



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

Issued to Complete Credit Management Ltd by
the Office of Communications ('Ofcom')

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Issue date:

19 March 2008

Imposition of 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 Complete Credit Management Limited ('CCM') company number 04690658 and whose registered address is 2297 Coventry Road, Birmingham B26 3PU, under section 128 of the Act, on 29 November 2007 and which is annexed to the Explanatory Statement attached (the 'section 128 notification'). CCM was given until 7 January 2008 to make representations on the matters notified therein.
4. The notification stated that Ofcom may issue a further notification to CCM under section 129 of the Act if, prior to 7 January 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 CCM under section 130 of the Act in respect of the persistent misuse notified by Ofcom.
5. CCM made representations to Ofcom on 7 January 2008 ('CCM's 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 in CCM's representations, Ofcom hereby determines that it is satisfied that, pursuant to section 130(2) of the Act, CCM 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').

Imposition of penalty under section 130 of the Communications Act

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 £5,000 on CCM in relation to CCM'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 CCM

11. CCM has until 5pm on Friday 18 April 2008 to pay to Ofcom £5,000 (five 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

19 March 2008

Explanatory Statement

Section 1

Summary and background

Ofcom's Decision

- 1.1 In order to address the problem of abandoned¹ and silent² 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.³
- 1.2 As part of this investigation, Ofcom requested information from CCM on 18 April 2007 (the 'information request'). CCM responded to the information request on 25 April 2007 (the 'information request response').
- 1.3 Following its investigation, Ofcom concluded that it had reasonable grounds for believing that CCM persistently misused an electronic communications network or service and issued CCM with a section 128 notification on 29 November 2007, a copy of which is annexed to this Explanatory Statement.
- 1.4 The section 128 notification stated that Ofcom may issue a further notification to CCM under section 129 of the Act if, prior to 7 January 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 CCM under section 130 of the Act in respect of the persistent misuse notified by Ofcom.
- 1.5 CCM had until 7 January 2008 to make representations on the matters contained in the section 128 notification. That period has now expired. CCM made representations on 7 January 2008 ('CCM's representations').
- 1.6 For the reasons set out in the section 128 notification, and having considered the evidence provided by CCM in its representations, Ofcom determines that it is satisfied that, pursuant to section 130(2) of the Act, CCM 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.
- 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 A call terminated by an ACS after the called person answers it.

² A generic description for 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).

³ Ofcom published a consultation on proposed amendments to the Persistent Misuse Guidelines on 17 December 2007. The consultation closed on 1 February 2008 and Ofcom is currently considering responses.

Imposition of penalty under section 130 of the Communications Act

- 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 £5,000 on CCM in relation to CCM'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.”⁴

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 CCM on 29 November 2007 after concluding that it had reasonable grounds for believing that CCM persistently misused an electronic communications network or service. CCM was allowed the period until 7 January 2008 to make representations about the matters notified, the period which has now expired, and CCM responded on 7 January 2008. Ofcom is therefore satisfied that section 130 of the Act applies in relation to its assessment of CCM'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 CCM in its representations, Ofcom hereby determines that it is satisfied that, pursuant to section 130(2) of the Act, CCM 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 it may impose a penalty on CCM 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 CCM'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

⁴ 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.⁵

⁵ Paragraph 6.15.

Section 3

Penalty Assessment

Legal Framework

3.1 Section 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.”⁶

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.

⁶ 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.

Seriousness

- 3.5 Ofcom considers that CCM'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. Ofcom however considers that on the facts of this particular case, the level of seriousness is, to some extent, mitigated. Ofcom's reasoning is as follows.
- First, in determining the seriousness of the contravention by CCM, Ofcom has been guided by the degree of harm or likely harm to end-users which results from 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, CCM provided data in the information request response of the number of abandoned calls it had made during the period under investigation, that is from 1 October 2006 to 18 April 2007 (the Relevant Period⁷). This data related to two call centre campaigns, known as 'COM1' and 'DOM1'. The data submitted by CCM showed that the total number of abandoned calls made during the Relevant Period was 450 for COM1 and 365 for DOM1, making a total figure for abandoned calls across both campaigns of 815.^{7,8} Ofcom notes that the Persistent Misuse Guidelines state that even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety.⁹

⁷ As set out in the section 128 notification, Ofcom considered it appropriate to aggregate CCM's call data across its two campaigns to reach an overall abandoned call rate for the company as a whole for each of the 24 hour periods in the Relevant Period. This was in order to give an overall picture of CCM's performance against the requirements of the Persistent Misuse Guidelines (see paragraphs 2.19 and 2.26 of the section 128 notification in particular).

⁸ Ofcom does not accept CCM's representation at paragraph 5.1.2.1(c) that the relevant total number of abandoned calls made during the Relevant Period was 468. Ofcom understands from CCM that this total relates to the number of abandoned calls made during the 29 of the 24 hour periods of contravention during the Relevant Period as set out in the section 128 notification (that is the 24 hour periods in which the abandoned calls made by CCM exceeded 3% of live calls made). Ofcom considers that the more appropriate measure of harm or likely harm is the total number of abandoned calls across the Relevant Period in its entirety. This is because as even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety, it would be inappropriate to disregard the number of abandoned calls made on other days during the Relevant Period in assessing harm or likely harm.

⁹ Paragraph 6.15.

- 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 steps taken by call centre operators to reduce the degree of concern silent or abandoned calls cause. Observation of certain procedures goes to the seriousness of an act of misuse; including the abandoned call rate shall be no more than 3% of live calls on each individual campaign over any 24 hour period.¹⁰ In this case and as also set out in Annex 2 to the section 128 notification, CCM exceeded the 3% abandoned call rate on 29 of the 120 days on which CCM made calls during the Relevant Period; that is 24.1% of the days set out in Annex 2 of the section 128 notification.¹¹ That the 3% limit was exceeded in this way is a relevant factor when determining the seriousness of the case.

3.6 CCM in its representations requested Ofcom take into account certain factors in its consideration of seriousness.¹² These were as follows:

- CCM submitted Ofcom take account of the low volume of abandoned calls it had made. In describing the root causes of its non-compliance CCM also submitted that it was a “small niche service provider” where very low numbers of calls had resulted in it exceeding the 3% guidance. In this context it said specifically that in almost 50% of call failure periods less than 2 calls had resulted in abandoned call rates over 3%;¹³
- the calls were abandoned and not silent;
- the end users it called had already been contacted by CCM by letter, explaining why CCM was attempting to contact them – in CCM’s view, removing the potential likelihood for annoyance or anxiety¹⁴; and
- CCM was unable to identify any specific complaints of its activities, either through its own complaints process, BT or Ofcom.

In addition, CCM submitted that “whilst no further mention is made of further guidelines in Ofcom’s notification...it is accepted that full compliance has occurred over the relevant period otherwise this would have formed part of the section 128(1) notifications.”¹⁵ Although this representation was not made in respect to seriousness specifically, Ofcom is of the view it is appropriate to consider this submission in that context and this is addressed further below.

3.7 The fact that end users had already been contacted by letter by CCM is not a relevant consideration in assessing the seriousness of a case. Ofcom is of the view that an abandoned call may cause annoyance, inconvenience or anxiety regardless of whether or not there is an existing relationship in place between the calling party and the called party.

3.8 In addition, Ofcom does not accept that CCM’s inability to identify complaints should be taken into account in assessing seriousness; for example, this might be due to the fact that end users in this case were unaware of complaint procedures. Lack of

¹⁰ Paragraph 6.16.

¹¹ As set out at footnote 11 of the section 128 notification, 24 hour periods which fall within the Relevant Period, but for which no call data was provided by CCM have not been included in Ofcom’s assessment of the number of days during which CCM exceeded the 3% abandoned call rate.

¹² Paragraph 5.1.2.1 of CCM’s representations.

¹³ Paragraph 4.1.2 of CCM’s representations.

¹⁴ Paragraph 5.1.2.1(a)(ii) of CCM’s representations.

¹⁵ Paragraph 3 of CCM’s representations.

identified complaints is not reliable evidence of the effect or likely effect of an act of misuse for the purposes of a consideration of “seriousness”.

- 3.9 Ofcom recognises however that none of the calls made by CCM were a type of abandoned call which are “silent calls” – that is calls which the Persistent Misuse Guidelines describe as “almost certain to cause inconvenience” and “very likely to cause annoyance”.¹⁶
- 3.10 Ofcom takes CCMs submission with regard to “further guidelines” as a reference to other guidance within the Persistent Misuse Guidelines. At paragraph 6.16 of these guidelines, as noted above, it is suggested that compliance with other procedures goes to an assessment of seriousness such as playing of an information message within 2 seconds of the call being answered; calls which are not answered must ring for a minimum of 15 seconds before being terminated; any repeat calls to a number the subject of an abandoned call in the following 72 hours must be made by a live operator; and that for each outbound call, a caller line identification number is presented. Ofcom also recognises, as set out in the section 128 notification, that both of CCM’s two campaigns had played an information message, that they allowed calls to ring for 15 seconds before terminating the call; calls made within 72 hours of an abandoned call were made by a live operators and that the two campaigns both presented a caller line identification.¹⁷
- 3.11 Ofcom has also taken into account in assessing the level of seriousness in this case that:
- the total amount of abandoned calls across two campaigns was relatively low (as set out in paragraph 3.5);
 - CCM exceeded the 3% abandoned call rate on less than a quarter of the days on which CCM made calls during the Relevant Period (as also set out in paragraph 3.5); and
 - as submitted by CCM, in almost half of the 24 hour periods where CCM exceeded the 3% limit, this was by a very small number of calls (less than two).

In this context, Ofcom notes that the Persistent Misuse Guidelines 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.¹⁸ Similarly, the greater the number of people affected by the misuse, the higher the level of penalty that it is appropriate to impose.¹⁹

- 3.12 Although it considers this case remains a serious contravention of section 128 (inasmuch as CCM had used 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) Ofcom is also of the view that the seriousness of this case is mitigated to some extent by the factors set out in paragraphs 3.10 and 3.11 above considered in the round.

¹⁶ Paragraph 6.11.

¹⁷ Annex 1 of the section 128 notification.

¹⁸ See paragraph 9.6 of the Persistent Misuse Guidelines.

¹⁹ See paragraph 9.7 of the Persistent Misuse Guidelines.

Precedents

- 3.13 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 four previous cases.²⁰ In those cases, the starting point of the penalties ranged from £32,500 to £45,000.
- 3.14 CCM submitted in its representations that there were a number of differences between those cases and the circumstances under consideration in this case. CCM said that the previous cases were contravening a number of elements of the Persistent Misuse Guidelines, in particular as to the making of silent calls, which was not the case here. In CCM's view they involved a high volume of complaints and abandoned calls relative to CCM and were as a result of unsolicited calls rather than where there was an established relationship with the called party as in this case. In general, Ofcom is of the view however that whilst the 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 overall. Ofcom has taken that approach in this case as well.

Incentives to comply

- 3.15 In its representations on incentives to comply, CCM submitted that understanding its non-compliance was sufficient incentive to have remedied that situation and ensure compliance in the future. Ofcom disagrees. First, Ofcom considers that the question of incentives to comply relates to industry as a whole and not only to the persistent misuser. Secondly, CCM'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 Persistent Misuse Guidelines across industry and for CCM.

Summary of calculation of a starting point

- 3.16 In light of these considerations and the facts of this particular case, Ofcom considers that it is appropriate and proportionate to set the penalty starting point at £5,000. The starting point reflects the seriousness of this particular case the level of which is, to some extent, mitigated on the facts; and is 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

- 3.17 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.²¹ These include, but are not limited to:
- a) Any gain (financial or otherwise) made by the regulated body in breach (or any connected body);

²⁰ 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, 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/

²¹ See paragraph 5 of the Penalty Guidelines.

- 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.
- 3.18 In respect of the issue of financial gain, CCM explained in its representations that it had made no gain as a result of the contravention. It submitted that its business was about negotiating payments with end users on behalf of their clients; abandoned calls meant potential lost opportunities to do this; that it was rewarded for negotiated payments and not call volumes; and that the abandoned calls were not as result of it having too few agents. Ofcom therefore has no evidence to suggest that the calls made by CCM resulted in any gain (financial or otherwise) to CCM or any connected body. In light of this, no adjustment is made to the starting figure in relation to paragraph (a).²²
- 3.19 In relation to paragraph (b), Ofcom has already considered the degree of harm in respect of CCM's contravention and CCM's representations on this point, as set out at paragraphs 3.5 to 3.12 above. In light of this, no adjustment is made to the starting figure in relation to the degree of harm.
- 3.20 Ofcom also has no evidence of increased cost incurred by consumers or other market participants due to CCM's contravention. Ofcom does not consider any adjustment to the starting point is necessary in relation to this factor.²³
- 3.21 As regards paragraph (c), CCM submitted that it was a young business that was small with a staff of 45 on average, including the management team. It also submitted that its turnover for the period 2006/2007 was £3.6 million. Ofcom does not consider that the starting point of £5,000 is disproportionate in terms of CCM's limited size and turnover.
- 3.22 As to paragraph (d), CCM stated that one contributing factor to its contravention was in respect of influences outside of its control; such as during fire alarms or system failures. In these instances abandoned calls were created due to the situation itself and agents logging out of the ACS in line with health and safety procedures. CCM said it knew of at least 3 cases when this had occurred and that it believed that this may have been the case in other periods but due to a lack data, it was unable to confirm this. Due to the lack of evidence regarding matters beyond CCM's control, Ofcom considers that paragraph (d) does not result in any adjustment to the starting point.

²² Ofcom does note however that the use of ACS offers the possibility of initiating calls without the need for individual numbers being dialled in turn and that this will often be for financial reasons.

²³ Ofcom notes CCM's representation on the issue of increased costs to consumers, in particular that it has offered to pay compensation to end users who have received abandoned calls from CCM. Ofcom considers this point in its evaluation of whether and to what extent CCM has remedied the consequences of its breach at paragraph 3.37 below.

- 3.23 In considering the issue of duration as set out in paragraph (e), Ofcom has already taken into account the fact that CCM's contravention continued even after Ofcom fined four companies for persistent misuse in January 2007.
- 3.24 Finally, paragraph (f) does not apply since neither Ofcom nor any other body has already imposed a penalty for the same conduct on CCM.
- 3.25 Following consideration of the specific criteria in the manner set out above, Ofcom considers that it is appropriate and proportionate to make no adjustments to the starting point of the penalty, and that it should remain at £5,000.
- 3.26 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.
- 3.27 This is the first time that Ofcom has taken action against CCM 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.
- 3.28 Ofcom notified CCM on 29 November 2007 that it had reasonable grounds for believing that CCM 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. CCM was therefore made aware at this point that Ofcom considered CCM to have contravened section 128 of the Act. CCM submitted in its representations to Ofcom that since the date of the notification until 7 January 2008, it had been "100% compliant with all Ofcom guidelines".²⁴ In light of this, Ofcom has no evidence at this stage that CCM continued its contravention after 29 November 2007 and for this reason Ofcom has not increased the level of the penalty in relation to this factor.
- 3.29 CCM stated in its representations that senior management only became aware of failure to comply at the point of the section 128 notification. Although it also stated that the Persistent Misuse Guidelines had been discussed, it also stated that "team managers had taken responsibility for managing all activities relating to the ACS and as there had been historically no complaints occurring then nothing has indicated to the current senior management team that an issue existed." Ofcom is of the view therefore that CCM's senior management were unaware that CCM 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. Beyond having a general duty to oversee the management and operation of the business, there does not appear to be a specific reason why senior management should have been aware of the number of abandoned calls being made

²⁴ Paragraph 4.3 of CCM's representations.

on a daily basis. For this reason Ofcom has not increased the level of the penalty in relation to this factor.

- 3.30 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. As set out above, it is evident from CCM's representations that it was only as a result of receiving the section 128 notification that CCM undertook to put in place steps to ensure compliance. In light of this, and the fact that CCM should have been aware from at least 1 March 2006 about 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.
- 3.31 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.
- 3.32 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.
- 3.33 Ofcom considers that CCM failed to take steps to identify and mitigate external factors that might have resulted in it contravening section 128 of the Act. 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, CCM stated in its representations that it was only at the time of the section 128 notification that senior management became aware of the contravention. CCM also noted that it was on receipt of the notification that analysis was undertaken to establish the cause of any non-compliance and as a result of this, remedial action was approved and implemented.²⁵ Ofcom considers therefore that the work undertaken by CCM to identify and mitigate external factors was only as a result of Ofcom bringing CCM's attention to its outbound calling programme, rather than a result of pro-active steps being taken independently of contact with Ofcom. Ofcom therefore does not consider that CCM 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.
- 3.34 In its representations, CCM has provided evidence of actions taken to end its contravention and remedy the consequences of its contravention. In summary, the representations stated that CCM had taken steps to improve its performance in five

²⁵ For example, paragraphs 5.1.2.2, 4.1, 4.2, 4.3 of CCM's representations and paragraph 2 of the executive summary.

areas; that of a) agent behavioural change; b) management of the ACS technology; c) external support; d) reporting of compliance data; and e) audit trails as follows:²⁶

- **Agent behavioural change:** CCM stated that agent behaviours had contributed to non-compliance. It had therefore sought to ensure these did not happen again by documenting new internal procedures; by training all current agents on new procedures and the consequences of non-compliance on a one to one basis; by amending training packages to reflect new internal processes; and targeting team managers with ensuring compliance with new processes by their teams.
- **Management of the ACS technology:** CCM stated that the senior management team had agreed to create and recruit for a new role within the business with responsibility for the day to day management of the ACS technology and that recruitment was expected to commence during January 2008.
- **External support:** CCM submitted that its senior management team had requested that to ensure compliance was maintained for the future, all key personnel in the day to day management of ACS are to undertake a training session with the supplier which had been booked for early February 2008; that the ACS supplier was to be engaged in supporting the ACS management for a year to provide a better understanding for CCM staff of the technology involved; and that the ACS supplier would be engaged when there was a material change in CCM's business which involved operational changes around ACS.
- **Reporting of compliance data:** CCM stated that the senior management team and head of business would receive weekly reports on the daily abandoned calls volumes and percentages; that a new escalation process had been implemented by the operational team at CCM to ensure decisions around the ACS system were dealt with at an "appropriate and empowered level". In addition, quarterly internal compliance audits would be carried out against the Persistent Misuse Guidelines, cascaded within the operational management team with the results linked directly to personal targets and bonuses; and
- **Audit trails:** CCM stated that it considered that insufficient data had been captured to allow it to allow sufficient analysis or audit trail moving forward. It had therefore implemented processes to capture additional data. It stated that it had already implemented processes capture specific information on abandoned calls and that this would be retained in the case of future inquiry and that an internal log had been implemented to capture changes to ACS settings or events which impact on performance. CCM also said an internal report had been commissioned for further work in root causes of problems and that this would be undertaken once sufficient data had been collected.

3.35 CCM also stated that it had authorised an additional spend of 2.3% of its forecast turnover for 2007/8 to ensure robust processes and management were in place for achieving future compliance.²⁷

3.36 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

²⁶ Paragraph 4.2 of CCM's representations.

²⁷ Covering letter of CCM's representations dated 7 January 2008. This is further explained at paragraph 5.1.2.1 as £60,000; or £2143 per "seat" on the ACS; or £128.20 for every abandoned call made during the 29 24 hour periods of contravention; or £2069 for each 24 hour period in which CCM did not comply and at 5.1.2.2 as £38,000 of the £60,000 as a continuing annual spend.

ensure that it is not repeated, Ofcom considers that these steps should have been undertaken by CCM 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 CCM ought to have undertaken in any event.

- 3.37 Ofcom is satisfied that CCM has taken appropriate steps to remedy the consequences of its breach. CCM states in its representations that it is “happy to provide appropriate compensation to any consumers who have proven to have received an abandoned call from [CCM] over the period of partial compliance. [CMM] are willing to offer £5 compensation in recognition that an abandoned call may have caused annoyance”. Ofcom would usually expect a company to actively remedy any consequences of its breach, whereas in this case CCM appears to have placed the burden on customers to seek out redress themselves. Ofcom appreciates however in the case of persistent misuse that it might be difficult to identify all those recipients of abandoned calls that have unnecessarily suffered annoyance, inconvenience or anxiety. Ofcom will assess each case on its merits. Here given that none of the calls made by CCM were silent, Ofcom is satisfied that CCM’s offer of compensation to any consumer who is proven to have received an abandoned call during the Relevant Period is sufficient for Ofcom to consider that steps have been taken to remedy the consequences of CCM’s breach as set out in the section 128 notification and for this reason, considers that there should be a decrease in the level of penalty.
- 3.38 CCM has co-operated with Ofcom’s investigation. It responded adequately to statutory information requests issued to it by Ofcom under section 135 of the Act during the course of the investigation. CCM has additionally made representations in relation to the requirements of the section 128 notification. Ofcom, however, does not consider that it is appropriate to reduce the penalty in light of such behaviour, which was not out of the ordinary or other than that which would be expected.
- 3.39 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.
- 3.40 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.²⁸ Similarly, the greater the number of people affected by the misuse, the higher the level of penalty that it is appropriate to impose.²⁹
- 3.41 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 calculation of the starting point above.

²⁸ See paragraph 9.6 of the Persistent Misuse Guidelines.

²⁹ See paragraph 9.7 of the Persistent Misuse Guidelines.

3.42 The Persistent Misuse Guidelines also set out some objective elements that Ofcom will take into consideration when assessing the seriousness of persistent misuse.³⁰ Ofcom has however already taken these elements into account in its assessment of the penalty above. Specifically:

- Is it the misuser's first offence or do they have a previous history of persistent misuse? As noted above at paragraph 3.27, CCM 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 CCM's senior management was aware that CCM 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 above, Ofcom considers that CCM has acted to end the contravention detailed in the section 128 notification and to remedy the consequences of that contravention.
- Has good faith in making amends been demonstrated? Paragraphs 3.34 to 3.38 explain how Ofcom has taken into account the actions by CCM to end the contravention and remedy the consequences of contravention. These actions would appear to demonstrate good faith by CCM.
- 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 – that is even though the calls made in this case were not silent, Ofcom considers that the case remains serious in light of the number of calls made and the proportion of time during the Relevant Period over which the abandoned call rate exceeded 3%.

3.43 Ofcom considers that no adjustment to the penalty level is needed in light of the factors set out in the Persistent Misuse Guidelines due to the fact that these elements have already been taken into account in determining the level of the penalty following the Penalty Guidelines.

Final amount of penalty

3.44 As set out above Ofcom considers that the penalty should be increased due to the absence of, ineffective and/or repeated failures of internal mechanisms or procedures intended to prevent contravention of section 128 during the Relevant Period. However, as also set out above, CCM's actions since the Relevant Period have been appropriate to end that contravention and remedy its consequences. Given this, Ofcom considers it appropriate and proportionate to give equal weight to the increase and decrease to the level of the penalty as a result of those factors. As a result, Ofcom considers that any increase to the level of the penalty would be cancelled out by the decrease to the level of the penalty.

³⁰ Paragraphs 9.8, 9.9 and 9.10 of the Persistent Misuse Guidelines.

- 3.45 Therefore, having taken into account sections 130(4) and 130(5) of the Act, including CCM'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 CCM in relation to its contravention of section 128 of the Act in this case is £5,000.

Conclusion

- 3.46 Ofcom has concluded that the criteria in section 130 of the Act have been met and that it may impose a penalty on CCM in relation to its contravention of section 128 of the Act.
- 3.47 Having taken into account all the relevant circumstances, Ofcom has decided that it is appropriate and proportionate to impose on CCM a penalty of £5,000 in relation to CCM's contravention of section 128 of the Act.
- 3.48 Ofcom considers that it is reasonable to require that this penalty be paid by 5pm on Friday 18 April 2008.

Annex 1

Notification under section 128 of the Act



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

Notice served on
Complete Credit Management Ltd by the
Office of Communications ("Ofcom")

Date: 29 November 2007

Imposition of penalty under section 130 of the Communications Act

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Notification under section 128 of the Communications Act 2003

1. This Notification is issued to Complete Credit Management Limited (“CCM”), whose company number is 04690658. It sets out Ofcom’s determination pursuant to section 128(1) of the Communications Act 2003 (the “Act”), specifying:
 - a) the use of an electronic communications network or electronic communications services that Ofcom considers constitutes persistent misuse; and
 - b) the period during which CCM has an opportunity to make representations about the matters notified.

Section 128 of the Communications Act 2003

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

Ofcom’s determination

5. Ofcom hereby determines that there are reasonable grounds for believing that, between 1 October 2006 and 18 April 2007 (the “Relevant Period”), CCM misused an electronic communications network or electronic communications services with the effect or likely effect of causing another person unnecessarily to suffer annoyance, inconvenience or anxiety within the meaning of sections 128(1) and 128(5)(a) of the Act. Ofcom further determines that there are reasonable grounds for believing that during the Relevant Period the misuse engaged in by CCM was persistent as it was repeated on a sufficient number of occasions for it to be clear that the misuse represented a pattern of behaviour or practice within the meaning of section 128(6)(a) of the Act.
6. The reasons for Ofcom’s determination are set out in the Explanatory Statement accompanying this Notification which, read together with the annexes, sets out the evidence on which Ofcom has based its determination.

The use Ofcom considers to be persistent misuse

7. In making this determination, Ofcom has had regard to its *Statement of policy on the persistent misuse of an electronic communications network or service*, published on 1

¹ Full definitions of sections 128(5) and 128(6) are set out in paragraphs 2.8 and 2.9 of the Explanatory Statement.

March 2006 in accordance with section 131 of the Act (the “Persistent Misuse Guidelines”).

8. Applying the principles set out in the Persistent Misuse Guidelines², Ofcom considers that CCM, by virtue of its use of an Automated Calling System (“ACS”), has persistently misused an electronic communications network or electronic communications services, with the effect or likely effect of causing another person unnecessarily to suffer annoyance, inconvenience or anxiety. Specifically, Ofcom considers that CCM has used 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

Representations concerning this Notification

9. CCM has until 7 January 2008 (the “Deadline”) to make representations to Ofcom about the matters set out in this Notification and the accompanying Explanatory Statement.

Other matters

10. If, prior to the Deadline, CCM does not secure that any persistent misuse by it of an electronic communications network or electronic communications services, contrary to section 128 of the Act, as set out in this Notification, is brought to an end and is not repeated then Ofcom may issue to CCM a further notification under section 129 of the Act.
11. If CCM has, in one or more of the ways set out in this Notification, persistently misused an electronic communications network or electronic communications services, Ofcom may impose a penalty on CCM under section 130 of the Act. Under section 130(5) of the Act, in making a determination as to the amount of the penalty to be imposed, Ofcom must have regard to:
 - a) any representations made by CCM;
 - b) any steps taken by CCM for securing that the notified misuse is brought to an end and is not repeated; and
 - c) any steps taken by CCM to remedy the consequences of the notified misuse.

Interpretation

12. Words or expressions used in this Notification and/or the Explanatory Statement have the same meaning as in the Act, except for those defined as follows:

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

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

² See paragraphs 6.11 to 6.16 of the Persistent Misuse Guidelines as regards misuse by making silent or abandoned calls, and in particular, paragraph 6.16 of the Persistent Misuse Guidelines in relation to the collective procedures a call centre can adopt which will mitigate the seriousness of a particular act of misuse.

³ Defined below in paragraph 12.

Abandoned calls (x)/(abandoned calls (x) + calls passed to live operator (y)) x 100/1

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

“CLI” means ‘calling line identification’, which is a facility that enables identification of the number from which a call is being made;

“Excessive Number of Abandoned Calls” means, for any 24 hour period, Abandoned Calls made in excess of an Abandoned Call Rate of 3%;

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

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

“Live Call” means a call which is answered by an individual; and

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

Neil Buckley

Director of Investigations

29 November 2007

Section 2

Explanatory Statement

Summary

- 2.1 This Explanatory Statement sets out Ofcom's reasons for its determination in paragraph 5 of the Notification that CCM has misused an electronic communications network or electronic communications services with the effect or likely effect of causing another person unnecessarily to suffer annoyance, inconvenience or anxiety within the meaning of section 128(5)(a) of the Act. It also sets out Ofcom's reasons for its determination that such misuse is persistent as it is repeated on a sufficient number of occasions for it to be clear that the misuse represents a pattern of behaviour or practice pursuant to section 128(6)(a) of the Act.
- 2.2 Abandoned Calls typically occur when an ACS is used to generate outgoing calls. If a number is dialled by an ACS and answered by a live individual, the call is terminated by the ACS if there is no call centre agent available to handle it, thereby becoming an Abandoned Call. When an Abandoned Call is not followed by a message explaining why the Abandoned Call has occurred, the person receiving the call hears silence. Such calls are commonly known as "Silent Calls".
- 2.3 Ofcom's Persistent Misuse Guidelines express Ofcom's policy that repeatedly making Abandoned Calls (or making Abandoned Calls that are Silent Calls) constitutes persistent misuse for the purposes of section 128 of the Act.⁴ The Persistent Misuse Guidelines also set out Ofcom's policy governing the use of ACS and outline the factors that Ofcom will take into account in deciding in particular cases whether or not to take enforcement action under the persistent misuse powers.
- 2.4 On 22 June 2006, Ofcom began an own-initiative programme of monitoring and enforcement of rules preventing annoyance caused to consumers by Silent and Abandoned calls. As part of this programme (which was extended on 20 June 2007 for a further six months), Ofcom investigated CCM's compliance with Ofcom's policy as set out in the Persistent Misuse Guidelines and with section 128 of the Act.
- 2.5 On the basis of the evidence gathered during its investigation Ofcom has concluded that, during the Relevant Period, CCM engaged in misuse of an electronic communications network or electronic communications services by making an Excessive Number of Abandoned Calls on multiple occasions, and that this misuse is persistent. Ofcom has therefore issued this Notification under section 128 of the Act. Ofcom has not made any finding at this stage with respect to the question of whether CCM is engaging in persistent misuse on an ongoing basis.
- 2.6 CCM now has until 7 January 2008 (the "Deadline") to make representations to Ofcom on the matters contained in the Notification. If, as at this date, CCM has not secured that any persistent misuse still occurring in respect of which it has been notified is brought to an end, and is not repeated, Ofcom may issue a further notification to CCM under section 129 of the Act. Ofcom may also impose a penalty on CCM under section 130 of the Act in respect of the persistent misuse notified by Ofcom.

⁴ See the Persistent Misuse Guidelines, paragraphs 5.1, 5.2 and 6.15.

Legislative framework

2.7 The Notification is issued under section 128(1) of the Act which enables Ofcom to issue a notification to a person where it has reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications service.

2.8 Section 128(5) defines “misuse” as follows:

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

(a) the effect or likely effect of his use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety; or

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

2.9 Section 128(6) defines what constitutes “persistent” misuse as follows:

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

(a) a pattern of behaviour or practice; or

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

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

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

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

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

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

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

“(1) This section applies where –

Imposition of penalty under section 130 of the Communications Act

- (a) a person (“the notified misuser”) has been given a notification under section 128;
- (b) Ofcom have allowed the notified misuser an opportunity of making representations about the matters notified; and
- (c) the period allowed for the making of the representations has expired.

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

- (a) that he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; and
- (b) that he has not, since the giving of the notification, taken all such steps as Ofcom consider appropriate for –
 - (i) securing that his misuse is brought to an end and is not repeated; and
 - (ii) remedying the consequences of the notified misuse.

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

- (a) securing that his misuse is brought to an end and is not repeated, and
- (b) remedying the consequences of the notified misuse, as may be specified in the notification.”

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

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

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

- (a) a person (“the notified misuser”) has been given a notification under section 128;
- (b) Ofcom have allowed the notified misuser an opportunity of making representations about the matters notified; and
- (c) the period allowed for the making of representations has expired.

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

electronic communications network or electronic communications service.

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

(4) The amount of penalty imposed is to be such amount not exceeding £50,000⁵ 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."

2.14 Under section 131 of the Act Ofcom has a duty to publish a statement of general policy with respect to the exercise of its powers under sections 128 to 130. Further, Ofcom must have regard to the statement of general policy when exercising these powers.⁶

Ofcom's Persistent Misuse Guidelines

2.15 In fulfilment of its duty under section 131 of the Act, Ofcom published its Persistent Misuse Guidelines on 1 March 2006.

2.16 The Persistent Misuse Guidelines provide examples of the types of behaviour that Ofcom considers may be forms of persistent misuse. One example is the misuse of ACS by making abandoned calls. Use of ACS (also known as "power diallers" or "predictive diallers"), which can initiate calls to a sequence of pre-stored numbers, means that many calls can be generated initially without the need for human intervention.⁷ If a number is dialled by an ACS and answered by a live individual, the call is terminated by the ACS if there is no call centre agent available to handle it, thereby becoming an Abandoned Call.⁸

2.17 In Ofcom's view, it is undeniable that even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety.⁹ Paragraph 6.16 of the Persistent Misuse Guidelines sets out procedures that companies using ACS can adopt which,

⁵ Section 130(4) of the Act as amended by the *Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2006*, SI 2006/1032, section 2(1).

⁶ Communications Act 2003 section 131(4).

⁷ See the Persistent Misuse Guidelines, paragraph 6.4.

⁸ See the Persistent Misuse Guidelines, paragraphs 5.1, 5.2 and 6.15.

⁹ See the Persistent Misuse Guidelines, paragraph 6.15.

taken as a package, will act as mitigating factors in establishing the seriousness of a particular act of misuse. These procedures are:

- a) the Abandoned Call Rate shall be no more than three percent of Live Calls on each individual campaign over any 24 hour period;¹⁰
- b) in the event of an Abandoned Call, a very brief recorded Information Message is played within two seconds of the call being answered, which contains at least the following information:
 - the identity of the company on whose behalf the call was made (which will not necessarily be the same company that is making the call);
 - details of a no charge (0800) or Special Services basic rate (0845) number the called person can contact so they have the possibility of declining to receive further calls from that company; and
 - includes no marketing content and is not used as an opportunity to market to the called person;
- c) calls which are not answered must ring for a minimum of 15 seconds before being terminated;
- d) when an Abandoned Call has been made to a particular number, any repeat calls to that number in the following 72 hours must be made by a live operator;
- e) for each outbound call a CLI number is presented to which a return call may be made which is not charged at a higher rate than the national call rate; and
- f) any call made by the called person to the contact number provided shall not be used as an opportunity to market to that person, without that person's consent.

2.18 Paragraph 6.16 of the Persistent Misuse Guidelines also requires that records that demonstrate compliance with the above procedures be kept for a minimum period of six months.

2.19 In assessing compliance with the Persistent Misuse Guidelines' requirement that the Abandoned Call Rate shall be no more than three percent of Live Calls on each individual campaign over any 24 hour period (as set out in paragraph 2.17(a) above), Ofcom considers that in circumstances where a company is operating multiple campaigns from either one or more call centres, it may be appropriate to calculate the Abandoned Call Rate using an aggregation of data across all campaigns run by and on behalf of the company in any one 24 hour period. This provides one figure for the Abandoned Call Rate for the company as a whole in any given 24 hour period, giving Ofcom an overall picture of the performance of a company's dialling activity operations (whether run internally or outsourced) against the requirements of the Persistent Misuse Guidelines.

2.20 Where Ofcom has aggregated a company's call data and proposes to rely on aggregated figures for the purpose of a notification issued under section 128 of the Act, Ofcom may, in any event, also provide performance figures for the company based on disaggregated data (that is, using results calculated by reference to each of

¹⁰ But see paragraph 2.19 for Ofcom's treatment of companies conducting multiple campaigns and call centres.

the company's calling campaigns and/or call centres) so that a company is able to ascertain the performance of call centre operations for each campaign and/or call centre and target any remedial action as may be appropriate and/or necessary.

Ofcom's programme of monitoring and enforcement

- 2.21 On 22 June 2006 Ofcom opened an own-initiative investigation of monitoring and enforcement of rules preventing annoyance caused to consumers by Silent and Abandoned calls as set out in the Persistent Misuse Guidelines. On 20 June 2007 Ofcom extended this programme of monitoring and enforcement for a further six months.
- 2.22 As part of this extended monitoring and enforcement programme, Ofcom identified a number of companies as having purchased an ACS through manufacturers of ACS equipment, from whom Ofcom had previously obtained client lists. Ofcom identified CCM as one such company.
- 2.23 On 18 April 2007 Ofcom issued CCM with a request for information under section 135 of the Act (the "Information Request"), requiring CCM to provide specified information, namely call centre activity over a period of six months from October 2006 and information on call centre procedures (relative to the procedures set out in paragraph 6.16 of the Persistent Misuse Guidelines).
- 2.24 On 25 April 2007, CCM replied to the Information Request providing the specified information for its two campaigns which operated during the Relevant Period, 'COM1' (which generates calls to commercial customers) and 'DOM1' (which generates calls to domestic customers). The specified information was provided for each campaign for each 24 hour period between 1 October 2006 and 18 April 2007 (inclusive), as follows:
- i) the total number of calls attempted;
 - ii) the total number of calls answered by an answering machine (including BT's 1571 service);
 - iii) the total number of calls answered by an individual;
 - iv) the total number of abandoned calls;
 - v) the total number of calls passed to a live operator;
 - vi) the abandoned call rate (i.e. the rate of calls abandoned relative to live calls); and
 - vii) the number of calls terminated or released by the ACS before being answered by an individual or an answering machine.
- 2.25 In addition, CCM provided information in relation to its compliance with the further procedures set out in paragraph 6.16 of the Persistent Misuse Guidelines and in paragraph 2.17 above.
- 2.26 As set out at paragraph 2.17(a), the Persistent Misuse Guidelines state that the Abandoned Call Rate shall be no more than three percent of Live Calls on each individual campaign over any 24 hour period. As outlined in paragraph 2.19, Ofcom considers that in some circumstances it may be appropriate to aggregate call data across campaigns and/or call centres. Ofcom understands that during the Relevant

Period, CCM operated two campaigns. Accordingly, Ofcom considers that in CCM's case it is appropriate to aggregate its call data in order to reach an overall Abandoned Call Rate for the company as a whole for each of the 24 hour periods in the Relevant Period.

- 2.27 Using the information supplied by CCM on 25 April 2007 in response to the Information Request, Ofcom calculated CCM's aggregated Abandoned Call Rate for each 24 hour period during the Relevant Period using the Abandoned Call Rate formula set out in paragraph 12 of the Notification.¹¹
- 2.28 Ofcom then identified the number of 24 hour periods during the Relevant Period in which CCM made an Excessive Number of Abandoned Calls as defined in paragraph 12 of the Notification.

Ofcom's assessment and decision

- 2.29 In order to exercise its power under section 128(1) to issue a notification, Ofcom must establish:
- a) That the notified person has used an electronic communications network or services;
 - b) That the effect or likely effect of that use, or of conduct arising from that use, is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety so as to amount to misuse; and
 - c) That the misuse is persistent in that it represents either a pattern of behaviour or practice, or recklessness as to whether persons suffer annoyance, inconvenience or anxiety.
- 2.30 This section sets out the basis on which Ofcom has decided to issue the Notification to CCM, taking into account the elements outlined above.

Use of an electronic communications network or services

- 2.31 The Act defines "electronic communications network" to mean:

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

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

(i) apparatus comprised in the system;

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

¹¹ 24 hour periods falling within the Relevant Period, but during which CCM did not attempt to make any calls, have not been included in the data considered by Ofcom. Such periods are therefore not included in the total of 120 24 hour periods set out in Annex 2.

(iii) software and stored data.”¹²

2.32 The Act defines “electronic communications service” to mean:

“...a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except so far as it is a content service.”¹³

2.33 The Act defines “signal” as including:

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

(b) signals serving for the impartation of anything between persons, between a person and a thing or between things, or for the actuation or control of any apparatus.”¹⁴

2.34 CCM uses voice telephony to make outgoing calls to users of publicly available telephony services. Initiating these calls comprises the use both of one or more electronic communications networks (that being the network of CCM’s provider and/or the network of the provider which provides telephony services to the party being called) and use of electronic communications services (being the use of the voice telephony service provided to CCM by a communications provider).

2.35 The making of calls which result in Abandoned Calls comprises the use of an electronic communications service, since it is a service consisting in or the principal feature of which is, the conveyance by means of an electronic communications network of signals, as defined. The transmissions between CCM and the recipients of these Abandoned Calls, and the data comprised therein, therefore falls within this definition.

2.36 Ofcom therefore considers that, for the reasons outlined at paragraphs 2.34 and 2.35 above, CCM has used both electronic communications networks and electronic communications services as defined in the Act.

The effect or likely effect of this use, or of conduct arising from this use, is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety so as to amount to misuse

2.37 As stated in paragraph 2.8 above, section 128(5) of the Act sets out what constitutes a misuse of an electronic communications network or electronic communications service.

2.38 Ofcom’s Persistent Misuse Guidelines set out Ofcom’s view that Abandoned Calls may cause unnecessary annoyance, inconvenience or anxiety to those who receive them.¹⁵ The Persistent Misuse Guidelines also note that a persistent failure by a company using an ACS (for example, within a call centre) to ensure that they do not generate more calls than their agents can handle will constitute an act of persistent misuse and may lead to the issue of a notification under section 128.¹⁶

¹² Section 32(1) of the Act.

¹³ Section 32(2) of the Act.

¹⁴ Section 32(10) of the Act.

¹⁵ For the reasons set out in paragraphs 6.11 to 6.14 of the Persistent Misuse Guidelines.

¹⁶ Persistent Misuse Guidelines, paragraph 6.15.

- 2.39 Ofcom has assessed CCM's conduct against the requirements of the Persistent Misuse Guidelines insofar as they relate to the use of an ACS, particularly at paragraph 6.16 of the Persistent Misuse Guidelines.¹⁷ The results of that analysis are contained in Part 2 of Annex 1 to this Notification.
- 2.40 On the basis of the information provided to Ofcom, CCM engaged in misuse by making Abandoned Calls which amounted to an Excessive Number of Abandoned Calls on a total of 29 out of 120 24 hour periods during the Relevant Period¹⁸. Each of these 24 hour periods is identified in Annex 2. Ofcom therefore considers that it has reasonable grounds for believing that misuse has occurred during the Relevant Period within the meaning of section 128(5)(a) of the Act.

The misuse is persistent

- 2.41 As set out in paragraphs 2.9 and 2.10, sections 128(6) and 128(7) of the Act set out the basis on which misuse may be considered persistent.
- 2.42 On the basis of CCM having made an Excessive Number of Abandoned Calls on 29 out of 120 24 hour periods during the Relevant Period¹⁹, Ofcom considers that it has reasonable grounds for believing that the misuse engaged in by CCM has occurred on a persistent basis within the meaning of section 128(6)(a).²⁰
- 2.43 On the basis of the information contained in Part 2 of Annex 1 and Annex 2, and the assessment set out in paragraphs 2.40 to 2.42, Ofcom has decided to issue a Notification to CCM.

Other matters set out in the Notification

- 2.44 CCM has until the Deadline to make representations to Ofcom about the matters set out in this Notification and the accompanying Explanatory Statement.
- 2.45 If, after this time, CCM has not secured that the persistent misuse is brought to an end, and is not repeated, then Ofcom may issue CCM a further notification under section 129 of the Act.
- 2.46 If CCM has, in one or more notified respects, persistently misused an electronic communications network or electronic communications service, Ofcom may impose a penalty on CCM under section 130 of the Act.
- 2.47 Ofcom will also consider any submissions received, and actions taken to end the persistent misuse and/or the remedy the consequences of the persistent misuse when considering the amount of any penalty. The maximum penalty that may be imposed is £50,000 per contravention.

¹⁷ Also set out at paragraph 2.17 above.

¹⁸ On a disaggregated basis (that is, per campaign), CCM made an Excessive Number of Abandoned Calls in [x] out of a total of [x] 24 hour periods for COM1 and [x] out of a total of [x] 24 hour periods for DOM1. These figures are based on the information provided by CCM to Ofcom on 25 April 2007 in response to the Information Request.

¹⁹ The disaggregated figures per campaign are included at footnote 18.

²⁰ A summary of aggregated campaign activity data sent by CCM covering the relevant 120 24 hour periods is set out at Annex 2.

Annex 1

Summary of relevant information and evidence

Part 1 - CCM	
Company	Complete Credit Management Ltd
Address	2297 Coventry Road, Birmingham B26 3PU
Company number	04690658
Short description	Providers of debt recovery services
Use of ACS	Two campaigns both using ACS for outbound calls, on behalf of Complete Credit Management Ltd.
Part 2 - Persistent misuse	
Individual elements considered in Ofcom's assessment of whether Company's conduct amounts to persistent misuse	
Excessive Number of Abandoned Calls	An Excessive Number of Abandoned Calls were made in 29 of the 120 x 24 hour periods during the Relevant Period. ²¹
Information Message played?	The two campaigns both played an Information Message.
Calls left to ring 15 seconds before terminating?	The two campaigns both allowed calls to ring for 15 seconds before terminating the call.
Calls made within 72 hours of an abandoned call made by a live agent?	Yes
CLI presented	The two campaigns both presented a CLI.
Part 3 - Ofcom's investigation	
Date programme began	22 June 2006
Why information requested	CCM was identified as having purchased an ACS.
Date of information requests	18 April 2007
Date information received	25 April 2007
Deadline for Response to Notification	7 January 2008

²¹ The figures per campaign are included at footnote 18.

Annex 2

Summary of aggregated campaign activity data supplied by CCM²²

Date	Calls passed to Live Operator	Abandoned Calls (excluding calls answered by answering machine)	Abandoned Call Rate	Abandoned % >3%
01/10/2006	122	12	9.0%	Yes
02/10/2006	249	17	6.4%	Yes
03/10/2006	246	17	6.5%	Yes
04/10/2006	76	0	0.0%	No
05/10/2006	138	1	0.7%	No
06/10/2006	138	2	1.4%	No
09/10/2006	82	16	16.3%	Yes
10/10/2006	12	0	0.0%	No
12/10/2006	68	4	5.6%	Yes
13/10/2006	34	1	2.9%	No
17/10/2006	23	41	64.1%	Yes
18/10/2006	111	19	14.6%	Yes
20/10/2006	10	0	0.0%	No
23/10/2006	113	6	5.0%	Yes
24/10/2006	4	0	0.0%	No
30/10/2006	40	5	11.1%	Yes
31/10/2006	29	0	0.0%	No
03/11/2006	4	0	0.0%	No
06/11/2006	110	4	3.5%	Yes
07/11/2006	142	5	3.4%	Yes
08/11/2006	87	0	0.0%	No
09/11/2006	10	1	9.1%	Yes
10/11/2006	20	0	0.0%	No
20/11/2006	14	0	0.0%	No
21/11/2006	173	2	1.1%	No
22/11/2006	85	2	2.3%	No
23/11/2006	37	0	0.0%	No
24/11/2006	65	1	1.5%	No
27/11/2006	53	2	3.6%	Yes
28/11/2006	123	1	0.8%	No
29/11/2006	74	0	0.0%	No
30/11/2006	42	3	6.7%	Yes
01/12/2006	39	0	0.0%	No
06/12/2006	83	4	4.6%	Yes
07/12/2006	70	1	1.4%	No

²² In response to the Information Request, CCM provided separate call data for each of its two campaigns (COM1 and DOM1) which were operating during the Relevant Period. For the reasons set out in paragraph 2.19 of the Explanatory Statement, Ofcom has aggregated the data for each of these campaigns in order to calculate a single Abandoned Call Rate for CCM as a whole for each of the 24 hour periods listed above. Ofcom has also included the figures per campaign at footnote 18.

Imposition of penalty under section 130 of the Communications Act

Date	Calls passed to Live Operator	Abandoned Calls (excluding calls answered by answering machine)	Abandoned Call Rate	Abandoned % >3%
08/12/2006	17	2	10.5%	Yes
12/12/2006	135	3	2.2%	No
13/12/2006	133	2	1.5%	No
14/12/2006	81	7	8.0%	Yes
15/12/2006	73	0	0.0%	No
18/12/2006	111	4	3.5%	Yes
19/12/2006	80	1	1.2%	No
20/12/2006	43	0	0.0%	No
21/12/2006	12	1	7.7%	Yes
02/01/2007	16	0	0.0%	No
03/01/2007	25	0	0.0%	No
05/01/2007	16	0	0.0%	No
08/01/2007	76	1	1.3%	No
09/01/2007	183	5	2.7%	No
10/01/2007	162	4	2.4%	No
11/01/2007	94	2	2.1%	No
12/01/2007	47	0	0.0%	No
15/01/2007	22	0	0.0%	No
16/01/2007	86	1	1.1%	No
17/01/2007	132	8	5.7%	Yes
18/01/2007	186	6	3.1%	Yes
19/01/2007	156	2	1.3%	No
22/01/2007	82	0	0.0%	No
23/01/2007	274	13	4.5%	Yes
24/01/2007	362	4	1.1%	No
25/01/2007	214	0	0.0%	No
26/01/2007	345	4	1.1%	No
27/01/2007	52	1	1.9%	No
29/01/2007	563	12	2.1%	No
30/01/2007	798	35	4.2%	Yes
31/01/2007	838	36	4.1%	Yes
01/02/2007	738	41	5.3%	Yes
02/02/2007	642	6	0.9%	No
05/02/2007	763	13	1.7%	No
06/02/2007	762	106	12.2%	Yes
07/02/2007	824	10	1.2%	No
08/02/2007	673	10	1.5%	No
09/02/2007	372	9	2.4%	No
12/02/2007	863	27	3.0%	Yes
13/02/2007	806	11	1.3%	No
14/02/2007	476	6	1.2%	No
15/02/2007	355	12	3.3%	Yes
16/02/2007	531	2	0.4%	No
19/02/2007	138	3	2.1%	No
20/02/2007	562	15	2.6%	No
21/02/2007	503	9	1.8%	No
22/02/2007	757	6	0.8%	No

Imposition of penalty under section 130 of the Communications Act

Date	Calls passed to Live Operator	Abandoned Calls (excluding calls answered by answering machine)	Abandoned Call Rate	Abandoned % >3%
23/02/2007	265	3	1.1%	No
26/02/2007	623	6	1.0%	No
27/02/2007	634	10	1.6%	No
28/02/2007	339	6	1.7%	No
01/03/2007	383	14	3.5%	Yes
02/03/2007	318	7	2.2%	No
05/03/2007	651	8	1.2%	No
06/03/2007	699	12	1.7%	No
07/03/2007	704	13	1.8%	No
08/03/2007	753	10	1.3%	No
09/03/2007	978	11	1.1%	No
12/03/2007	481	4	0.8%	No
13/03/2007	481	3	0.6%	No
14/03/2007	425	2	0.5%	No
15/03/2007	503	5	1.0%	No
16/03/2007	267	4	1.5%	No
19/03/2007	380	4	1.0%	No
20/03/2007	469	5	1.1%	No
21/03/2007	501	8	1.6%	No
22/03/2007	519	9	1.7%	No
23/03/2007	365	6	1.6%	No
26/03/2007	245	3	1.2%	No
27/03/2007	624	5	0.8%	No
28/03/2007	978	8	0.8%	No
29/03/2007	303	1	0.3%	No
30/03/2007	998	11	1.1%	No
31/03/2007	503	5	1.0%	No
02/04/2007	81	2	2.4%	No
03/04/2007	749	2	0.3%	No
04/04/2007	325	2	0.6%	No
05/04/2007	172	3	1.7%	No
10/04/2007	269	3	1.1%	No
11/04/2007	156	1	0.6%	No
12/04/2007	138	2	1.4%	No
13/04/2007	66	0	0.0%	No
16/04/2007	37	1	2.6%	No
17/04/2007	276	5	1.8%	No
18/04/2007	325	4	1.2%	No
120 24 hour periods²³				29

²³ 24 hour periods where no calls were attempted by CCM have not been included, as per footnote 11.