



Notification to Green Deal Savings Limited of a penalty under Section 130 of the Communications Act 2003

Notification served on Green Deal Savings Limited
by the Office of Communications ("Ofcom")

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Notification to Green Deal Savings Limited of a penalty under Section 130 of the Communications Act 2003

Subject of this Notification

1. This Notification is addressed to Green Deal Savings Limited, trading as Green Deal Savings (“GDS”), registered company number 07709734, and registered address 2nd Floor, Nelson Mill, Gaskell Street, Bolton, BL1 2QE.
2. It notifies GDS of the imposition by the Office of Communications (“Ofcom”) of the following penalty under section 130 of the Communications Act 2003 (the “Act”):
 - a) A penalty of £20,000.
 - b) Ofcom imposes this penalty on GDS, as it has, in both of the respects notified pursuant to a notification under section 128 of the Act, persistently misused an electronic communications network or electronic communications service between 27 October 2013 and 14 December 2013 (the “Relevant Period”).

Background

3. Section 130 of the Act applies where:
 - a) a person has been given a notification under section 128 of the Act;
 - b) has been given an opportunity to make representations; and
 - c) the period allowed for making representations has expired.
4. Section 130(2) of the Act allows Ofcom to impose a penalty upon that person if he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.
5. On 23 June 2014 Ofcom issued to GDS, under section 128 of the Act, a notification that Ofcom had reasonable grounds for believing that GDS had persistently misused an electronic communications network or electronic communications service during the Relevant Period (the “section 128 notification”). The section 128 notification is at Annex 1 to this document.
6. Pursuant to section 128(3)(b) of the Act, Ofcom specified a period of not less than one month, during which GDS had an opportunity of making representations about the matters notified in the section 128 notification. Ofcom received written representations from GDS on 21 July 2014 (the “Representations”) in relation to the matters notified. The Representations are at Annex 2 to this document.
7. Ofcom considered the Representations carefully. On 18 September 2014 Ofcom served on GDS a notification of a possible penalty under section 130 of the Act (the “Provisional Notification”). The Provisional Notification set out Ofcom’s preliminary

view that it should impose a penalty on GDS, as it had, in both of the notified respects set out in the section 128 notification, persistently misused an electronic communications network or electronic communications service during the Relevant Period.

8. The reasons for Ofcom's provisional determination were set out in the Explanatory Statement accompanying the Provisional Notification.
9. The Provisional Notification gave GDS until 5pm on 16 October 2014 to make written representations to Ofcom about matters set out in the accompanying Explanatory Statement. It also gave GDS the opportunity to make oral representations to Ofcom in relation to these matters. On 18 September 2014, Ofcom received an email and a phone call from GDS on the Provisional Notification (Annexes 11 and 12 to this document respectively). On 13 October 2014, GDS submitted its written representations to Ofcom (the "October 2014 Representations") (Annex 13 to this Notification).

Sections 128, 129, 130 and 131 of the Act

10. Section 128 of the Act says that, where Ofcom determines that there are reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services, they may give that person (the "notified misuser") a notification under section 128 of the Act.
11. Ofcom may serve an enforcement notice under section 129 of the Act if, by the end of the period specified in the section 128 notification, Ofcom is satisfied that the notified misuser:
 - a) has persistently misused an electronic communications network or an electronic communications service; and
 - b) has not taken all such steps as Ofcom consider appropriate for:
 - (i) securing that its misuse is brought to an end and not repeated; and
 - (ii) remedying the consequences of the notified misuse.

Compliance with an enforcement notice under section 129 is enforceable in civil proceedings by Ofcom.

12. Section 130 of the Act applies where:
 - a) a person (the notified misuser) has been given a notification under section 128;
 - b) Ofcom have allowed the notified misuser an opportunity of making representations about the matters notified; and
 - c) the period allowed for the making of the representations has expired.
13. Where these conditions are met, it provides that Ofcom may impose a penalty on the notified misuser if he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.
14. Section 130(4) provides that the amount of a penalty imposed is to be such amount not exceeding £2,000,000 as Ofcom determine to be –

- a) appropriate; and
 - a) proportionate to the misuse in respect of which it is imposed.
15. It also provides, amongst other things, that in making that determination Ofcom must have regard to:
- a) any representations made to them by the notified misuser;
 - b) any steps taken by him for securing that his misuse is brought to an end and is not repeated; and
 - c) any steps taken by him for remedying the consequences of the notified misuse.
16. Ofcom may issue an enforcement notification under section 129 of the Act (as referred to above) and impose a penalty under section 130 of the Act (as referred to above).
17. Section 131 of the Act provides that Ofcom, in exercising the powers conferred on it by sections 128 to 130 of the Act, must have regard to the statement of general policy (as referred to at paragraph 16).

Determination made by Ofcom

18. For the reasons set out in the Explanatory Statement, Ofcom determines that, pursuant to section 130(2) of the Act, GDS has in both of the notified respects, persistently misused an electronic communications network or electronic communications service.
19. In making this determination and in accordance with section 131 of the Act¹, Ofcom has also had regard to the principles set out in its revised Statement of Policy on the persistent misuse of an electronic communications network or service 2010², published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement*³ (the “policy statement”). For ease of reference, a copy of the policy statement is at Annex 3 of this document.
20. Having had regard to representations made to Ofcom by GDS, steps taken by GDS for securing that its misuse is brought to an end and not repeated; and steps taken by GDS for remedying the consequences of the notified misuse, Ofcom has decided to impose a penalty in this case under section 130 of the Act, taking into consideration the nature of the persistent misuse involved in this case.
21. Specifically, having regard to sections 130(4) and (5) of the Act, as well as the Penalty Guidelines⁴ published on 13 June 2011, and to which Ofcom must have regard, under section 392 of the Act (the “Penalty Guidelines”) and the policy statement, Ofcom has decided to exercise its regulatory judgment to impose a penalty of £20,000 on GDS in relation to GDS’ persistent misuse of an electronic communications network or service in both respects notified in the section 128 notification.
22. The reasons for Ofcom’s determination are set out in the following Explanatory Statement.

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

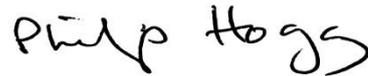
² <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>

³ Annex 3, <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

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

Interpretation

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



Neil Buckley (Director of Investigations, Competition Group) and Philip Hogg (Legal Director of Spectrum, Legal Group) as decision makers for Ofcom

1 December 2014

Section 1

Subject of this notification

- 1.1 This document is a notification of Ofcom's imposition of a financial penalty ("Notification") on Green Deal Savings Limited, trading as Green Deal Savings ("GDS"), under section 130 of the Communications Act 2003 (the "Act"). It sets out Ofcom's decision that such a penalty should be imposed on GDS and our determination of what that penalty should be.
- 1.2 The issue of this Notification follows Ofcom's:
- a) information request under section 135 dated 24 February 2014 (the "First Information Request"⁵);
 - b) analysis of GDS' response to the First Information Request received on 10 March 2014 (the "First Response"⁶) and subsequent clarifications in emails to Ofcom on 20 and 21 March 2014⁷;
 - c) investigation into GDS' compliance between the period 27 October 2013 and 14 December 2013 (the "Relevant Period") with section 128 of the Act, having regard to the principles set out in the policy statement⁸;
 - d) determination that there are reasonable grounds for believing that, during the Relevant Period, GDS persistently misused an electronic communications network or electronic communications service;
 - e) service on GDS on 23 June 2014 of a notification under section 128 of the Act (the "section 128 notification"⁹);
 - f) consideration of representations to the section 128 notification by GDS dated 21 July 2014 (the "Representations")¹⁰;
 - g) information request under section 135 dated 28 July 2014 (the "Second Information Request"¹¹);
 - h) analysis of GDS' response to the Second Information Request received on 28 July 2014 (the "Second Response"¹²);
 - i) consideration of comments made by Mr [redacted], Managing Director of GDS, in a telephone call of 28 July 2014; and
 - j) consideration of steps taken to secure that the misuse is brought to an end and not repeated, and to remedy the consequences of the misuse notified in the section 128 notification.

⁵ Annex 6, the First Information Request dated 24 February 2014.

⁶ Annex 7, the First Response dated 10 March 2014.

⁷ Annex 8, GDS emails of 20 and 21 March 2014.

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

⁹ Annex 1, section 128 notification issued to GDS, 23 June 2014.

¹⁰ Annex 2, the Representations dated 21 July 2014.

¹¹ Annex 9, the Second Information Request dated 28 July 2014

¹² Annex 10, the Second Response dated 28 July 2014.

- k) service on GDS on 18 September 2014 of a provisional notification under section 130 of the Act (the “Provisional Notification”¹¹), setting out, amongst other things, Ofcom’s preliminary view that we should impose on GDS a penalty in respect of its persistent misuse of an electronic communications network or service between 27 October and 14 December 2013; and
 - l) GDS’ written representations of 13 October 2014 (the “October 2014 Representations”), and an email and telephone call of 18 September 2014 (the “September 2014 email” and the “September 2014 phone call”) (together “the Representations on the section 130 Provisional Notification”).
- 1.3 Taking all of the above into account, Ofcom’s decision is that a financial penalty be imposed on GDS as it has, in both of the notified respects set out in the section 128 notification, persistently misused an electronic communications network or electronic communications service during the Relevant Period. Ofcom’s determination is that the penalty will be £20,000.
- 1.4 Ofcom’s determination is that this penalty is appropriate and proportionate to the contravention in respect of which it is imposed. In taking that view, Ofcom has had regard to:
- a) the Representations;
 - b) the number and nature of occasions on which GDS was not compliant with the persistent misuse provisions, having regard to the policy statement;
 - c) steps taken by GDS for securing that its misuse is brought to an end and is not repeated;
 - d) the penalty guidelines in force under section 392 of the Act at the time that the decision to impose the penalty, and the determination of its amount, was made (the “Penalty Guidelines”)¹³; and
 - e) the Representations on the section 130 Provisional Notification.
- 1.5 As set out in the policy statement, in deciding whether to take enforcement action for persistent misuse caused by abandoned and silent calls in a particular case, we will be guided by a sense of administrative priority determined by the level of consumer detriment and will take account of the steps that have been taken by Automatic Calling System (“ACS”) users to reduce the degree of concern that silent or abandoned calls cause¹⁴.
- 1.6 The reasons for Ofcom’s decision and determination are set out in the following sections of this Notification. In particular, aspects of Ofcom’s decision and determination include:
- a) that GDS has, in both of the respects notified in the section 128 notification, persistently misused an electronic communications network or service during the Relevant Period by:

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

¹⁴ Annex 3, the policy statement (A1.12 to A1.13).

- making multiple (and certainly more than three)¹⁵ abandoned calls during one 24 hour period (27 October 2013). Ofcom estimates on the basis of the evidence available that GDS made approximately 420 abandoned calls in total on that day. Ofcom considers it appropriate to take enforcement action in respect of this 24 hour period because the abandoned call rate also exceeded 3 per cent of live calls; and
 - making multiple (and certainly more than three)¹⁶ abandoned calls during the Relevant Period where it failed to ensure that an information message was played. Ofcom estimates on the basis of the evidence available that GDS failed to include an information message on approximately 12,703 abandoned calls during the Relevant Period.
- b) the central objective in imposing a penalty and determining its amount, set out in the Penalty Guidelines, is deterrence: setting the amount of any penalty to be sufficient to ensure that it will act as an effective incentive to compliance for GDS, having regard to the seriousness of its infringement, and others to whom the persistent misuse provisions and the policy statement applies; and
- c) such persistent misuse is sufficiently serious as to warrant the imposition of a penalty in order to create a deterrent effect for GDS, and for all those subject to regulation by Ofcom, in turn to help ensure widespread compliance with legislation and regulatory principles and to further the interests of citizens and consumers, as well as those of fair-dealing businesses harmed by the wrongdoing of competitors.
- 1.7 Ofcom's determination is that a penalty on GDS of £20,000 would be appropriate and proportionate to the contravention for which it would be imposed.
- 1.8 The following sections of this Notification set out:
- a) the background detail to this matter, including the applicable statutory framework;
 - b) Ofcom's analysis of the options open to it and the basis for our decision to impose a penalty; and
 - c) Ofcom's determination of the amount of that penalty and the basis on which that determination is made.

¹⁵ Annex 3, the policy statement, paragraph A1.10, sets out Ofcom's view that what constitutes a pattern of behaviour or practice needs to be determined case by case. However, it is likely to require a minimum of three incidents of the conduct in question.

¹⁶ See footnote 15 above.

Section 2

Background

- 2.1 The following section sets out the background to Ofcom's investigation into GDS, both before and after the issue of the section 128 notification to GDS on 23 June 2014.

The statutory framework

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

Ofcom's duties and functions

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

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

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

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

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

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

- 2.5 With section 3(3) in mind, Ofcom has published a statement of regulatory principles.¹⁷ 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.

¹⁷ <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>

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

Sections 128, 129 and 130 of the Act

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

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

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

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

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

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

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

(a) a pattern of behaviour or practice; or

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

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

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

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

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

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

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

“(1) This section applies where –

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

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

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

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

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

as may be specified in the notification.”

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

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

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

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

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

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

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

(4) The amount of penalty imposed is to be such amount not exceeding £2,000,000¹⁸ 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*¹⁹, published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement*²⁰ (the "policy statement") (see Annex 3).

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

2.17 The Penalty Guidelines provide that:

¹⁸ Section 130(4) of the Act as amended by the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010, SI 2010/2291, article 2(1).

¹⁹ <http://www.legislation.gov.uk/ukxi/2010/2291/article/2/made>.

¹⁹ <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>

²⁰ Annex 3, the policy statement.

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

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

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

The investigation and findings

- 2.20 While reference is made to evidence received and made available to Ofcom (including representations, responses to statutory information requests and correspondence) and, in making this decision Ofcom has carefully considered this in its entirety, this Notification does not purport to be a comprehensive restatement of this evidence base. The documentary evidence is, however, annexed to this Notification and made available to GDS.
- 2.21 On 22 June 2006 Ofcom opened an own-initiative programme of monitoring and enforcement in order to monitor compliance by companies with the persistent misuse provisions in the Act having regard to the principles set out in the policy statement as applicable from time to time²¹. The programme has been on-going since that time.
- 2.22 As part of the above programme, Ofcom reviews complaints data received by the Ofcom Consumer Contact Team to decide whether enforcement action is appropriate and if so, in respect of which companies.

²¹ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

- 2.23 Within this review of complaints, Ofcom noted complaints regarding abandoned and silent calls allegedly being generated by or on behalf of GDS using the Calling Line Identification (“CLI”) number 08458622106 between the period 27 October 2013 and 14 December 2013. Of the 33 complaints against CLI 08458622106, 11 alleged nobody was speaking; 10 alleged that the line was dead; 7 alleged the line was dead followed by a “goodbye” after a lengthy period; and 5 alleged voices were heard in the background. Consequently, it was determined appropriate to conduct an investigation into GDS’ compliance with the persistent misuse provisions in the Act having regard to the policy statement.
- 2.24 Ofcom’s investigation of GDS’ compliance with the persistent misuse provisions of the Act, having regard to the policy statement, included:
- a) analysis of complaint data received by the Ofcom Consumer Contact Team in relation to the Relevant Period;
 - b) issuing an information request to GDS under section 135 of the Act (the “First Information Request”²²) on 24 February 2014. This requested information in relation to GDS’ processes and procedures in respect of its use of ACS and whether such processes and procedures were consistent with Ofcom’s policy statement; and
 - c) analysis by Ofcom of GDS’ response to the First Response²³ received on 10 March 2014 and subsequent clarifications that were confirmed in emails to Ofcom on 20 and 21 March 2014.
- 2.25 Following the investigation, the section 128 notification was issued to GDS on 23 June 2014²⁴. 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, GDS persistently misused an electronic communications network or service;
 - b) the specific use made of an electronic communications network or electronic communications services by GDS that Ofcom considered constituted persistent misuse; and
 - c) the period during which GDS had the opportunity to make representations about the matters notified.
- 2.26 In particular, the policy statement sets out details of procedures that should be adopted to reduce the consumer detriment and/or the degree of concern that silent or abandoned calls cause. This includes monitoring the abandoned call rate using the formula set out in the policy statement to ensure that it does not exceed 3 per cent of live calls. Evidence provided in the First Response and related correspondence showed that GDS failed to do this, as it did not ensure that its abandoned call rate, as calculated in accordance with the policy statement, remained below 3 per cent of live calls on one 24 hour period – 27 October 2013 – during the Relevant Period. Based on the available evidence, Ofcom calculated that the abandoned call rates on that date was 3.23 per cent.

²² Annex 6, the First Information Request dated 24 February 2014

²³ Annex 7, the First Response dated 10 March 2014.

²⁴ Annex 1, section 128 notification issued to GDS dated 23 June 2014.

- 2.27 GDS also failed to ensure that an information message was played in the event of an abandoned call throughout the Relevant Period – Ofcom estimates on the basis of the evidence available, that GDS failed to include an information message on approximately 12,703 abandoned calls during the Relevant Period.
- 2.28 Accordingly, in the section 128 notification, Ofcom set out its reasonable grounds for believing that GDS had exceeded an abandoned call rate of 3 per cent on one 24 hour period at the call centre it operated. The notification also set out that GDS' persistent misuse comprised the failure to play an information message in the event of an abandoned call throughout the Relevant Period.
- 2.29 GDS had until 21 July 2014 to make representations about the matters notified, to take steps for securing that the misuse was brought to an end and was not repeated, and to remedy the consequences of the notified misuse.

The representations submitted by GDS to the section 128 Notification

- 2.30 GDS submitted its representations to Ofcom on the matters set out in the section 128 notification (the "Representations")²⁵ on 21 July 2014.
- 2.31 The Representations set out:
- a) That GDS accepted that it had "*... persistently misused an electronic communications network or electronic communications service, albeit it was unaware of the problem having arisen, until the matter was drawn to its attention by Ofcom.*"²⁶
 - b) GDS' submissions as to why it considered that it would be unnecessary, inappropriate and disproportionate for Ofcom to take further action; and
 - c) the actions GDS had implemented since the Relevant Period to bring the contravention to an end.
- 2.32 In the Representations, GDS did not dispute that the making of abandoned calls is liable to be misuse for the purposes of sections 128 to 130 of the Act, as set out in the section 128 notification²⁷. It also accepted that the abandoned call rate exceeded the 3 per cent threshold on one 24 hour period during the Relevant Period²⁸. However it argued that this contravention was small: "*Indeed it is worth noting that there was only one day (27 October 2013) on which the silent call rate exceeded the 3% limit specified in the Statement of Policy; and on that day, the rate was only 3.23% ... Accordingly, in terms of the quantitative assessment which we understand requires to be carried out, GDS' contravention was minimal and therefore any harm caused to consumers would have been limited.*"²⁹
- 2.33 Ofcom's policy statement sets out factors that Ofcom will use as a guide to determine the cases in which it should take action under sections 128 to 130 of the Act. In particular, factors going to questions of administrative priority determined by the level

²⁵ Annex 2, Representations.

²⁶ Paragraph 6, the Representations.

²⁷ Paragraph 6, the Representations.

²⁸ Paragraph 20, the Representations.

²⁹ Paragraphs 19 to 21, the Representations.

of consumer detriment involved and taking account of steps taken by ACS users to reduce the degree of consumer harm that abandoned or silent calls cause.

- 2.34 The policy statement sets out a formula for calculating a 3 per cent abandoned call rate per 24 hour period. It indicates that we are more likely to take action in respect of abandoned calls where this rate is exceeded. We are likely to regard such cases as serious³⁰. This provides operators with a margin for error in respect of misuse in respect of which we might take action for being persistent.
- 2.35 In this case, GDS exceeded the specified 3 per cent on one 24 hour period, making a total of approximately 420 abandoned calls on that day. This was part of an overall pattern of misuse comprising approximately 12,703 abandoned calls during the Relevant Period where GDS failed to play an information message, resulting in silent calls. We consider that this represents a pattern of misuse meeting the definition of persistent misuse.
- 2.36 In its Representations, GDS also accepted that it failed to play an information message during the Relevant Period. Specifically GDS submitted that:
- At the start of the campaign to which the contravention relates, [X], GDS' call centre provider, installed its call centre service and tested it "... to ensure compliance with Ofcom's Statement of Policy. As part of this, [X] set and tested the "No Agent Available" ("NAA") message, which was noted at the time as being operational."³¹
 - However, on being informed by Ofcom on 3 January 2014 of complaints in relation to silent and abandoned calls, it immediately began investigating the cause with [X]. GDS confirmed that "... the reason for the silent calls was a misconfiguration of the dialler; specifically, the NAA³² message had inadvertently been removed from the settings and therefore was not being played in the event of an abandoned call. It has since been established that the reason for this was that, in the process of altering the call centre system's settings in relation to that campaign, a manager had accidentally deleted the NAA message from the system."³³
- 2.37 The aim of playing an information message in the event of an abandoned call is to prevent recipients from receiving silent calls when over-dialling occurs and there are insufficient call centre agents to handle a call which has been answered. Information messages reduce harm by informing the recipient about who has called them and how they can return the call to decline to receive further calls.³⁴ Ofcom considers that silent calls, where no such information message is played, are particularly likely to generate consumer harm.³⁵ Furthermore, Ofcom has estimated that in total GDS made approximately 12,703 silent calls across the Relevant Period. We consider that this represents a pattern of behaviour or practice that meets the definition of persistent misuse.

³⁰ See e.g. Section 130 notification issued to TalkTalk http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/FINAL_Non-confidential_TTG_1.pdf, paragraph 4.19

³¹ Paragraph 1, the Representations.

³² No Agent Available.

³³ Paragraphs 4 and 5, the Representations.

³⁴ See paragraph 5.5 of the consultation statement at <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

³⁵ See paragraph 1.6 of the consultation statement at <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

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

- 2.38 Taking into account the findings in the section 128 notification, the Representations and the above points, we provisionally determined that GDS had in one or more of the respects notified to it in the section 128 notification, engaged in persistent misuse such that it was liable to the possibility of a penalty under section 130 of the Act. In particular the effect or likely effect of GDS' use of an electronic communications network or service was to cause call recipients unnecessarily to suffer annoyance, inconvenience or anxiety and that this misuse was repeated on a sufficient number of occasions for it to be clear that the misuse represented a pattern of behaviour.
- 2.39 Ofcom issued the Provisional Notification to GDS on 18 September 2014 and provisionally determined that a penalty should be imposed on GDS. The Provisional Notification provided an opportunity for GDS to make written representations on the matters set out and the level of the provisional penalty by 16 October 2014. GDS submitted written representations on 13 October 2014. We also consider a telephone call on 18 September 2014 between Mr [X] (Managing Director of GDS) and Ofcom, and an email of the same date form part of the representations.

GDS' representations on the Provisional Notification

- 2.40 In the September 2014 phone call, Mr [X] said that the misuse had been a genuine mistake, and he had no new points to add to the Representations. In the September 2014 email, Mr [X] stated that, in view of current trading conditions, he could not afford to engage solicitors to prepare representations and that he would close the Glasgow call centre by the end of October 2014.
- 2.41 The October 2014 Representations included the following points.
- *"When the call centre was set up I [X] ensured the IT Company was aware [of] all our necessities and also took advice from them regarding the equipment required to adhere to OFCOM regulations and requirements. The system operated correctly until a member of staff unintentionally altered the settings. As soon as I became aware of this immediate action was taken to remedy the situation ..."*
 - *"GDS Ltd is finding trading conditions extremely hard at the moment and we have already had to restructure the business to address the decline in turnover."*
 - *"All staff have been made aware that their jobs are at risk and that many of them will no longer have a position with GDS Ltd should a fine of £[X] be imposed, indeed the Company wouldn't survive such a cost."*
 - *"I [X] accept that a mistake was made, however the provisional notification under s130 of the Communications Act (2003) appears to be extremely severe and will have far reaching consequences for many people who rely on GDS for their income."*
 - *"I am at a financial and academic disadvantage in my attempts to defend GDS Ltd, however I would ask that you seriously consider the far reaching consequences to the members of staff working for GDS Ltd when finalising the action you intend to take."*

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

- 2.42 Ofcom has considered the points that GDS made in its representations on the Provisional Notification carefully. In particular we note that the October 2014 Representations state that “[~~§<~~], Managing Director at GDS] *accept that a mistake was made...*” GDS has not disputed that it has engaged in the persistent misuse notified in the section 128 notification, specifically that it:
- Made multiple (and certainly more than three) abandoned calls during one 24 hour period (27 October 2013). Ofcom estimates on the basis of the evidence available that GDS made approximately 420 abandoned calls in total on that one day. Ofcom considers it appropriate to take enforcement action in respect of this 24 hour period because the abandoned call rate also exceeded 3 per cent of live calls.
 - Made multiple (and certainly more than three) abandoned calls during the Relevant Period where it failed to ensure that an information message was played. Ofcom estimates on the basis of the evidence available that GDS failed to include an information message on approximately 12,703 abandoned calls during the Relevant Period.
- 2.43 We determine that GDS has persistently misused an electronic communications network of electronic communications services by exceeding an abandoned call rate of 3 per cent of live calls over a 24 hour period during one 24 hour period within the Relevant Period and by failing to ensure that an information message was played in the event of an abandoned call throughout the Relevant Period. We have taken into account GDS' representations, including the Representations on the section 130 Provisional Notification, when considering whether it would be appropriate to impose a penalty on GDS and if so, at what level any such penalty should be set.

Section 3

Ofcom's decision on next steps

- 3.1 The following section sets out Ofcom's analysis of the options available to us in this matter, and our decision to impose a penalty on GDS under section 130 of the Act.
- 3.2 Ofcom's options are:
- (a) taking no further action;
 - (b) issuing a notification under section 129 of the Act; and
 - (c) imposing on GDS a penalty under section 130 of the Act, in addition to, or instead of, a notification under section 129.

Ofcom's approach

- 3.3 Ofcom considers each case on its merits. Our approach to enforcing compliance with the persistent misuse provisions contained in the Act having regard to the principles set out in the policy statement is as follows.
- 3.4 The purpose of imposing a penalty is set out in Ofcom's Penalty Guidelines:
- "The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement"³⁶.*
- 3.5 The imposition of an appropriate and proportionate punishment (penalty) for wrongful conduct, including in appropriate cases an element designed to have a proportionate deterrent effect, and the threat of such punishment (penalty) in future cases, should provide an incentive for compliance, and a corresponding deterrent to non-compliance. That would help to secure Ofcom's objective of furthering the interests of citizens and consumers, as well as those of fair-dealing businesses harmed by the wrongdoing of competitors, by helping to foster widespread compliance with legislation and regulatory rules.
- 3.6 Not taking action where it is appropriate and proportionate risks undermining not only the persistent misuse provisions but also the entire regulatory regime. It would mean that Ofcom was not providing appropriate incentive to compliance and deterrent to non-compliance.
- 3.7 Ofcom has considered the options available to us in the present case, in light of the above, in line with our statutory duties and powers. Having done so, we take the view that a penalty should be imposed on GDS for the reasons we set out below.

No further action

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

³⁶ Annex 4, Ofcom Penalty Guidelines (paragraph 3).

in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service during the Relevant Period, it was not appropriate in all the circumstances of the case to take further steps.

- 3.9 Having carefully considered the evidence obtained during the investigation, the First Response, related correspondence, the Representations and the Representations on the section 130 Provisional Notification, Ofcom determines that GDS has persistently misused an electronic communications network or service in both of the notified respects during the Relevant Period. In light of that determination, and for the following reasons, we also determine that further action is appropriate in order to further the interests of citizens, consumers and fair-dealing businesses.
- 3.10 Evidence in Ofcom's market research most recently found that 61 per cent of participants received a silent call and 14 per cent received an abandoned call (in which the caller played an information message). In addition it found that abandoned calls were considered by consumers to be annoying (71 per cent of such calls) and distressing (6 per cent of calls)³⁷. The research also reported that more silent calls were considered to be annoying (88 per cent of calls) and distressing (9 per cent of calls). Indeed, a higher proportion of silent calls were considered to be annoying compared to any other type of call; and a higher proportion of silent calls were also considered to be distressing (9 per cent of calls) compared to recorded sales calls (3 per cent of calls) and live sales calls (5 per cent of calls).
- 3.11 On those bases, our judgment is that the making of multiple abandoned calls, particularly where the rate at which a person makes them is above 3 per cent in a 24 hour period, and the making of multiple abandoned calls where a person fails to play an information message, are serious contraventions. Our further judgment is that it would further the interests of citizens and consumers to take further action in cases where we determine that unlawful persistent misuse, in the form of such calls, has occurred.
- 3.12 Whilst any action must be appropriate and proportionate to the misuse in respect of which it is imposed, taking further action of one or more of the kinds available to Ofcom, should serve to deter non-compliance with legislation and regulatory rules. This will protect citizens and consumers from the harm that the evidence shows they suffer from persistent misuse in the form of abandoned and silent calls.

Issuing a notification under section 129 of the Act

- 3.13 The following is Ofcom's consideration of whether any further enforcement action should involve serving on GDS a notification under section 129 of the Act. For the reasons set out, Ofcom's view is that it should not.
- 3.14 In order to issue a notification under section 129 of the Act, Ofcom must be satisfied that:
- (a) the notified misuser has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; and

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

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

- (i) securing that his misuse is brought to an end and not repeated; and
- (ii) remedying the consequences of the notified misuse.³⁸

3.15 This option is open to Ofcom where, as in this case, we are satisfied that GDS has persistently misused an electronic communications network or electronic communications service, if we are also satisfied that it has not taken all the appropriate steps to stop and prevent persistent misuse and remedy that which has occurred.

3.16 In its Representations, GDS stated that it considers that a section 129 notification is unnecessary because it brought the misuse to an end and took steps to ensure that the misuse was not repeated. Specifically it stated the following:

- a) Following contact from Ofcom on 3 January 2014, Mr [X], Managing Director of GDS, contacted [X] on the same day and requested that they establish the reasons for the silent calls;
- b) On 7 January 2014, it was established that the message had been removed and Mr [X] asked [X] “... to produce a set of instructions that a manager could follow in order to create a new NAA message and to apply further settings to prevent inadvertent deletion of the new NAA message.”³⁹;
- c) “By 17 January 2014, such instructions had been produced, a new NAA message had been applied to the system, and the system was ‘locked’ so that managers could not inadvertently delete the NAA message. From that date no further silent calls were made. Accordingly, the misuse was completely remedied within two weeks of GDS being notified by Ofcom that complaints had been made.”⁴⁰

3.17 In addition, GDS stated that it took the following steps to ensure that the misuse is not repeated:

- a) Certain settings in the dialler are now passcode controlled and cannot be accessed by GDS employees without such passcode. “This prevents any employee accidentally or purposely making any changes to the settings.”⁴¹
- b) Any changes to the settings can now only be made through [X].
- c) GDS now also has a voicemail box checked daily by managers in the call centre for any complaints received, allowing complaints to be picked up and remedied immediately.

3.18 GDS also submitted that it has “... taken sufficient steps to ensure that the misuse has been brought to an end and is not repeated. Accordingly, we submit that a Section 129 Enforcement Notification is unnecessary.”⁴²

³⁸ Section 129(2) of the Act.

³⁹ Paragraph 9, the Representations.

⁴⁰ Paragraph 10, the Representations.

⁴¹ Paragraph 12(1), the Representations.

⁴² Paragraph 14, the Representations.

- 3.19 In the October 2014 Representations, GDS reiterated that as soon as it became aware that a member of staff had unintentionally altered the dialler settings it “took immediate action to remedy the situation.”⁴³
- 3.20 Ofcom has taken these steps into account and considers that GDS has taken appropriate steps to end and ensure that its failure to include an information message when calls are abandoned is not repeated.
- 3.21 However, the Representations did not contain any information on how GDS plans to ensure that its failure to ensure that the abandoned call rate does not exceed 3 per cent of live calls in a 24 hour period is not repeated. Ofcom acknowledges that the abandoned call rate exceeded 3 per cent in only one 24 hour period during the Relevant Period. However, we consider that GDS should have set out the appropriate steps that it intended to take to ensure that this failure is not repeated in future.
- 3.22 On these bases, our judgment is that GDS has taken some, but not all, appropriate steps to help secure that its misuse is brought to an end and not repeated.
- 3.23 As to the steps GDS has taken to remedy the consequences of the misuse notified to it, we take account that section 129(7) of the Act provides:
- “(7) References in this section to remedying the consequences of misuse include references to paying an amount to a person –*
- (a) by way of compensation for loss or damage suffered by that person; or*
- (b) in respect of annoyance, inconvenience or anxiety to which he has been put.”*
- 3.24 In the Representations GDS did not set out any steps it intends to take to remedy the consequences of the notified misuse. Affected consumers suffered harm as a result of GDS’ actions evidenced by the complaints Ofcom received (as summarised at paragraph 2.24). Ofcom considers that GDS could have acknowledged the harm caused by remedying the consequences of the contravention. It is therefore our view that GDS has not yet taken any steps to remedy the consequences of the notified misuse.
- 3.25 Ofcom considers that it could issue a section 129 notification in this case, as GDS has:
- taken some, but not all, appropriate steps to ensure that the misuse is brought to an end and is not repeated;
 - has not set out any steps for remedying the consequences of the notified misuse.
- 3.26 However, in light of the timely steps that GDS has taken to end its failure to play an information message in the event of an abandoned call and to prevent this from happening again (as outlined at paragraphs 3.16 to 3.19 above) our view is that it would not be a proportionate regulatory response to serve on GDS a notification under section 129 of the Act. Instead, we have reflected the failure to take all

⁴³ Annex 13, the October 2014 Representations.

appropriate steps to prevent future misuse and to remedy the consequences of the misuse in the level of the penalty.

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 GDS a penalty under section 130 of the Act. Ofcom's view 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."⁴⁴

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 set out in paragraphs 2.42 to 2.43, Ofcom is satisfied that GDS persistently misused an electronic communications network or electronic communications service. On this basis, GDS may be liable for the imposition of a penalty under section 130 of the Act.

3.31 GDS stated in its Representations that, "*In all the circumstances, we respectfully submit that the imposition of a penalty would be inappropriate and disproportionate.*"⁴⁵ It considers this for the following reasons:

- It made 12,703 silent calls over the Relevant Period, which when averaged across the Relevant Period, the abandoned call rate was 1.91%.
- There was only one day on which the abandoned call rate exceeded the 3 per cent of live calls, and on that day the rate was only 3.23%.
- GDS stated that the "*... misuse was no way intentional and as soon as the company was made aware of the contravention, it took immediate steps to ensure compliance with Ofcom's regulations*",⁴⁶

3.32 In addition GDS made the following points:

⁴⁴ Section 130(1) of the Act.

⁴⁵ Paragraph 15, the Representations.

⁴⁶ Paragraph 24, the Representations.

- GDS has not previously received a Section 128 Notification from Ofcom and “*In the course of its investigation, GDS was advised by [§<] that, although it administers many call centres for companies like GDS, this is the first occasion that the incident which led to the misuse here has ever occurred*”⁴⁷;
- GDS also brought Ofcom’s attention to the full co-operation of GDS during the investigation; and
- GDS is concerned about the perception of the company and considers that the publication of the section 128 Notification in itself is sufficient deterrent.⁴⁸

3.33 The policy statement sets out that the abandoned call rate should be calculated over a 24 hour period (paragraph A.130) and this is how Ofcom calculated the abandoned call rates in the section 128 notification when assessing GDS’ use of an ACS. This prevents the masking of poor performance during individual 24 hour periods by compliant use on other days during the Relevant Period. While Ofcom notes that the abandoned call rate exceeded 3 per cent in only one 24 period during the Relevant Period, Ofcom considers that GDS’ failure to include an information message in the event of abandoned calls also constituted persistent misuse. In Ofcom’s view, the imposition of a penalty is appropriate and proportionate in respect of these contraventions. Ofcom also considers that the overall percentage/volume of calls is not determinative to establishing persistent misuse or whether further enforcement action is warranted. Therefore GDS’ references in its representations to the number of silent calls averaged across the relevant period to give an abandoned call rate of 1.91% does not mean that it is not appropriate to take enforcement action in this case.

3.34 The Representations conclude that it would not be “... *appropriate or proportionate that Ofcom impose a penalty on GDS. GDS’ contravention was a genuine mistake, occasioned due to inadvertence, and the company has gone to great lengths to remedy the misuse and to ensure full compliance with Ofcom regulations going forward ... we respectfully submit that any further action would be disproportionate to the relatively limited contravention that occurred.*”⁴⁹ In the October 2014 Representations GDS made a similar point and submitted that the “provisional notification under s130 of the Communications Act (2003) appears to be extremely severe and will have far reaching consequences for many people who rely on GDS for their income.”⁵⁰

3.35 Taking account of the matters in paragraphs 3.9 to 3.12 above, and that we have decided not to take action under section 129 of the Act, we are of the view that the imposition of a penalty would help to secure Ofcom’s objective of furthering the interests of citizens and consumers. We make the regulatory judgment that it is necessary and appropriate to impose a penalty on GDS so as to reflect the seriousness of its conduct and to deter non-compliance with the persistent misuse provisions of the Act, having regard to the policy statement, by GDS and others.

3.36 Accordingly, we are imposing a penalty on GDS in this case under section 130 of the Act. The following section sets out Ofcom’s determination of the penalty amount, which is a matter of regulatory judgment and includes taking account of:

⁴⁷ Paragraph 25, the Representations.

⁴⁸ Paragraph 29, the Representations.

⁴⁹ Paragraphs 31 to 33, the Representations.

⁵⁰ Annex 13, the 13 October 2014 Representations.

- (a) the Representations made by GDS, including a telephone call with Mr [§<], Managing Director of GDS, on 28 July 2014, and the Second Response;
- (b) the Representations on the section 130 Provisional Notification⁵¹.
- (c) any steps taken by GDS for securing that the notified misuse was brought to an end and not repeated;
- (d) any steps taken by GDS for remedying the consequences of the notified misuse; and
- (e) other requirements of the Act, including that the penalty is appropriate and proportionate to the relevant misuse and has regard to the Penalty Guidelines.

⁵¹ Annexes 11, 12 and 13.

Section 4

Determination of the amount of penalty

- 4.1 The following section of this document sets out Ofcom's determination of the amount of the penalty imposed on GDS. It explains why we consider the penalty to be appropriate and proportionate to the contravention in respect of which it is imposed. Likewise, the regard we have had in exercising our regulatory judgment to:
- a) the increased maximum level of penalty under the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010 No. 2291;
 - b) the Representations⁵², including a telephone call of 28 July 2014 with Mr [X], Managing Director of GDS, and the Second Response⁵³;
 - c) the October 2014 Representations on the Provisional Notification⁵⁴, and the September 2014 email⁵⁵ and September 2014 phone call with Mr [X], Managing Director of GDS⁵⁶;
 - d) steps taken by GDS for securing that the notified misuse is brought to an end and not repeated;
 - e) steps taken by GDS for remedying the consequences of the notified misuse; and
 - f) the Penalty Guidelines.

Legal framework

- 4.2 Ofcom may impose a penalty if a person notified under section 128 of the Act has persistently misused an electronic communications network or an electronic communications service in one or more notified respect. The applicable legal framework is set out in detail in section 2 of this document.
- 4.3 Sections 130(4) and 130(5) of the Act set out the maximum level of penalty that Ofcom may impose and the factors that Ofcom must have regard to when setting the level of the penalty.
- 4.4 The maximum level of penalty was increased following an order⁵⁷ made by the Secretary of State under section 130(9) of the Act. The maximum level of penalty is now £2 million.
- 4.5 The upward revision of the maximum penalty followed a consultation by the Department of Business, Innovation and Skills entitled "*Raising the maximum penalty for the persistent misuse of an electronic communications network or service*,

⁵² Annex 2, the Representations.

⁵³ Annex 10, the Second Response of 28 July 2014.

⁵⁴ Annex 13, the October 2014 Representations.

⁵⁵ Annex 11, the September 2014 email.

⁵⁶ Annex 12, the September 2014 phone call.

⁵⁷ [The Communications Act 2003 \(Maximum Penalty for Persistent Misuse of Network or Service\) Order 2010 No. 2291.](#)

2009".⁵⁸ 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 respondents had received calls and tried various methods to combat the problem*".⁵⁹

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*".⁶⁰ 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*".⁶¹

4.7 Section 130 states:

"...

- (4) The amount of a penalty imposed is to be such amount not exceeding £2,000,000 as OFCOM determine to be-
 - (a) appropriate; and
 - (b) proportionate to the misuse in respect of which it is imposed.
- (5) In making that determination OFCOM must have regard to-
 - (a) any representations made to them by the notified misuser;
 - (b) any steps taken by him for securing that his misuse is brought to an end and is not repeated; and
 - (c) any steps taken by him for remedying the consequences of the notified misuse."

4.8 As previously noted, in accordance with section 392 of the Act, Ofcom prepared and published a statement containing the guidelines it proposes to follow in determining the amount of penalties imposed by it under the provisions of the Act or any other enactment apart from the Competition Act 1998⁶². By virtue of section 392(6) of the

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<http://webarchive.nationalarchives.gov.uk/200906090003228/http://www.berr.gov.uk/files/file53311.pdf>

⁵⁹ 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

⁶⁰ Ibid, page 1,

⁶¹ Ibid, page 5.

⁶² Annex 4, Ofcom Penalty Guidelines dated 13 June 2011.

Act, Ofcom must have regard to the statement for the time being in force when setting the penalty amount. Issuing a penalty under section 130 is also referred to in the policy statement⁶³.

The Penalty Guidelines

- 4.9 As set out in our Penalty Guidelines, Ofcom considers all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of penalty. The regard we have had to these guidelines, in accordance with section 392 of the Act, is set out below.
- 4.10 The particular factors we have considered are as follows. In considering them, we have taken into account the maximum penalty that may be imposed (and the reasons for its setting at that level); the Representations; the First and Second Responses; the Representations on the section 130 Provisional Notification; steps taken by GDS; and the statutory requirements that a penalty is appropriate and proportionate:
- a) that *“The central object of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement.”*⁶⁴
 - b) the following which appear to us to be relevant in this case in determining an appropriate penalty:
 - i. the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;
 - ii. the duration of the contravention;
 - iii. any gain (financial or otherwise) made by GDS (or any connected body) as a result of the contravention;
 - iv. any steps taken for remedying the consequences of the contravention;
 - v. whether in all the circumstances appropriate steps had been taken by GDS to prevent the contravention;
 - vi. whether GDS has a history of contraventions;
 - vii. the extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, it was occurring or would occur;
 - viii. whether there has been a failure to keep adequate records;
 - ix. whether the contravention continued, or timely and effective steps were taken to end it, once GDS became aware of it; and
 - x. the extent to which the level of penalty is proportionate, taking into account the size and turnover of GDS.

⁶³ Annex 3, the policy statement (A1.100 to A1.104).

⁶⁴ Annex 4, the Penalty Guidelines, paragraph 3.

- 4.11 We have also had regard to precedents set by previous cases, and to the need for transparency in applying the Penalty Guidelines, particularly as regards the weighting of the factors considered in making our determination. We have also considered the extent of GDS' co-operation with Ofcom's investigation.

Deterrence and seriousness of the contravention

- 4.12 As noted above, the Penalty Guidelines provide that "*The central object of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement.*"
- 4.13 GDS considered this factor in the Representations. It submitted that "*...GDS has been (and remains) very concerned about the perception of the company – both to Ofcom and the general public about this issue, which occurred due to inadvertence. In particular, it has had to acknowledge it is responsible for the issue having arisen and feels strongly that the publication of the Section 128 Notice itself is sufficient deterrent in the circumstances.*"⁶⁵ We have carefully considered these representations in reaching the following view.
- 4.14 We take account, first, that part of Ofcom's principal duty is to further the interests of consumers in relevant markets. Section 128 of the Act provides Ofcom with enforcement powers so that it may take action to protect consumers and citizens from harm resulting from persistent misuse of an electronic communications network or electronic communications services.
- 4.15 We also have regard to the numbers of abandoned calls and their effects on consumers. Abandoned and silent calls will almost invariably result in consumer harm, which may range from inconvenience and annoyance through to genuine anxiety⁶⁶. We give weight to the evidence to this effect in Ofcom's market research, which most recently found that abandoned calls with an information message were considered to be annoying (71 per cent of calls) and distressing (6 per cent of calls). The research also reported that more silent calls were considered to be annoying (88 per cent of calls) and distressing (9 per cent of calls)⁶⁷.
- 4.16 There is therefore, in our regulatory judgment, an inherent seriousness in persistent misuse by way of making abandoned and silent calls, such as that by GDS. There is a need for enforcement action, including appropriate and proportionate financial penalties, to provide GDS, and others, with an effective incentive to comply with the Act, having regard to the policy statement, and to deter non-compliance with the rules relating to such misuse, to protect consumers from the relevant harm pursuant to our principal duty.
- 4.17 Moreover, as set out in the policy statement, Ofcom's approach when assessing whether to take enforcement action in respect of abandoned and silent calls has been, and continues to be, to ensure that users of ACS technology take steps to avoid making abandoned and silent calls; and that when such calls are made, steps are taken to reduce the degree of harm caused⁶⁸.

⁶⁵ Annex 2, the Representations, paragraph 27.

⁶⁶ Annex 3, policy statement (1.6).

⁶⁷ Market Research published on 23 May 2014, http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance_calls_research/

⁶⁸ Annex 3, Statement of Policy, paragraph 4.1.

- 4.18 ACS technology is used by call centres to improve efficiency by maximising the amount of time call centre agents spend speaking to consumers. Persons using these technologies may pass the cost savings that these technologies allow on to consumers. However, if not robustly and properly managed, a side effect of these technologies may be the generation of abandoned and silent calls resulting in consumer harm.
- 4.19 Ofcom recognises that a balance is needed between the positive efficiency benefits of ACS on the one hand, and the potential for these technologies to cause consumer harm on the other. In recognition of the benefits of ACS when properly managed, Ofcom does not enforce the persistent misuse provisions of the Act against their use *per se*, but has put in place guidelines in respect of their use (the policy statement) so as to reduce the possibility of harm and to set out when we would prioritise enforcement action.
- 4.20 For example, the policy statement sets out the “*abandoned call rate formula*,” which provides that the abandoned call rate shall be no more than 3 per cent of live calls per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over a 24 hour period (27 October 2013). This provides ACS users with a margin for error, balancing possible efficiencies with the need to protect consumers from harm. It also means, however, that, where this threshold is breached, there is intrinsically serious conduct that Ofcom is all the more liable to regard as serious because a margin for error has already been allowed and has been exceeded.
- 4.21 GDS’ persistent misuse during the Relevant Period in respect of which Ofcom is taking this enforcement action included it making multiple abandoned calls during one 24 hour period. On the basis of the available evidence, we estimate that GDS made 420 abandoned calls in total on that day. Compared to other recent cases where we have taken enforcement action, this case may be considered relatively small. Nonetheless, in our regulatory judgment, we consider that it is an intrinsically serious contravention.
- 4.22 GDS’ persistent misuse also involved it making multiple abandoned calls and failing to ensure that an information message was played – we estimate it made approximately 12,703 such silent calls during the Relevant Period. Ofcom considers the failure to play an information message in the event of an abandoned call to be a serious and unacceptable matter, as silent calls are more likely to give rise to anxiety and distress.
- 4.23 Accordingly, Ofcom considers that in this case the contravention should be characterised as serious.

Degree of harm caused by the contravention

- 4.24 We have given consideration to the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants. In doing so, we note that GDS states in its Representations that, “... *there was only one day (27 October 2013) on which the silent call rate exceeded the 3% limit specified in the Statement of Policy; and on that day, the rate was only 3.23%*”⁶⁹
- 4.25 We have regard to section 128(5) of the Act, which provides that a person misuses an electronic communications network or electronic communications service if the “...

⁶⁹ Annex 2, the Representations, paragraph 20.

effect or likely effect of which is to cause another person to unnecessarily suffer annoyance, inconvenience or anxiety." As set out in the policy statement⁷⁰ and in the section 128 notification, and based on the evidence set out therein, it is Ofcom's view that the effect or likely effect of making abandoned and silent calls is to cause other persons to suffer unnecessary annoyance, inconvenience or anxiety⁷¹. This is supported by the evidence in Ofcom's market research described elsewhere in this document.

- 4.26 We also take into account that, in our determination, GDS made multiple abandoned calls. In doing so, it exceeded an abandoned call rate of 3 per cent of live calls over a 24 hour period on one occasion, making approximately 420 abandoned calls on that day. It also made multiple abandoned calls where no information message was played, resulting in approximately 12,703 silent calls across the Relevant Period. The failure to play any information message in the event of an abandoned call means that the harmful effects of silent calls are greater (although, for completeness, we acknowledge that, in this case, GDS did present a valid CLI number).
- 4.27 On that basis, Ofcom considers that GDS would have generated actual or potential consumer harm during the Relevant Period in a significant number of those relevant cases, and that the harm was likely to have been considerable.
- 4.28 Accordingly, we are of the view that the effect or likely effect of GDS' use of the electronic communications network or electronic communications service was that call recipients unnecessarily suffered annoyance, inconvenience or anxiety.

The duration of the contravention

- 4.29 In relation to the issue of the duration of the contravention, it is important to note that for the purposes of exercising its enforcement powers in an efficient, appropriate and proportionate manner and so that parties do not have to provide undue amounts of information, Ofcom may select a timeframe within which it bases an investigation. This timeframe is known as the Relevant Period and its duration is determined on a case by case basis. In the present case, a seven week period was selected as the Relevant Period, between 27 October 2013 and 14 December 2013.
- 4.30 Our view is that the duration of the notified non-compliance is significant because, notwithstanding the fact that the abandoned call rate exceeded 3 per cent on only one 24 hour period during the Relevant Period, GDS failed to play an information message when making multiple abandoned calls on each of the 42 days on which it made outbound calls during the seven week Relevant Period.

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

- 4.31 GDS stated in its Representations that it, "*... did not make any gain (financial or otherwise) as a result of the contravention. On the contrary, it is likely that GDS lost money as, due to the inadvertent deletion of the NAA message, the receiver of the call would have been given no information about the company or the reason for the call.*"⁷²
- 4.32 GDS' failure to maintain an abandoned call rate of under 3 per cent during one 24 hour period may have resulted in GDS benefitting as a result of its failure to follow

⁷⁰ Annex 3, the Statement of Policy statement, paragraph 1.6.

⁷¹ Annex 1, paragraph 1.5.

⁷² Annex 2, paragraph 30(2).

the principles set out in the policy statement and carrying out the persistent misuse on that day. However, on the basis that we do not have direct evidence of such gain in this case, we have not taken this factor into account in the determination of the penalty amount. We also accept that it is unlikely in this case that GDS made any gain as a result of its failure to play an information message in the event of an abandoned call.

Steps taken by GDS to remedy the consequences of the contravention

4.33 Ofcom's view is that, as of the date of this Notification, GDS has not taken steps, or said that it intends to take steps, to remedy the consequences of the misuse notified to it under section 128 of the Act. We have taken this into account in determining the penalty amount. In particular, we have not given GDS any credit for taking steps to remedy the consequences of the contravention.

Whether GDS has a history of contraventions

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

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

4.35 In Ofcom's view, GDS failed to take all appropriate steps to prevent the contravention.

4.36 In reaching this view, we had regard to the following factors. These include that over the following periods of time, in addition to the publication of the policy statement, Ofcom took the following actions to raise ACS users' awareness of the importance of compliance:

- (a) Ofcom published an open letter on 20 December 2010⁷³ addressed to industry stating that enforcement action would be taken should the policy statement not be followed and that companies would be expected to be operating in accordance with it by 1 February 2011. In particular, it alerted industry to the increase in the maximum penalty for persistent misuse from its previous level of £50,000 to £2 million.
- (b) Ofcom published another open letter on 21 May 2012⁷⁴. This letter was again addressed to industry and set out Ofcom's current approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls. It described the steps we expect ACS users to take to avoid making these calls, and if such calls are made, to limit consumer harm. One of these steps was, "*ensuring an abandoned call rate ... of no more than 3 per cent of live calls per campaign.*"

⁷³ Annex 14, First open letter to industry stakeholders dated 20 December 2010, http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/acs_users.pdf

⁷⁴ Annex 15, Second open letter to industry stakeholders dated 21 May 2012, http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/Open_letter_to_stakeholders.pdf

(c) Ofcom published another open letter on 20 March 2013⁷⁵ in co-ordination with the Information Commissioner's Office. This letter was again addressed to industry and reinforced the importance of complying with the legal and regulatory measures in place to protect consumers from harm.

4.37 In this context, we attached some weight to the fact that GDS has been trading since 2011 and should therefore have been aware of at least the second and third of these open letters, as they related specifically to GDS' business practices through the use of a call centre. GDS should therefore have been fully aware of the steps it, as an ACS user, should have taken to avoid persistently misusing electronic communications networks and services and the possible sanctions that may apply should it do so.

4.38 GDS should have taken those steps. That the misuse occurred indicates that it did not do so, or only did so ineffectively.

4.39 Ofcom notes that GDS relied on a third party supplier, [X], to administer its call centre services. In its Representations, GDS noted that, "*In the course of its investigation, GDS was advised by [X] that, although it administers many call centres for companies like GDS, this is the first occasion that the incident which led to the misuse has ever occurred.*"⁷⁶

4.40 Ofcom also notes comments in the Second Response in which GDS states:

"I rely on staff based over 300 miles away to operate the system properly and whilst this was a genuine mistake, I have to accept that there was a contravention, which as the owner/director of the company I am responsible for. This has led me to give serious consideration to the whole operation, because I can't be in Glasgow every day. The resoluteness and persistence by OFCOM clearly demonstrates that there is no tolerance for any contravention regardless of whether it was accidental or not, which in turn raises many questions and concerns for me moving forward."

4.41 In a telephone call of 28 July 2014, Mr [X], Managing Director of GDS, made a similar comment. He said that it was extremely difficult for him to control his call centre which was 300 miles from his home and that he may decide that the hassle of ensuring on-going compliance may not be worth the effort and that he would then have to lay off 70 staff.⁷⁷

4.42 In the October 2014 Representations, GDS stated that it ensured that the "*IT Company was aware off] all our necessities and also took advice from them regarding the equipment required to adhere to Ofcom regulations and requirements.*"⁷⁸

4.43 Ofcom considers that a party is expected to take all reasonable steps to monitor and assess on-going compliance with the policy statement, including non-compliance which may be the result of a mistake. Therefore, it is GDS' responsibility to ensure that the ACS is working correctly in the event of an abandoned call, including the playing of an appropriate information message. Ofcom considers that the 300 mile distance from Mr [X]'s residence to the GDS call centre in Glasgow is not a relevant factor when assessing compliance. For example, GDS management could have

⁷⁵ Annex 16, Third open letter to industry stakeholders dated 20 March 2013, http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/ICO_Ofcom_letter_200313.pdf

⁷⁶ Annex 2, the Representations, paragraph 25.

⁷⁷ Contemporaneous note of telephone call, 28 July 2014.

⁷⁸ Annex 13, the October 2014 Representations

ensured that regular test calls were made to check compliance with the policy statement. GDS should also have processes in place to monitor and ensure that its abandoned call rate does not go above 3 per cent of live calls in any 24 hour period. This can be achieved through appropriate delegation and active management of the dialler by personnel with the appropriate training and experience, with oversight by senior personnel.

- 4.44 Accordingly, our regulatory judgment is that GDS did not take sufficient effective steps, having regard to the policy statement, to prevent the relevant persistent misuse. We have taken this into account in our determination of the penalty amount.

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

- 4.45 Our assessment is that the persistent misuse in this case did not occur intentionally, recklessly or with the knowledge of GDS' senior managers. We therefore attach no weight to any such considerations in assessing the penalty.

- 4.46 GDS explained to Ofcom in the Response that:

"... GDS' misuse was in no way intentional and as soon as the company was made aware of the contravention, it took immediate steps to ensure compliance with Ofcom's regulations".

- 4.47 GDS reiterated this point in the October 2014 Representations: *"The system operated correctly until a member of staff unintentionally altered the settings. As soon as I [[X]] became aware of this immediate action was taken to remedy the situation..."*

- 4.48 The fact that the abandoned call rates on all but one 24 hour period were under 3 per cent during the Relevant Period suggests to Ofcom that GDS is a company that was aiming to comply with the policy statement. In addition, Ofcom accepts that in this case, the NAA message may have been mistakenly deleted from the dialler settings, resulting in calls being abandoned without an information message being played.

- 4.49 While Ofcom also considers that GDS could have done more to prevent the contravention, it is our view that GDS' contravention of the persistent misuse provisions did not occur intentionally.

- 4.50 As to recklessness, we consider this to mean being aware of risk in a course of action and deciding to take that course ignoring the risk, or paying no heed to whether any such risk exists. Following consideration of the First Response, related correspondence and the Representations, our view is that GDS' notified contravention was not reckless on this basis.

- 4.51 While we consider that not all steps were taken to prevent the notified misuse from occurring, we have no evidence as to the seniority of those involved in processes at GDS and therefore no evidence that its senior managers knew, or ought to have known, that the misuse was occurring or would occur. The penalty amount would have been higher had we found evidence that senior managers at GDS had, or ought to have had, this knowledge.

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

- 4.52 In its Second Response of 28 July 2014⁷⁹ GDS told Ofcom that its turnover for the year ending 31 July 2013 was £[redacted]; and during the relevant period it had around 45 full time staff and 30 part time staff⁸⁰ in its call centre in Glasgow. In its Representations, GDS also told us that its profit last year was £[redacted]; however, Ofcom does not consider profit to be a relevant figure when calculating the level of any penalty, as profit does not necessarily bear any relationship to the size of a company.
- 4.53 In the September 2014 email, Mr [redacted] stated that, in view of current trading conditions, he could not afford to engage solicitors to prepare representations and that he would close the Glasgow call centre by the end of October 2014.
- 4.54 In the October 2014 Representations GDS told us that “*GDS Ltd is finding trading conditions extremely hard at the moment and we have already had to restructure the business to address the decline in turnover.*”⁸¹ GDS provided a graph that set out that its monthly turnover declined from £[redacted] in January 2014 to £[redacted] in August 2014.⁸² GDS also stated that “*All staff have been made aware that their jobs are at risk and that many of them will no longer have a position with GDS Ltd should a fine of £[redacted] be imposed, indeed the Company would not survive such a cost.*”
- 4.55 In Ofcom’s view, all of these factors indicate that GDS is a relatively small business and that it may be facing difficult trading conditions and decreasing turnover. Any penalty Ofcom imposes must be an appropriate and proportionate penalty for the misuse involved in this case, such as would deter a business of that size from persistent misuse. We have taken these factors into account in determining the penalty amount.

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

- 4.56 Following our careful consideration of the Representations, the First Response and related correspondence, and representations on the Provisional Notification, Ofcom’s judgment is that GDS has taken some, but not all, appropriate steps to bring the relevant misuse to an end once it was aware of it (as set out at paragraphs 3.16 to 3.19). We have taken this into account in our determination of the penalty amount.

Whether there has been a failure to keep adequate records

- 4.57 Ofcom issued GDS with two information requests on 24 February and 28 July 2014 and GDS provided timely responses, with the information requested, to Ofcom on 10 March and 28 July 2014. Ofcom therefore believes that GDS has demonstrated an ability to keep adequate records. Accordingly, this has been taken into account in determining the penalty amount. In particular, the penalty amount has not been increased on account of any shortcomings in record-keeping.

⁷⁹ Annex 10, the Second Response of 28 July 2014.

⁸⁰ During the Relevant Period the number of full time staff ranged from 44 to 47; the number of part time staff ranged from 25 to 34.

⁸¹ Annex 13, October 2014 Representations.

⁸² Ibid.

Co-operation with Ofcom's investigation

- 4.58 Ofcom's ability to protect consumers and fair dealing businesses effectively, and to perform our statutory duties, is impeded if parties under investigation fail to provide accurate, and timely, co-operation with our investigations. In that light, the Penalty Guidelines state that, "*Ofcom may increase the penalty where the regulated body in breach has failed to cooperate fully with our investigation*⁸³." We have therefore considered the co-operation GDS gave to Ofcom's investigation of this matter.
- 4.59 In this case, GDS was punctual in its response to Ofcom's statutory information requests and in the delivery of its Representations and the Representations on the section 130 Provisional Notification. It also co-operated promptly where Ofcom sought clarifications to the information provided.
- 4.60 Our overall assessment, therefore, is that GDS co-operated with Ofcom in material respects. Accordingly, we do not propose to increase the penalty on this account.

Relevant precedents set by previous cases

- 4.61 The Penalty Guidelines also indicate that we will, in determining a penalty, have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and the context of each case. We have considered them here.
- 4.62 Under section 128 of the Act, Ofcom has taken action against companies for persistently misusing an electronic communications network or service, most notably in relation to the making of abandoned and/or silent calls. Under section 130 of the Act, Ofcom has imposed penalties for persistent misuse in respect of thirteen companies since June 2006⁸⁴.

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

- 4.63 While, as noted above, Ofcom imposed penalties for persistent misuse of an electronic communications network or service prior to 2011, we consider these pre-2011 precedents to be of limited assistance in the determination of this case for the following reasons:
- the pre-2011 cases were determined prior to the introduction of secondary legislation⁸⁵ increasing the maximum financial penalty in respect of persistent misuse from £50,000 to £2 million;
 - the pre-2011 cases were determined on the basis of penalty guidelines which have now been superseded by the current Penalty Guidelines;
 - the pre-2011 cases related to persistent misuse having regard to a policy statement which has now been superseded by the current policy statement;
 - the period of investigation (i.e. Relevant Period) has been reduced in duration, for the purposes of assisting efficient enforcement, from approximately seven

⁸³ Annex 4, the Penalty Guidelines.

⁸⁴ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

⁸⁵ http://www.legislation.gov.uk/uksi/2010/2291/pdfs/ukxi_20102291_en.pdf

months to seven weeks⁸⁶ 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.

4.64 Accordingly, we do not consider the pre-2011 cases to be particularly relevant in light of the revised variables and this section does not therefore purport to be a comprehensive analysis of each case as compared and distinguished from the present case. Nevertheless, we note that:

- Ofcom has held that there is a need for penalties to act as a sufficient incentive to comply with section 128 of the Act, and having regard to the policy statement, across industry and for the target of the investigation specifically;⁸⁷
- Ofcom has held that the seriousness of harm is linked to the number of abandoned and/or silent calls made⁸⁸, with silent calls being particularly serious⁸⁹, but even a relatively small number of calls may be, “serious”⁹⁰;
- in the majority of pre-2011 cases, Ofcom found no direct evidence to suggest that senior management were aware or ought to have been aware of the respective contraventions;
- Ofcom has held that, “*it is the Company’s responsibility to ensure that its call centres comply with its legal obligations....In these circumstances, Ofcom does not consider that the Company’s contraventions can be attributed to circumstances beyond the Company’s control nor to the actions of a third party*”⁹¹; and
- in many of the pre-2011 cases, evidence was provided of steps taken to secure that the misuse was both brought to an end and not repeated⁹².

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

4.65 The most recent persistent misuse cases for contraventions of section 128 of the Act were determined on 19 April 2012, 6 December 2012, 18 April 2013 and 9

⁸⁶ Note the duration of the Relevant Period in a particular case may vary depending on the facts and circumstances of that case.

⁸⁷ See, in particular, Complete Credit Management, March 2008.

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

⁸⁸ Annex 3, the policy statement, A1.84.

⁸⁹ See e.g. Barclaycard, September 2008 http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/barclaycard/

⁹⁰ See e.g. Complete Credit Management, March 2008

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

⁹¹ Space Kitchens and Bedrooms (Holdings) Ltd, January 2007

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

⁹² See e.g. Equidebt Limited (December 2008), Abbey National Plc (March 2008), Complete Credit Management (March 2008) http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

September 2014. The first imposed a penalty of £750,000 on HomeServe; the second imposed a penalty of £60,000 on npower; the third imposed a penalty of £750,000 on TalkTalk, and the fourth imposed a penalty of £10,000 on Ageas.

- 4.66 These cases were determined:
- a) on the basis of the policy statement (published on 1 October 2010);
 - b) on the basis of the Penalty Guidelines (published on 13 June 2011);
 - c) after the introduction of secondary legislation increasing the maximum financial penalty in respect of persistent misuse from £50,000 to £2 million;
 - d) in respect of a period of investigation (i.e. relevant period) of seven weeks; and
 - e) in consideration of the circumstances of the case in the round.
- 4.67 The key features of the HomeServe, npower, TalkTalk and Ageas cases and the present case are considered below in terms of the factors set out in the Penalty Guidelines.

Deterrence and seriousness of the contravention

- 4.68 Ofcom considered that the persistent misuse in the HomeServe and TalkTalk cases should be characterised as serious. In both those cases, that seriousness was a significant factor in the substantial penalty imposed.
- 4.69 The contravention of section 128 during the seven week relevant period in the HomeServe case was significant, involving 42 separate 24 hour periods where it exceeded the 3 per cent abandoned call rate and generated 14,756 abandoned calls. Of those 42 days, 27 of them involved HomeServe making one or more calls to that specific number within the same 24 hour period, resulting in 36,218 calls which did not adhere to the 24 hour policy set out in the policy statement.
- 4.70 TalkTalk, meanwhile, amongst other compliance failures, exceeded an abandoned call rate of 3 per cent of live calls over a 24 hour period by a substantial amount on at least four separate occasions during the relevant period (1 February to 21 March 2011). This translated to approximately 9,000 calls. It also failed to ensure that an information message was always played in the event of an abandoned call at the Teleperformance Cape Town call centre across at least one campaign, so these calls were in effect silent calls, which Ofcom considers to cause more serious harm than abandoned calls. It also persistently made 512 abandoned calls over 29 days at the McAlpine call centre. In addition, TalkTalk did not adhere to the 24 hour policy set out in the policy statement. In the HomeServe case and in the TalkTalk case it was deemed appropriate to impose a penalty reflecting a serious contravention which would send a deterrent message to the notified party and to industry.
- 4.71 In the npower case, Ofcom found that the relevant conduct was serious but at the lower end of the scale. npower exceeded an abandoned call rate of 3 per cent of live calls over a 24 hour period on 8 separate occasions during the relevant period in that case. On those days, the volume of abandoned calls made was 1,756. npower also included marketing content within the information message played in the event of an abandoned call.

- 4.72 In the Ageas case a three per cent abandoned call rate was exceeded on three separate occasions. Ofcom estimated, on the basis of the available evidence, that Ageas made approximately 148 abandoned calls in total on these days. Ofcom considered that this was a relatively small and less serious example of what, in Ofcom's regulatory judgment, is an intrinsically serious contravention.
- 4.73 We consider that the npower case provides the most informative precedent with regard to the present case, as the contravention was serious but at the lower end of the scale in comparison to the TalkTalk and HomeServe cases. We acknowledge that npower failed to maintain an abandoned call rate of under 3 per cent on 8 occasions, leading to 1,756 abandoned calls, compared to one occasion and 420 abandoned calls in the case of GDS. In addition, npower included marketing content within the information message played in the event of an abandoned call. However, GDS failed to play an information message on 12,703 occasions during the Relevant Period, leading to silent calls. Ofcom considers that silent calls, where no information message is played, are particularly likely to give rise to consumer harm. For this reason we consider that GDS' contravention to be more serious than that of npower.

Degree of harm caused by the contravention

- 4.74 Ofcom was of the view that HomeServe and TalkTalk generated a considerable degree of harm. It took into account the scale of the contravention and the harm suffered by recipients of the silent and abandoned calls during the relevant period in those cases. TalkTalk made approximately 9,000 silent calls, but it was not possible in the HomeServe case to quantify the number of silent calls resulting from AMD false positives, although this could have been significant. In contrast to the HomeServe and TalkTalk cases, neither npower nor Ageas generated silent calls (which Ofcom considers cause more serious harm than abandoned calls).
- 4.75 Ofcom is of the view that the harm caused by npower and Ageas was of a lower level than that of HomeServe and TalkTalk. npower generated 1,756 abandoned calls during eight separate 24 hour periods where it exceeded an abandoned call rate of 3 per cent. It also included marketing content within its information message, although Ofcom did not consider the harm caused in respect of this particular misuse to be at a serious level. Ageas generated 148 abandoned calls during three separate 24 hour periods where it exceeded an abandoned call rate of 3 per cent. Ofcom concluded that the conduct of npower and Ageas, although serious, pointed to a contravention at the lower end of the scale.
- 4.76 Again, Ofcom considers the degree of harm caused by GDS in this case is likely to be of a broadly similar level to that generated by npower, although the fact that GDS also made 12,703 silent calls means that the harm caused is likely to have been greater. This is reflected in the level of the penalty.

Duration of the contravention

- 4.77 In the HomeServe, TalkTalk, npower and Ageas cases a seven week period was considered, in itself, a substantial duration for a contravention of a provision designed to prevent persons unnecessarily suffering annoyance, inconvenience or anxiety.
- 4.78 Ofcom holds a similar opinion with regard to the GDS case, as set out above at paragraph 4.30.

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

- 4.79 In the present case, and similar to the HomeServe, TalkTalk, npower and Ageas cases, Ofcom considers that it is possible that GDS may have derived *some* limited gain from its misuse, as described above at paragraph 4.32. However, we do not have direct evidence of such gain and consequently this factor has not been taken into account in the level of the penalty.

Steps taken to remedy the consequences of the contraventions

- 4.80 HomeServe made representations regarding the steps it would take to remedy the consequences of its notified misuse. In summary, these stated that HomeServe would:
- a) provide compensation to a claimant upon HomeServe establishing from its records that the CLI of the claimant matched the CLI contacted while Answer Machine Detection technology was in operation;
 - b) issue a statement on its website about the offer of compensation;
 - c) communicate the offer of compensation in response to all press enquiries made to it; and
 - d) provide compensation to the individuals who lodged a complaint with Ofcom during the Relevant Period and to the individuals who had complained to HomeServe during the Relevant Period.
- 4.81 Ofcom concluded that HomeServe had committed to putting in place such steps as it considered appropriate for remedying the consequences of the notified misuse and this was taken into account in determining the penalty.
- 4.82 npower also took steps to remedy the consequences of its misuse. It stated that it would write to all those people who received abandoned calls on the eight days and send them a £10 shopping voucher. npower was given due credit for this in Ofcom's determination of the penalty.
- 4.83 TalkTalk did not provide any evidence of steps taken to remedy the consequences of the contraventions (its representations denied liability in respect of the notified misuse). Accordingly, it was given no credit on this account in our assessment of the penalty imposed on it.
- 4.84 Ageas identified all individuals who received an abandoned call during the relevant period and committed to providing them and those individuals who had complained to Ofcom during the relevant period with a £10 Marks and Spencer voucher."
- 4.85 In the present case, GDS has not provided information on steps it has taken or intends to take to remedy the consequences of the notified misuse. Accordingly we have given GDS no credit on this account in our assessment of the penalty imposed on it.

History of contravention

- 4.86 HomeServe, npower and Ageas did not have a history of notification of contraventions in respect of the persistent misuse provisions. Consequently, in those cases, Ofcom did not consider this to be an aggravating factor in the penalty

assessment. This is in contrast to TalkTalk whom Ofcom has penalised in respect of a previous persistent misuse contravention⁹³.

- 4.87 Consistently with the HomeServe, npower and Ageas cases, no previous persistent misuse contravention has been taken into account in assessing the level of penalty imposed on GDS.

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

- 4.88 In the HomeServe case Ofcom considered that it had failed to follow the policy statement's principles and procedures (or do so effectively and promptly), or take other appropriate steps for preventing the notified misuse. It considered that the absence or ineffectiveness of the procedures had demonstrated HomeServe's failure to take appropriate (and timely) steps to prevent its notified contravention.
- 4.89 Similarly, Ofcom found that npower failed to take all appropriate (and timely) steps in order to prevent its notified misuse. Ofcom did however acknowledge that npower had taken steps to bring itself into compliance.
- 4.90 TalkTalk maintained that prior to its investigation it had in place a number of steps to meet Ofcom's requirements and to prevent possible contraventions. Ofcom determined in that case that if TalkTalk had better compliance strategies in place during the relevant period, it would have been able to identify compliance weaknesses and then been able to take steps to prevent them.
- 4.91 In the Ageas case Ofcom took the view that it took some steps to end the relevant misuse once it was aware, or should have been aware, of it, but it failed to take all the appropriate steps in a timely and effective manner.
- 4.92 In our penalty assessment in the present case, we have similarly taken into account that GDS failed to take all appropriate steps to prevent the notified misuse before it occurred. We describe how at paragraphs 4.34 to 4.45. We have taken this into account in our determination of the penalty amount.

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

- 4.93 In HomeServe, the senior management had received a report (during the Relevant Period) from an independent body engaged to assist in a review of dialler operations. This report detailed findings and recommendations, and included a list of non-compliant matters. Ofcom stated that "*it is apparent to Ofcom that senior management, upon receipt of this report, would have been aware not only that the Guidelines were not being followed but also of the seriousness and extent of the contraventions*" and that notwithstanding this was the state of their knowledge, it was not until two months later that testing was conducted which revealed an abandoned call rate significantly higher than 3 per cent.
- 4.94 In npower Ofcom accepted that senior management did not know that a contravention was occurring or would occur. In the TalkTalk case there was no

⁹³ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/carphonewarehouse/

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

- 4.95 Our approach in the present case is consistent with these earlier ones. There is no evidence to suggest that GDS' senior management would have been aware of the contraventions. Furthermore, as set out at paragraph 4.48, the evidence suggests that GDS is a company that was aiming to comply with the policy statement and Ofcom accepts that the information message may have been deleted by mistake. Accordingly, our penalty assessment does not include an amount on this account.

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

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

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

- 4.98 In the HomeServe and npower cases, Ofcom took the view that:
- they had not taken timely steps that were effective in bringing them into compliance once they had become aware of their contraventions; and
 - this was another factor which added to the amount of any penalty imposed; but
 - that exacerbation was mitigated by certain steps they took after Ofcom informed them of the investigation.
- 4.99 In the Ageas case Ofcom took the view that Ageas had taken some steps to end the relevant misuse once it was aware, or should have been aware, of it, but it failed to take all the appropriate steps in a timely and effective manner.
- 4.100 In the present case we consider that GDS took some, but not all, appropriate steps, as described above at paragraph 3.16 and 3.17, to end the relevant misuse once it became of it. We weight this factor appropriately in our penalty assessment by giving GDS credit and reducing the level of the penalty.

Record-keeping

- 4.101 In the TalkTalk case, unlike HomeServe, npower and Ageas, there was a failure to keep records and a failure to take appropriate steps to provide a robust reasoned estimate of AMD false positives which meant that Ofcom was unable to determine the consistency of one call centre's actions with the policy statement. We regarded this as particularly serious.
- 4.102 We do not believe that the present case is similar to the TalkTalk case. GDS provided Ofcom with information which enabled GDS' compliance with the policy

statement to be assessed. Therefore, this has not been a factor Ofcom has taken into account in assessing the penalty amount.

Co-operation with Ofcom's investigation

- 4.103 Ofcom acknowledged that in general HomeServe had provided full co-operation with the investigation. It had promptly provided the information as required and Ofcom stated that it *"had no reason to believe that the information provided was inaccurate in any way."*
- 4.104 Ofcom found that npower had not cooperated fully with the investigation due to inaccurate material presented to Ofcom and this was taken into account in the level of its fine.
- 4.105 TalkTalk was punctual in its responses to Ofcom's statutory information requests and in the delivery of its representations. However, it did not provide all the required information in respect of one aspect of the investigation until after Ofcom made a number of requests.
- 4.106 Ageas did make some errors in the information used to calculate its abandoned call rates during the relevant period, but it cooperated promptly with Ofcom to resolve these errors.
- 4.107 In the present case GDS was punctual in its responses to Ofcom's statutory information requests and in the delivery of its Representations. It is therefore our view that GDS cooperated with our investigation and this has been taken into account in assessing the level of penalty.

Ofcom's conclusions on the penalty amount

- 4.108 Any penalty Ofcom imposes on GDS must be appropriate and proportionate to the contravention in respect to which it is imposed. Ofcom's central objective in setting a penalty is deterrence. An appropriate penalty would be one that secures this objective in a proportionate way. We have set out above the particular factors relevant to those requirements.
- 4.109 In particular, we have noted that GDS contravened the persistent misuse provisions during the seven week Relevant Period by: (a) exceeding an abandoned call rate of 3 per cent of live calls during one 24 hour period, making in our estimate 420 abandoned calls; and (b) failing to play an information message in the event of an abandoned call throughout the Relevant Period, making a total of approximately 12,703 silent calls.
- 4.110 As regards the weighting of the factors considered, it is our regulatory judgment that the following factors are of particular importance in the circumstances of this case and tend to add to the amount of an appropriate and proportionate penalty:
- persistent misuse is inherently serious, in particular in cases where a person exceeds the margin for error in the 3 per cent abandoned call rate and where no information is played the event of an abandoned call;
 - there was a degree of consumer harm likely to have arisen from GDS' notified misuse;

- the duration of the notified non-compliance is significant as set out in paragraph 4.30 above; and
- GDS failed to take all appropriate steps to prevent the misuse before it occurred.

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

- That GDS took immediate action to stop the failure to play an information message when calls were abandoned when becoming aware of it and to ensure that it is not repeated; and
- GDS is a small business with a turnover of around £[~~8~~], and as such there is a need to ensure that the penalty is proportionate to the size of the organisation.

4.112 On the basis of these factors, Ofcom's regulatory judgment is that a penalty of £20,000 would be appropriate and proportionate. This reflects that Ofcom considers cases of persistent misuse to be serious, even where this results from a mistake, since appropriate compliance checks should have identified this at an early stage; and that this is liable to be met with a penalty, to deter GDS and others from engaging in that conduct.

Section 5

Table of Annexes

Annex 1	Section 128 notification issued to GDS dated 23 June 2014
Annex 2	GDS representations to the section 128 notification (the "Representations") dated 21 July 2014
Annex 3	<i>The Revised statement of policy, and Tackling abandoned and silent calls: Statement, October 2010)</i>
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Annex 12	File note of conversation between [redacted] of GDS and Ofcom, 18 September 2014
Annex 13	Representations on the Provisional Notification received on 13 October 2014
Annex 14	First open letter to ACS users published on 20 December 2010
Annex 15	Second open letter to ACS users published on 21 May 2012
Annex 16	Third open letter to ACS users published on 20 March 2013

Annex 1: Section 128 notification issued to GDS dated 23 June 2014.

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

Annex 2: GDS representations to the section 128 notification (the “Representations”) dated 21 July 2014.

[§<]

Annex 3: The Revised statement of policy, and Tackling abandoned and silent calls: Statement, October 2010).

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

Annex 4: Ofcom Penalty Guidelines dated 13 June 2011.

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

Annex 5: Ofcom calculation of Abandoned Call Rates using GDS data

Campaign: GDS

A	B	C	D	E	F	G	H
Date	Abandoned calls	AMs ⁹⁴ to Live Operator	Live call to Live Operator	Ratio of AM to all calls passed to live operator	Estimated abandoned to AM	Estimated abandoned calls excluding calls abandoned to AM	Abn Call Rate (ACR)
				= C/(C+D)	= B*E	= B-F	= G/(G+D)
27 Oct 13	987	8,017	12,569	39.8%	268	420	3.23%
28 Oct 13	[X]	[X]	[X]	[X]	[X]	[X]	2.02%
29 Oct 13	[X]	[X]	[X]	[X]	[X]	[X]	1.87%
30 Oct 13	[X]	[X]	[X]	[X]	[X]	[X]	2.27%
31 Oct 13	[X]	[X]	[X]	[X]	[X]	[X]	1.51%
1 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	2.52%
2 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	
3 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	2.12%
4 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	2.25%
5 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	1.49%
6 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	2.34%
7 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	2.20%
8 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	1.14%
9 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	
10 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	2.65%
11 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	2.51%
12 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	2.21%
13 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	2.02%
14 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	1.70%
15 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	1.61%
16 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	
17 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	1.99%
18 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	2.14%
19 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	2.21%
20 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	1.72%
21 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	1.63%
22 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	0.97%
23 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	
24 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	2.18%
25 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	1.45%

⁹⁴ "AMs" refers to Answer Machines.

Notification of the imposition of a penalty under section 130 of the Communications Act 2003

26 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	1.57%
27 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	1.57%
28 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	1.95%
29 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	1.34%
30 Nov 13	[X]	[X]	[X]	[X]	[X]	[X]	
1 Dec 13	[X]	[X]	[X]	[X]	[X]	[X]	2.51%
2 Dec 13	[X]	[X]	[X]	[X]	[X]	[X]	1.77%
3 Dec 13	[X]	[X]	[X]	[X]	[X]	[X]	1.55%
4 Dec 13	[X]	[X]	[X]	[X]	[X]	[X]	1.80%
5 Dec 13	[X]	[X]	[X]	[X]	[X]	[X]	2.76%
6 Dec 13	[X]	[X]	[X]	[X]	[X]	[X]	1.07%
7 Dec 13	[X]	[X]	[X]	[X]	[X]	[X]	
8 Dec 13	[X]	[X]	[X]	[X]	[X]	[X]	1.61%
9 Dec 13	[X]	[X]	[X]	[X]	[X]	[X]	2.03%
10 Dec 13	[X]	[X]	[X]	[X]	[X]	[X]	1.52%
11 Dec 13	[X]	[X]	[X]	[X]	[X]	[X]	1.59%
12 Dec 13	[X]	[X]	[X]	[X]	[X]	[X]	1.60%
13 Dec 13	[X]	[X]	[X]	[X]	[X]	[X]	2.17%
14 Dec 13	[X]	[X]	[X]	[X]	[X]	[X]	
Total	[X]	[X]	[X]	[X]	[X]	[X]	

Annex 6: First Information request sent to GDS under section 135 of the Act on 24 February 2014 (the “First Information Request”)

In preparing the specified information requested below, please note the following.

Scope of specified information

This notice requires Green Deal Savings to provide information to Ofcom. The specified information should cover the period from **27 October 2013** to **14 December 2013** inclusive (the ‘**Relevant Period**’).

The specified information should include all outbound calls to UK consumers during the Relevant Period, made either directly by Green Deal Savings or by a third party acting on behalf of or under instruction from Green Deal Savings, using an ACS.

The specified information should therefore include any outsourced or other call centre(s) (including those located outside the UK), which were contracted by Green Deal Savings to make calls to UK consumers on behalf of Green Deal Savings during the Relevant Period.

Manner and form of provision of specified information

Please provide this information in electronic form.

Questions 4 and 8 request information based on templates. If the information is held in your records management systems in a form from which it is not possible to complete the templates, please provide the information requested in an alternative format, ensuring that it is electronically searchable and explaining how what you provide comprises the information requested.

Explanation of terms

Section 3 of the Statement of Policy provides an explanation of the terms used below and an explanation of the methodology which can be used when determining compliance with the Statement of Policy.

Aggregation and disaggregation basis

Ofcom considers that where a company is operating multiple campaigns simultaneously from one or more call centres, it may be appropriate to calculate the abandoned call rate using an aggregation of data across all calls centres and/or all campaigns run by and on behalf of the company. Where Ofcom has aggregated a company’s call data and proposes to rely on those figures for the purpose of a notification issued under section 128 of the Act, Ofcom may also set out the underlying information on a disaggregated basis (that is by call centre and/or campaign) to aid understanding of any non-compliance⁹⁵.

Questions

Nature of Green Deal Savings’ activity

- 1) Please provide a corporate structure chart for the group which includes Green Deal Savings. The structure chart should:

⁹⁵ Paragraphs 5.57 and 5.58, Ofcom’s current Statement of Policy, published 1 October 2010.

- a. Specify the full names of all subsidiaries and/or holding companies of Green Deal Savings.
- b. For each of the above, specify the nature of the activity undertaken (for example claims management).

Call centres and campaigns

- 2) For all call centres which made calls to UK consumers acting on behalf of or under instruction from Green Deal Savings during the Relevant Period, please confirm:
 - a. The call centre name (registered company name and trading name) and company number.
 - b. The address of the call centre.
 - c. Whether or not each call centre was operated directly by Green Deal Savings or on behalf of Green Deal Savings by a third party.
- 3) For each campaign conducted during the Relevant Period, please confirm:
 - a. The campaign name or title.
 - b. The call centre(s) that worked on the campaign.
- 4) Please provide:
 - a. The data as set out in both Templates 1 and 2 below, broken down by each 24 hour period during the Relevant Period. The data should be provided electronically by means of an Excel spread sheet.
 - b. Please provide both one worksheet per call centre and one worksheet per campaign, making clear which campaign(s) or call centre/s the data refers to. Where Answer Machine Detection ('AMD') was not used, please disregard column D.
 - c. Evidence to substantiate the reasoned estimate of AMD false positives incurred where AMD was used at a call centre⁹⁶.

Template 1:
Call Centre X / all campaigns (and so on per call centre)

	A	B	C	D	E
	Date	Number of live calls passed to a live operator	Unadjusted total of abandoned calls	Actual AMD false positives figure or reasoned number of AMD false positives ⁹⁷	Number of calls passed to a live operator and classified as answered by an answer machine
1	x/x/13				

⁹⁶ Refer to A1.35 – A1.46 of the Statement of Policy. How we will assess the robustness of testing used to determine a reasoned estimate of AMD false positives is outlined in A1.40 – A1.43.

⁹⁷ Refer to A1.35 – A1.46 of the Statement of Policy.

2	y/x/13				
3	z/x/13				

Template 2:**Campaign X** / all call centres (i.e. that were involved in dialling within that campaign)

	A	B	C	D	E
	Date	Number of live calls passed to a live operator	Unadjusted total of abandoned calls	Actual AMD false positives figure or reasoned number of AMD false positives ⁹⁸	Number of calls passed to a live operator and classified as answered by an answer machine
1	x/x/13				
2	y/x/13				
3	z/x/13				

- 5) Please confirm whether and how Green Deal Savings reviews calls put through to its live operators to ensure these operators are correctly classifying 'live calls' and 'calls to answer machines' (thus ensuring live calls are not incorrectly disconnected). If Green Deal Savings does conduct such reviews, please provide the results of any review(s) that were undertaken during the Relevant Period (or closest to the Relevant Period if none were undertaken during the Relevant Period) and set out any adjustments made to the data provided in column E of Templates 1 and 2, in response to question 4.

Recorded information message

- 6) Please confirm whether, within two seconds of a call being answered by an individual⁹⁹ and before being terminated or released by the ACS, Green Deal Savings, in each call centre and for each campaign, provided a brief recorded information message.
- 7) Please provide the script(s) of the recorded message referred to in question 6, per call centre or per campaign, as appropriate.

24 hour policy

- 8) Please confirm what procedures, if any, Green Deal Savings has in place to ensure that, in instances where a call is made to a number and that call is identified by AMD technology as being answered by an answer machine, any subsequent call to that

⁹⁸ Refer to A1.35 – A1.46 of the Statement of Policy.

⁹⁹ See A1.51 of the Statement of Policy for an explanation of 'within two seconds of the call being answered'.

number that calendar day is made with the guaranteed presence of a live operator. Again, please provide this information per call centre and /or per campaign, as appropriate.

Please supply the data as set out in Template 3 below, on all calls made using AMD technology between midnight and midnight on each calendar day during the Relevant Period:

- a. Please either provide the information in chronological order, or specify the time of each call.
- b. Please provide one worksheet per call centre per day, making clear which campaign(s) the data refers to.

Template 3:

	A	B	C	D
	Date	Time of call	CLI dialled	Answerphone detected? (Y/N)
1	x/x/13			
2				
3				

Caller Line Identification

- 9) Please state the CLI used for each outgoing call during the Relevant Period, whether Green Deal Savings displayed a CLI number to which a return call may be made. Please provide the CLI number(s) in question. Again, please provide this information both per call centre and per campaign.

Annex 7: Response from GDS to the First Information Request (the “First Response”) received on 10 March 2014.

[§<]

Annex 8: GDS clarifying emails of 20 and 21 March 2014.

From: [✂]
Sent: [✂]
To: [✂]
Cc: [✂]
Subject:[✂]

Mr [✂],

[✂]

Kind regards,

[✂]

[✂]

[✂]

[✂]

[✂]

From: [✂]

Sent: 20 March 2014 09:20

To: [✂]

Cc: [✂]

Subject: Ofcom section 135 information request - clarification of your response

Mr [✂],

Thank you for your response of 10 March to the questions set out in the Annex to the section 135 information request of 24 February 2014. Questions 6 and 7 deal with the playing of a recorded information message in the event of an abandoned call.

Recorded information message

6) Please confirm whether, within two seconds of a call being answered by an individual and before being terminated or released by the ACS, Green Deal Savings, in each call centre and for each campaign, provided a brief recorded information message.

7) Please provide the script(s) of the recorded message referred to in question 6, per call centre or per campaign, as appropriate.

You responded to these questions as follows:

6) [✂].

7) [✂]

[✂]

In your response to the section 135 you are required to set out the situation during the relevant period, in this case the period covering 27/10 to 14/12 2013. I would therefore like to give you the opportunity to correct your response to the section 135, if necessary, or to provide an explanation as to the apparent inconsistencies in your previous correspondence.

I would be grateful if you could respond by 5pm on Friday 21 March.

Kind regards,

[✂]

[✂]

Senior Consumer Affairs Manager

[✂]

[✂]

:: Ofcom

Riverside House

2a Southwark Bridge Road

London SE1 9HA

020 7981 3000

www.ofcom.org.uk

For more information visit www.ofcom.org.uk

This email (and any attachments) is confidential and intended for the use of the addressee only.

From: [✂]
Sent: [✂]
To: [✂]
Subject: [✂]

Hi Mr [✂],
[✂]
From: [✂]
Sent: [✂]
To: [✂]

Subject: RE: Ofcom section 135 information request - clarification of your response

Mr [✂],

In relation to the automated message settings not being included in the campaign, could you please confirm the following:

- * The date on which you became aware of this issue;
- * The date you corrected the issue; and
- * The date you 'locked down' the function to prevent it reoccurring.

I would be grateful if you could respond by 5pm today.

Regards,
[✂].

From: [✂]
Sent: 20 March 2014 10:13
To: [✂]
Cc: [✂]
Subject: RE: Ofcom section 135 information request - clarification of your response

Mr [✂],

[✂]

6) [✂]

[✂]

Kind regards,
[✂]

[✂]

From: [✂]@ofcom.org.uk
Sent: 20 March 2014 09:20
To: [✂]
Cc: [✂]
Subject: Ofcom section 135 information request - clarification of your response

Mr [✂],

Thank you for your response of 10 March to the questions set out in the Annex to the section 135 information request of 24 February 2014. Questions 6 and 7 deal with the playing of a recorded information message in the event of an abandoned call.

Recorded information message

6) Please confirm whether, within two seconds of a call being answered by an individual and before being terminated or released by the ACS, Green Deal Savings, in each call centre and for each campaign, provided a brief recorded information message.

7) Please provide the script(s) of the recorded message referred to in question 6, per call centre or per campaign, as appropriate.

You responded to these questions as follows:

6) [REDACTED].

7) [REDACTED].

[REDACTED]

In your response to the section 135 you are required to set out the situation during the relevant period, in this case the period covering 27/10 to 14/12 2013. I would therefore like to give you the opportunity to correct your response to the section 135, if necessary, or to provide an explanation as to the apparent inconsistencies in your previous correspondence. I would be grateful if you could respond by 5pm on Friday 21 March.

Kind regards,

[REDACTED]

:: [REDACTED]

Senior Consumer Affairs Manager

[REDACTED]

[REDACTED]@ofcom.org.uk

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For more information visit www.ofcom.org.uk

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Annex 9: Second Information request sent to GDS under section 135 of the Act on 28 July 2014 (the “Second Information Request”)

Financial information

1. Please provide turnover figures for Green Deal Savings for the financial years ending 31 July 2012 and 31 July 2013.
2. Green Deal Savings' 2012/2013 accounts as filed with Companies House indicate that consultancy services were provided by [X], for which fees of £[X] and £[X] were paid in 2012 and 2013 respectively. Please provide a detailed explanation of what those consultancy services consisted of.

Other information relating to size

3. Please provide the number of full-time employees of Green Deal Savings between 27 October and 14 December 2013, the ‘Relevant Period’ as set out in the 1st section 135 notice. If the number of full-time employees changed at any time within that period, please identify the change and give the date.
4. Please provide the number of part-time employees of Green Deal Savings between 13 October 2013 and 30 November 2013. If the number of part-time employees changed at any time within that period, please identify the change and give the date.

Annex 10: Response from GDS to the Second Information Request (the “Second Response” received on 28 July 2014

[REDACTED]

Annex 11: Email of 18 September 2014

[✂]

Annex 12: File note of conversation between [REDACTED] of GDS and Ofcom, 18 September 2014

[REDACTED]

Annex 13: Representations on the Provisional Notification received on 13 October 2014

[Redacted]

Annex 14: First open letter to ACS users published on 20 December 2010

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

Annex 15: Second open letter to ACS users published on 21 May 2012

[http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/Open letter to stakeholders.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/Open_letter_to_stakeholders.pdf)

Annex 16: Third open letter to ACS users published on 20 March 2013

http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/ICO_Ofcom_letter_200313.pdf