



**Notification under Section 128
of the Communications Act 2003
regarding persistent misuse of an
electronic communications
network or electronic
communications service**

Notice served on Ant Marketing by the Office of
Communications ("Ofcom")

Publication date: **31 October 2005**

Contents

Section		Page
1	Notification	1
2	Explanatory Statement - Summary	4
3	Background	5
4	Ofcom's decision and reasoning	8
5	Annex	12

Section 1

Notification

NOTIFICATION UNDER SECTION 128 OF THE COMMUNICATIONS ACT 2003 REGARDING PERSISTENT MISUSE OF AN ELECTRONIC COMMUNICATIONS NETWORK OR AN ELECTRONIC COMMUNICATIONS SERVICE

1. Section 128 of the Communications Act 2003 (the "Act") enables Ofcom to issue a notification to a person where Ofcom has reasonable grounds for believing that a person has engaged in persistent misuse of an electronic communications network or electronic communications service in a way that causes annoyance, inconvenience or anxiety.

Ofcom's determination

2. Ofcom hereby determines that there are reasonable grounds for believing that Ant Marketing is, or has been, persistently misusing an electronic communications network or electronic communications service in a way that causes or is likely to cause annoyance, inconvenience or anxiety as defined in section 128(5)(a) and section 128(6)(a) by generating an excessive level of Abandoned Calls. The reasons for Ofcom's determination are set out in the Explanatory Statement attached to this notification.

Action required by Ant Marketing

3. Ant Marketing shall ensure that:
 - 1) the Abandoned Call Rate shall be no more than three per cent of Live Calls on each individual campaign over any 24 hour period;
 - 2) calls which are not answered should ring for a minimum of 15 seconds before being terminated;
 - 3) when an Abandoned Call is made to a telephone number, that number is not called again by Ant Marketing for a period of 72 hours unless a dedicated operator is available;
 - 4) it retains records of all calls made by it on a rolling basis for a period of at least 12 months, maintained on a daily basis for each campaign using an Automated Calling System, specifying:
 - a. the total number of calls attempted;
 - b. the total number of calls to an answering machine or voicemail service;
 - c. the total number of Live Calls;
 - d. the total number of Abandoned Calls; and
 - e. the Abandoned Call Rate;

Notice served on Ant Marketing by the Office of Communications ("Ofcom")

- 5) it presents for each outbound call a calling line identification ("CLI") number to which a return call can be made which should not be charged at a higher rate than the national call rate;
 - 6) either a recorded message or a live operator is available at the number presented under 5) above to inform called persons of Ant Marketing's identity, the intended purpose of the Abandoned Call and that their number will be deleted from Ant Marketing's database and added to its in-house suppression list if the called person:
 - a. states that this is their wish; and
 - b leaves their name and telephone number;
 - 7) any call made by a called person to a contact number provided under 6) above should not be used as an opportunity to market to that person;
 - 8) it monitors callers' messages under 6) above in order to carry out their requests.
4. Ant Marketing shall comply with the above requirement by 30 November 2005.
 5. Ant Marketing shall provide Ofcom with evidence of compliance with the above requirement on a monthly basis. Ant Marketing shall provide Ofcom with the first monthly written evidence by 4 December 2005 and shall continue to provide this information until 5 May 2006.

Representations concerning this notification

6. Ant Marketing shall have until 30 November 2005 to make representations to Ofcom about the matters set out in this notification and the accompanying Explanatory Statement.

Interpretation

7. Words or expressions used in this notification have the same meaning as in the Act, except for the following:

'Abandoned Call' means where an Automated Calling System terminates a call after it has been answered by a live individual.

'Abandoned Call Rate' means the proportion of Abandoned Calls to the total number of Live Calls.

'Automated Calling System' means a system which is capable of automatically initiating a sequence of calls to more than one destination in accordance with instructions stored in that system.

'Live Call' means a call where a live individual answers a call made by an Automated Calling System

Notice served on Ant Marketing by the Office of Communications ("Ofcom")

David Stewart

Director of Investigations

31 October 2005

Section 2

Explanatory Statement - Summary

Decision

- 2.1 This Explanatory Statement sets out Ofcom's reasons for determining that Ant Marketing is or has been persistently misusing an electronic communications network or electronic communications services as defined in section 128(5)(a) and section 128(6)(a) of the Communications Act 2003 (the "Act").
- 2.2 An 'Abandoned Call' is a call that is terminated after it has been answered by an individual. Abandoned Calls typically occur when an Automated Calling System is used to generate and attempt to connect calls. If there are not enough operators available to handle a call, it is terminated on answer. Such calls are commonly known as 'silent calls'. Ofcom considers that Abandoned Calls can represent misuse as defined in section 128(5) of the Act.
- 2.3 On 16 June 2005, Ofcom opened an investigation to determine whether seven companies, including Ant Marketing, had persistently misused an electronic communications network or electronic communications services as defined in section 128 of the Act by making significant numbers of Abandoned Calls.
- 2.4 On the basis of the evidence gathered in its investigation, Ofcom has concluded that Ant Marketing had been making significant numbers of Abandoned Calls. Ofcom has therefore decided to issue Ant Marketing with a notification under section 128 of the Act.
- 2.5 The section 128 notification requires Ant Marketing to adopt a number of procedures to ensure that the potential for misuse is minimised by 30 November 2005. Ant Marketing has until 30 November 2005 to make representations to Ofcom about the matters set out in the notification and the accompanying Explanatory Statement.
- 2.6 Following the period for making representations under the section 128 notification given to Ant Marketing, if Ofcom considers that Ant Marketing has failed to comply with the section 128 notification and has not taken all such steps as Ofcom considers appropriate for (i) securing that the misuse is brought to an end and is not repeated; and (ii) remedying the consequence of the notified misuse, Ofcom may consider further action, including issuing Ant Marketing a section 129 enforcement notification and/or imposing a penalty under section 130 of the Act.

Section 3

Background

Ofcom's investigation into Ant Marketing

- 3.1 On 16 June 2005, Ofcom opened an investigation to determine whether seven companies, including Ant Marketing, had persistently misused an electronic communications network or electronic communications service as defined in section 128 of the Act, by making significant numbers of Abandoned Calls.
- 3.2 Ofcom received complaints from members of the public about three of the seven companies under investigation regarding the annoyance caused to consumers by the making of Abandoned Calls.
- 3.3 In addition, Ofcom required BT to provide information relating to Abandoned Calls. The request was made under section 135 of the Act. Following the receipt of the information from BT Ofcom identified the remaining four companies under investigation (including Ant Marketing) as companies which have regularly made Abandoned Calls.
- 3.4 Please see the Competition Bulletin entry for this investigation at: http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_835/?a=87101
- 3.5 On 29 July 2005 Ofcom issued a notice under section 135 of the Act to Ant Marketing requiring various Automated Calling System statistics for the 12 month period between July 2004 and July 2005, including daily Abandoned Call levels, and measures Ant Marketing had put in place to minimise the level of Abandoned Calls. The information provided by Ant Marketing in response to the notice is summarised in the table in Annex 1.

Legislative framework

- 3.6 Section 128 of the Act enables Ofcom to issue a notification to a person where it has reasonable grounds for believing that a person has engaged in persistent misuse of an electronic communications network or electronic communications service in a way that causes annoyance, inconvenience or anxiety.
- 3.7 The relevant parts of the Act which provide for the persistent misuse test are set out in sub-sections 128(1), 128(5), 128(6) and 128(7) of the Act. These sub-sections provide as follows:

"(1) Where OFCOM determine that there are reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services, they may give that person a notification under this section.

...

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

Notice served on Ant Marketing by the Office of Communications ("Ofcom")

(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.

(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.

(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."

3.8 Ofcom may give a person ('the misuser') who has been given a section 128 notification a section 129 enforcement notification where the following conditions are satisfied:

a) the misuser has been given the opportunity of making representations about the section 128 notification;

b) the period for making those representations has expired;

c) Ofcom is satisfied that that the misuser has persistently misused an electronic communications network or electronic communications service; and

d) since giving the section 128 notification, the misuser has not taken all such steps as Ofcom consider appropriate for (i) securing that the misuse is brought to an end and is not repeated; and (ii) remedying the consequence of the notified misuse.

3.9 Should the misuser fail to comply with the section 129 enforcement notification, Ofcom can enforce the duties contained in the section 129 enforcement notification by way of an injunction or by any other appropriate remedy or relief.

3.10 In addition to, or as an alternative to, a section 129 enforcement notification, a misuser who has been given a section 128 notification may also be subject to a penalty. Ofcom may impose a penalty under section 130 of the Act where the following conditions are satisfied:

- a) the misuser has been given the opportunity of making representations about the section 128 notification;
- b) the period for making those representations has expired; and
- c) the misuser has persistently misused an electronic communications network or electronic communications service or where he has contravened a requirement of an section 129 enforcement notification given in respect of the notified misuse.

Section 4

Ofcom's decision and reasoning

Reasonable grounds

- 4.1 Ofcom's statement of policy on persistent misuse (the 'Statement on Misuse')¹ identifies the making of Abandoned Calls as a form of behaviour where persistent misuse can occur and states that action under section 128 of the Act may be justified².
- 4.2 The very nature of an Abandoned Call, whereby the called party is unable to speak to the called person, is likely to cause inconvenience, annoyance and anxiety. Ofcom has considered the behaviour of Ant Marketing in relation to the Statement on Misuse.
- 4.3 Section 128(5) of the Act sets out what constitutes a misuse of an electronic communications network or electronic communications service. Based on the information supplied by Ant Marketing, Ofcom notes that Ant Marketing has made Abandoned Calls during the period of investigation. On this basis, Ofcom considers that misuse has occurred as defined in section 128(5)(a) of the Act.
- 4.4 Section 128 of the Act states that the misuse must be persistent. Ofcom considers that misuse is persistent as defined in section 128(6)(a) of the Act where the misuse represents a pattern of behaviour or practice. The Statement of Misuse states that "properly run call centres will strive to ensure that they do not generate more calls than their operators can handle. A persistent failure to do so may lead to the issue of a notification under section 128."³
- 4.5 However, in deciding whether to take enforcement action in a particular case Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment and the steps call centre operators have taken to reduce the degree of concern that Abandoned Calls cause. There are a number of procedures that call centres can adopt which, taken as a package, will act as mitigating factors in establishing the gravity of a particular act of misuse⁴.
- 4.6 These procedures include ensuring that:
- the 'abandoned call' rate shall be no more than three per cent of 'live calls' on each individual campaign over any 24 hour period;
 - in the event of an 'abandoned call', a very brief recorded information message is played within one second of the call being answered, which:
 - identifies the company on whose behalf the call was made;
 - identifies the intended purpose of the call (i.e. "an unsolicited sales call", "a call as part of debt recovery", etc)

¹ <http://www.ofcom.org.uk/consult/condocs/misuse/>

² *ibid*, paragraphs 4.12 and 4.15

³ *ibid*, paragraph 4.13

⁴ *ibid*, paragraph 4.15

- o offers the called person the possibility of declining to receive further calls from that company by contacting a no charge (0800) or Special Services basic rate (0845) number;
 - o includes no marketing content and is not used as an opportunity to market to the called person;
- calls which are not answered should ring for a minimum of 15 seconds before being terminated;
 - when an 'abandoned call' is made to a particular number, that number is not called again in the following 72 hours, unless a dedicated operator is available;
 - for each outbound CLI number is presented to which a return call may be made which is not charged at a higher rate than the national call rate;
 - either a recorded message or a live operator is available at the CLI number presented to inform called persons of the identity of the organisation that called them, the intended purpose of the 'abandoned call' and that the called person's number will be deleted from the organisation's database and added to its in-house suppression list at the called person's request if they leave their name and telephone number;
 - any call made by the called person to the contact number provided shall not be used as an opportunity to market to that person;
 - records are kept that demonstrate compliance with the above procedures
- 4.7 On 29 July 2005, Ofcom issued a notice under section 135 of the Act to Ant Marketing requiring various Automated Calling Systems statistics for the 12 month period between July 2004 and July 2005, including daily Abandoned Call levels, and measures Ant Marketing had put in place to minimise the level of Abandoned Calls. The information provided by Ant Marketing in response to the notice is summarised in the table in Annex 1.
- 4.8 The information provided by Ant Marketing shows that for the period between July 2004 and July 2005, the overall average daily Abandoned Call rate was approximately 15% per cent.
- 4.9 In its response, Ant Marketing acknowledged to Ofcom that their use of the Automated Calling System was persistent misuse as defined in section 128 of the Act.
- 4.10 As Ofcom has reasonable grounds to believe that Ant Marketing is or has been persistently misusing an electronic communications network or electronic communications service as defined in section 128(5)(a) and section 128(6)(a) of the Act and has not taken adequate steps to reduce the degree of concern the Abandoned Calls could cause, Ofcom has decided to issue Ant Marketing with a notification under section 128 of the Act.

Period for compliance with the Section 128 notification

- 4.11 Ofcom considers that the appropriate period during which Ant Marketing shall comply with the notification given to it under section 128 of the Act is 1 month. Ofcom will monitor Ant Marketing's performance over 6 months following the representation period.

Action required of Ant Marketing

4.12 The notification requires Ant Marketing to ensure that:

- 1) the Abandoned Call Rate shall be no more than three per cent of Live Calls on each individual campaign over any 24 hour period;
- 2) calls which are not answered should ring for a minimum of 15 seconds before being terminated;
- 3) when an Abandoned Call is made to a telephone number, that number is not called again by Ant Marketing for a period of 72 hours unless a dedicated operator is available;
- 4) it retains records of all calls made by it on a rolling basis for a period of at least 12 months, maintained on a daily basis for each campaign using an Automated Calling System, specifying:
 - a. the total number of calls attempted;
 - b. the total number of calls to an answering machine or voicemail service;
 - c. the total number of Live Calls;
 - d. the total number of Abandoned Calls; and
 - e. the Abandoned Call Rate;
- 5) it presents for each outbound CLI number to which a return call can be made which should not be charged at a higher rate than the national call rate;
- 6) either a recorded message or a live operator is available at the number presented under 5) above to inform called persons of Ant Marketing identity, the intended purpose of the Abandoned Call and that their number will be deleted from Ant Marketing database and added to its in-house suppression list if the called person::
 - a. states that this is their wish; and
 - b. leaves their name and telephone number;
- 7) any call made by a called person to a contact number provided under 6) above should not be used as an opportunity to market to that person;
- 8) it monitors callers' messages under 6) above in order to carry out their requests.

4.13 The notification also requires Ant Marketing to provide Ofcom with evidence on a monthly basis showing that it has complied with the above requirement. Ofcom requires the evidence to be provided in a form similar to that provided previously to Ofcom. Ant Marketing is required to provide Ofcom with the first monthly evidence by 4 December 2005 and shall continue to provide this information until 4 May 2005.

Failure to comply with section 128 notification

- 4.14 Following the period for making representations under the section 128 notification given to Ant Marketing, if Ofcom considers that Ant Marketing has failed to comply with the section 128 notification and has not taken all such steps as Ofcom considers appropriate for (i) securing that the misuse is brought to an end and is not repeated; and (ii) remedying the consequence of the notified misuse, Ofcom may consider further action, including issuing Ant Marketing a section 129 enforcement notification and/or imposing a penalty under section 130 of the Act.

Section 5

Annex

Table - Summary of information provided by Ant Marketing ('Ant')

Information requested	Information provided by Ant
<p>(1) Records of all calls made by Ant Marketing on a rolling basis for a period of at least 12 months, broken down on a daily basis for Ant Marketing's outgoing numbers used for ACS-based telemarketing activities, specifying for each day and number:</p> <ul style="list-style-type: none"> a. the total number of calls attempted; b. the total number of calls to an answering machine (incl. BT's 1571 service); c. the total number of calls connected to a live individual (i.e. live calls); d. the total number of Abandoned Calls; and e. the Abandoned Call Rate;. 	<p>During the period in respect of which information was provided, the level of silent calls was variable, with silent calls going from below 1% to as high as 50% on certain days. The average daily silent call rate is approximately 15%.</p> <p>Ant stated that they recognise that their use of the dialler has not conformed to S128 of the Communications Act 2003. There have been many contributing factors, including employee training issues, changes within the management team and the technical specifications of their ACE.</p>
<p>(2) How long is the ACS programmed to ring before a call is abandoned?</p>	<p>Ant diallers are programmed to ring for 28 seconds (approx 7 rings).</p>
<p>(3) Confirm whether each outgoing telemarketing call displays a CLI.</p>	<p>Ant confirm that a CLI number is presented on each of their ACE telephone lines</p>
<p>(4) Procedures in place to handle customer complaints and requests for removal of a customer's number and data i.e to an in-house suppression file.</p> <p>How compliance with those procedures is ensured at each site.</p>	<p>Ant stated:</p> <p>Request by customers or through clients for customer data removal is communicated by the Campaign Manager or nominated Assistant, via email, to a designated Technical Support Analyst responsible for maintaining the in-house suppression files who adds the contact to this "Master Do Not Call" list.</p> <p>Records of contacts on the suppression file is physically deleted from the calling database, by the Technical Support Analyst.</p> <p>A procedure is in place so that written confirmation is subsequently emailed back to the Campaign Manager to confirm that the activity has been carried out successfully.</p> <p>Where confirmation not received by the Campaign Manager, a chase-up call should be made to ensure the activity has been completed.</p>

<p>(5) Procedures or actions in place to control the number of Abandoned calls.</p> <p>How compliance with those procedures is carried out.</p>	<p>Ant stated one of two procedures used to screen against TPS. The IT personnel and Campaign managers are responsible for maintaining these procedures:</p> <p><u>Procedure 1 – Client responsible for screening against TPS</u></p> <p>Data received by clients who screen their data against TPS is flagged with the screening date prior to it being added to Ant Marketing’s calling database.</p> <p>Every day, records which are 28 days over the screening date are removed and returned to the client. The client may choose to re-TPS these records and return them to Ant at their next data download.</p> <p>Each campaign may have different requirements, for example, certain clients request data returned much earlier than the 28 day period.</p> <p><u>Procedure 2 – Ant Marketing responsible for screening against TPS</u></p> <p>Data sent to Ant by a client where is sent to a third party who execute the screening process on their behalf.</p> <p>The records are flagged with the date that they passed through this procedure and then the data is applied to their calling database.</p> <p>Similar to Procedure 1, the records are removed and re-TPS screened within 28 days of the last date recorded.</p>
---	---