



# Enforcement notification and penalty under sections 129 and 130 of the Communications Act 2003

Issued to Ultimate Credit Services Limited by  
the Office of Communications ('Ofcom')

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# Enforcement notification and penalty given to Ultimate Credit Services under sections 129 and 130 of the Communications Act 2003

## Background

1. On 6 August 2008 a notification under section 128 of the Communications Act 2003 (the 'Act') was issued to Ultimate Credit Services Limited ('UCS'), company number SC272245 and registered address 106 Hope Street, Glasgow G2 6PH (the 'section 128 notification').<sup>1</sup> UCS was given until 5pm on 12 September 2008 to make representations on the matters notified therein.
2. The section 128 notification set out Ofcom's determination that there were reasonable grounds to believe that, between 1 October 2006 and 30 April 2007 (the 'relevant period'), UCS persistently misused an electronic communications network or electronic communications services; 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. The section 128 notification also stated that Ofcom may issue a further notification to UCS under section 129 of the Act if, by 5pm on 12 September 2008, UCS had 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. Additionally, the section 128 notification stated that Ofcom may also impose a penalty on UCS under section 130 of the Act in respect of the persistent misuse notified.
4. UCS made representations to Ofcom on 12 September 2008 (the 'representations') in relation to the matters notified. In light of the information provided by UCS in the representations, Ofcom requested further data from UCS on 16 October 2008 (the 'second information request'). UCS responded with the requested data on 2 November 2008.
5. Ofcom has considered the representations and UCS's response to the second information request, 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 UCS in the representations and in response to the second information request, Ofcom hereby determines that it is satisfied that UCS:
  - a. has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications services; specifically by using an automated calling system ('ACS') to make and repeat,

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<sup>1</sup> The section 128 notification can be found at [http://www.ofcom.org.uk/bulletins/comp\\_bull\\_index/comp\\_bull\\_ocases/open\\_all/cw\\_905/](http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_905/)

on a sufficient number of occasions so as to represent a pattern of behaviour or practice, an excessive number of abandoned calls.

- b. has not, since the giving of the section 128 notification, taken all such steps as Ofcom considers appropriate for –
  - i. securing that the misuse is brought to an end and is not repeated; and
  - ii. remedying the consequences of the notified misuse.
7. In light of this, and having had regard to our statutory duties and regulatory principles, Ofcom has decided in this case to issue an enforcement notification under section 129 of the Act (the 'enforcement notification') and a penalty under section 130 of the Act (the 'penalty notice'). The reasons for Ofcom's determination are set out below and further explained in the explanatory statement.
8. In making its determination, Ofcom has 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').<sup>2</sup>

### **The enforcement notification**

9. Section 129(2) of the Act enables Ofcom to issue an enforcement notification where Ofcom is satisfied that a notified misuser has in one or more of the notified respects, persistently misused an electronic communications network or electronic communications services; and that the misuser has not since being notified taken all such steps as Ofcom considers appropriate for securing that the misuse is brought to an end and not repeated and remedying the consequences of the notified misuse.
10. Section 129(3) of the Act sets out that an enforcement notification imposes a requirement on the misuser 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.
11. As set out in the section 128 notification, Ofcom is satisfied that UCS has in one or more of the notified respects, persistently misused an electronic communications network or electronic communications services; 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.
12. For the reasons set out in the explanatory statement Ofcom is further satisfied that pursuant to section 129(2)(b) of the Act, UCS has not secured that its misuse has been brought to an end and is not repeated, and has not remedied the consequences of its misuse.

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<sup>2</sup> 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'). UCS's conduct which has been the subject of Ofcom's investigation took place between 1 October 2006 and 30 April 2007. UCS also provided additional evidence of its conduct covering the period between 5 August and 9 September 2008. Accordingly 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.

13. In reaching this decision Ofcom has taken account of the evidence provided by UCS in the representations that the misuse continued after the relevant period. Ofcom has also had regard to the second information request, as well as section 129(7) of the Act and the Persistent Misuse Guidelines, which refer to remedying the consequences of misuse.

**Steps to secure that the misuse is brought to an end and is not repeated**

14. Pursuant to section 129(3) of the Act, this enforcement notification imposes a requirement on UCS to take all such steps Ofcom considers appropriate for securing that its misuse is both brought to an end *and* not repeated. The misuse which shall be brought to an end and not repeated is identified in the section 128 notification; namely 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.
15. In relation to securing that UCS has brought its misuse to an end, Ofcom specifies that UCS should observe the requirements set out in paragraph 4.16 of the Revised Guidelines in relation to conduct since 10 September 2008, which can be summarised as follows:
- the ‘abandoned call’ rate shall be no more than three per cent of ‘live calls’, calculated per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over any 24 hour period, and shall include a reasoned estimate of Answer Machine Detection (‘AMD’) false positives;
  - in the event of an ‘abandoned call’, a very brief recorded information message is played no later than two seconds after the telephone has been picked up;
  - calls which are not answered must ring for a minimum of 15 seconds before being terminated;
  - when an ‘abandoned call’ has been made to a particular number, any repeat calls to that number in the following 72 hours may only be made with the guaranteed presence of a live operator;
  - for each outbound call a CLI number is presented to which a return call may be made;
  - 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
  - records are kept for a minimum period of six months that demonstrate compliance with the above rules and procedures.
16. Of the steps set out above, Ofcom would expect UCS to have particular regard to its abandoned call rate. Ofcom would expect UCS to take all appropriate steps to ensure that the abandoned call rate does not exceed three per cent in any 24 hour period. In calculating the abandoned call rate, UCS should note that the Revised

Guidelines explicitly set out the need to include a reasoned estimate of AMD false positives<sup>3</sup>, where AMD is being used.

17. In order to secure that the notified misuse is not repeated, Ofcom specifies that UCS should take, as a minimum, the following steps<sup>4</sup>:
- examine whether it is able to conduct its automated outbound calling in accordance with the abandoned call rate set out above, for each 24 hour period during which it is used. If UCS uses AMD equipment, this examination should include the requirement to factor in false positives to the abandoned call rate.
  - undertake a review of the operation of its automated dialler equipment, with particular emphasis on ensuring that compliance can be achieved with the abandoned call rate in every 24 hour period;
  - undertake a review of whether there are sufficient call centre agents available to answer live calls, in order that the abandoned call rate does not exceed 3% in any 24 hour period; and
  - appoint an individual within the company to be responsible for compliance with each of the steps set out in the Revised Guidelines, and in particular the abandoned call rate. That person should be required to report regularly to the senior management of the company on compliance with the relevant requirements, and suggest any remedial actions as appropriate.

### **Steps to remedy the consequences of the notified misuse**

18. Ofcom considers that persistent misuse by making abandoned calls may cause annoyance, inconvenience or anxiety. In relation to remedying the consequences of such misuse, Ofcom notes that section 129(7)(b) of the Act refers to paying an amount to a person in respect of such annoyance, inconvenience or anxiety. The Persistent Misuse Guidelines also make reference to the potential for a requirement to pay the person who has suffered the effects of this misuse,<sup>5</sup> and this is reiterated in the Revised Guidelines.<sup>6</sup>
19. Ofcom therefore considers that in order for UCS to show that it has taken steps to remedy the consequences of its abandoned calls, it should provide Ofcom with evidence of a willingness to compensate any person affected by the notified misuse.
20. UCS must also put in place a process for handling complaints from recipients of the abandoned calls which are the subject of the notified misuse. That process should include provision for assessment of an appropriate level of compensation.

### **The penalty notice**

21. Having regard to the relevant sections of the Act, the Penalty Guidelines published on 29 December 2003 under section 392 of the Act (the 'Penalty Guidelines')<sup>7</sup> and

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<sup>3</sup> Paragraph 4.16 of the Revised Guidelines.

<sup>4</sup> These steps are all examples of actions taken by previous misusers to secure that notified misuse is not repeated.

<sup>5</sup> Paragraph 8.5 of the Persistent Misuse Guidelines.

<sup>6</sup> Paragraph 6.5 of the Revised Guidelines.

<sup>7</sup> <http://www.ofcom.org.uk/about/accoun/pg/penguid.pdf>

the Persistent Misuse Guidelines, Ofcom has also decided to impose a financial penalty on UCS.

22. Ofcom has determined that, in relation to UCS's persistent misuse of an electronic communications network or service in one or more of the respects notified in the section 128 notification, and taking into account all relevant factors, an appropriate and proportionate penalty level is £45,000 (forty-five thousand pounds sterling).
23. The reasons for Ofcom's assessment of this level of penalty are set out in the explanatory statement.

### **Action required by UCS**

24. UCS has until **5pm** on **27 February 2009** to:
  - take the steps specified to secure that its misuse is brought to an end;
  - take the steps specified to secure that its misuse is not repeated;
  - take the steps specified to remedy the consequences of the misuse; and
  - provide evidence to Ofcom that the above steps have been taken.
25. UCS also has until **5pm** on **27 February 2009** to pay to Ofcom £45,000.
26. UCS should note section 129(5) of the Act, which makes clear that it is the duty of a person to whom an enforcement notification has been given to comply with it. Under section 129(6) of the Act, Ofcom is able to enforce this duty by way of civil proceedings.

### **Interpretation**

27. Words or expressions used in the enforcement notification, the penalty notice 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**

**28 January 2009**



# Explanatory Statement

## Section 1

# Summary and background

## Ofcom's Decision

- 1.1 In order to address the problem of abandoned<sup>8</sup> and silent<sup>9</sup> 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 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') by organisations using an Automated Calling System ('ACS').<sup>10</sup>
- 1.2 As part of this investigation, Ofcom requested information from UCS on 19 April 2007 (the 'first information request'). UCS provided a response to the first information request on 13 June 2007.
- 1.3 Following its investigation, Ofcom concluded that it had reasonable grounds for believing that UCS persistently misused an electronic communications network or services and issued UCS with the section 128 notification on 6 August 2008.
- 1.4 The section 128 notification stated that Ofcom may issue a further notification to UCS under section 129 of the Act if, by 12 September 2008, UCS had 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. Additionally, the section 128 notification stated that Ofcom may also impose a penalty on UCS under section 130 of the Act in respect of the persistent misuse notified by Ofcom.
- 1.5 UCS also had until 5pm on 12 September 2008 to make representations on the matters contained in the section 128 notification. That period has now expired. UCS made representations on 12 September 2008 (the 'representations').
- 1.6 The representations indicated that the call data which UCS had provided on 13 June 2007, and which Ofcom used in making its determination in the section 128 notification, was inaccurate. The representations included two sets of call data information:

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<sup>8</sup> A call usually terminated by an ACS after the called person answers it.

<sup>9</sup> 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 of the Persistent Misuse Guidelines).

<sup>10</sup> 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'). UCS's conduct which has been the subject of Ofcom's investigation took place between 1 October 2006 and 30 April 2007 (the 'relevant period'). UCS also provided additional evidence of its conduct covering the period between 5 August and 9 September 2008. Accordingly, 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.

- revised call data covering the period originally investigated, that is between 1 October 2006 and 30 April 2007 (the 'revised call data'); and
  - additional call data covering the period between 5 August and 9 September 2008 (the 'additional call data').
- 1.7 Following receipt of the representations, Ofcom assessed the revised call data and noted that UCS had not calculated the abandoned call rate in accordance with the formula set out in the Persistent Misuse Guidelines. In light of this, Ofcom requested accurate call data from UCS on 16 October 2008 (the 'second information request').
- 1.8 UCS responded to the second information request on 2 November 2008. It set out call data, including an accurate calculation of the abandoned call rate, for each 24 hour period during the relevant period. On the basis of this information Ofcom is satisfied that its determination in the section 128 notification, in relation to the misuse occurring on a sufficient number of occasions for it to be clear that it represented a pattern of behaviour or practice, the number of days during which UCS made an excessive number of abandoned calls, and the days on which this occurred, remains valid.<sup>11</sup>
- 1.9 Therefore for the reasons set out in the section 128 notification, and having considered the evidence provided by UCS in the representations and in response to the second information request, Ofcom determines that it is satisfied that UCS has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications services; 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.
- 1.10 Furthermore having considered the evidence provided by UCS in the representations, and in particular the additional call data which covers the period from 5 August to 9 September 2008, Ofcom determines that it is satisfied that UCS has not, since the giving of the notification, taken all such steps as Ofcom considers appropriate for securing that its misuse is brought to an end and not repeated; and remedying the consequences of the notified misuse.
- 1.11 In light of this, and having had regard to our statutory duties and regulatory principles, Ofcom has decided to issue an enforcement notification under section 129 of the Act (the 'enforcement notification'), in particular to secure that UCS ceases its misuse and does not repeat it.
- 1.12 Ofcom has also decided to impose a penalty on UCS under section 130 of the Act (the 'penalty notice'). Ofcom has determined that the level of the penalty shall be £45,000 taking into consideration all relevant factors including the nature of the persistent misuse involved in this case, and the information provided by UCS since the giving of the section 128 notification.
- 1.13 Section 2 sets out in more detail Ofcom's decision to issue the enforcement notification.

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<sup>11</sup> Following assessment of UCS's response to the second information request, Ofcom notes that the one change to its conclusions in the section 128 notification is the total number of abandoned calls made by UCS during the relevant period. The total number of such calls is therefore [3<] rather than 25,044 as stated in the section 128 notification.

1.14 Section 3 sets out in more detail Ofcom's decision to issue the penalty notice.

## Section 2

# Ofcom's decision to impose an enforcement notification

2.1 Section 129(1) 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.”

2.2 Under section 129(2) of the Act 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.”

2.3 Ofcom issued the section 128 notification to UCS on 6 August 2008 after concluding that it had reasonable grounds for believing that UCS persistently misused an electronic communications network or service. UCS was allowed the period until 12 September 2008 to make representations about the matters notified. This period has now expired, and UCS responded on 12 September 2008. Ofcom is therefore satisfied that section 129 of the Act applies in relation to its assessment of UCS's conduct as each of the criteria in section 129(1) have been met.

2.4 For the reasons set out in the section 128 notification, and having considered the evidence provided by UCS in response to the second information request, Ofcom hereby determines that it is satisfied that, pursuant to section 129(2)(a) of the Act, UCS has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications services; 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 Pursuant to section 129(b)(i) of the Act, Ofcom determines that it is satisfied that UCS has not taken all such steps which Ofcom considers appropriate to secure that the misuse was brought to an end and not repeated since the giving of the notification, as explained below.

- 2.6 As set out at paragraph 1.6, the representations included the additional call data, which covered 29 of the 24 hour periods which occurred between 5 August and 9 September 2008. UCS provided the additional call data of its own volition. The section 128 notification was issued on 6 August 2008; the additional call data includes 27 x 24 hour periods after UCS was notified by Ofcom. Ofcom has assessed the additional call data, and determines that of the 27 periods for which data was provided since the giving of the notification, UCS made an excessive number of abandoned calls in [3<] of them.<sup>12</sup>
- 2.7 As set out in the section 128 notification, the Persistent Misuse Guidelines set out Ofcom's view that even a single abandoned call may cause unnecessary annoyance inconvenience or anxiety and therefore constitute misuse,<sup>13</sup> and that misuse becomes persistent misuse 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 persistent misuse.<sup>14</sup> Ofcom further considers that the [3<] periods during which an excessive number of abandoned calls were made are spread throughout the period for which data was provided in such a way as to as to constitute ongoing persistent misuse.
- 2.8 In light of this, Ofcom therefore determines that, at least during the period covered by the additional call data, UCS continued to contravene the Persistent Misuse Guidelines and section 128 of the Act after being given the section 128 notification.
- 2.9 In relation to section 129(b)(ii) of the Act, Ofcom also determines that it is satisfied that UCS has not taken all such steps which Ofcom considers appropriate to remedy the consequences of the notified misuse. In making that determination, Ofcom has had regard to section 129(7) of the Act and the Persistent Misuse Guidelines.
- 2.10 The Persistent Misuse Guidelines suggest that in order to remedy the consequences of misuse, a misuser may be required to pay the person who has suffered the effects of misuse an appropriate sum of money.<sup>15</sup> This view is reiterated in the Revised Guidelines.<sup>16</sup> Ofcom notes that it may sometimes be difficult to identify all those recipients of abandoned calls in order to effect compensation. However, Ofcom considers that it is possible to put in place procedures to address complaints and provide evidence of a willingness to compensate those who may have been affected by abandoned calls. Such procedures would suggest a recognition by the misuser that their conduct may have caused harm, and that some level of compensation is due which may serve to go some way to remedying the consequences.
- 2.11 Section 129(7) of the Act also refers to paying an amount to a person either by way of compensation for loss or damaged suffered; or (perhaps more appropriately in the case of abandoned calls) in respect of annoyance, inconvenience or anxiety to which the person has been put.
- 2.12 Ofcom would have expected UCS to have made reference to this aspect of the section 128 notification in the representations or as part of other evidence subsequently provided to Ofcom.

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<sup>12</sup> An 'excessive number of abandoned calls' in this sense relates to a 24 hour period during which the abandoned call rate which was in excess of 3% of the total live calls made. [3<]

<sup>13</sup> For the reasons set out in paragraphs 6.11 to 6.14 of the Persistent Misuse Guidelines.

<sup>14</sup> Paragraph 3.5 of the Persistent Misuse Guidelines.

<sup>15</sup> Paragraph 8.5 of the Persistent Misuse Guidelines.

<sup>16</sup> Paragraph 6.5 of the Revised Guidelines.

- 2.13 However UCS has not provided any evidence to Ofcom that it has sought to remedy the consequences of the misuse in any respect since the giving of the section 128 notification. For that reason Ofcom does not consider that UCS has remedied the consequences of the notified misuse.
- 2.14 In light of the reasons set out above, Ofcom considers that it may issue to UCS an enforcement notification under section 129 of the Act.

### Steps to secure that the misuse is brought to an end and is not repeated

- 2.15 Ofcom requires that UCS should take all appropriate steps as it considers necessary to cease the persistent misuse identified in the section 128 notification, where the misuse continues to occur or may occur in the future. In doing so it should have regard to the Revised Guidelines, which set out steps which can be taken by call centre operators to reduce the degree of concern that silent or abandoned calls cause.<sup>17</sup> These steps are summarised at paragraph 15 of the enforcement notification.
- 2.16 UCS should note that in deciding whether to take enforcement action in a particular case, Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment and will take account of the steps taken to reduce the degree of concern that silent or abandoned calls cause. In particular, UCS should note the reference in the Revised Guidelines to the fact that the abandoned call rate “shall be no more than three per cent of ‘live calls’ [...] **over any 24 hour period** [...]” (emphasis added).
- 2.17 As set out in the section 128 notification Ofcom considers UCS to have persistently misused by making an excessive number of abandoned calls in 155 of the 160 x 24 hour periods during the relevant period in which those calls were made.
- 2.18 Therefore in order to cease its persistent misuse, and as set out at paragraph 16 of the enforcement notification, Ofcom considers that UCS should have regard specifically to its abandoned call rate in order to ensure that it does not make an excessive number of abandoned calls in any 24 hour period.
- 2.19 UCS should also take all appropriate steps to ensure that the misuse is not repeated in the future. In this regard, Ofcom expects UCS to provide evidence to Ofcom that it has taken at least the steps specified at paragraph 17 of the enforcement notification. Ofcom would further expect UCS to take any other steps which it may deem appropriate to ensure such misuse is not repeated.

### Steps to remedy the consequences of the notified misuse

- 2.20 As regards steps to remedy the consequences of the notified misuse in this case, Ofcom notes that a significant period of time has passed since the notified misuse occurred.<sup>18</sup> Nevertheless, as set out at paragraphs 19 to 20 of the enforcement notification, Ofcom requires UCS to demonstrate to Ofcom that it is willing and able to compensate any person affected by the notified misuse, where such a person suffered annoyance inconvenience or anxiety.

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<sup>17</sup> Paragraph 4.16 of the Revised Guidelines.

<sup>18</sup> The notified misuse occurred between 1 October 2006 and 30 April 2007.

- 2.21 In addition, if it has not already done so, UCS must put in place a process for handling complaints which may be generated by recipients of the abandoned calls which are the subject of the notified misuse.
- 2.22 Ofcom considers the failure by UCS to provide evidence that it has remedied the consequences of its misuse in section 4 of this explanatory statement (the assessment of the penalty level under section 130 of the Act).

## Conclusion

- 2.23 Ofcom has concluded that the criteria in section 129 of the Act have been met and that it may issue an enforcement notification to UCS in this case.
- 2.24 Pursuant to section 129(4) of the Act, Ofcom considers that a reasonable period to give UCS to ensure that it complies with the enforcement notification would be one month. Ofcom therefore gives UCS until **27 February 2009** to take the steps described in the enforcement notification.
- 2.25 Sections 129(5) and 129(6) of the Act set out that it shall be the duty of a person to whom an enforcement notification has been given to comply with it, and that the duty is enforceable in civil proceedings by Ofcom.

## Section 3

# Ofcom's decision to impose a penalty

3.1 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.”<sup>19</sup>

3.2 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.”

3.3 Ofcom issued the section 128 notification to UCS on 6 August 2008 after concluding that it had reasonable grounds for believing that UCS persistently misused an electronic communications network or service. UCS was allowed the period until 12 September 2008 to make representations about the matters notified. This period has now expired, and UCS responded on 12 September 2008. Ofcom is therefore satisfied that section 130 of the Act applies in relation to its assessment of UCS's conduct as each of the criteria in section 130(1) have been met.

3.4 As set out at paragraph 2.4, Ofcom determines that it is satisfied that UCS 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.

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

3.6 Having considered the evidence gathered in its investigation as set out in the section 128 notification, having considered UCS's representations and its response to the second information request, 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 Persistent Misuse

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<sup>19</sup> Section 130(1) of the Act.



Guidelines make it clear that even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety.<sup>20</sup>

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<sup>20</sup> Paragraph 6.15.

## Section 4

# Penalty Assessment

## Legal Framework

4.1 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.”<sup>21</sup>

4.2 Ofcom also published its Penalty Guidelines on 29 December 2003 under section 392 of the Act (the ‘Penalty Guidelines’). The Penalty Guidelines set out the factors Ofcom will generally take into consideration in determining the level of a financial 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 the degree of persistency; the number of people exposed to the misuse; and the seriousness of the misuse.

4.3 Ofcom sets out below its application of the issues relevant to the factors listed in paragraphs 4.1 and 4.2 above.

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<sup>21</sup> 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

- 4.4 The criteria set out in the Penalty Guidelines state that in general, when setting a starting figure for a penalty, Ofcom is likely first to consider the following factors:
- 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.
- 4.5 Ofcom considers that UCS'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. This is for the following reasons:
- In determining the seriousness of the contravention by UCS, 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, UCS's submissions to Ofcom showed that the total number of abandoned calls it had made during the relevant period was [§<].<sup>22</sup> In this context, Ofcom notes that the Persistent Misuse Guidelines state that even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety.<sup>23</sup>
  - In addition, as set out in the Persistent Misuse Guidelines, in deciding whether to take enforcement action in relation to section 128 of the Act, Ofcom will take account of certain steps taken by call centre operators to reduce the degree of concern that silent or abandoned calls cause.<sup>24</sup> 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, UCS exceeded the 3% abandoned call rate on 155 of the 160 days on which it made calls during the Relevant Period. That is 96% of the days set out in Annex 2 of the section 128 notification.
- 4.6 In light of the factors which are set out above, Ofcom considers that UCS's misuse constitutes a serious contravention of the persistent misuse provisions of the Act.
- 4.7 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

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<sup>22</sup> As set out at footnote 11, UCS provided information in response to the second information request following on from the section 128 notification and the representations, which showed that the total number of abandoned calls made during the relevant period was [§<] rather than 25,044 which was the total provided by UCS in its response to the first information request.

<sup>23</sup> Paragraph 6.15 of the Persistent Misuse Guidelines.

<sup>24</sup> Paragraph 6.16 of the Persistent Misuse Guidelines.

the making of abandoned calls in eight previous cases.<sup>25</sup> In those cases, the starting point of the penalties ranged from £5,000 to £50,000. 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.

4.8 In addition, UCS'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 of the Act and the Revised Guidelines across industry and for UCS specifically.

4.9 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 £34,000. This level reflects the seriousness of UCS's contravention; it is also appropriate and proportionate in terms of previous cases and the continued requirement to create incentives to comply.

### **Application of specific criteria, aggravating and mitigating factors**

4.10 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.<sup>26</sup> 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.

4.11 Ofcom has no evidence to suggest that the calls made by UCS resulted in any gain (financial or otherwise) to UCS or any connected body. In light of this, no adjustment is made to the starting figure in relation to paragraph (a).<sup>27</sup>

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<sup>25</sup> In January 2007 Ofcom imposed penalties on Bracken Bay Kitchens Ltd, Space Kitchens and Bedrooms Ltd, Toucan Residential Ltd (formerly IDT Direct Ltd) and Carphone Warehouse plc; in March 2008 Ofcom imposed penalties on Abbey National plc and Complete Credit Management Ltd; in September 2008 Ofcom imposed a penalty on Barclays Bank plc trading as Barclaycard; and in December 2008 Ofcom imposed a penalty on Equidebt Limited. Each of these penalties was issued for contravening section 128 of Act by making an excessive number of abandoned calls. More information is available on the Competition and Consumer Enforcement Bulletin, which can be found at:

[http://www.ofcom.org.uk/bulletins/comp\\_bull\\_index/comp\\_bull\\_ocases/open\\_all/cw\\_905/](http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_905/)

<sup>26</sup> See paragraph 5 of the Penalty Guidelines.

- 4.12 In relation to paragraph (b), Ofcom has already considered the degree of harm in respect of UCS's contravention, as set out at paragraph 4.5 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 UCS's contravention. Ofcom does not consider any adjustment to the starting point is necessary in relation to this factor.
- 4.13 Turning to the third specific criterion, Ofcom will consider whether the starting point is appropriate and proportionate for the misuse committed in light of the size and turnover of a company. In this case, Ofcom does not have information which would enable a consideration of whether it would be appropriate to make an adjustment to the level of the penalty. The latest available financial information regarding UCS relates to the financial year ending 31 December 2006. UCS failed to respond to requests for current information regarding its size and turnover.<sup>28</sup> Accordingly, Ofcom has not adjusted the starting point in relation to this criterion.
- 4.14 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.
- 4.15 In considering the issue of duration as set out in paragraph (e), Ofcom has already taken into account the fact that UCS's contravention continued after Ofcom fined four companies for persistent misuse in January 2007.
- 4.16 Finally, paragraph (f) does not apply since neither Ofcom nor any other body has already imposed a penalty for the same conduct on UCS.
- 4.17 Following consideration of the specific criteria in the manner set out above, Ofcom considers that it would be appropriate and proportionate to make no adjustments to the starting point, and that it should remain at £34,000.
- 4.18 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 after either becoming aware of the contravention or being notified of a contravention by Ofcom;
  - c) senior management knowledge of the contravention; and
  - d) the absence, ineffectiveness or repeated failure of internal procedures intended to prevent contravention.
- 4.19 This is the first time that Ofcom has taken action against UCS in relation to its misuse of an electronic communications network or service so this is not a repeated contravention. Ofcom has not, therefore, increased the penalty on account of this factor.
- 4.20 Ofcom notified UCS on 6 August 2008 that it had reasonable grounds for believing that UCS persistently misused an electronic communications network or service,

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<sup>27</sup> 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.

<sup>28</sup> Ofcom asked UCS for information during the course of a phone call between Matthew Peake (Ofcom) and the managing director of UCS [redacted], and again in an email [redacted].

contrary to section 128 of the Act. UCS was therefore made aware at this point that Ofcom considered UCS to have contravened section 128 of the Act.

- 4.21 The additional call data provided by UCS in the representations shows that UCS made an excessive number of abandoned calls during 24 hour periods which occurred after the section 128 notification. Ofcom therefore considers that UCS continued the contravention after being notified by Ofcom, at least during the period which the additional call data covers. On that basis Ofcom considers that it is appropriate and proportionate to increase the level of the penalty.
- 4.22 There is no direct evidence that UCS's senior management was aware that UCS was in contravention of section 128 of the Act during the relevant period. For this reason Ofcom has not increased the level of the penalty in relation to this factor.
- 4.23 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. The representations state that [redacted]. The representations go on to explain that the effect of this is that [redacted]. We consider that this procedure has not secured compliance, as highlighted by the additional call data. The Persistent Misuse Guidelines state that the abandoned call rate shall be no more than 3% of live calls “[...] over any 24 hour period.” As set out at paragraph 2.6, Ofcom has identified [redacted] periods in which the abandoned call rate was in excess of 3%. We therefore consider that it is appropriate and proportionate to increase the penalty in light of this factor.
- 4.24 In addition we consider that a further aggravating factor needs to be considered in the case of UCS. As set out in the section 128 notification,<sup>29</sup> UCS has caused substantial delays in the progress of Ofcom’s investigation by its failure to respond with requested information in a timely or accurate manner. This issue arose again in the representations, where UCS admitted previous data was inaccurate and supplied revised data which was also found to be inaccurate. This culminated in the need to send the second information request to UCS, for which the company failed to meet the deadline. In the course of any investigation, Ofcom expects industry to engage in a professional and responsive manner, and UCS failed to do so on repeated occasions. In light of this, Ofcom considers that it is appropriate and proportionate to increase the penalty.
- 4.25 Finally, as set out in our reasoning in section 2 above, we consider that UCS has failed to remedy the consequences of its misuse, and that it is appropriate and proportionate that this failure should lead to an increase in the level of the penalty in this case.
- 4.26 In summary, Ofcom considers that it is appropriate and proportionate to increase the level of penalty in relation to four factors, namely the continuation of the contravention after being notified by Ofcom; the absence, ineffectiveness or repeated failure of internal procedures intended to prevent contravention; the failure to respond adequately during the investigation; and the failure to remedy the consequences of the misuse. Therefore following consideration of these factors, Ofcom considers that the level of the penalty should be increased to £45,000.
- 4.27 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:

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<sup>29</sup> Paragraphs 2.19 to 2.23

- 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.
- 4.28 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 its own volition taken such steps to identify and mitigate a potential contravention. In this case, there is no evidence that UCS identified or mitigated any external factors which resulted in its contravention. Ofcom therefore considers that it is appropriate and proportionate to make no adjustment to the penalty in light of this factor.
- 4.29 In relation to paragraph (b), we do not have any evidence that UCS has taken steps to end the contravention. Further, as set out above, we do not consider that UCS has acted to remedy the consequences of the contravention. Ofcom therefore considers that it is appropriate and proportionate to make no adjustment to the penalty in light of this factor.
- 4.30 Ofcom does not consider that UCS has co-operated in a satisfactory manner with the investigation or responded adequately to statutory information requests. However we have considered this above at paragraph 4.24. Therefore we do not consider that it is appropriate or proportionate to adjust the penalty for this factor.
- 4.31 Following consideration of factors which tend towards a decrease, we consider that the penalty level should not be adjusted, and that the penalty level should remain at £45,000.
- 4.32 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.
- 4.33 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.<sup>30</sup> Similarly, the greater the number of people affected by the misuse, the higher the level of penalty that it is appropriate to impose.<sup>31</sup>
- 4.34 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 4.5 above.

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<sup>30</sup> See paragraph 9.6 of the Persistent Misuse Guidelines.

<sup>31</sup> See paragraph 9.7 of the Persistent Misuse Guidelines.

4.35 The Persistent Misuse Guidelines also set out some objective elements that Ofcom will take into consideration when assessing the seriousness of persistent misuse.<sup>32</sup> Specifically:

- Is it the misuser's first offence or do they have a previous history of persistent misuse? As noted above at paragraph 4.16, UCS 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 UCS's senior management was aware that UCS was in contravention during the relevant period.
- Has the misuser done everything required of him by the [enforcement] notification? Ofcom has taken into account above its view that UCS has failed to act to end the contravention detailed in the section 128 notification or to remedy the consequences of that contravention.
- Has good faith in making amends been demonstrated? As set out above, Ofcom does not consider that UCS has taken steps to remedy the consequences of the misuse. Accordingly, Ofcom does not consider that UCS was able to demonstrate good faith in making amends for the misuse which occurred during the relevant period. However this has been taken into account in raising the penalty on account of UCS's failure to remedy the consequences of its misuse, as set out at paragraph 4.25.
- 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 into account in assessing seriousness. As stated in paragraph 4.5, Ofcom considers that the misuse is serious in light of the number of abandoned calls made and the extent to which the abandoned call rate exceeded 3% during the Relevant Period.

4.36 Ofcom therefore considers that no adjustment to the penalty level is needed in light of the factors set out in the Persistent Misuse Guidelines. The penalty therefore remains at £45,000.

### **Final amount of penalty**

4.37 Having taken into account sections 130(4) and 130(5) of the Act, including the 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 it is appropriate and proportionate to impose a penalty of £45,000 on UCS in relation to its contravention of section 128 of the Act.

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<sup>32</sup> See paragraphs 9.8, 9.9 and 9.10 of the Persistent Misuse Guidelines.



## Conclusion

- 4.38 Ofcom has concluded that the criteria in section 130 of the Act have been met and that it may impose a penalty on UCS in relation to its contravention of section 128 of the Act.
- 4.39 Having taken into account all the relevant circumstances, Ofcom has decided that it is appropriate and proportionate to impose on UCS a penalty of £45,000 in relation to UCS's contravention of section 128 of the Act.
- 4.40 Ofcom considers that it is reasonable to require that this penalty be paid by **5pm** on **27 February 2009**.