

Final order in relation to Komtel's use of automatic calling equipment

18 July 2003

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Final Order under Section 16 of the Telecommunications Act 1984

Condition 9.2 of Komtel's Licence

WHEREAS:

1. On 8 February 2002, the Secretary of State granted a class licence to provide International Simple Voice Resale services (the "Licence") to all persons of the class defined in paragraph 2 of the Licence, under section 7 of the Telecommunications Act 1984 (the "Act") for the running of telecommunication systems authorised by the Licence (the "Applicable Systems");
 2. Komtel Limited provides by means of its Applicable Systems telecommunication services under the Licence ("the Licensee");
 3. Condition 9 of the Licence relates to the use of automatic calling equipment. It applies where the Applicable Systems, or any telecommunication apparatus comprised in them, are capable of automatically initiating a sequence of calls to each of more than one destination in accordance with instructions stored in the Applicable Systems or telecommunication apparatus comprised in them and are capable of transmitting, for reception by persons at some or all of the destinations so called, sounds which are not live speech or sounds which are for the purpose of the transmission or reception of facsimile messages;
 4. For the purposes of Condition 9, one or more of the calls must constitute Messages comprising matter that has been recorded; be intended or reasonably expected by the Licensee to be one which does not result in any Messages consisting of live speech being delivered to the recipient of the call; or be intended or reasonably expected by the Licensee to identify whether apparatus addressed by the Number so called is capable of the transmission or reception of facsimile messages;
 5. Condition 9.2 requires that the Licensee, except in so far as the Director consents otherwise, secure that its Applicable Systems are used to initiate calls to transmit Messages of the description referred to in paragraph 3 of this Order only to telecommunication systems which are run by the Licensee or by persons who have consented in writing to receive such calls and which are identified by reference to Numbers which are used to make calls to those telecommunication systems. The Licensee is additionally required to maintain, or secure that there is maintained, a record giving particulars of the persons who have consented to receiving such calls and their Numbers;
 6. The Director has not consented to the Licensee making calls to transmit Messages of the description referred to in paragraph 3 without first obtaining the consent of the called parties;
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7. The Director is satisfied that the Licensee has used and is currently using automatic calling equipment to initiate calls to a large number of end users without first obtaining their consent to do so;

8. Accordingly, on the information available to him, the Director is satisfied that the Licensee has in the past contravened Condition 9.2 of the Licence. Further, the Director is satisfied that, given the scale of the complaints and the ability of the Licensee to benefit financially from its conduct, the Licensee is likely again to contravene Condition 9.2 of its Licence;

9. On 17 June 2003 the Director issued to the Licensee a notice under section 17 of the Act of his intention to make a final order against the Licensee in order to secure compliance with that condition; and

10. Having given notice under section 17 of the Act of his proposal to make this final order and having received representations in response to the notice which he has duly considered and taken into account, the Director considers it requisite that a final order be made on the following terms. The Director's reasons for making this final order are detailed in the explanatory memorandum that accompanies, and is published with, this final order.

THEREFORE:

THE DIRECTOR IN EXERCISE OF THE POWERS CONFERRED ON HIM BY SECTIONS 16(1) AND 16(6) OF THE ACT MAKES THE FOLLOWING FINAL ORDER

1. The Licensee shall ensure that its Applicable Systems are used in a manner which complies with Condition 9.2(a) and (b) of its Licence, and in particular, the Licensee shall not make any call transmitting messages of the description referred to in Condition 9.1(b) of the Licence without first obtaining the written consent of the called party.

2. This final order shall take effect on **21 July 2003**.

3. In this final order words or expressions used have, except where the context otherwise requires, the same meaning as in the Act or the Licence.

DAVID ALBERT EDMONDS

DIRECTOR GENERAL OF TELECOMMUNICATIONS
18 July 2003

Explanatory Memorandum

Summary

1. This issue relates to the use by Komtel Limited of automatic calling equipment to make calls to consumers.
2. Komtel is a network operator operating under the Class Licence to provide International Simple Voice Resale services (the "Licence"), granted to all persons of the class identified in paragraph 2 of the Licence by the Secretary of State under section 7 of the Telecommunications Act 1984 (the "Act") on 8 February 2002.
3. Following an investigation into complaints received regarding calls made from numbers believed to have been sub-allocated to Komtel, the Director has concluded, for the reasons described below, that Komtel has been acting in breach of Condition 9.2 of the Licence by making calls using automatic calling equipment ("ACE") without the consent of the called parties.
4. In the absence of this final order, the Director is further of the view that, for the reasons described below, Komtel is likely again to be in breach of Condition 9.2 of the Licence. The final order requires Komtel to remedy the breach of Condition 9.2 of the Licence by desisting from making calls using ACE without first obtaining the consent of the called party.
5. The Director published a Notice under Section 17 of the Act on 17 June 2003, setting out his intention to issue the final order and giving interested parties an opportunity to comment on his proposals. The deadline for comments was 15 July 2003.
6. The Director has received representations from Komtel. He has continued to receive complaints from consumers in relation to calls made by Komtel. Having considered Komtel's representations and the further complaints, the Director considers, for the reasons described below, that it is requisite for him to make the final order.

The legal background

7. Condition 9.1 of the Licence applies if "the Applicable Systems, or any telecommunication apparatus comprised in them:
 - (a) are capable of automatically initiating a sequence of calls to each of more than one destination in accordance with instructions stored in the Applicable Systems or telecommunication apparatus comprised in them; and
 - (b) are capable of transmitting, for reception by persons at some or all of the destinations so called;
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- (i) sounds which are not live speech; or
- (ii) sounds which are for the purpose of the transmission or reception of facsimile messages;

and where one or more of the calls referred to in paragraph 9.1(a):

- (A) constitutes Messages comprising matter that has been recorded;
- (B) is intended or reasonably expected by the Licensee to be one which does not result in any Messages consisting of live speech being delivered to the recipient of the call; or
- (C) is intended or reasonably expected by the Licensee to identify whether apparatus addressed by the Number so called is capable of transmission or reception of facsimile messages.”

8. Condition 9.2 goes on to state that the Licensee shall, “except in so far as the Director consents otherwise:

- (a) secure that the Applicable Systems are used to initiate calls to transmit the Messages of the description referred to in paragraph 9.1(b) only to telecommunication systems which are run by the Licensee or by persons who have consented to receive such calls and which are identified by reference to Numbers which are used to make calls to those telecommunication systems; and
- (b) maintain, or secure that there is maintained, a record giving particulars of the persons and the Numbers referred to in paragraph 9.2(a), and shall make that record available for inspection on reasonable notice by the Director.”

9. Condition 9.3 disapplies paragraph 9.2(a) where “regulation 22 of the Telecommunications (Data Protection and Privacy) Regulations 1999 (SI 1999/2093) (use of automatic calling equipment for direct marketing purposes) applies”.

10. Applicable Systems are defined in paragraph 6 of the Licence as “any or all of the telecommunication systems run by the Licensee under this Licence unless the context otherwise requires”.

11. Message is defined in paragraph 1 of Schedule 1 to the Licence as “anything falling within paragraphs (a) to (d) of Section 4(1) of the Act”, that is:

- (a) speech, music and other sounds;
 - (b) visual images;
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(c) signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images; or

(d) signals serving for actuation or control of machinery or apparatus.

12. Number is defined in paragraph 1 of Schedule 1 to the Licence as “any identifier (including name or address) of any end user, telecommunication apparatus, or telecommunication service related element”.

13. Regulation 22 of the Telecommunications (Data Protection and Privacy) Regulations 1999 (“the Regulations”) states that:

“(1) This regulation applies in relation to the use of publicly available telecommunications services by means of an automated calling system (that is to say, a system which, when activated, operates to make calls without human intervention) for the communication of material for direct marketing purposes, whether the called line is that of a subscriber who is an individual or that of a corporate subscriber.

(2) A person shall not use, or instigate the use of, publicly available telecommunications services, and a subscriber to such services shall not permit his line to be used, as mentioned in paragraph (1), except where the called line is that of a subscriber who has previously notified the caller that for the time being he consents to such communications as are there mentioned being sent by, or at the instigation of, the caller in question on that line.”

The complaints

14. In the period from 27 February 2003 to 13 June 2003, the Director received over 40 complaints from consumers regarding short duration calls made by Komtel to the complainants’ mobile phones. The calls were of such short duration that, in the majority of cases, the complainants were unable to answer the call themselves. The callers were aware that they had been called as their mobile phones registered a missed call.

15. The complainants advised that the calls they had missed were from 08718717123. This number is the presentation number rather than the number that the calls were made from, the Calling Line Identifier (CLI). 08718717123 is part of a number block that has been allocated to Totem Communications, who it appears have in turn sub-allocated the number to Komtel Ltd.

16. The fact that the calls were of such short duration gave the Director cause to suspect that automatic calling equipment was being used. The Director opened an investigation on this basis.

The Director's investigation

17. In order to satisfy himself that Komtel has acted and is likely again to act in breach of Condition 9 of its Licence, the Director has considered whether the following conditions have been fulfilled:

- (i) Komtel's Applicable Systems (or telecommunication apparatus comprised in them) have been used to automatically initiate a sequence of calls to each of more than one destination in accordance with instructions stored in them;
- (ii) Komtel's Applicable Systems (or telecommunication apparatus comprised in them) were capable of transmitting sounds which were not live speech;
- (iii) it was intended or reasonably expected that the calls made would not result in messages of live speech being transmitted to the recipients of the calls;
- (iv) callers had not consented in writing to receiving such calls; and
- (v) the calls were not made for direct marketing purposes.

18. Officers of the Director wrote to Komtel on 6 March 2003, outlining the complaints and requesting information as to whether or not Komtel was using ACE to make calls and a copy of the record that Komtel is required to maintain of those persons and their numbers who have consented to receiving calls from Komtel made using ACE.

19. In its reply of 12 March, Komtel advised that it owned a call centre and that, for one of its current promotions, the call centre had been used to make "large numbers of calls to both mobile and fixed line telephones". Komtel advised that these calls had been screened against the Telephone Preference Service ("TPS") list and typically lasted 25-30 seconds.

20. Komtel admitted that a number of short duration calls had been made but it stated that it was aware of the reasons for such calls having been made. Komtel advised that it used CallScripter software to present the next number to dial to its call centre operators and then dial the number. The typical time for the system to connect to a mobile phone is nine seconds, with a further two seconds taken to route the call through the TPS screening. Komtel found that in some instances its call centre ACD switch was timing out calls after 13 seconds, leaving just two seconds of ringing time. Komtel advised that it had raised faults with the manufacturer of its switching equipment and the operator providing it with TPS routing.

21. The Director is aware that network operators regularly monitor call patterns made across their networks to ensure network stability. He, therefore, held discussions with BT to identify whether it had received similar complaints or noticed congestion on its network in the areas that Komtel connected to that

network. BT advised that it had received a number of complaints about short duration calls being made and had carried out monitoring on its network in the Cardigan area, where Komtel has its head office. The Director requested that BT provide this information to him.

22. BT carried out monitoring on the lines used by Komtel by use of GeoProbe, a network monitoring tool that monitors signalling traffic. Information was gathered on traffic between the Carmarthen Local Switch Processor (which processes calls from switches in the Cardigan area, which Komtel has offices connected to) and the Cardiff and Swansea Trunk switches. Calls were monitored for a period of approximately five minutes at around 9:00, 12:00, 15:00 and 18:00 each day from 10-16 May 2003. During these periods, calls were made at a rate of between 1.8 and 8.0 calls per second with an average of 5.2 calls per second. A total of just over 42,000 calls were made in the 27 periods of approximately five minutes (there was no traffic on the numbers during one of the periods monitored).

23. The call monitoring was carried out on the basis of the number that was being presented to the recipients of the calls. In the majority of complaints received by the Director, the presentation number was 08718717123, though complaints were also received about several numbers in the 07030400xxx range, which have also been sub-allocated to Komtel. BT further advised that similar patterns of calls had been identified on the 08718717676 number.

24. There were five outcomes of the calls that were made:

- (i) the number dialled was unobtainable eg the number had not been allocated to an end user;
- (ii) the call was not answered and was terminated by the calling party (Komtel);
- (iii) the call was not answered and was terminated by the called network;
- (iv) the call was answered by the called party; or
- (v) the call was abandoned.

25. For calls where the number dialled was unobtainable, Komtel released (i.e. ended) 99.9% of the calls within 0.1 seconds of the call being set up – the quickest being within nine milliseconds. Number unobtainable calls accounted for 27% of the calls monitored.

26. Where Komtel chose to release calls after detecting no answer, 99.95% of the calls were cleared within four seconds of the call being set up with the majority (around 72%) being cleared within 2.2-2.5 seconds. Of the calls monitored, around 23% of calls were released by Komtel after no answer was received. Nearly 1.5% of calls were terminated by the called network because no answer was received

from the called number. The clearing time depended on the network that was called.

27. Around 39% of calls made during the monitored periods were answered. Komtel, however, cleared 73% of these calls within 0.5 seconds of the call being answered, with 99.6% being cleared by Komtel within 1.5 seconds. The shortest duration of call was 80 milliseconds.

28. Abandoned calls accounted for 10% of the monitored calls. The duration of these calls was under one second.

The Director's findings

29. On the basis of the monitoring information provided by BT, the Director is satisfied that Komtel has been systematically calling blocks of mobile and fixed line telephone numbers, with the numbers being dialled sequentially. This is consistent with blocks of numbers having been programmed into autodiallers.

30. Komtel has admitted in its response to the Director that it uses CallScripter to set up and dial the calls. The time at which some of the calls were made, the frequency of the calls and the speed and consistency at which the calls were cleared has led the Director to conclude that Komtel's Applicable Systems, or telecommunication apparatus comprised in them, have been used to automatically initiate a sequence of calls in accordance with instructions stored in the Applicable Systems.

31. Where the calls matured and were answered, Komtel terminated the call so quickly that live speech was unlikely to have taken place. Komtel's decision to consistently terminate calls within 1.5 seconds of them being answered means that it intended, or at the least should have reasonably expected, that the calls it was making would not result in live speech being transmitted.

32. The Director is also satisfied that the recipients of the calls had not consented to receiving them. Komtel has been unable to provide the Director with a list of callers who have consented to receive calls made using ACE and a number of the complainants specifically stated that they had not consented to receive such calls.

33. As discussed at paragraph 31 above, the Director is satisfied that no live speech has taken place as a result of a large proportion of the calls. As such, the Director is satisfied that the purpose of the calls made by Komtel was not direct marketing as this would require an expectation that live speech take place or a message be left. The Director notes that a number of the complainants rang the presentation number left by Komtel and that some had cheap calls marketed to them as a result of their calls. However, the Director does not consider that this marketing stems from the calls made to the complainants by Komtel, but rather from the calls made to Komtel by the complainants. Where the consumers did not ring Komtel back, no direct marketing at all took place.

34. It is not necessary for the Director to show that every call made by Komtel was made using ACE or contained sounds which were not live speech. Condition 9.1 simply requires that the Applicable Systems be **capable** of automatically initiating the calls and be **capable** of transmitting sounds which are not live speech. Any call made by Komtel that is intended or reasonably expected not to result in live speech being passed then amounts to a breach of Condition 9.2 when the consent of the recipient of the call has not been obtained.

The breach of the licence

35. In failing to obtain the written consent of the recipient of the call before making a call to them using ACE, Komtel has acted in breach of Condition 9.2 of its Licence. In the absence of this final order, the Director is satisfied that Komtel will continue to make calls using ACE and is, therefore, likely again to be in breach of its Licence.

36. The Director has a duty under Section 16 of the Telecommunications Act 1984 to enforce any breach of a licence condition (to the extent that this duty has not been disapplied under Section 16(5)).

37. Ensuring that operators first obtain the written consent of consumers to receive such calls before making calls to them using ACE provides consumers with choice as to whether or not they wish to receive such calls. It also helps protect consumers from practices such as presentation number dumping.

38. By making calls that are of such short duration that live speech cannot take place, but which are long enough for the presentation number to be left with the called party, Komtel is effectively encouraging the recipients of the calls to ring back to see who had called them, at the consumer's cost. The Director notes that revenue sharing is permitted on the 0871 numbers used by Komtel and that presentation number dumping becomes far less cost effective when the calls are made by human operators rather than ACE. This is because ACE can make and clear calls far quicker than a human operator can and is far less labour intensive. Given Komtel's ability to benefit financially from presentation number dumping, the Director considers that Komtel is likely again to be in breach of its Licence unless he issues this final order.

39. On 17 June 2003, the Director issued a Notice under Section 17 of the Act giving notice that he proposed to make a final order under Section 16(1) of the Act for the purposes of securing compliance with the Licence granted to Komtel. A copy of this Notice is available on Oftel's website at: <http://www.oftel.gov.uk/publications/licensing/2003/komt0603.htm>. Interested parties were given until 15 July 2003 to make representations about or objections to the proposed final order.

Representations from the parties

40. The Director has received representations from Komtel regarding his proposals to issue a final order. He has also continued to receive complaints from consumers who have received short duration calls from Komtel.

41. Komtel refutes the Director's allegations, claiming that it had previously made clear to the Director that it has a problem with its "call centre ACD and CallScripter software" and that it intended to cease using this equipment by 14 July. Komtel has subsequently confirmed that all its call centre application changes would be made by 14 July.

42. Komtel argues that it is a direct marketing company and that 40 complaints from consumers is insignificant as a percentage of calls made by Komtel. Komtel has suggested that if the Director decides to issue the final order, "it is likely that Komtel will simply close it's [sic] call centre resulting in the loss of all 14 staff who work in the call centre, with Oftel [sic] being blamed as the reason".

Assessment of responses

43. The Director has noted Komtel's explanation that the short duration calls were the result of problems with its call centre ACD and CallScripter software. The Director also notes that Komtel has been aware of these problems for a number of months, having first mentioned it to the Director in a facsimile message of 12 March 2003, yet has continued to use the equipment despite the Director highlighting his concerns to Komtel.

44. The Director is surprised that Komtel, as a direct marketing firm, has felt able to continue to use ACE. On the basis of the monitoring information obtained from BT (as described at paragraphs 21 to 28 above), the Director has calculated that under 0.2% of calls made by Komtel were actually answered and lasted for more than 1.5 seconds. All other calls either failed to be completed or were of such short duration that marketing could not take place.

45. Since 14 July, the Director has received complaints from several consumers who have received short duration calls from Komtel that were made after that date, despite Komtel claiming to have changed its call centre applications by that date. Further monitoring information supplied by BT has confirmed that similar calling patterns to those detailed in paragraphs 24 to 28 above are being seen. The Director has therefore concluded that Komtel is continuing to use ACE in contravention of its licence.

46. Komtel has suggested that the number of complaints received by the Director is insignificant as a percentage of the calls made by Komtel. The Director does not consider that this is relevant as to whether or not Komtel is breaching its licence. The Director is satisfied that, on the evidence before him, Komtel is using ACE in a manner that contravenes its licence. The Director has received numerous

complaints from consumers and notes that concerns have been raised by a number of other consumers on various websites, such as <http://www.northamptonshire.co.uk/archives/00000139.htm>.

47. The Director wishes to emphasise that he is not seeking to prevent Komtel from making direct marketing calls but rather from using ACE to make calls that do not result in live speech. The Director considers that it would be relatively simple for Komtel to use call centre staff to make the marketing calls, rather than ACE. The Director refutes any suggestion that, by issuing this order, he is forcing Komtel to close its call centre.

Conclusions

48. The Director, having regard to all the relevant matters arising from his examination of the complaint referred to above and the representations of Komtel considers that it is requisite to issue a final order.

49. The final order requires Komtel to act in accordance with Condition 9.2 of its Licence, in particular by obtaining prior written consent from any party that it wishes to make a call to using ACE, before it makes that call, and keeping a record of all such parties and their telephone numbers.
