



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

Notice served on Promote-It (UK) Limited ("Promote-It") by the Office of Communications ("Ofcom")

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## 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 Promote-It 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 making significant numbers of fax calls to non-fax numbers. The reasons for Ofcom's determination are set out in the Explanatory Statement attached to this notification.

#### **Action required by Promote It**

3. Promote-It shall ensure that:
  - 1) it does not send any unsolicited communications via fax to any telephone number unless that number has been cleaned against:
    - a. the Fax Preference Service (FPS) file within the previous 28 days; and
    - b. its in-house suppression list.
  - 2) calls which are not answered should ring for a minimum of 15 seconds before they are terminated;
  - 3) 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;
  - 4) either a recorded message or a live operator is available at the number presented under 3) above to inform called persons of Promote-It's identity, the intended purpose of the fax call and that their number will be deleted from Promote-It'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;
  - 5) any call made by a called person to a contact number provided under 3) above should not be used as an opportunity to market to that person

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- 6) it monitors callers' messages under 4) above in order to carry out their requests;
  - 7) 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, specifying:
    - a. the total number of calls attempted;
    - b. the total number of successful faxes delivered; and
    - c. the total number of calls to a non-fax number.
4. Promote-It shall comply with the above requirement by 30 November 2005.
  5. Promote-It shall provide Ofcom with evidence of compliance with the above requirement on a monthly basis. Promote-It shall provide Ofcom with the first monthly written evidence by 4 December 2005 and shall continue to provide this information until 4 May 2006.

## **Representations concerning this notification**

6. Promote-It 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.

**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 Promote-It 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 Communications Act 2003 (the "Act").
- 2.2 Nuisance calls may arise because fax broadcasting companies are attempting to send fax messages to telephone numbers that are not connected to terminal equipment capable of receiving fax messages (or 'non-fax numbers'). If the called person answers such a call they are likely to hear the high-pitched tones of the fax 'handshake' protocol. Some called persons will be able to identify this as an abortive fax call; others may not. Ofcom considers that fax calls to non-fax numbers 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 Promote-It had persistently misused an electronic communications network or electronic communications service as defined in section 128 of the Act by making fax calls to non-fax numbers.
- 2.4 On the basis of the evidence gathered in its investigation, Ofcom has concluded that Promote-It had been making significant numbers of fax calls to non-fax numbers. Ofcom has therefore decided to issue Promote-It with a notification under section 128 of the Act.
- 2.5 The section 128 notification requires Promote-It to adopt a number of procedures to ensure that the potential for misuse is minimised by 30 November 2005. Promote-It 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 Promote-It, if Ofcom considers that Promote-It 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 Promote-It a section 129 enforcement notification and/or imposing a penalty under section 130 of the Act.

## Section 3

# Background

### Ofcom's investigation into Promote-It

- 3.1 From April to May 2005, Ofcom received a significant number of complaints from members of the public about Promote-It regarding the annoyance caused to consumers by the making of fax calls to non-fax numbers. Therefore, on 16 June 2005, Ofcom opened an investigation to determine whether Promote-It had persistently misused an electronic communications network or electronic communications service as defined in section 128 of the Act, by making such calls.
- 3.2 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](http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_835/?a=87101)
- 3.3 On 29 July 2005 Ofcom issued a notice under section 135 of the Act to Promote-It requiring various statistics for the 12 month period between July 2004 and July 2005, including the number of fax calls to non-fax numbers, and measures Promote-It had put in place to minimise the level of such calls. The information provided by Promote-It in response to the notice is summarised in the table in Annex 1.

### Legislative framework

- 3.4 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.
- 3.5 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--

(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.

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(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."

3.6 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.

3.7 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.

3.8 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:

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- 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')<sup>1</sup> identifies the making of fax calls to non-fax numbers as a form of behaviour where persistent misuse can occur and states that action under section 128 of the Act may be justified<sup>2</sup>.
- 4.2 The very nature of a fax call to a non-fax number, whereby the called person is unable to speak to the calling party and is likely to hear the high-pitched tones of the fax 'handshake' protocol, is likely to cause inconvenience, annoyance and anxiety. Ofcom has considered the behaviour of Promote-It 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 Promote-It, it was difficult for Ofcom to assess the number of fax calls to non-fax numbers generated by Promote-It. This was because Promote-It's call records did not separate calls to non-fax numbers from failed deliveries as its equipment was not capable of recognising calls to non-fax numbers. Ofcom therefore looked at the number and severity of the complaints it had received from members of the public in relation to Promote-It.
- 4.4 Many of the complaints received by Ofcom about Promote-It were about repeat fax calls in a single day to the same non-fax number. 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 repeated fax calls to a non-fax number may lead to the issue of a notification under section 128<sup>3</sup>. On this basis, Ofcom considers that misuse has occurred as defined in section 128(5)(a) of the Act.
- 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 fax broadcasters have taken to reduce the degree of concern that fax calls to non-fax numbers cause. There are a number of procedures that fax broadcasters can adopt which, taken as a package, will act as mitigating factors in establishing the gravity of a particular act of misuse.
- 4.6 These procedures include ensuring that:
  - unsolicited communications shall not be sent via fax to any telephone number unless that number has been cleaned against:
    - the Fax Preference Service (FPS) file within the previous 28 days; and
    - a person's in-house suppression list.

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

<sup>2</sup> *ibid*, paragraph 4.17

<sup>3</sup> *ibid*

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- calls which are not answered should ring for a minimum of 15 seconds before they are terminated;
- for each outbound call a CLI number is presented to which a return call can be made which should not be 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 who 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 if the called person:
  - states that this is their wish; and
  - leaves their name and telephone number
- any call made by a called person to a contact number provided by the CLI should not be used as an opportunity to market to that person;
- records are kept demonstrating compliance with the above procedures.

4.7 On 29 July 2005 Ofcom issued a notice under section 135 of the Act to Promote-It requiring various statistics for the 12 month period between July 2004 and July 2005, including daily calls levels, and measures Promote-It had put in place to minimise the level of fax calls to non-fax numbers. The information provided by Promote-It in response to the notice is summarised in the table in Annex 1.

4.8 Ofcom acknowledges that Promote-It already has in place some of the procedures identified in 3.5 above in order to reduce the incidence of fax calls to non-fax numbers such as:

- displaying a CLI, which routes a returned call to a dedicated answering machine with a recorded message informing the caller of Promote-It's identity and how to have their telephone number removed from Promote-it's calling lists; and
- a cleansing procedure designed to remove voice numbers from Promote-It calling lists.

4.9 As Ofcom has reasonable grounds to believe that Promote-It 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 after considering evidence gathered in this investigation, Ofcom has decided to issue Promote-It with a notification under section 128 of the Act.

### Period for compliance with the Section 128 notification

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

### Action required of Promote-It

4.11 Promote-It shall ensure that:

- 1) It does not send any unsolicited communications via fax to any telephone number unless that number has been cleaned against:

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a. the Fax Preference Service (FPS) file within the previous 28 days; and

b. its in-house suppression list.

2) calls which are not answered should ring for a minimum of 15 seconds before they are terminated;

3) 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;

4) either a recorded message or a live operator is available at the number presented under 3) above to inform called persons of Promote-It's identity, the intended purpose of the fax call and that their number will be deleted from Promote-It'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;

5) any call made by a called person to a contact number provided under 3) above should not be used as an opportunity to market to that person

6) it monitors callers' messages under 4) above in order to carry out their requests;

7) 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, specifying:

a. the total number of calls attempted;

b. the total number of successful faxes delivered; and

c. the total number of calls to a non-fax number.

4.12 The notification also requires Promote-It 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. Promote-It is required to provide Ofcom with the first monthly evidence by 4 December 2005 and shall continue to provide this information until 4 May 2006.

### **Failure to comply with section 128 notification**

4.13 Following the period for making representations under the section 128 notification given to Promote-It if Ofcom considers that Promote-It 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

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further action, including issuing Promote-It a section 129 enforcement notification and/or imposing a penalty under section 130 of the Act.

Section 5

Annex 1

Information requested	Information provided by Promote-It ('PI')
<p>(1) Daily records of all calls in the last 12 months specifying:                      a. the total number of fax calls attempted; and                      b. the total number of calls to a non-fax number; .</p>	<p>Call data for period from 01 August 04 – 31 July 05.</p> <p>The company's system does not allow for the data to be recorded against each individual outgoing number, only against each individual job.</p> <p>The outcome of each job is recorded as a total number of successful deliveries, failed deliveries and engaged signals. The calls to 'non-fax' numbers cannot be separated.</p>
<p>(2) How long is the ACS programmed to ring before a call is abandoned?</p>	<p>PI's equipment programmed to ring for 30 seconds.</p>
<p>(3) Confirm whether each outgoing telemarketing call displays a CLI.</p>	<p>Every outgoing line carries the CLI '0870 013 0875'. Calls to this number are routed to a dedicated answering service identifying the company and how to have a number removed directly via a freefone number.</p>
<p>(4) Source of data used by Promote-It for telemarketing activities?</p>	<p>PI have a commercial agreement with "Blue Sheep Limited" a "business data supplier" who supply the opt in Business Data from which all Fax Data is sourced for PI's clients. All other transmissions on behalf of PI's clients where data is not sourced from the Business Data agreement is supplied by PI's clients, customer lists, own data.</p>

<p>5) Procedures 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>Complaints from 'voice' users are fielded by the staff who remove the number from the business database as soon as possible by entering the number manually into their deletion list and informing the caller of the FPS service and how to contact them. In some cases, staff carry out this task on their behalf.</p> <p>If the complaint is of a serious nature the caller is put through to a manager or director who will deal with it as a matter of priority.</p> <p>All faxes delivered carry a deletion request line "If you do not wish to receive any further faxes please call our deletion line 0870 442 0554 (national rate call)" All calls to this line are recorded and downloaded once a week and incorporated into their "data cleansing process " .</p> <p>PI cleanse its lists against the FPS every weekend between Friday 6:00pm and Monday 08:00am. Staff do not generate any lists on a Monday until given the all clear that this process has been complete</p> <p>The Monthly updated Business Data from their supplier is cleansed against the following:          FPS – most recent download          Promote-it's Suppression list – most recent download          All non geographic fax numbers</p> <p>All outgoing calls attempting to deliver a business fax carry the CLI '0870 013 0875' enabling the recipient of the fax call, when dialling 1471 or equivalent, hear a recorded message with instructions.</p>
<p>6) Procedures to cleanse and verify calling lists against the TPS and FPS.</p> <p>How compliance with those procedures is ensured at each site.</p>	<p>FPS list is downloaded every week.</p> <p>As the data they use supplied by their supplier is for fax marketing and is listed as fax numbers, they are not required to cleanse that data against the TPS register.</p> <p>All telemarketing data used for manual outward-bound tele-calling is supplied by their supplier [X] and is cleansed against the TPS, CTPS and FPS register.</p>

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<p>7) Procedures or actions to control the number of calls made to non-fax numbers.</p> <p>How compliance with those procedures is carried out.</p>	<p>PI operate a 'bad number detection process'.</p>
<p>8) Specify whether your equipment is capable of recognising that it is attempting to send a fax transmission to a non-fax number.</p> <p>Procedures, if any, to remove the relevant number from your data when this occurs.</p>	<p>Their equipment is not capable of recognising a transmission to a non-fax number.</p>