



Notice of Imposition of a Penalty under Section 130 of the Communications Act 2003

Issued to Barclaycard by
the Office of Communications ('Ofcom')

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Imposition of a penalty under section 130 of the Communications Act

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Notice of Imposition of a Penalty under Section 130 of the Communications Act 2003

Background

1. Section 130 of the Communications Act 2003 (the 'Act') applies where a person has been given a notification under section 128 of the Act; has been given an opportunity to make representations; and the period allowed for making representations has expired.
2. Section 130(2) of the Act allows Ofcom to impose a penalty upon that person if it is satisfied that he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.
3. A notification was issued to Barclays Bank plc trading as Barclaycard ('Barclaycard'), company number 01026167 and whose registered address is 1 Churchill Place, London E14 5HP, under section 128 of the Act, on 20 June 2008 (the 'section 128 notification').¹ Barclaycard was given until 5pm on 21 July 2008 to make representations on the matters notified therein.
4. The section 128 notification stated that Ofcom may issue a further notification to Barclaycard under section 129 of the Act if, by 5pm on 21 July 2008, the notified persistent misuse was not brought to an end and not repeated. Additionally, the section 128 notification stated that Ofcom may also impose a penalty on Barclaycard under section 130 of the Act in respect of the persistent misuse notified by Ofcom.
5. Barclaycard made representations to Ofcom on 21 July 2008 (the 'representations') in relation to the matters notified. Ofcom has considered the representations and sets out its determination below.

Determination made by Ofcom

6. For the reasons set out in the section 128 notification, and having considered the evidence provided by Barclaycard in the representations, Ofcom hereby determines that it is satisfied that, pursuant to section 130(2) of the Act, Barclaycard has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; specifically by using an automated calling system ('ACS') to make and repeat, on a sufficient number of occasions so as to represent a pattern of behaviour or practice, an excessive number of abandoned calls.
7. In making this determination, Ofcom has also had regard to the principles set out in its Statement of policy on the persistent misuse of an electronic communications network or service, published on 1 March 2006 in accordance with section 131 of the Act (the 'Persistent Misuse Guidelines').²

¹ The section 128 notification can be found at http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_905/

² Ofcom published a 'Revised statement of policy on the persistent misuse of an electronic communications network or service' on 10 September 2008 (the 'Revised Guidelines'). Barclaycard's

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8. Having had regard to our statutory duties and regulatory principles Ofcom has decided to impose a penalty in this case under section 130 of the Act, taking into consideration the nature of the persistent misuse involved in this case.
9. Specifically, having regard to sections 130(4) and (5) of the Act, the Penalty Guidelines published on 29 December 2003 under section 392 of the Act (the 'Penalty Guidelines') and the Persistent Misuse Guidelines, Ofcom has decided to impose a penalty of £50,000 on Barclaycard in relation to Barclaycard's persistent misuse of an electronic communications network or service in one or more of the respects notified in the section 128 notification.
10. The reasons for Ofcom's determination are set out in the Explanatory Statement attached to this notice.

Action required by Barclaycard

11. Barclaycard has until 5pm on 22 October 2008 to pay to Ofcom £50,000 (fifty thousand pounds sterling).

Interpretation

12. Words or expressions used in this Notification and/or the Explanatory Statement have the same meaning as in the Act and as otherwise defined in the section 128 notification.

Neil Buckley

Director of Investigations

24 September 2008

conduct which has been the subject of Ofcom's investigation took place between 1 October 2006 and 10 May 2007. As such, Ofcom has considered this conduct in the context of the Persistent Misuse Guidelines which were in place during this time rather than the Revised Guidelines.

Explanatory Statement

Section 1

Summary and background

Ofcom's Decision

- 1.1 In order to address the problem of abandoned³ and silent⁴ calls in the context of section 128 of the Act, Ofcom opened an own-initiative programme of enforcement on 22 June 2006. Specifically, this programme investigated compliance with the principles set out in the Persistent Misuse Guidelines by organisations using ACS.⁵
- 1.2 As part of this 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.
- 1.3 Following its investigation, Ofcom concluded that it had reasonable grounds for believing that Barclaycard persistently misused an electronic communications network or service and issued Barclaycard with a section 128 notification on 20 June 2008.
- 1.4 The section 128 notification stated that Ofcom may issue a further notification to Barclaycard under section 129 of the Act if, by 21 July 2008, the notified persistent misuse was not brought to an end and not repeated. Additionally, the section 128 notification stated that Ofcom may also impose a penalty on Barclaycard under section 130 of the Act in respect of the persistent misuse notified by Ofcom.
- 1.5 Barclaycard also had until 5pm on 21 July 2008 to make representations on the matters contained in the section 128 notification. That period has now expired. Barclaycard made representations on 21 July 2008.
- 1.6 For the reasons set out in the section 128 notification, and having considered the evidence provided by Barclaycard in its representations, Ofcom determines that it is satisfied that, pursuant to section 130(2) of the Act, Barclaycard has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; specifically by using an Automated Calling System ('ACS') to make and repeat, on a sufficient number of occasions so as to represent a pattern of behaviour or practice, an excessive number of abandoned calls.

³ A call usually terminated by an ACS after the called person answers it.

⁴ A type of abandoned call where the called person hears nothing on answering the phone and has no means of establishing whether anyone is at the other end (see paragraph 6.11, Persistent Misuse Guidelines).

⁵ Ofcom published a 'Revised statement of policy on the persistent misuse of an electronic communications network or service' on 10 September 2008 (the 'Revised Guidelines'). Barclaycard's conduct which has been the subject of Ofcom's investigation took place between 1 October 2006 and 10 May 2007. As such, Ofcom has considered this conduct in the context of the Persistent Misuse Guidelines which were in place during this time rather than the Revised Guidelines.

Imposition of a penalty under section 130 of the Communications Act

- 1.7 Having had regard to our statutory duties and regulatory principles, Ofcom has decided to impose a penalty in this case under section 130 of the Act, taking into consideration the nature of the persistent misuse involved in this case.
- 1.8 Specifically having regard to sections 130(4) and (5) of the Act, the Penalty Guidelines and the Persistent Misuse Guidelines, Ofcom has decided to impose a penalty of £50,000 on Barclaycard in relation to Barclaycard's persistent misuse of an electronic communications network or service in one or more of the respects notified in the section 128 notification.

Section 2

Ofcom's decision to impose a penalty

2.1 Section 130 of the Act applies in circumstances 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.”¹

2.2 Under section 130(2) of the Act:

“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.”

2.3 Ofcom issued the section 128 notification to Barclaycard on 20 June 2008 after concluding that it had reasonable grounds for believing that Barclaycard persistently misused an electronic communications network or service. Barclaycard was allowed the period until 21 July 2008 to make representations about the matters notified, the period which has now expired, and Barclaycard responded on 21 July 2008. Ofcom is therefore satisfied that section 130 of the Act applies in relation to its assessment of Barclaycard's conduct as each of the criteria in section 130(1) have been met.

2.4 For the reasons set out in the section 128 notification, and having considered the evidence provided by Barclaycard in its representations, Ofcom hereby determines that it is satisfied that, pursuant to section 130(2) of the Act, Barclaycard has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; specifically by using an ACS to make and repeat, on a sufficient number of occasions so as to represent a pattern of behaviour or practice, an excessive number of abandoned calls.

2.5 Ofcom therefore considers that it may impose a penalty on Barclaycard pursuant to section 130 of the Act.

2.6 Having considered the evidence gathered in its investigation as set out in the section 128 notification, having considered Barclaycard's representations and having had regard to our statutory duties and regulatory principles, Ofcom has decided to impose a penalty in this case under section 130 of the Act. This decision takes into consideration the nature of the persistent misuse involved in this case; that is the use of ACS to make and repeat, on a sufficient number of occasions so as to represent a pattern of behaviour or practice, an excessive number of abandoned calls. The

¹ Section 130(1) of the Act.

Persistent Misuse Guidelines make it clear that it is undeniable that even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety.²

² Paragraph 6.15.

Section 3

Penalty Assessment

Legal Framework

3.1 Sections 130(4) and 130(5) of the Act set out the maximum level of penalty that Ofcom may impose and the factors that Ofcom must have regard to when setting the level of the penalty. Section 130 states:

“... ”

- (4) The amount of a penalty imposed is to be such amount not exceeding £50,000 as OFCOM determine to be-
 - (a) appropriate; and
 - (b) proportionate to the misuse in respect of which it is imposed.

- (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.”³

3.2 Ofcom has also published the Penalty Guidelines which set out the factors it will generally take into consideration in determining the level of the penalty. These set out a series of both general and specific criteria which may be considered in arriving at a starting point for penalties and factors which tend to lead to an increase and/or decrease in the level of any penalty. In addition, factors relevant to an assessment of penalties are also discussed in the Persistent Misuse Guidelines. These include degree of persistency; the number of people exposed to the misuse; and the seriousness of the misuse.

3.3 Ofcom sets out below its application of the issues relevant to the factors listed in paragraphs 3.1 and 3.2 above.

³ 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.

Assessment

Calculation of a starting point

3.4 The general criteria set out in the Penalty Guidelines state that in general, Ofcom is likely first to consider the following factors when setting a starting figure for a penalty:

- the seriousness of the contravention;
- any precedents set by previous cases; and
- the need to ensure that the threat of penalties will act as a sufficient incentive to comply.

3.5 Ofcom considers that Barclaycard's persistent misuse of an electronic communications network or electronic communications service, specifically by using ACS to make and repeat, on a sufficient number of occasions so as to represent a pattern of behaviour or practice, an excessive number of abandoned calls, is a serious contravention of section 128 of the Act as follows.

- In determining the seriousness of the contravention by Barclaycard, Ofcom has been guided by the degree of harm or likely harm to end-users which results from its misuse. In the case of abandoned calls, Ofcom considers that harm or likely harm is linked to the number of such calls which were made. In this case, Barclaycard's submissions to Ofcom on 21 February 2008 illustrated that the total number of abandoned calls it had made during the period under investigation, that is from 1 October 2006 to 10 May 2007 (the 'Relevant Period'), was [3<]. In this context, Ofcom notes that the Persistent Misuse Guidelines state that even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety.⁴
- In addition, as set out in the Persistent Misuse Guidelines, in deciding whether to take enforcement action in relation to section 128, Ofcom will take account of certain steps taken by call centre operators to reduce the degree of concern silent or abandoned calls cause.⁵ Failure to take such steps will be taken into account in assessing the seriousness of an act of misuse and in relation to those steps in this case, Ofcom notes the following:
 - *Excessive number of abandoned calls* - The abandoned call rate shall be no more than 3% of live calls on each individual campaign over any 24 hour period. In this case, and as set out in the section 128 notification, on an aggregated basis Barclaycard exceeded the 3% abandoned call rate on 221 of the 221 days on which it made calls during the Relevant Period. That is 100% of the days set out in Annex 2 of the section 128 notification.⁶
 - *Abandoned calls which were silent* - A brief recorded information message shall be played within two seconds of the call being answered. In this case and as set out in the section 128 notification, a significant proportion (over 91%) of the total abandoned calls made by Barclaycard were a type of abandoned call which are "silent calls", that is calls which the Persistent

⁴ Paragraph 6.15.

⁵ Paragraph 6.16.

⁶ [3<]. This 24 hour period is therefore not included in the 24 hour periods set out in Annex 2 of the section 128 notification.

Misuse Guidelines describe as “almost certain to cause inconvenience” and “very likely to cause annoyance.”⁷

- *Failure to present a CLI*⁸ - Each outbound call should present a CLI to which a return call can be made. In this case and as set out in the section 128 notification, a significant proportion (approximately 80%) of the total abandoned calls made by Barclaycard did not present a CLI to the recipient.
- *No repeat calls within 72 hours* – When an abandoned call is made to a particular number, any repeat calls to that number in the following 72 hours should be made by a live operator. In this case and as set out in the section 128 notification, during the Relevant Period three of Barclaycard’s call centres did not have procedures in place to comply with this step with the result that individuals may have received more than one abandoned call from Barclaycard within a 72 hour period.
- *Failure to keep adequate information* – Records should be kept to demonstrate compliance with the above procedures. Two call centres did not keep records which enabled Ofcom to assess the abandoned call rate at each of these call centres.

3.6 In light of each of the factors which are set out above, Ofcom considers that Barclaycard’s misuse constitutes an extremely serious contravention of the persistent misuse provisions of the Act.

3.7 In terms of precedents set by previous cases, Ofcom has imposed penalties for persistent misuse of an electronic communications network or service in relation to the making of abandoned calls in six previous cases.⁹ In those cases, the starting point of the penalties ranged from £5,000 to £45,000. Ofcom considers that whilst these precedents are useful to some degree, it is not appropriate to attach too much weight to those amounts as the starting point in each case is assessed against the circumstances of that particular case in the round.

3.8 In addition, Barclaycard’s contravention in part occurred after four companies were fined in January 2007. Ofcom therefore considers that there is and remains a need to ensure that the threat of penalties will act as a sufficient incentive to comply with section 128 and the guidelines across industry and for Barclaycard specifically.

3.9 In light of all of these considerations and the facts of this case, Ofcom considers that it is appropriate and proportionate to set the penalty starting point at the statutory maximum £50,000. This level reflects the extremely serious nature of Barclaycard’s contravention; it is also appropriate and proportionate in terms of previous cases and the continued requirement to create incentives to comply.

⁷ Paragraph 6.11.

⁸ ‘CLI’ means ‘Calling Line Identification’, which is a facility that enables identification of the number from which a call is being made.

⁹ In January 2007 Ofcom issued penalty notices to Bracken Bay Kitchens Ltd, Space Kitchens and Bedrooms Ltd, Toucan Residential Ltd (formerly IDT Direct Ltd) and Carphone Warehouse plc, and in March 2008 Ofcom issued penalty notices to Abbey National plc and Complete Credit Management Ltd. Each of these penalty notices was issued for contravening section 128 of Act by making an excessive amount of abandoned calls. More information is available on the Competition Bulletin, which can be found at:

http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_905/

Application of specific criteria, aggravating and mitigating factors

- 3.10 The Penalty Guidelines state that certain specific criteria may be relevant in adjusting the starting figure of the penalty, depending on the type of contravention.¹⁰ These include, but are not limited to:
- a) Any gain (financial or otherwise) made by the regulated body in breach (or any connected body);
 - b) The degree of harm caused, or increased cost incurred by consumers or other market participants;
 - c) Size and turnover of the regulated body;
 - d) The extent to which any contravention was caused by a third party, or any relevant circumstances beyond the control of the regulated body;
 - e) The duration of the contravention; and
 - f) Whether a penalty in respect of the same conduct has already been imposed by Ofcom or another body.
- 3.11 Ofcom has no evidence to suggest that the calls made by Barclaycard resulted in any gain (financial or otherwise) to Barclaycard or any connected body. In light of this, no adjustment is made to the starting figure in relation to paragraph (a).¹¹
- 3.12 In relation to paragraph (b), Ofcom has already considered the degree of harm in respect of Barclaycard's contravention, as set out at paragraph 3.5 above. In light of this, no adjustment is made to the starting figure in relation to the degree of consumer harm. Ofcom also has no evidence of increased cost incurred by consumers or other market participants due to Barclaycard's contravention. Ofcom does not consider any adjustment to the starting point is necessary in relation to this factor.
- 3.13 Turning to the third specific criterion, Ofcom will decide whether the starting point is appropriate and proportionate for the misuse committed in light of the size and turnover of a company. According to the latest available financial information Barclaycard's profit before tax was £540 million. Given Ofcom's view of the level of seriousness of Barclaycard's contravention as set out above, Ofcom considers it would be appropriate and proportionate to raise the starting point under this criterion.
- 3.14 Paragraph (d) does not result in any adjustment to the starting point because there is no evidence of any third party involvement in this case.
- 3.15 In considering the issue of duration as set out in paragraph (e), Ofcom has already taken into account the fact that Barclaycard's contravention continued even after Ofcom fined four companies for persistent misuse in January 2007.
- 3.16 Finally, paragraph (f) does not apply since neither Ofcom nor any other body has already imposed a penalty for the same conduct on Barclaycard.

¹⁰ See paragraph 5 of the Penalty Guidelines.

¹¹ Ofcom does note however that the use of ACS offers the possibility of initiating calls without the need for individual numbers to be dialled in turn and that this will often be for financial reasons.

- 3.17 Following consideration of the specific criteria in the manner set out above, Ofcom considers that it would be appropriate and proportionate to increase the penalty on account of the size and turnover of Barclaycard. However, as the penalty starting point is already at the £50,000 maximum, it is not possible to raise it further. The penalty therefore remains at £50,000.
- 3.18 The Penalty Guidelines also set out factors that might lead to an increase in the level of any penalty which include:
- a) repeated contraventions,
 - b) continuation of the contravention once notified by Ofcom,
 - c) senior management knowledge of the contravention, and
 - d) the absence, ineffectiveness or repeated failure of internal procedures intended to prevent contravention.
- 3.19 This is the first time that Ofcom has taken action against Barclaycard in relation to its misuse of an electronic communications network or service and this is not, therefore, a repeated contravention. Ofcom has not, therefore, increased the penalty on account of this factor.
- 3.20 Ofcom notified Barclaycard on 20 June 2008 that it had reasonable grounds for believing that Barclaycard persistently misused an electronic communications network or service, contrary to section 128 of the Act, specifically by using ACS to make and repeat, on a sufficient number of occasions so as to represent a pattern of behaviour or practice, an excessive number of abandoned calls. Barclaycard was therefore made aware at this point that Ofcom considered Barclaycard to have contravened section 128 of the Act. Ofcom has no evidence at this stage that Barclaycard has continued its contravention after 20 June 2008. For this reason Ofcom has not increased the level of the penalty in relation to this factor.
- 3.21 There is no evidence to suggest that Barclaycard's senior management was aware that Barclaycard was in contravention of section 128 of the Act during the Relevant Period. Barclaycard stated in its representations that a review of the processes in place to achieve compliance was undertaken as soon as Barclaycard senior management became aware of the "First Draft Notice", which was issued to Barclaycard on 17 April 2007. Ofcom has no reason to consider that Barclaycard's senior management knew that Barclaycard was in contravention of section 128 of the Act during the Relevant Period. Furthermore, Ofcom does not consider that senior management ought to have been aware of the contravention in this case. In Ofcom's view, Barclaycard's senior management's general duty was to oversee the management and operation of the business and that that did not necessarily extend to a position where it ought to have been aware of the number of abandoned calls being made on a daily basis, or of non-compliance with the other procedures set out at paragraph 3.5. For this reason Ofcom has not increased the level of the penalty in relation to this factor.
- 3.22 However, Ofcom is of the view that there was an absence of, ineffective or repeated failures of internal procedures to prevent contravention of section 128 during the Relevant Period. It is evident from Barclaycard's representations that it was only after 17 April 2007, when Ofcom issued the first draft information request, that Barclaycard put in place the steps that they claim would achieve "full compliance with Ofcom's requirements". In light of this, and the fact that Barclaycard should have been aware

from at least 1 March 2006 of Ofcom's policy towards silent and abandoned calls (that is the date of publication of the Persistent Misuse Guidelines), Ofcom considers that an increase in the level of the penalty is appropriate and proportionate for this reason.

3.23 Taking into account each of these factors, Ofcom considers that it is appropriate and proportionate to increase the level of penalty in relation to one factor, namely an absence of, ineffective or repeated failures of internal procedures to prevent contravention of section 128 during the Relevant Period. However, as the penalty starting point is already at the £50,000 maximum, it is not possible to raise it further. The penalty therefore remains at £50,000.

3.24 Ofcom has also considered the factors set out in the Penalty Guidelines which tend to lead to a decrease in the level of any penalty. These include:

- a) the extent to which the body has taken steps to identify and mitigate external factors that might result in a contravention,
- b) the extent and timeliness of any steps taken to end the contravention and remedy the consequences of the contravention; and
- c) co-operation with Ofcom's investigation.

3.25 In relation to paragraph (a), Ofcom is of the view that in order for this criterion to be met, a company must have independently and of their own volition taken such steps to identify and mitigate a potential contravention. In this case, it appears that it was only Ofcom's formal requests for information that were the catalysts for work undertaken by Barclaycard to reduce its abandoned call rate and to comply with the other procedures set out in paragraph 3.5.

3.26 Ofcom considers that the work undertaken by Barclaycard to identify and mitigate external factors was only as a result of Ofcom bringing Barclaycard's attention to its outbound calling programme, rather than a result of pro-active steps being taken independently of contact with Ofcom. Ofcom first contacted Barclaycard regarding its outbound call operations, by way of the first draft information request, on 17 April 2007. This view is supported in Barclaycard's representations to the section 128 notification where it stated that steps were taken as soon as the "First Draft Notice" was brought to the attention of senior management. It further states that these steps were taken in order to achieve "a reduction of silent and abandoned calls" and "full compliance with Ofcom's requirements."

3.27 Ofcom therefore has no evidence which shows that Barclaycard pro-actively and of its own accord took steps to identify and mitigate external factors that might lead to a contravention of section 128 of the Act. In light of this, Ofcom does not consider that this factor should lead to a decrease in the level of penalty.

3.28 In its representations, Barclaycard has provided evidence of steps taken to end its contravention and to ensure ongoing compliance. In summary, the representations stated that Barclaycard had taken remedial actions; effected organisational change; and ensured ongoing compliance as follows:

- **Remedial actions:** Barclaycard said it had looked to address each of the individual elements identified by Ofcom in the section 128 notification, by taking the following actions:

- Establishing a dialler team and manager in one call centre to focus on compliance with the procedures set out in the Persistent Misuse Guidelines;¹²
 - Reiterating the procedures set out in the Persistent Misuse Guidelines to all call centres;
 - Improving the monitoring of compliance by all call centres, and discussing any issues relating to compliance;
 - Ceasing the use of [3<] call centres;¹³
 - Ceasing the use of predictive diallers at [3<] call centres;¹⁴
 - Ensuring that all call centres play a information message in the event of an abandoned call, and ensuring that the message complies with the guidance set out in the Persistent Misuse Guidelines;
 - Ensuring that all centres have suitable procedures in place so that a repeat call made within 72 hours of an abandoned call is handled by a live operator;
 - Ensuring that all outbound calls present a CLI; and
 - Creating and retaining adequate records at all call centres to demonstrate compliance with the procedures set out in the Persistent Misuse Guidelines.
- **Organisational change:** Barclaycard stated that it has initiated “strategic organisational change” as a result of Ofcom’s investigation. This has included personnel changes and the removal of some individuals from their roles; defining new roles and responsibilities to ensure stronger internal senior management; and appointing a Barclaycard Ofcom “champion”.
 - **Ongoing compliance:** Barclaycard has reviewed and continues to review all its relevant policies and procedures, overseen by the Barclaycard Regulatory Compliance Director. A “Compliance Monitoring Programme” has been put in place which is designed to ensure the compliance of each call centre with the Act and with the procedures in the Persistent Misuse Guidelines. The key aspects of the Compliance Monitoring Programme are summarised below:
 - All new third party call centres used by Barclaycard will be screened to ensure they comply with ‘Ofcom requirements’ prior to operating on behalf of Barclaycard;
 - Call centres are required to complete an information template on a weekly basis, which is used to monitor compliance and escalate any resulting issues;

¹² The Barclaycard [3<] call centre.

¹³ Call centres no longer used: [3<].

¹⁴ Predictive diallers are no longer used at [3<].

- Call centres have received and completed compliance audit templates, setting out “all key Ofcom variables and measurables”. All call centres have confirmed that they are compliant.
- All new campaigns will be subject to an “appropriate sign-off process” before going live to ensure compliance.
- The Barclaycard Compliance Team will maintain all relevant management information and records, and will enable Barclaycard to provide evidence of compliance.
- The Compliance Monitoring Programme will be agreed annually at the Barclaycard Governance Control Committee, and is reported on quarterly.
- Barclaycard has put in place processes and measures to encourage more effective communication and information flow between Barclaycard and the call centres.

3.29 Although Ofcom is satisfied that the extent and timeliness of these actions should be sufficient to end the contravention as stated in the section 128 notification and to ensure that it is not repeated, Ofcom considers that these steps should have been undertaken by Barclaycard in any event in order to comply with section 128 of the Act and the Persistent Misuse Guidelines. Ofcom does not consider that it is appropriate or proportionate to decrease the penalty in light of compliance steps that Barclaycard ought to have undertaken in any event.

3.30 Ofcom does not have any evidence that Barclaycard has taken steps to remedy the consequences of its contravention. Barclaycard does not make reference to this aspect of the section 128 notification in its representations. Ofcom therefore does not consider that it is appropriate or proportionate to decrease the penalty on account of this factor. Barclaycard’s apparent failure to consider the remedying of the consequences of its misuse is considered further at paragraph 3.35.

3.31 Barclaycard has co-operated with Ofcom’s investigation. It responded to statutory information requests issued to it by Ofcom under section 135 of the Act during the course of the investigation. Barclaycard has additionally made representations in relation to the requirements of the section 128 notification. However, Ofcom does not consider that it is appropriate to reduce the penalty in light of such behaviour, which was not beyond that which would be expected.

3.32 Section 9 of the Persistent Misuse Guidelines contains discussion of penalties under section 130 of the Act. Specifically, paragraph 9.5 sets out three factors that Ofcom will take into account in setting the appropriate level of penalty in persistent misuse cases. The three factors are:

- the degree of persistency;
- the number of people exposed to the misuse; and
- the seriousness of the misuse.

3.33 The Persistent Misuse Guidelines further make clear that, other things being equal, an act of misuse that is repeated one thousand times will merit a higher penalty than

an act repeated ten times.¹⁵ Similarly, the greater the number of people affected by the misuse, the higher the level of penalty that it is appropriate to impose.¹⁶

3.34 Ofcom does not believe that additional consideration of these factors warrants any further adjustment to the penalty, as each of them have already been taken into account in paragraph 3.5 above.

3.35 The Persistent Misuse Guidelines also set out some objective elements that Ofcom will take into consideration when assessing the seriousness of persistent misuse.¹⁷ Specifically:

- Is it the misuser's first offence or do they have a previous history of persistent misuse? As noted above at paragraph 3.19, Barclaycard has no history of previous persistent misuse.
- What was the intention of the misuser – was the misuse accidental or a scam motivated by greed? Ofcom has no evidence that the misuse was a scam motivated by greed. As set out above Ofcom has no evidence that Barclaycard's senior management was aware that Barclaycard was in contravention during the relevant period or ought to have been aware.
- Has the misuser done everything required of him by the (enforcement) notification? As set out at paragraph 3.30, one aspect of the section 128 notification which Barclaycard has not addressed in its representations is the requirement to remedy the consequences of its notified misuse. The Persistent Misuse Guidelines suggest that in order to remedy the consequences, a misuser may be required to pay the person who has suffered the effects of misuse an appropriate sum of money.¹⁸ Ofcom notes that it may sometimes be difficult to identify all those recipients of abandoned calls in order to effect compensation but also notes that in previous cases of persistent misuse by making abandoned calls, misusers have offered goodwill gestures to individuals who may have been affected by their abandoned calls. By way of example, one such misuser offered to pay £5.00 to any recipient of one of its abandoned calls, as financial compensation for the annoyance caused. Such a gesture goes to recognition by the misuser that their conduct may have caused harm, and that some level of compensation is due. In this case, Ofcom would have expected Barclaycard to have offered a similar gesture or suitable alternative remedy. This is especially the case given the number of silent calls made by Barclaycard, which are 'almost certain' to have caused harm.¹⁹ Ofcom does not therefore consider that Barclaycard has done everything required of it by the notification and for this reason, considers that there should be an increase in the level of penalty for this.
- Has good faith in making amends been demonstrated? Although Barclaycard has not provided evidence of having remedied the misuse, the actions taken to end the contravention and to ensure future compliance would appear to demonstrate good faith by Barclaycard.

¹⁵ See paragraph 9.6 of the Guidelines.

¹⁶ See paragraph 9.7 of the Guidelines.

¹⁷ See paragraphs 9.8, 9.9 and 9.10 of the Guidelines.

¹⁸ See paragraph 8.5 of the Persistent Misuse Guidelines.

¹⁹ See paragraph 6.11 of the Guidelines.

- How great is the damage/harm done? Ofcom has taken into account the number of abandoned calls made during the relevant period and considered the level of consumer harm in light of this in determining the seriousness of the case.
- Where does the misuse fall on the spectrum of distress that extends from inconvenience through irritation to anxiety? Ofcom has taken the spectrum of distress of the calls made in this case into account in assessing seriousness. As stated in paragraph 3.5, Ofcom considers that the misuse is very serious in light of the number of abandoned calls made, the extent to which the abandoned call rate exceeded 3% during the Relevant Period, and the extent to which the other procedures in the Persistent Misuse Guidelines were not followed.

3.36 Ofcom therefore considers that one adjustment to the penalty level is needed in light of the factors set out in the Persistent Misuse Guidelines, that being an increase due to the failure by Barclaycard to do everything required of it by the section 128 notification. However, as the penalty starting point is already at the £50,000 maximum, it is not possible to raise it further. The penalty therefore remains at £50,000.

Final amount of penalty

- 3.37 Having taken into account sections 130(4) and 130(5) of the Act, including Barclaycard's representations, the Penalty Guidelines and the Persistent Misuse Guidelines, and thereby taking into account all the relevant circumstances as required by paragraph 3 of the Penalty Guidelines, Ofcom concludes that an appropriate and proportionate level of penalty to impose on Barclaycard in relation to its contravention of section 128 of the Act would be significantly in excess of £50,000.
- 3.38 However, in relation to the persistent misuse provisions of the Act, Ofcom is bound by a statutory maximum. Ofcom therefore determines that in the circumstances an appropriate and proportionate level of penalty to impose on Barclaycard in relation to its contravention of section 128 of the Act is the statutory maximum of £50,000.

Conclusion

- 3.39 Ofcom has concluded that the criteria in section 130 of the Act have been met and that it may impose a penalty on Barclaycard in relation to its contravention of section 128 of the Act.
- 3.40 Having taken into account all the relevant circumstances, Ofcom has decided that it is appropriate and proportionate to impose on Barclaycard a penalty of £50,000 in relation to Barclaycard's contravention of section 128 of the Act.
- 3.41 Ofcom considers that it is reasonable to require that this penalty be paid by 5pm on 22 October 2008.