



Notification under section 128
of the Communications Act 2003
regarding persistent misuse of an
electronic communications
network or electronic
communications services

Notice served on
Barclaycard by the
Office of Communications (“Ofcom”)

This is the non-confidential
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Redactions are indicated by [§<]

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Section 1

Notification under section 128(1) of the Communications Act 2003

1. This notification is issued to Barclays Bank plc, trading as Barclaycard (“Barclaycard”), registered company number 1026167 and registered address 1 Churchill Place, London E14 5HP.
2. This notification:
 - a. sets out Ofcom’s determination pursuant to section 128(1) of the Communications Act 2003 (the “Act”);
 - b. specifies the use made of an electronic communications network or electronic communications services by Barclaycard that Ofcom considers constitutes persistent misuse; and
 - c. specifies the period during which Barclaycard has an opportunity to make representations about the matters notified.
3. Words or expressions used in this notification and the accompanying explanatory statement have the same meaning as in the Act, except as otherwise defined.

Section 128 of the Act

4. Section 128(1) of the Act enables Ofcom to issue a notification to a person where Ofcom has determined that there are reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services.
5. Section 128(5) states that “misuse” occurs if the effect or likely effect of use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety or if the network or service is used to engage in conduct the effect or likely effect of which is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety.
6. Section 128(6) defines persistent misuse as any case in which misuse is repeated on a sufficient number of occasions for it to be clear that the misuse represents a pattern of behaviour or practice, or recklessness as to whether persons suffer annoyance, inconvenience or anxiety.

Ofcom’s determination

7. Ofcom hereby determines that there are reasonable grounds for believing that, between 1 October 2006 and 10 May 2007 (the “relevant period”), Barclaycard persistently misused an electronic communications network or electronic communications services on the following basis:
 - a. Barclaycard misused the network or service in accordance with section 128(5)(a) of the Act as the effect or likely effect of its use has been to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety; and

- b. the misuse was persistent as set out in section 128(6)(a) of the Act as it was repeated on a sufficient number of occasions for it to be clear that the misuse represented a pattern of behaviour or practice.
8. The reasons for Ofcom's determination are as set out below and further explained in the explanatory statement and annexes accompanying this notification.

The use Ofcom considers to be persistent misuse

9. In making this determination and in accordance with section 131 of the Act, Ofcom has had regard to its *Statement of policy on the persistent misuse of an electronic communications network or service*, published on 1 March 2006 (the "guidelines").¹
10. Accordingly, Ofcom considers that there are reasonable grounds for believing that Barclaycard, by virtue of its use of an automated calling system, has persistently misused an electronic communications network or electronic communications services on the following basis.
- a. Contrary to the guidelines, Barclaycard has made abandoned calls, and in particular:
 - without playing an information message;
 - to particular numbers in respect of which no procedures were in place to ensure that repeat calls to the same numbers in the following 72 hours were made by a live operator; and
 - to particular numbers in respect of which no calling line identification facility was presented to which a return call could be made.

Ofcom considers that the effect or likely effect of such use of the network or service has been to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety and this use constitutes "misuse" under the Act. As set out in the guidelines, Ofcom considers even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety.²

- b. The misuse is "persistent" within the meaning of the Act as it was repeated on a sufficient number of occasions for it to be clear that the misuse represented a pattern of behaviour or practice. The guidelines state that although what constitutes a cycle of repetitive behaviour will need to be determined on a case by case basis, it is likely to require a minimum of three instances of the conduct in question.

Ofcom considers, in this context, where a company is operating multiple campaigns over a number of call centres, directly or indirectly, it may be appropriate to aggregate data across all campaigns and across all call centres running those campaigns to give an overall picture of a company's performance and has done so in this case because of the number of call centres and campaigns involved – Ofcom understands from Barclaycard that it ran or outsourced [redacted] campaigns across [redacted] call centres during the relevant period.

¹ <http://www.ofcom.org.uk/consult/condocs/misuse/statement/> and specifically paragraphs 6.11 to 6.16. Ofcom published a consultation on proposed amendments to the guidelines on 17 December 2007. The consultation closed on 1 February 2008 and Ofcom is currently considering responses.

² See the guidelines, paragraph 6.15.

In this case, on an aggregated basis, Ofcom considers that Barclaycard's misuse was persistent because:

- Barclaycard made a total of [3<] abandoned calls during the relevant period; and
- Barclaycard made an excessive number of abandoned calls – and did so in each and every 24 hour period during the relevant period in which those calls were made.³

11. Ofcom further considers that Barclaycard has not kept adequate records for a minimum of six months that demonstrate compliance with each of the factors set out in paragraph 6.16 of the guidelines.

Representations concerning this notification

12. Barclaycard has until 5pm on 21 July 2008 (the “deadline”) to make representations to Ofcom about the matters set out in this notification as explained in the accompanying explanatory statement and to take all such steps for securing that the misuse is brought to an end and is not repeated and remedying the consequences of the notified misuse.

Other matters

13. Following expiration of the deadline, if Ofcom is satisfied that Barclaycard has in one or more of the notified respects persistently misused an electronic communications network or electronic communications services and has not taken all such steps as Ofcom considers appropriate for securing that the misuse is brought to an end and is not repeated and remedying the consequences of the notified misuse then Ofcom may issue to Barclaycard a further notification under section 129 of the Act.

14. If Barclaycard has, in one or more of the ways set out in this notification, persistently misused a network or services, Ofcom may impose a penalty on Barclaycard under section 130 of the Act.

Interpretation

15. “Abandoned call” means a call that is terminated by an ACS after the called person answers it;

“Abandoned call rate” means the proportion of Abandoned Calls to Live Calls over each 24 hour period calculated using the following formula:

$$\frac{\text{Abandoned calls (x)}}{\text{abandoned calls (x) + calls passed to live operator (y)}} \times 100/1$$

“Automated Calling System” (“ACS”) means a system which is capable of automatically initiating a sequence of calls to more than one destination in accordance with instructions stored on that system;

³ Ofcom notes that the guidelines currently suggest that assessment of whether there is an excessive number of abandoned calls should be made “on each individual campaign” (paragraph 6.16). Ofcom has also considered Barclaycard's conduct in this context and notes that Barclaycard made an excessive number of abandoned calls in each of [3<] individual campaigns during the relevant period.

“Calling Line Identification” (“CLI”), which is a facility that enables identification of the number from which a call is being made;

“Excessive number of abandoned calls” means, in a 24 hour period, an abandoned call rate of more than 3%;

“Information message” means a very brief recorded information message which is played within two seconds of the call being answered, which contains at least the following information:

- the identity of the company on whose behalf the call was made (which will not necessarily be the same company that is making the call);
- details of a no charge (0800) or Special Services basic rate (0845) number the called person can contact so they have the possibility of declining to receive further calls from that company; and
- includes no marketing content and is not used as an opportunity to market to the called person;

“Live call” means a call which is answered by an individual (the recipient of the call); and

“Silent call” means a call where the person called hears nothing on answering the telephone and has no means of establishing whether anyone is at the dialling end.

Neil Buckley

Director of Investigations

20 June 2008

Section 2

Explanatory statement

Summary

- 2.1 This explanatory statement sets out Ofcom's reasons for its determination in paragraph 10 of the attached notification ("the notification") that Barclay's Bank plc, trading as Barclaycard ("Barclaycard") has persistently misused an electronic communications network or electronic communications services.
- 2.2 Abandoned calls occur when an ACS is used (typically in a call centre) to generate outgoing calls. If a telephone number is dialled by an ACS, the call is answered by the called person but there is no call centre agent available to handle it, the call will be terminated by the ACS and it becomes an abandoned call. When an abandoned call is not accompanied by an information message, the person answering the call may hear nothing. Such calls are commonly known as "silent calls".
- 2.3 Ofcom's *Statement of policy on the persistent misuse of an electronic communications network or service* (the "guidelines")⁴ sets out Ofcom's policy that repeatedly making abandoned calls (including silent calls) constitutes persistent misuse for the purposes of section 128 of the Act.⁵ The guidelines also set out Ofcom's policy on the use of ACS and outline the factors that Ofcom will take into account in deciding in particular cases whether or not to take enforcement action.
- 2.4 On 22 June 2006, Ofcom began an own-initiative programme of monitoring and enforcement of rules preventing annoyance caused to consumers by silent and abandoned calls.
- 2.5 On the basis of the evidence gathered during its investigation, Ofcom has determined that there are reasonable grounds for believing that, between 1 October 2006 and 10 May 2007 (the "relevant period"), Barclaycard persistently misused an electronic communications network or electronic communications services and has issued the notification.

Legislative framework

- 2.6 The notification is issued under section 128(1) of the Act which enables Ofcom to issue a notification to a person where it has reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services.
- 2.7 Section 128(5) of the Act defines "misuse" as follows:

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

⁴ <http://www.ofcom.org.uk/consult/condocs/misuse/statement/>

⁵ See the guidelines, paragraphs 5.1, 5.2 and 6.15.

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

2.8 Section 128(6) defines what constitutes "persistent" misuse as follows:

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

(a) a pattern of behaviour or practice; or

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

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

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

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

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

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

2.10 Section 129 provides that Ofcom may issue a further notification (known as an "enforcement notification") in specified circumstances, as follows:

"(1) This section applies where –

(a) a person ("the notified misuser") has been given a notification under section 128;

(b) Ofcom have allowed the notified misuser an opportunity of making representations about the matters notified; and

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

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

(a) that he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; and

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

(i) securing that his misuse is brought to an end and is not repeated; and

(ii) remedying the consequences of the notified misuse.

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

(a) securing that his misuse is brought to an end and is not repeated, and

(b) remedying the consequences of the notified misuse,

as may be specified in the notification.”

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

2.12 Section 130 provides that Ofcom may also impose penalties for persistent misuse, as follows:

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

(a) a person (“the notified misuser”) has been given a notification under section 128;

(b) Ofcom have allowed the notified misuser an opportunity of making representations about the matters notified; and

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

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

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

(4) The amount of penalty imposed is to be such amount not exceeding £50,000⁶ as Ofcom determine to be –

(a) appropriate; and

(b) proportionate to the misuse in respect of which it is imposed.

⁶ Section 130(4) of the Act as amended by the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2006, SI 2006/1032, section 2(1).

(5) In making that determination Ofcom must have regard to –

(a) any representations made to them by the notified misuser;

(b) any steps taken by him for securing that his misuse is brought to an end and is not repeated; and

(c) any steps taken by him for remedying the consequences of the notified misuse."

2.13 Under section 131 Ofcom has a duty to publish a statement of general policy with respect to the exercise of its powers under sections 128 to 130 of the Act. Ofcom must have regard to the statement of general policy when exercising these powers.⁷

Ofcom's policy

2.14 In fulfilment of its duty under section 131, (as noted above) Ofcom has prepared the guidelines and published them on 1 March 2006.

2.15 The guidelines provide examples of the types of behaviour that Ofcom considers may be forms of persistent misuse. One such example is making abandoned calls as a result of the use of ACS. Use of ACS (also known as "power diallers" or "predictive diallers") means that calls can be initiated without the need for human intervention.⁸ If a telephone number is dialled by an ACS, the call is answered by the called person but there is no call centre agent available to handle it, the call will be terminated by the ACS and it becomes an abandoned call.

2.16 As set out in the guidelines, even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety.⁹ However, in deciding in any case 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 will take account of steps taken by call centre operators to reduce the degree of concern that silent or abandoned calls cause. In this context, paragraph 6.16 of the guidelines sets out procedures that companies using ACS can adopt which, taken as a package, will act as mitigating factors in establishing the seriousness of a particular act of misuse. These procedures are:

- a) the abandoned call rate shall be no more than three percent of live calls on each individual campaign over any 24 hour period;
- b) in the event of an abandoned call, a very brief recorded information message is played within two seconds of the call being answered, which contains at least the following information:
 - the identity of the company on whose behalf the call was made (which will not necessarily be the same company that is making the call);
 - details of a no charge (0800) or Special Services basic rate (0845) number the called person can contact so they have the possibility of declining to receive further calls from that company; and

⁷ Communications Act 2003 section 131(4).

⁸ See the guidelines, paragraph 6.4.

⁹ See the guidelines, paragraph 6.15.

- includes no marketing content and is not used as an opportunity to market to the called person;
- c) calls which are not answered must ring for a minimum of 15 seconds before being terminated;
 - d) when an abandoned call has been made to a particular number, any repeat calls to that number in the following 72 hours must be made by a live operator;
 - e) for each outbound call a 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;
 - f) any call made by the called person to the contact number provided shall not be used as an opportunity to market to that person, without that person's consent; and
 - g) records are kept for a minimum period of six months that demonstrate compliance with the above procedures.
- 2.17 As set out above, the guidelines state 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. Ofcom considers that where a company is operating multiple campaigns simultaneously from one or more call centres, it may be appropriate to calculate the abandoned call rate using an aggregation of data across all call centres and/or all campaigns run by and on behalf of the company. This will provide Ofcom an overall picture of the performance of a company's outbound dialling activity operations (whether run internally or outsourced) against the requirements of the Act and the guidelines.
- 2.18 Where Ofcom has aggregated a company's call data and proposes to rely on those figures for the purpose of a notification issued under section 128 of the Act, Ofcom may also set out the underlying information on a disaggregated basis. The aim of setting out information in this way is to enable a company to understand the basis of aggregated figures; assess the individual performance of each campaign and/or call centre; identify good practice where applicable; and target any remedial action that may be appropriate.

Ofcom's programme of monitoring and enforcement

- 2.19 On 22 June 2006 Ofcom opened an own-initiative programme of monitoring and enforcement of rules preventing annoyance caused to consumers by silent and abandoned calls. The programme has been ongoing since that time.
- 2.20 As part of this monitoring and enforcement programme, Ofcom approached a number of manufacturers of ACS equipment and asked them for details of their customers. This enabled Ofcom to identify a number of users of ACS equipment, which included Barclaycard.
- 2.21 As part of the investigation, Ofcom requested information from Barclaycard on 27 April 2007 (the "first information request") on 31 July 2007 (the "second information request") on 1 August 2007 (the "amended second information request") and on 7 February 2008 (the "third information request"). Barclaycard provided responses

between 14 and 24 May 2007, between 13 August and 5 September 2007 and on 21 February 2008.¹⁰

- 2.22 The first information request issued on 27 April 2007 required Barclaycard to provide data on outbound calls made using ACS since October 2006 and information on call centre procedures in relation to outbound calling.
- 2.23 Barclaycard responded to the first information request in four parts during the period between 14 and 24 May 2007. This included information about call centre procedures, set out in Annex 3, with clarifications to this information provided in the second and third information requests.
- 2.24 The information supplied meant that Ofcom was not able to make a full and complete assessment of Barclaycard's compliance relative to the guidelines. This was due in part to the fact that some of the information provided was insufficiently clear and required further explanation. Therefore, on 31 July 2007, Ofcom issued Barclaycard with the second information request. The second information request required Barclaycard to aggregate its data and clarify certain aspects of information relating to call centre procedures submitted in response to the first information request.
- 2.25 On 1 August 2007, following discussion with Barclaycard, Ofcom issued an amended second information request which contained minor amendments to the scope of information required in the second information request.
- 2.26 Barclaycard responded to the amended second information request in three parts during the period between 13 August and 5 September 2007.
- 2.27 On 7 February 2008, Ofcom issued the third information request in order to verify outstanding issues raised by the information previously provided by Barclaycard. Barclaycard responded on 21 February 2008.
- 2.28 The information provided by Barclaycard in response to the third information request included:
- the aggregated abandoned call rates for every 24 hour period in the relevant period, across all call centres/all campaigns (based on the formula at paragraph 15 of the notification)¹¹ – this is presented in Annex 2;
 - the data underlying the aggregated abandoned call rates – this is presented at Annex 4 for each call centre and Annex 5 for each campaign.¹²

Ofcom's assessment and decision

- 2.29 In order to exercise its power under section 128(1) to issue a notification, Ofcom must be satisfied that there are reasonable grounds for believing:

¹⁰ Barclaycard also corresponded with Ofcom on other dates in relation to matters raised in the information requests issued by Ofcom. The main responses to the information requests were received on the dates as set out in paragraph 2.21.

¹¹ In relation to [§<] of the call centres operating during the relevant period, [§<], an assessment of the abandoned call rate *per 24 hour period* at each of these call centres and across campaigns run by these call centres has not been possible as records enabling such an assessment were not kept (contrary to the guidelines).

¹² Barclaycard calculated the abandoned call rate for each 24 hour period per call centre (Annex 4). Ofcom has calculated the abandoned call rate for each 24 hour period per campaign (Annex 5).

- a) that a person has used an electronic communications network or electronic communications services;
- b) that the effect or likely effect of that use, or of conduct arising from that use, is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety so as to amount to misuse; and
- c) that the misuse is persistent in that it represents either a pattern of behaviour or practice, or recklessness as to whether persons suffer annoyance, inconvenience or anxiety.

2.30 The following section sets out the basis on which Ofcom has decided to issue the notification to Barclaycard, taking into account the elements outlined above.

Use of an electronic communications network or electronic communications services

2.31 The Act defines an “electronic communications network” as:

“(a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and

(b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals –

(i) apparatus comprised in the system;

(ii) apparatus used for the switching or routing of the signals; and

(iii) software and stored data.”¹³

2.32 The Act defines an “electronic communications service” as:

“...a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except so far as it is a content service.”¹⁴

2.33 The Act defines “signal” as including:

“(a) anything comprising speech, music, sounds, visual images or communications or data of any description; and

(b) signals serving for the impartation of anything between persons, between a person and a thing or between things, or for the actuation or control of any apparatus.”¹⁵

2.34 As set out in its response to the third information request, Barclaycard stated that during the relevant period, it made outbound calls using ACS from a total of [3<] call centres. Barclaycard therefore uses voice telephony to make outbound calls to users of publicly available telephony services. Making these calls comprises the use of a

¹³ Section 32(1) of the Act.

¹⁴ Section 32(2) of the Act.

¹⁵ Section 32(10) of the Act.

electronic communications network as defined in the Act (the network of Barclaycard's communications provider) and use of electronic communications services as defined in the Act (the voice telephony service provided to Barclaycard by its communications provider).

- 2.35 Ofcom therefore considers that, for the reasons outlined above, there are reasonable grounds for believing that Barclaycard has used an electronic communications network and electronic communications services as defined in the Act.

Misuse

- 2.36 As stated above, section 128(5) of the Act sets out what constitutes a misuse of an electronic communications network or electronic communications service; that is the effect or likely effect of that use, or of conduct arising from that use, is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety so as to amount to misuse.

- 2.37 Evidence gathered during Ofcom's investigation revealed that Barclaycard made abandoned calls during the relevant period. For the reasons set out above at paragraph 2.34, Barclaycard did so by using an electronic communications network and electronic communications services. Ofcom's guidelines set out Ofcom's view that even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety.¹⁶ Ofcom therefore considers that Barclaycard's use of a network or services in this case constitutes misuse.

- 2.38 In addition, the guidelines also set out details of procedures that can be adopted to mitigate the seriousness of a particular act of misuse.¹⁷ Ofcom has also assessed Barclaycard's conduct against these procedures.

- *Abandoned calls which were silent* - During the relevant period, [redacted] call centres did not play any information message within two seconds of an abandoned call being answered by the called person.¹⁸ This resulted in just over [redacted] of the total number of abandoned calls made by Barclaycard during the relevant period being silent calls (see Annex 1). Ofcom's guidelines state that any type of silent call is almost certain to cause inconvenience and is very likely to cause annoyance to the called person.¹⁹
- In this context, Ofcom notes paragraph 6.16 of the guidelines which suggests what information messages, when played, should contain at the very least. This includes the identity of the company on whose behalf the call was made; details of a no charge (0800) or Special Services basic rate (0845) number a called person can contact so they can decline further calls from the company; and no marketing content so that the message is not used as an opportunity to market the called person. Ofcom draws Barclaycard's attention to this and reminds it of the need to ensure compliance with the guidance in this regard.
- *Failure to present a CLI* - During the relevant period, [redacted] call centres²⁰ did not ensure that a CLI was displayed on each outbound call.²¹ This resulted in

¹⁶ For the reasons set out in paragraphs 6.11 to 6.14 of the guidelines.

¹⁷ Paragraph 6.16.

¹⁸ [redacted]

¹⁹ Paragraph 6.11 of the guidelines.

²⁰ [redacted]

approximately [redacted] of the total number of abandoned calls displaying no CLI (see Annex 1). The guidelines state that the level of distress caused to a called person will be exacerbated where a lack of CLI information precludes the possibility of a return call.²²

- *No repeat abandoned call within 72 hours* - During the relevant period, [redacted] call centres²³ did not ensure that, when an abandoned call was made to a particular number, any repeat calls to that number in the following 72 hours were made by a live operator. The result of this was the possibility that individuals may have received more than one abandoned call from Barclaycard within a 72 hour period. This applies to approximately [redacted] of the total number of abandoned calls made during the relevant period (see Annex 1).

2.39 Further, in relation to [redacted] of the call centres operating during the relevant period, [redacted], Barclaycard failed to ensure that adequate records were kept that would have enabled an assessment of the abandoned call rate per 24 hour period at each of these call centres and per campaign – contrary to the guidelines (see paragraph 2.16 above).

2.40 Accordingly, Ofcom is of the view that there are reasonable grounds for believing that the effect or likely effect of Barclaycard's use of an electronic communications network and electronic communications services to make abandoned calls in a way contrary to the procedures in the guidelines as set out above has been to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety so as to amount to misuse.

The misuse is persistent

2.41 As set out in paragraphs 2.8 and 2.9, sections 128(6) and 128(7) of the Act set out the basis on which misuse may be considered persistent.

2.42 The guidelines set out that properly managed call centres will strive to ensure that they do not generate more calls than they can handle. A persistent failure to do so will constitute an act of persistent misuse and may lead to the issue of a section 128 notification.²⁴

2.43 The guidelines also set out that misuse becomes persistent when the behaviour in question is repeated often enough to represent a pattern of behaviour or practice or it is clear that the misuse is reckless. Three examples of misuse may be sufficient to constitute sufficient misuse.²⁵

2.44 Ofcom is of the view that there are reasonable grounds for believing that in this case the misuse was repeated often enough to represent a pattern of behaviour or practice. The guidelines state that although what constitutes a cycle of repetitive behaviour will need to be determined on a case by case basis, it is likely to require a minimum of three instances of the conduct in question. Ofcom considers, in this context, where a company is operating multiple campaigns over a number of call

²¹ In response to the first information request, Barclaycard submitted that a CLI would be activated on outbound calls at one of these [redacted] call centres ([redacted]) with effect from 4 May 2007, 6 days before the end of the relevant period. This factor, amongst others, may be relevant to Ofcom's assessment of whether to issue a penalty under section 130 of the Act and if so, to what extent.

²² Paragraph 6.11 of the guidelines.

²³ [redacted]

²⁴ Paragraph 6.15 of the guidelines.

²⁵ Paragraph 3.5.

centres, directly or indirectly, it may be appropriate to aggregate data across all campaigns and across all call centres running those campaigns to give an overall picture of a company's performance. In this case, because of the numbers involved (as stated in its response to the third information request, Barclaycard was running or had outsourced [redacted] campaigns²⁶ across [redacted] call centres) Ofcom considers it appropriate to aggregate data to provide an overall picture of Barclaycard's performance against the requirements of the Act and the guidelines.

2.45 Specifically, Ofcom considers that Barclaycard's misuse was persistent because:²⁷

- Barclaycard made a total of [redacted] abandoned calls during the relevant period (see Annex 2);
- Barclaycard made an excessive number of abandoned calls – and did so in each and every 24 hour period during the relevant period in which those calls were made²⁸ (see Annex 2).

2.46 Ofcom notes that the guidelines currently suggest that assessment of whether there is an excessive number of abandoned calls should be made “on each individual campaign” (paragraph 6.16). Ofcom has also considered Barclaycard's conduct in this context and notes that Barclaycard made an excessive number of abandoned calls in each of [redacted] individual campaigns during the relevant period (see further Annex 5).

2.47 Accordingly, Ofcom considers that there are reasonable grounds for believing that the misuse engaged in by Barclaycard was persistent in that it was repeated on a sufficient number of occasions for it to be clear that the misuse represents a pattern of behaviour or practice as set out in section 128(6)(a) of the Act.

Other matters set out in the notification

2.48 Barclaycard has until **5pm on 21 July 2008** (the “deadline”) to make representations to Ofcom about the matters set out in this notification as explained in this explanatory statement and to take all such steps for securing that the misuse is brought to an end and is not repeated and remedying the consequences of the notified misuse.

2.49 Following expiration of the deadline, if Ofcom is satisfied that Barclaycard has in one or more of the notified respects persistently misused an electronic communications network or electronic communications services and has not taken all such steps as Ofcom considers appropriate for securing that the misuse is brought to an end and is not repeated and remedying the consequences of the notified misuse then Ofcom may issue to Barclaycard a further notification under section 129 of the Act.

²⁶ During the course of the investigation (in particular, in Barclaycard's letter to Ofcom of 9 July 2007, in Barclaycard's response to the third information request and during discussions between Ofcom and Barclaycard on 20 May 2008) Barclaycard expressed the view that outbound calls made in order to collect debt or notify individuals of potential fraudulent activity may not fall within the meaning of a campaign. Ofcom's view is however that the purpose behind an abandoned call does not prevent it being an abandoned call. If the making of abandoned calls by a person constitutes misuse which is persistent then that conduct will be contrary to section 128 of the Act and the guidelines, whatever the purpose behind the call may be.

²⁷ Based on information provided by Barclaycard - see paragraph 2.28 above.

²⁸ No calls were made at any call centre on [redacted].

- 2.50 If Barclaycard has, in one or more of the ways set out in this notification, persistently misused a network or services, Ofcom may impose a penalty on Barclaycard under section 130 of the Act and in accordance with the Penalty guidelines published on 29 December 2003 under section 392 of the Act and the guidelines. The maximum penalty that may be imposed is £50,000.²⁹

²⁹ The maximum level of penalty in section 130(4) of the Act was increased from £5,000 to £50,000 on 6 April 2006, as a result of an order made by the Secretary of State pursuant to section 130(9) of the Act – see *The Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2006*, SI 2006/1032

Annex 1

Summary of relevant information and evidence

Part 1 – Barclays Bank plc	
Company	Barclays Bank plc (specifically Barclaycard)
Address	1 Churchill Place, London, E14 5HP
Company number	1026167
Short description	Provider of financial services
Use of ACS	During the relevant period for the notification Barclaycard operated [redacted] campaigns conducted by [redacted] call centres, all using ACS to make outbound calls
Part 2 - Persistent misuse	
Individual elements considered in Ofcom’s assessment of whether Barclaycard’s conduct during the relevant period amounted to persistent misuse	
Aggregated abandoned call rate, per 24 hour period	<p>Barclaycard made a total of [redacted] abandoned calls during the relevant period (see Annex 2).</p> <p>Barclaycard made an excessive number of abandoned calls – and did so in every 24 hour period during the relevant period in which those calls were made (see Annex 2).</p> <p>Barclaycard made an excessive number of abandoned calls across [redacted] individual campaigns (see Annex 5).</p>
Information message not played resulting in “silent calls”	<p>[redacted] call centres (being [redacted]) did not play an information message and therefore made silent calls (see Annex 3).</p> <p>The total number of silent calls made by these call centres during the relevant period was in total [redacted] or approximately [redacted] of the total number of abandoned calls made across all call centres (that is [redacted]).</p>
Length of time calls were left to ring before termination	All of the call centres left calls to ring for a minimum of 15 seconds before being terminated.
A process in place which ensured that repeat calls which were made within 72 hours of an abandoned call made by a live agent	[redacted] call centres ([redacted]) did not ensure that repeat calls made within 72 hours of an abandoned call were made by a live agent (see Annex 3).

	These call centres made a total of [§<] calls or approximately [§<] of the total number of abandoned calls made during the relevant period (that is [§<])
Presentation of a CLI presented to which a return call may be made	[§<] call centres ([§<]) did not present a CLI in all cases (see Annex 3). The total number of calls made by these call centres which did not display a CLI was [§<] or approximately [§<] of the total number of abandoned calls made (that is [§<])
Retention of adequate records which demonstrated compliance with the above procedures	[§<] call centres ([§<]) did not keep adequate records.
Part 3 - Ofcom's investigation	
Date programme began	22 June 2006
Why information requested	Barclaycard was identified as having purchased an ACS.
Date of information requests	27 April 2007, 31 July 2007, 1 August 2007 and 7 February 2008
Date information received	14 May, 16 May, 18 May, 24 May, 13 August, 20 August, 5 September (all 2007) and 21 February 2008

Annex 2

Analysis of call data aggregated across all call centres/all campaigns³⁰

Date	Calls passed to live operator	Abandoned calls (excluding calls answered by answering machine)	Abandoned call rate (rounded up or down to 2 decimal places, as appropriate)	Ofcom calculation: abandoned call rate greater than 3%?
01/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
02/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
03/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
04/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
05/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
06/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
07/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
08/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
09/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
10/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
11/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
12/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
13/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
14/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
15/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
16/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
17/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
18/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
19/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
20/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
21/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
22/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
23/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
24/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
25/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
26/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
27/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
28/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
29/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
30/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
31/10/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
01/11/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
02/11/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
03/11/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
04/11/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
05/11/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
06/11/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes
07/11/2006	[REDACTED]	[REDACTED]	[REDACTED]	yes

³⁰ [REDACTED]. This 24 hour period is therefore not included in 24 hour periods set out in Annex 2.

Date	Calls passed to live operator	Abandoned calls (excluding calls answered by answering machine)	Abandoned call rate (rounded up or down to 2 decimal places, as appropriate)	Ofcom calculation: abandoned call rate greater than 3%?
08/11/2006	☒	☒	☒	yes
09/11/2006	☒	☒	☒	yes
10/11/2006	☒	☒	☒	yes
11/11/2006	☒	☒	☒	yes
12/11/2006	☒	☒	☒	yes
13/11/2006	☒	☒	☒	yes
14/11/2006	☒	☒	☒	yes
15/11/2006	☒	☒	☒	yes
16/11/2006	☒	☒	☒	yes
17/11/2006	☒	☒	☒	yes
18/11/2006	☒	☒	☒	yes
19/11/2006	☒	☒	☒	yes
20/11/2006	☒	☒	☒	yes
21/11/2006	☒	☒	☒	yes
22/11/2006	☒	☒	☒	yes
23/11/2006	☒	☒	☒	yes
24/11/2006	☒	☒	☒	yes
25/11/2006	☒	☒	☒	yes
26/11/2006	☒	☒	☒	yes
27/11/2006	☒	☒	☒	yes
28/11/2006	☒	☒	☒	yes
29/11/2006	☒	☒	☒	yes
30/11/2006	☒	☒	☒	yes
01/12/2006	☒	☒	☒	yes
02/12/2006	☒	☒	☒	yes
03/12/2006	☒	☒	☒	yes
04/12/2006	☒	☒	☒	yes
05/12/2006	☒	☒	☒	yes
06/12/2006	☒	☒	☒	yes
07/12/2006	☒	☒	☒	yes
08/12/2006	☒	☒	☒	yes
09/12/2006	☒	☒	☒	yes
10/12/2006	☒	☒	☒	yes
11/12/2006	☒	☒	☒	yes
12/12/2006	☒	☒	☒	yes
13/12/2006	☒	☒	☒	yes
14/12/2006	☒	☒	☒	yes
15/12/2006	☒	☒	☒	yes
16/12/2006	☒	☒	☒	yes
17/12/2006	☒	☒	☒	yes
18/12/2006	☒	☒	☒	yes
19/12/2006	☒	☒	☒	yes
20/12/2006	☒	☒	☒	yes
21/12/2006	☒	☒	☒	yes
22/12/2006	☒	☒	☒	yes
23/12/2006	☒	☒	☒	yes
24/12/2006	☒	☒	☒	yes

Date	Calls passed to live operator	Abandoned calls (excluding calls answered by answering machine)	Abandoned call rate (rounded up or down to 2 decimal places, as appropriate)	Ofcom calculation: abandoned call rate greater than 3%?
26/12/2006	☒	☒	☒	yes
27/12/2006	☒	☒	☒	yes
28/12/2006	☒	☒	☒	yes
29/12/2006	☒	☒	☒	yes
30/12/2006	☒	☒	☒	yes
31/12/2006	☒	☒	☒	yes
01/01/2007	☒	☒	☒	yes
02/01/2007	☒	☒	☒	yes
03/01/2007	☒	☒	☒	yes
04/01/2007	☒	☒	☒	yes
05/01/2007	☒	☒	☒	yes
06/01/2007	☒	☒	☒	yes
07/01/2007	☒	☒	☒	yes
08/01/2007	☒	☒	☒	yes
09/01/2007	☒	☒	☒	yes
10/01/2007	☒	☒	☒	yes
11/01/2007	☒	☒	☒	yes
12/01/2007	☒	☒	☒	yes
13/01/2007	☒	☒	☒	yes
14/01/2007	☒	☒	☒	yes
15/01/2007	☒	☒	☒	yes
16/01/2007	☒	☒	☒	yes
17/01/2007	☒	☒	☒	yes
18/01/2007	☒	☒	☒	yes
19/01/2007	☒	☒	☒	yes
20/01/2007	☒	☒	☒	yes
21/01/2007	☒	☒	☒	yes
22/01/2007	☒	☒	☒	yes
23/01/2007	☒	☒	☒	yes
24/01/2007	☒	☒	☒	yes
25/01/2007	☒	☒	☒	yes
26/01/2007	☒	☒	☒	yes
27/01/2007	☒	☒	☒	yes
28/01/2007	☒	☒	☒	yes
29/01/2007	☒	☒	☒	yes
30/01/2007	☒	☒	☒	yes
31/01/2007	☒	☒	☒	yes
01/02/2007	☒	☒	☒	yes
02/02/2007	☒	☒	☒	yes
03/02/2007	☒	☒	☒	yes
04/02/2007	☒	☒	☒	yes
05/02/2007	☒	☒	☒	yes
06/02/2007	☒	☒	☒	yes
07/02/2007	☒	☒	☒	yes
08/02/2007	☒	☒	☒	yes
09/02/2007	☒	☒	☒	yes
10/02/2007	☒	☒	☒	yes

Date	Calls passed to live operator	Abandoned calls (excluding calls answered by answering machine)	Abandoned call rate (rounded up or down to 2 decimal places, as appropriate)	Ofcom calculation: abandoned call rate greater than 3%?
11/02/2007	☒	☒	☒	yes
12/02/2007	☒	☒	☒	yes
13/02/2007	☒	☒	☒	yes
14/02/2007	☒	☒	☒	yes
15/02/2007	☒	☒	☒	yes
16/02/2007	☒	☒	☒	yes
17/02/2007	☒	☒	☒	yes
18/02/2007	☒	☒	☒	yes
19/02/2007	☒	☒	☒	yes
20/02/2007	☒	☒	☒	yes
21/02/2007	☒	☒	☒	yes
22/02/2007	☒	☒	☒	yes
23/02/2007	☒	☒	☒	yes
24/02/2007	☒	☒	☒	yes
25/02/2007	☒	☒	☒	yes
26/02/2007	☒	☒	☒	yes
27/02/2007	☒	☒	☒	yes
28/02/2007	☒	☒	☒	yes
01/03/2007	☒	☒	☒	yes
02/03/2007	☒	☒	☒	yes
03/03/2007	☒	☒	☒	yes
04/03/2007	☒	☒	☒	yes
05/03/2007	☒	☒	☒	yes
06/03/2007	☒	☒	☒	yes
07/03/2007	☒	☒	☒	yes
08/03/2007	☒	☒	☒	yes
09/03/2007	☒	☒	☒	yes
10/03/2007	☒	☒	☒	yes
11/03/2007	☒	☒	☒	yes
12/03/2007	☒	☒	☒	yes
13/03/2007	☒	☒	☒	yes
14/03/2007	☒	☒	☒	yes
15/03/2007	☒	☒	☒	yes
16/03/2007	☒	☒	☒	yes
17/03/2007	☒	☒	☒	yes
18/03/2007	☒	☒	☒	yes
19/03/2007	☒	☒	☒	yes
20/03/2007	☒	☒	☒	yes
21/03/2007	☒	☒	☒	yes
22/03/2007	☒	☒	☒	yes
23/03/2007	☒	☒	☒	yes
24/03/2007	☒	☒	☒	yes
25/03/2007	☒	☒	☒	yes
26/03/2007	☒	☒	☒	yes
27/03/2007	☒	☒	☒	yes
28/03/2007	☒	☒	☒	yes
29/03/2007	☒	☒	☒	yes

Date	Calls passed to live operator	Abandoned calls (excluding calls answered by answering machine)	Abandoned call rate (rounded up or down to 2 decimal places, as appropriate)	Ofcom calculation: abandoned call rate greater than 3%?
30/03/2007	0	0	0	yes
31/03/2007	0	0	0	yes
01/04/2007	0	0	0	yes
02/04/2007	0	0	0	yes
03/04/2007	0	0	0	yes
04/04/2007	0	0	0	yes
05/04/2007	0	0	0	yes
06/04/2007	0	0	0	yes
07/04/2007	0	0	0	yes
08/04/2007	0	0	0	yes
09/04/2007	0	0	0	yes
10/04/2007	0	0	0	yes
11/04/2007	0	0	0	yes
12/04/2007	0	0	0	yes
13/04/2007	0	0	0	yes
14/04/2007	0	0	0	yes
15/04/2007	0	0	0	yes
16/04/2007	0	0	0	yes
17/04/2007	0	0	0	yes
18/04/2007	0	0	0	yes
19/04/2007	0	0	0	yes
20/04/2007	0	0	0	yes
21/04/2007	0	0	0	yes
22/04/2007	0	0	0	yes
23/04/2007	0	0	0	yes
24/04/2007	0	0	0	yes
25/04/2007	0	0	0	yes
26/04/2007	0	0	0	yes
27/04/2007	0	0	0	yes
28/04/2007	0	0	0	yes
29/04/2007	0	0	0	yes
30/04/2007	0	0	0	yes
01/05/2007	0	0	0	yes
02/05/2007	0	0	0	yes
03/05/2007	0	0	0	yes
04/05/2007	0	0	0	yes
05/05/2007	0	0	0	yes
06/05/2007	0	0	0	yes
07/05/2007	0	0	0	yes
08/05/2007	0	0	0	yes
09/05/2007	0	0	0	yes
10/05/2007	0	0	0	yes

Date	Calls passed to live operator	Abandoned calls (excluding calls answered by answering machine)	Abandoned call rate (rounded up or down to 2 decimal places, as appropriate)	Ofcom calculation: abandoned call rate greater than 3%?
221 x 24 hour periods	[<]³¹	[<]³²		221

³¹ Data for [<] included a total figure for calls passed to a live operator during the relevant period ([<]). This figure is therefore included in the total number of calls passed to a live operator but is not included in the presentation per individual 24 hour periods.

³² Data for [<] included a total figure for abandoned calls during the relevant period ([<]). This figure is therefore included in the total figure for abandoned calls but is not included in the presentation per individual 24 hour periods.

Annex 3

Information relating to call centre procedures per individual call centre

[3<]

Annex 4

Analysis of call data for each individual call centre

[3<]

Annex 5

Analysis of call data for each individual campaign

[3<]