and
 - d) responsibility and culpability attaches to HomeServe as a result.
- 4.98 Consequently, in determining the level of any penalty amount we have taken into account the extent to which senior management knew that a contravention was occurring.
- 4.99 As to the effectiveness or otherwise of the steps HomeServe took towards compliance once it became aware of its contravention, we return to those in the sections below.

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

- 4.100 HomeServe is an international home emergency and repairs company which provides insurance cover and fixed-priced repairs to consumers. It has 3.3 million customers across the UK and has international operations in America and in parts of continental Europe. Its statutory reporting accounts as at May 2011, submitted to Companies House, disclosed a turnover of £467.1m and a profit of £104.8m.¹¹⁷
- 4.101 In Ofcom's view, these factors indicate that HomeServe is a sizeable business with a significant turnover. As such, there is an expectation that it would have robust compliance strategy in place with respect to its outbound calling activities. In accordance with our Penalty Guidelines, we consider that HomeServe'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 HomeServe *became aware* of it.

- 4.102 Ofcom also takes the view that:
- a) HomeServe did not take timely steps that were effective in bringing it into compliance once it became *aware* of its contravention;¹¹⁸ and
 - b) this is another factor adding to the amount of any penalty imposed on HomeServe; but

¹¹⁷ Annex 13, HomeServe's Annual Report and Accounts 2011.

¹¹⁸ As discussed in section 3, Ofcom is of the view that HomeServe has *now* (after the section 128 notification was issued) taken steps for securing that its notified misuse is brought to an end and not repeated.

- c) that exacerbation is mitigated by certain steps HomeServe took *after* Ofcom informed HomeServe that it was being investigated.
- 4.103 Ofcom informed HomeServe of its concerns regarding its compliance with the persistent misuse provisions in May 2010 when Ofcom wrote to HomeServe.¹¹⁹ Ofcom also contacted HomeServe in relation to this, in August and September 2010. On 20 December 2010, Ofcom issued an open letter to industry advising of the (new) Guidelines and Ofcom's expectations of implementation following expiration of the implementation period on 1 February 2011. On 28 March 2011, Ofcom contacted HomeServe on a further occasion to inform it that Ofcom intended to conduct an investigation into HomeServe's call centre operations over the Relevant Period.¹²⁰
- 4.104 Following our consideration of all of the representations and responses to information requests, we are also of the view that there were delays between the point at which HomeServe was expressly advised of non-compliance and it taking action to address that non-compliance. This view is reinforced by the fact that HomeServe was in possession of a report from 10 February 2011 onwards which unequivocally stated there was non-compliance at [X], and that, among other things, the compliance environment was 'weak'.¹²¹ Yet HomeServe did not engage [X] to implement its recommendations until 7 March 2011.
- 4.105 HomeServe submitted that "[X] were asked to pitch for the work immediately and submitted a proposal on 10 February, the same day as the finalised report was received. This proposal was immediately accepted by the relevant operations team."¹²² HomeServe also stated that "*the proposed project and vendor then had to go through a formal procurement process*"¹²³ ... and that "*The time lapses is not in any way unusual and, we believe, should not be described as a 'delay'*".¹²⁴ It further stated that it was "*HomeServe's intention to address the identified compliance risks with a structured project and implementation of most of the recommendations were left until [X] were formally appointed.*"¹²⁵ HomeServe reiterated these points in its February 2012 Representations, and added that "*Following receipt of [X] report of 10 February 2011, the original timescale for completing the phase 2 remedial steps was scheduled for the end of February 2011. Due to the nature of the procurement process, the phase 2 work commenced on 12 March 2011. HomeServe does not consider that this led to undue delay in the circumstances in terms of ensuring HomeServe was compliant.*"¹²⁶
- 4.106 In light of the serious nature of non-compliance that [X] review revealed it is not clear to Ofcom why HomeServe did not expedite its procurement process or at the very least take steps to implement some of [X] recommendations. On this point, in relation to two of [X] recommendations, namely reporting and calculation of three percent rule and false positive testing, it stated that the timing could be in place by the end of February.¹²⁷

¹¹⁹ Annex 4, Ofcom letter to HomeServe dated 7 May 2010.

¹²⁰ Annex 12, file note of Ofcom conversation with HomeServe's Senior Legal Counsel [X] on 28 March 2011.

¹²¹ Annex 11, page 8, HomeServe's Response to the Second Information Request.

¹²² Annex 11, page 8, HomeServe's Response to the Second Information Request.

¹²³ Annex 11, page 8, HomeServe's Response to the Second Information Request.

¹²⁴ Annex 11, page 8, HomeServe's Response to the Second Information Request.

¹²⁵ Annex 11, page 9, HomeServe's Response to the Second Information Request.

¹²⁶ Annex 15, 4.15, February 2012 Representations.

¹²⁷ Annex 9, the August 2011 Representations, Annex 7, [X] Report, page 13.

- 4.107 In a similar vein. Ofcom notes that an independent auditor, [X], was not appointed to carry out testing of the false positive rate at [X] (and the in-house centres) until 9 March 2011 – a month after it was verbally told by [X] of the non-compliance. And further, the actual testing was not conducted for a further month after [X] was appointed. HomeServe, in its August 2011 Representations stated that a number of factors resulted in the time taken between appointment and testing by [X], including that [X] were completing other projects, the time taken to purchase the testing kit and to carry out the testing.¹²⁸
- 4.108 While Ofcom in part accepts these arguments, it still considers that given the extent of the problems revealed by [X], HomeServe should have found a way to expedite matters and in the meantime ensured the AMD technology was switched off. HomeServe could have, for example, invested additional resources and purchased two recorders so that testing at [X] and at in-house call centres could be carried out concurrently, or contracted the services of another auditor who would be available before 17 March 2011.
- 4.109 In the Second Information Request,¹²⁹ HomeServe stated that it retained [X] to assist in implementing the recommendations [X] had made. This included [X] conducting internal audits of the in-house and outsourced call centres, the most recent of which occurred at the end of July 2011 and stated all operations were following the principles set out in the Guidelines. [X] reviewed HomeServe's existing compliance policies and procedures and prepared a revised document, entitled "*Compliance Standards for Outbound Calling*" issued on 27 April 2011.¹³⁰ Each third party call centre company provided confirmation to HomeServe that AMD was not to be used on any HomeServe campaign at any point in the future without the express consent of HomeServe.¹³¹
- 4.110 HomeServe also appointed a full time Compliance Officer to undertake regular audits both internally at the outsourced call centres and the implementation of HomeServe's "*Compliance Standards for Outbound Calling*" document which sets out compliance standards.¹³²
- 4.111 Furthermore, HomeServe, of its own volition, commenced a review of its call centre obligations following Ofcom's publication of the Guidelines in October 2010.
- 4.112 Following consideration of the above points, we accept that the steps HomeServe took appear to have brought HomeServe closer to compliance.
- 4.113 However, we hold the view that although HomeServe took some steps, these were:
- *after* Ofcom had informed HomeServe it would be investigated;
 - not sufficiently expedited; and

¹²⁸ Annex 11, page 9, HomeServe's response to the Second Information Request.

¹²⁹ Annex 11, HomeServe's response to the Second Information Request.

¹³⁰ Annex 9, the August 2011 Representations, Annex F.

¹³¹ Annex 11, page 10, HomeServe's response to the Second Information Request.

¹³² Annex 11, HomeServe's response to the Second Information Request.

- not all the steps necessary to bring the contravention to an end once it became *aware* of it.¹³³

Co-operation with Ofcom's investigation

- 4.114 Ofcom's Penalty Guidelines say, "*Ofcom may increase the penalty where the regulated body in breach has failed to cooperate fully with our investigation.*" We have considered the possible impact on any penalty, of the co-operation HomeServe gave to Ofcom's investigation of this matter.
- 4.115 Ofcom acknowledges in general that HomeServe has provided full co-operation with Ofcom's investigation of this matter. It has responded to information requests promptly, provided information as required and Ofcom has no reason to believe that the information provided was inaccurate in any way.
- 4.116 Accordingly, Ofcom does not consider that there has been a lack of co-operation that might serve as an aggravating factor in this matter and to increase the amount of any penalty we may impose.

Relevant precedents set by previous cases

- 4.117 Our Penalty Guidelines published on 13 June 2011 also indicate that we will, in determining a penalty, have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and the context of each case. We have considered them here. For the sake of clarity, this section is structured as follows:
- qualifications as to any weight which may be attached to the existing persistent misuse precedents (prior to 2011);¹³⁴
 - comparison and distinction between the present case and persistent misuse cases prior to 2011 in respect of penalty factors considered in common;
 - comparison and distinction between the present case and other cases in which penalties were imposed; and
 - summary of relevance of previous precedents.
- 4.118 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 silent or abandoned calls. Under section 130 of the Act, Ofcom has imposed penalties for persistent misuse in respect of nine companies since June 2006.¹³⁵

Qualifications as to any weight which may be attached to the existing persistent misuse cases

¹³³ For the avoidance of doubt, Ofcom is of the view that HomeServe has *now* (after the section 128 notification was issued) taken steps for securing that its notified misuse is brought to an end and not repeated.

¹³⁴ These pre-2011 cases are considered as a group. See:

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

¹³⁵ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

4.119 While, as noted above, Ofcom has previously imposed penalties for persistent misuse of an electronic communications network or service, we consider these precedents to be of limited assistance in the determination of this case for the following reasons:

- the previous cases were determined prior to the introduction of secondary legislation¹³⁶ increasing the maximum financial penalty in respect of persistent misuse from £50,000 to £2 million;
- the previous 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 previous 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 7 months to 7 weeks¹³⁷ 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.

4.120 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.

Comparison and distinction between the present case and persistent misuse cases prior to 2011 in respect of penalty factors considered in common

4.121 There are no previous cases in which Ofcom has set penalties in respect of persistent misuse using the current Guidelines, the current Penalty Guidelines and following the introduction of an increased maximum penalty. However, there are precedents in which we have imposed a penalty for persistent misuse using previous penalty guidelines and in which the maximum financial penalty that could be imposed at the time was £50,000. For ease of reference, we have referred to persistent misuse cases before 2011 as the “pre-2011 cases” in this document. These pre-2011 cases are as follows:

- Barclays Bank Plc (“Barclaycard”), September 2008
- Ultimate Credit Services Limited (“UCS”), January 2008
- Equidebt Limited (“Equidebt”), December 2008
- Abbey National Plc (“Abbey”) , March 2008
- Complete Credit Management Limited (“CCM”), March 2008

¹³⁶ http://www.legislation.gov.uk/ukxi/2010/2291/pdfs/uksi_20102291_en.pdf

¹³⁷ Note the duration of the relevant period in a particular case may vary depending on the facts and circumstances of that case.

- Bracken Bay Kitchens (“Bracken Bay”) , January 2007
- Space Kitchens and Bedrooms (Holdings) Limited (“Space Kitchens”), January 2007
- Carphone Warehouse Group Plc (“Carphone”), January 2007
- Toucan Residential Limited, formerly IDT Direct Limited (“Toucan”), January 2007

4.122 In the above pre-2011 cases, Ofcom imposed penalties for persistent misuse ranging from £5,000 to the then statutory maximum penalty of £50,000. In terms of severity, the pre-2011 cases were considered by Ofcom to range from serious to very serious. These cases concerned non-compliance in respect of abandoned call rates in excess of three percent of live calls over a 24 hour period but some also concerned other forms of persistent misuse,¹³⁸ including failure to present a (valid or accurate) CLI and failure to play information messages after the occurrence of an abandoned call. Therefore these cases also include factual issues which are different to those in the present case.

4.123 Pursuant to section 130(5) of the Act, in making its determination, Ofcom must have regard not only to any representations by the notified misuser but also to; any steps taken by the notified misuser for securing that the misuse is brought to an end and not repeated; and any steps taken by the notified misuser for remedying the consequences of the notified misuse. These two factors set out under section 130(5)(a) and (b) of the Act were considered in all the pre-2011 cases.

4.124 There are certain penalty factors which remain common to both the previous penalty guidelines and the current Penalty Guidelines and therefore, subject to the caveats at paragraph 4.119, these pre-2011 cases are useful but only insofar as they provide an indication of the application of such common factors.

4.125 The application of factors common to both the present case and the pre-2011 cases are set out below.

Common factor 1: Deterrent effect

4.126 These cases considered the deterrent effect of the imposition of a penalty.

4.127 Ofcom stated its position particularly clearly in the CCM case. In the CCM case, CCM submitted that by understanding its own non-compliance, this was sufficient incentive to have remedied that situation and ensure compliance in the future. Ofcom disagreed, stating it “*considered the question of incentives to comply relates to industry as a whole and not only to the persistent misuser.*” Ofcom further stated it considered that there remains a need to ensure that the threat of penalties will act as a sufficient incentive to comply with section 128 and the (then) guidelines in respect of persistent misuse. Ofcom, in the pre-2011 cases took into account whether the contraventions at issue continued even after Ofcom had fined other companies for persistent misuse.

4.128 Comparably, in the present case, Ofcom has taken into account the fact that the threat of penalties for persistent misuse has been in the public domain since the Act

¹³⁸ As stated in the Guidelines at 1.24 “*Abandoned and silent calls are just two examples of persistent misuse that call centres may be responsible for...*”

came into force in 2003 and Ofcom fined a number of companies. Recently, it again featured prominently in the public domain, particularly within industry circles, following the introduction of the increased financial penalty and the revised Guidelines.

4.129 Ofcom has taken into account that in the present case, the contravention occurred:

- after the imposition of penalties in the pre-2011 cases;
- after Ofcom issued an open letter to industry advising of new Guidelines and Ofcom's expectations of implementation by February 2011; and
- after Ofcom contacted HomeServe to inform it that Ofcom intended to conduct an investigation into HomeServe's call centre operations over the Relevant Period.

4.130 We consider that clearly 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 Guidelines across industry and for HomeServe specifically.

Common factor 2: Seriousness and degree of harm caused by the contravention

4.131 Seriousness and degree of harm caused by the contravention are relevant to both the present case and the pre-2011 cases. In the pre-2011 cases, Ofcom was guided by the degree of harm or likely harm which results from the persistent misuse. In the pre-2011 cases, Ofcom's position was that harm is linked to the number of abandoned and/or silent calls made and took this into account in determining the seriousness of a case.

4.132 This approach to ascertaining seriousness remains relevant. The issue of the harm or likely harm is presently considered to be linked to the number of abandoned and/or silent calls. This is set out in the Guidelines which state:

"Causing annoyance to a significant number of people is inherently more serious than causing annoyance to a small number and is more likely to justify enforcement action".¹³⁹

4.133 Notwithstanding that the total number of abandoned and/or silent calls made during the relevant periods in respect of each pre-2011 case varied considerably, the persistent misuse in all these cases was considered at the very least to be, "serious".

4.134 The abandoned call rate was deemed to be relatively low, for example in the CCM case. The total number of abandoned calls made during the relevant period (between 1 October 2006 and 18 April 2007) was 815 and CCM exceeded the three percent abandoned call rate on 29 of the 120 days on which it made calls during the relevant period. Ofcom in assessing the level of seriousness in that case, took into account the fact that (i) the total amount of abandoned calls was relatively low; (ii) that the three percent abandoned call rate was exceeded on less than a quarter of the days on which CCM made calls during the relevant period; (iii) in almost half of the 24 hour periods where CCM exceeded the three percent limit, this was by a very small number of calls (less than two). Yet Ofcom remained of the view that there was a serious contravention of section 128 (in as much as CCM had used an

¹³⁹ The Guidelines, Annex 1, A1.84.

ACS technology to make and repeat), on a sufficient number of occasions so as to represent a pattern of behaviour or practice.

- 4.135 In the present case, the period of investigation was shorter in duration than in the CCM case, as the Relevant Period spanned from 1 February 2011 to 21 March 2011.
- 4.136 In that time, HomeServe exceeded an abandoned call rate of three percent of live calls over a 24 hour period on 42 separate occasions during the Relevant Period (1 February 2011 and 21 March 2011). This occurred at a particular call centre ([§<]) and the abandoned call rate exceeded three per cent every day that automatic dialling was in operation (42 days out of 49).
- 4.137 Moreover, another notified misuse related to HomeServe making one or more repeat calls using AMD equipment to a specific number previously identified as being picked up by an answering machine within the same 24 hour period during the Relevant Period. This occurred on 27 x 24 hour periods during the Relevant Period and as a result the 24 hour policy was not complied with on 27 out of 42 days where automatic dialling was in operation during the Relevant Period. The number of calls made which did not adhere to the 24 hour policy was 36,218.
- 4.138 While Ofcom, as in the CCM case, considers HomeServe's contravention to be serious, the CCM case can be contrasted with the present case as, within a shorter period of time, HomeServe or parties acting for or on its behalf, generated a greater amount of non-compliant calls than in the CCM case.
- 4.139 In relation to the issue of duration and assessment of non-compliance within the relevant period, the present case can be distinguished from the Abbey case.
- 4.140 The duration of a relevant period is not in itself an indicator of a whether non-compliance has occurred to any greater or less extent. The reason for a comparatively shorter relevant period in the present case to the Abbey case is simply Ofcom's need to maximise administrative efficiency in the course of investigations (as discussed in more detail at paragraphs 4.47 to 4.57). It is this necessity to maximise administrative efficiency that has recently lead to reduced periods of investigation.
- 4.141 Therefore the fact that the periods of investigation differ greatly between these two cases is not relevant to the level of non-compliance.

Common factor 3: Whether senior management knew, or ought to have known, that a contravention was occurring or would occur.

- 4.142 Another factor considered in both the pre-2011 cases and the present case is the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur. In the majority of the 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. For example, in the case of Barclaycard (in which Ofcom imposed the maximum statutory penalty applicable at the time), Ofcom stated that there was no direct evidence to suggest senior management were aware or ought to have been aware of the contravention and that *"the senior management's general duty was to oversee the management and operation of the business and that did not necessarily extend to a position where it ought to have been aware of the number of calls on a daily basis, or of non-compliance with the other procedures."*

- 4.143 However, and by way of contrast, in the case of Toucan, Ofcom considered that as the company had previously been the subject of an investigation into the making of silent and/or abandoned calls, then as a result of that investigation, the company's senior management ought to have been aware of Ofcom's guidelines and, critically ought to have known that a contravention was occurring or could occur in the circumstances.
- 4.144 Although HomeServe has not previously been the subject of investigation in respect of persistent misuse, HomeServe had received a report from [X] on 10 February 2011 stating for example that *"on every day that we sampled at least one internally reported calling list had an abandon rate of above the 3% rule"*.
- 4.145 HomeServe submitted in the August 2011 and February 2012 Representations that it had received assurances from all of its outsourced call centre operations that they were compliant with the Guidelines. It subsequently transpired that they were not compliant. Ofcom's position set out in the Space Kitchens case is of note. In this case the company asserted that it experienced technical problems and other difficulties with its dialler manufacture which affected the number of abandoned calls made. In the section 130 notification, Ofcom stated that:

"Ofcom considers that it is the Company's responsibility to ensure that its call centres comply with its legal obligations, and in particular, to comply with the Persistent Misuse Statement.¹⁴⁰ In these circumstances Ofcom does not consider that the Company's contraventions can be attributed to circumstances beyond the control of the Company nor to the actions of a third party."

- 4.146 In the present case, and similarly to the Toucan case, Ofcom considers that senior management at HomeServe knew or at least, ought to have known, that a contravention was occurring or would occur.

Common factor 4: Whether in all the circumstances the company took appropriate steps to prevent the contravention

- 4.147 The issue of whether in all the circumstances the company took appropriate steps to prevent the contravention was considered in both the pre-2011 cases and in the present case. Common to many of the pre-2011 cases is Ofcom's statement that during the relevant period there were ineffective or repeated failures of internal procedures or that procedures were absent altogether. In Barclaycard it was concluded that Barclaycard only put in place the steps to achieve compliance after it had received a first draft information request from Ofcom.
- 4.148 Ofcom stated in the pre-2011 cases that it expects companies to pro-actively and of their own accord take steps to identify and mitigate external factors that might lead to a contravention of section 128 of the Act. This remains the position. Compliance is considered to be within a company's own control and responsibility and companies are expected to have processes for compliance in place.
- 4.149 In the present case, Ofcom is of the view that HomeServe failed to take appropriate (and timely) steps in order to prevent its notified contravention.

Common factor 5: Whether any steps have been taken by the misuser for securing that their misuse is brought to an end and not repeated

¹⁴⁰ I.e. the guidelines in existence at the time.

4.150 The issue as to whether any steps have been taken by the misuser for securing that their persistent misuse is brought to an end and not repeated is considered in the pre-2011 cases and the present case.

4.151 In the pre-2011 cases, the notified parties made representations to the effect that they had taken steps which applied to their structure, technology, personnel, processes and best practice of the company. For example, in the Abbey case, action taken was evidenced in the areas of (a) technology and processes; (b) key performance indicators and reporting; (c) real-time dialler operation and; (d) senior management capability. In the Equidebt case, Equidebt even went as far as to elect not to rely on the use of AMD technology in its outbound calling operations. CCM took steps relative to five areas; that of (a) agent behavioural change (b) management of the ACS technology; (c) external support; (d) reporting of compliance data; and (e) audit trails.

4.152 In the UCS case, Ofcom determined that the misuser had not secured that the misuse had been brought to an end as evidence indicated an excessive number of abandoned calls during 24 hour periods occurred *after* the section 128 notification. Ofcom therefore in that case considered that UCS continued the contravention after being notified. Whereas in the present case, Ofcom's view is that it has *now* taken adequate steps for securing the misuse is brought to an end and not repeated.

Common factor 6: Any steps taken by the notified misuser for remedying the consequences of the notified misuse

4.153 Any steps taken by the notified misuser for remedying the consequences of the notified misuse is considered in the pre-2011 cases and the present case.

4.154 Provision of "formalised complaints procedures" were considered in respect of this issue, for example in Equidebt. In Equidebt, allowance was made for payment of financial compensation in the event of a complaint. Ofcom stated that Equidebt's policy in relation to compensation "*goes some way to remedy the consequences of its misuse*". In Barclaycard, Ofcom noted that a compensation gesture "*goes to recognition by the misuser that their conduct may have caused harm, and that some level of compensation is due*" and that it "*would have expected Barclaycard to have offered a similar gesture or suitable alternative remedy*".

4.155 However, in the Abbey case, Ofcom stated that:

"Ofcom would usually expect a company to actively remedy any consequences of its breach, whereas in this case Abbey appears to have placed the burden on customers to seek out redress themselves."

4.156 In the present case, it is Ofcom's view that HomeServe has committed to put in place such steps as we consider appropriate for remedying the consequences of the notified misuse. As previously noted, the actions cited by HomeServe as being steps for remedying the consequences of the notified misuse in the August 2011 Representations (improvements to complaint handling procedures and use of a CLI number) are not remedial steps but rather, they are compliance steps. However, HomeServe has now in response to the Provisional Notification offered compensation to those consumers who were affected by its persistent misuse (as set out in section 2 of this document) and has stated it will publicise this on its website. Ofcom considers this to be a remedial step.

Common factor 7: Co-operation with Ofcom

- 4.157 Co-operation was also considered in terms of responses to statutory information requests issued to it by Ofcom under section 135 of the Act during the course of the investigation.
- 4.158 In the UCS case, Ofcom did not consider UCS to have co-operated in a satisfactory manner with the investigation or responded adequately to statutory information requests. Ofcom stated that UCS had caused substantial delays in the progress of Ofcom's investigation by its failure to respond with the requested information in a timely or accurate manner. This issue arose again in the representations, where UCS admitted previous data was inaccurate and supplied revised data which was also found to be inaccurate. This culminated in the need to send a second information request to UCS, for which the company failed to meet the deadline. In the course of any investigation, Ofcom expects industry to engage in a professional and responsive manner, and UCS failed to do so on repeated occasions.
- 4.159 The present case can be distinguished from UCS as we do not consider that there has been a lack of co-operation that might serve as an aggravating factor and to increase the amount of any penalty we may impose.

Common factor 8: History of contravention

- 4.160 The majority of the pre-2011 cases concerned companies with no previous history of persistent misuse.¹⁴¹

Common factor 9: Any gain or extra cost incurred by consumers and other market participants

- 4.161 Ofcom concluded in the pre-2011 cases, that there was no direct evidence of any gain or extra cost incurred by consumers and other market participants. In the present case, consumers may have incurred financial cost. However, we do not have direct evidence of this.

Comparison and distinction between the present case and other penalty cases.

General Conditions penalty cases

- 4.162 A recent case, determined on 17 August 2011 in relation to Talk Talk Telecom Limited and Tiscali U.K. Limited ("TalkTalk"), was determined on the basis of the current Penalty Guidelines.¹⁴² Ofcom imposed a penalty of £3,037,120 on TalkTalk for its contravention of General Condition 11.1. Although this case provides an indication of the factors that were taken into account when determining the amount of the penalty, as it concerned different provisions of legislation and conduct which was significantly different to the present case, it is of limited use for present purposes.
- 4.163 The TalkTalk case provides an indication of the factors which are taken into account when applying the Penalty Guidelines. However, the TalkTalk case concerned a penalty for the contravention of General Condition 11.1 notified under sections 94 – 96 of the Act rather than persistent misuse as in the present case.
- 4.164 The key features of the Talk Talk case and present case are considered below.

¹⁴¹ Except for example in the Toucan case, the company had previously been the subject of an investigation into the making of silent or abandoned calls in the context of section 128 of the Act.

¹⁴² See: http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01051/notification.pdf

- 4.165 First, it is noteworthy that General Condition 11.1 is an important consumer protection rule. Ofcom must ensure compliance with such rules in accordance with our principal duty to further the interests of citizens and consumers. Compliance with General Condition 11.1 is a fundamental and ongoing obligation.
- 4.166 Likewise, the persistent misuse provisions set out in the Act, further the interests of citizens and consumers by endeavouring to protect them from harm or likely harm of persistent misuse.
- 4.167 Second, both cases involved allegations of a pattern of behaviour resulting in a breach. In the TalkTalk case, TalkTalk Telecom and Tiscali had been erroneously billing end-users for services not provided (in particular for cancelled services). In the present case, HomeServe's actions are considered to amount to a pattern of behaviour in breach of the Guidelines.
- 4.168 The duration and severity of the contravention were key features of the TalkTalk case. TalkTalk was only penalised for its contravention of General Condition 11.1 between January and November 2010, and TalkTalk's breach of the relevant general condition continued until March 2011. Although TalkTalk issued far fewer erroneous bills after November 2010, and took steps to remedy the consequences of doing so for those who received the bills, Ofcom considered that the steps it took for complying with the relevant general condition were insufficient and that its breach was still of significant magnitude after November 2010. Ofcom therefore imposed a penalty (in respect of the relevant period).
- 4.169 Third, in neither the present case nor the Talk Talk case was the practice considered to be intentional. Nevertheless, in the TalkTalk case, Ofcom considered that senior management had knowledge of the contravention and that it did not take its contravention of General Condition 11.1 sufficiently seriously and demonstrate enough care to comply with that Condition. Similarly, in the present case, Ofcom is of the view that senior management were aware of the contravention, that it continued for some time after they were so aware; that it did not take the matter sufficiently seriously and take enough care to ensure it was in compliance, and that consequently responsibility and culpability attaches to HomeServe as a result.
- 4.170 Fourth, while senior management at HomeServe and TalkTalk were aware of contravening behaviour, senior management in both cases did ultimately take steps to end the contravention.
- 4.171 Fifth, there are similarities in the ways in which both TalkTalk and HomeServe responded to their breaches. Both appointed independent experts to help them comply with the relevant legislation and Ofcom's guidelines. HomeServe has emphasised that the appointment of [redacted]¹⁴³ was voluntary and taken without delay following the publication of the Guidelines.¹⁴⁴
- 4.172 Both Talk Talk's and HomeServe's appointed experts identified measures which could be taken in order to ensure compliance with the relevant legislation and guidelines.
- 4.173 Sixth, both companies co-operated with Ofcom. However, HomeServe's actions in response to Ofcom's section 128 notification were more timely in ensuring compliance going forward.

¹⁴³ The August 2011 Representations stated that [redacted] were appointed on 10 December 2010.

¹⁴⁴ The Guidelines were published on 1 October 2010.

- 4.174 Seventh, in both cases, the companies reported that they had made no gains as a result of the activities, and both companies contended that their actions had not caused any extra cost to be incurred by consumers and other market participants.
- 4.175 HomeServe contended that any harm caused by its activities was negligible. HomeServe decided against offering compensation to its customers as it considered that no financial harm had been suffered by them.
- 4.176 In the TalkTalk case, by contrast, goodwill payments of £1,041,441 were made to 62,055 affected end-users, believed to have “*experienced inconvenience, annoyance or anxiety by such billing issues.*” TalkTalk also gave bill credits of £1.7 million to the 61,719 customers to whom bills had erroneously been issued between 1 January and 1 November, and also set up a dedicated customer complaint team to which affected customers could refer complaints about such bills.
- 4.177 Despite these actions by TalkTalk, Ofcom considered that it was necessary to impose the penalty, to reflect the severity and length of TalkTalk’s contravention and to ensure that TalkTalk complied with General Condition 11.1 and serve as a deterrent and prevent the future breach of General Conditions.
- 4.178 There are other precedents in which we have imposed a penalty for contraventions of other General Conditions, namely General Condition 1.2 in the Telephonics case¹⁴⁵ and General Condition 14.3 in the Just Telecomms case.¹⁴⁶ They also concerned factors which are significantly different to those in the present case and the penalties in those cases were set at ten per cent of relevant turnover.
- 4.179 First, both cases involved either an intentional and planned practice of deceiving customers (in the Just Telecomms case) or actively and knowingly preventing customers from transferring to other providers (in the Telephonics case). And further, in the Telephonics case, engaging in additional aggravating behaviour.
- 4.180 By contrast, in the present case HomeServe’s contravention was not intentional or a planned practice.
- 4.181 Second, in the Just Telecomms case and the Telephonics case, the providers’ behaviour had the effect of frustrating the competitive process. In the case of Telephonics by seeking to retain customers that it would not otherwise have retained, and preventing them from switching providers, at the expense of those competing providers who are abiding by regulatory requirements. And, in the Just Telecomms case, attracting customers by deceiving them and entering them into long minimum contract terms, preventing them from transferring to providers who were compliant with sales and marketing rules.
- 4.182 In the present case we have not investigated whether HomeServe’s actions have had any specific anti-competitive ramifications as we are concerned with harm to consumers through persistent misuse.
- 4.183 Third, Telephonics took no steps for complying with the relevant General Condition or to remedy the consequences of its contravention and Just Telecomms took only minimal and insufficient steps (and only then belatedly, once Ofcom issued a draft enforcement and penalty notice).

¹⁴⁵ See: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/CW_998/

¹⁴⁶ See: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_857/

- 4.184 By way of distinction, HomeServe has taken adequate steps for securing the misuse is brought to an end and not repeated and has committed to put in place such steps as we consider appropriate for remedying the consequences of the notified misuse. HomeServe has also generally co-operated with Ofcom in our investigation, in contrast to Telephonics and Just Telecomms.
- 4.185 Finally, both Telephonics' and Just Telecomms' senior management were not only involved in the contravening behaviour, but actively encouraged it. While HomeServe's senior management were aware of its contravening behaviour, there is no evidence to suggest they were encouraging it.

Broadcasting Sanctions penalty cases

- 4.186 Pursuant to the Act, the Broadcasting Acts 1990 and 1996, and the Broadcasting Code ("the Code"), Ofcom has the power to impose sanctions on broadcasters for deliberate, serious or repeated breaches of the Code. The Code sets out rules and guidance for broadcasters in relation to television and radio which cover standards in programming, sponsorship, fairness and privacy. One of the sanctions Ofcom can impose is a financial penalty.
- 4.187 Significant fines have been imposed in relation to breaches of the Code. However, the broadcasting cases concern different conduct and provisions of the Act, as well as other Acts. Our view, therefore, is that they do not provide relevant precedents for the present case.

Summary of relevance of previous precedents

- 4.188 In summary and to re-iterate, we consider the pre-2011 precedents to be of limited assistance to our determination of this case for the following reasons:
- they were determined prior to the introduction of secondary legislation increasing the maximum financial penalty in respect of persistent misuse from £50,000 to £2 million;
 - they were determined on the basis of penalty guidelines which have now been superseded by the current Penalty Guidelines published on 13 June 2011;
 - they 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 7 months to 7 weeks and therefore the figures in respect of the number of abandoned/silent calls do not provide a helpful comparison; and
 - the starting point in each case is assessed against the circumstances of that particular case in the round.
- 4.189 In terms of determining a penalty in the circumstances of the HomeServe case, we consider the TalkTalk case to be more informative than the pre-2011 cases on the basis that it applied the current Penalty Guidelines. However, its usefulness is limited and it can be distinguished in many respects, including primarily that it concerns different conduct and different provisions of the Act.

4.190 Ofcom will assess each case on its merits.

4.191 In the present case, the penalty under the Act is determined in a “in the round” assessment under our now applicable Penalty Guidelines. As part of that assessment, we have considered the level of seriousness of the HomeServe contravention and its consequent place on the scale of relevant penalties. Likewise, its place in the overall assessment of an appropriate and proportionate penalty, as both punishment and deterrent, for HomeServe’s contraventions.

Ofcom’s conclusions on the penalty amount

4.192 Any penalty Ofcom imposed on HomeServe 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 (doing so in a proportionate way). We have set out above the particular factors relevant to those requirements.

4.193 In particular, the contravention of section 128 by HomeServe during the seven week relevant period, was significant, involving 42 x 24 hour periods where it exceeded the three percent abandoned call rate and of those 42 days, 27 of them involved HomeServe making one or more calls to that specific number within the same 24 hour period, resulting in 36,218 calls which did not adhere to the 24 hour policy set out in the Guidelines. A policy which was specifically introduced by Ofcom to tackle repeat silent calls, a major cause of consumer harm. This would suggest that it is appropriate to impose a penalty reflecting a serious contravention, which would send a deterrent message to HomeServe and industry.

4.194 However, we acknowledge that the seriousness of HomeServe’s contravention and the harm involved was mitigated by the fact that HomeServe of its own volition commenced a review of its dialling policies and procedures before Ofcom’s investigation, and following the publication of the Guidelines in October 2010. Furthermore, we note that HomeServe had taken some steps to limit the harm caused by silent and abandoned calls, during the Relevant Period, for example playing an information message identifying HomeServe, terminating calls after ringing no less than 18 seconds and complying with the 72 hour policy. We also acknowledge that HomeServe has taken such steps we consider appropriate for securing that its persistent misuse has been brought to an end, and committed to remedy the consequences of its notified misuse.

4.195 Taking account of these above factors would suggest, in Ofcom’s view, a penalty in the region of £600-800,000 (30% - 45% of the maximum penalty level). Keeping in mind that 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, involving all aggravating factors. Ofcom does not consider HomeServe’s contravention to be at this level.

4.196 However, we consider that there are some aggravating factors in this case which should be reflected in the penalty amount. These factors include:

- that HomeServe failed to take all appropriate (and timely) steps to *prevent* the contravention; and
- the awareness of senior management of the relevant contravention and that at for least a significant part of the time they were so aware, they did not

take the matter sufficiently seriously (nor was action expedited) to ensure HomeServe was compliant.

- 4.197 Considering all of these factors in the round, we are minded to impose a penalty of £750,000.
- 4.198 We consider that this amount would be appropriate and proportionate taking account of all the available evidence in this case, that it would reflect the seriousness of HomeServe's contravention of the persistent misuse provisions but also demonstrate that Ofcom has acknowledged the mitigating factors in this case, and reflected this in the penalty level. In particular, we note HomeServe's commitment to put right its non-compliance by taking steps to end the contravention and ensure future compliance with the persistent misuse provisions. Ofcom's recognition of this goes towards our aim to incentivise industry as a whole to not only comply in the first instance but to ensure ongoing compliance in the longer term. We also note the steps HomeServe has committed to take to remedy the consequences of its notified misuse. This includes HomeServe's offer of £10 compensation to those claimants whose CLI matches HomeServe's records of being contacted while AMD was in operation, and to publicise this offer on its website.
- 4.199 We consider this penalty would have a deterrent effect by sending a clear message (in particular, to users of ACS and AMD technology) that strong enforcement action will be taken where the Guidelines and/or persistent misuse provisions are not adhered to. The regulation of electronic communications networks and electronic communications services has been on a balanced and reasonable basis, for example, the use of AMD and ACS technology is not prohibited (and is permissible in accordance with defined compliance principles) and Ofcom's enforcement priority has been set at a three percent abandoned call rate rather than a zero tolerance approach. This approach has allowed industry to benefit from the use of ACS and AMD technology. Where non-compliance does occur, we will take strong enforcement action providing a message to both the notified misuser and industry that persistent misuse is a breach of the Act. We expect companies to make adequate investment in compliance measures.
- 4.200 The penalty amount would also be proportionate taking into account the size and relevant turnover of HomeServe. As previously noted, HomeServe's statutory accounts as at 31 May 2011 disclosed its turnover as £467.1m, with a statutory profit of £104.8m.¹⁴⁷
- 4.201 In our view, these factors indicate that HomeServe's business is significant and that it should have the resources employed to ensure it, and its outsourced calling partners, are compliant with the Guidelines.
- 4.202 Furthermore, in our view, any penalty imposed must not only mark the seriousness of HomeServe's contravention of section 128, but also be sufficient, consistent with principles of appropriateness and proportionality, to minimise the risk of it contravening in a similar way in future. Likewise, to alert other providers to the importance of avoiding such conduct.
- 4.203 In light of the factors which are set out above, Ofcom's decision is that an appropriate and proportionate penalty to impose on HomeServe is £750,000. We consider that this penalty amount is sufficient to have this deterrent effect, while

¹⁴⁷ Annex 13, HomeServe PLC, Annual Report and Accounts 2011.

being proportionate to the contravention engaged in, and based on the facts of this case.

Section 5

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