



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

Notice served on Thomson Directories Ltd ("Thomson Directories") 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 Thomson Directories 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 Thomson Directories

3. Thomson Directories 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 Thomson Directories 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 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 Thomson Directories' identity, the intended purpose of the Abandoned Call and that their number will be deleted from Thomson Directories' 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. Thomson Directories shall comply with the above requirement by 30 November 2005.
 5. Thomson Directories shall provide Ofcom with evidence of compliance with the above requirement on a monthly basis. Thomson Directories 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. Thomson Directories 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

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 Thomson Directories 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 Thomson Directories, 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 Thomson Directories had been making significant numbers of Abandoned Calls. Ofcom has therefore decided to issue Thomson Directories with a notification under section 128 of the Act.
- 2.5 The section 128 notification requires Thomson Directories to adopt a number of procedures to ensure that the potential for misuse is minimised by 30 November 2005. Thomson Directories 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 Thomson Directories, if Ofcom considers that Thomson Directories 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 Thomson Directories a section 129 enforcement notification and/or imposing a penalty under section 130 of the Act.

Section 3

Background

Ofcom's investigation into Thomson Directories

- 3.1 On 16 June 2005, Ofcom opened an investigation to determine whether seven companies, including Thomson Directories, 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 Thomson Directories) 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 Thomson Directories requiring various Automated Calling System statistics for the 12 month period between January 2005 and July 2005, including daily Abandoned Call levels, and measures Thomson Directories had put in place to minimise the level of Abandoned Calls. The information provided by Thomson Directories 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--

(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 Thomson Directories 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 Thomson Directories, Ofcom notes that Thomson Directories 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 Thomson Directories requiring various Automated Calling Systems statistics for the 12 month period between July 2004 and July 2005, including daily Abandoned Call levels, and measures Thomson Directories had put in place to minimise the level of Abandoned Calls. The information provided by Thomson Directories in response to the notice is summarised in the table in Annex 1. Thomson Directories was able to provide weekly reports for the period from January 2005 to July 2005.
- 4.8 The information provided by Thomson Directories shows that for the period between January 2005 and July 2005, the overall Abandoned Call rate was on average approximately 20 per cent on a weekly basis.
- 4.9 In its response, Thomson Directories stated that the Abandoned Call Rate was unacceptably high. It also recognised that the procedures in place for monitoring the Automated Calling System during that time were either inadequate or were not being applied properly. Thomson Directories has informed Ofcom that, in its view, it has now rectified this and intends to maintain a level of reporting and monitoring of the system's activity to ensure the level of 'abandoned calls' is minimised. Ofcom has not received call records or other evidence that would demonstrate this change although Ofcom does not have any evidence to the contrary.
- 4.10 As Ofcom has reasonable grounds to believe that Thomson Directories 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 Thomson Directories 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 Thomson Directories shall comply with the notification given to it under section 128 of the Act is 1 month. Ofcom will monitor Thomson Directories's performance over 6 months following the representation period.

Action required of Thomson Directories

- 4.12 The notification requires Thomson Directories 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 Thomson Directories 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 Thomson Directories's identity, the intended purpose of the Abandoned Call and that their number will be deleted from Thomson Directories'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.
- 4.13 The notification also requires Thomson Directories 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. Thomson Directories 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 Thomson Directories, if Ofcom considers that Thomson Directories 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 Thomson Directories 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 Thomson Directories

Information requested	Information provided by Thomson Directories
<p>(1) Records of all calls made by Thomson Directories on a rolling basis for a period of at least 12 months, broken down on a daily basis for Thomson Directories's outgoing numbers used for ACS-based telemarketing activities, specifying for each day and number:</p> <p>a. the total number of calls attempted;</p> <p>b. the total number of calls to an answering machine (incl. BT's 1571 service);</p> <p>c. the total number of calls connected to a live individual (i.e. live calls);</p> <p>d. the total number of Abandoned Calls; and</p> <p>e. the Abandoned Call Rate;.</p>	<p>During the period in respect of which the information was provided, the level of silent calls was variable, with silent calls going from below 1% to as high as over 60% in certain weeks. The overall Abandoned Call rate was on average approximately 20 per cent on a weekly basis.</p> <p>Thomson Directories stated that the drop rate of its ACE system before the recent changes were made to it was unacceptably high. It also recognises that the procedures that were in place for monitoring it were either inadequate or were not being applied properly. Thomson Directories' submission to Ofcom states that it have now rectified this and intends to maintain a level of reporting and monitoring of the system's activity to ensure the level of silent calls is minimised.</p>
<p>(2) How long is the ACS programmed to ring before a call is abandoned?</p>	<p>Diallers are programmed to ring for 30 seconds</p>
<p>(3) Confirm whether each outgoing telemarketing call displays a CLI.</p>	<p>Prior to 2 August 2005, no CLI presented.</p> <p>After 2 August, the inbound call centre number is displayed for all dialler line calls made</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>Requests for suppression received at any stage from a person who has a listing on the database are dealt with by amending the record on the database "in the appropriate way".</p> <p>Thomson Directories receives business subscriber data from [X] which it uses to contact, via its outbound call centre, to get their consent to list them on the database, to classify the business listing.</p> <p>The business contacted is told that they will obtain a free listing in the Thomson Local, and the data will be used for other purposes including marketing. At this stage, the business can request to not have a listing in any products and/or to not have the information used for marketing or to not have further calls, in which case the record will be marked so that no further calls by the outbound call centre will be made.</p> <p>Outbound call centre makes calls only between 9am-5pm and does not knowingly call consumers.</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>Before the selection of sales prospects which is issued to the salesforce, where a telephone number on the TPS file is matched against a record on the Thomson database, that record will be excluded from the prospects.</p> <p>Where a salesperson obtains a number outside of the sales prospects, they can check telephone number through one of two systems. One system checks the number against both the database and the TPS file and the other, available on Thomson Directories intranet, checks telephone numbers against the TPS file.</p>
---	---