



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

Notice served on
Redress Financial Management Limited by the
Office of Communications ("Ofcom")

This is a non-confidential version. Confidential
information and data has been redacted and the Annexes
omitted. Redactions are indicated by [X]

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Section 1

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

1. This notification is issued to Redress Financial Management Limited, trading as Redress Claims (“Redress”), registered company number **06240014** and registered address Unit 3, The Courtyard, Mid Point Thornbury, Bradford, BD3 7AY.
2. This notification:
 - a. sets out Ofcom’s determination pursuant to section 128(1) of the Communications Act 2003 (the “Act”);
 - b. specifies the use made of an electronic communications network or electronic communications services by Redress that Ofcom considers constitutes persistent misuse; and
 - c. specifies the period during which Redress has an opportunity to make representations about the matters notified.
3. Words or expressions used in this notification and the accompanying explanatory statement have the same meaning as in the Act, except as otherwise defined.

Section 128 of the Act

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

Ofcom’s determination

7. Ofcom hereby determines that there are reasonable grounds for believing that, between 15 August 2012 and 15 November 2012 (the “relevant period”), Redress persistently misused an electronic communications network or electronic communications services on the following basis:
 - a. Redress misused the network or service in accordance with section 128(5)(a) of the Act as the effect or likely effect of its use has been to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety; and

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

The use Ofcom considers to be persistent misuse

9. In making this determination and in accordance with section 131 of the Act, Ofcom has had regard to its *Revised statement of policy on the persistent misuse of an electronic communications network or service 2010* (the "policy statement"), published on 1 October 2010¹.
10. Accordingly, Ofcom considers that there are reasonable grounds for believing that during the relevant period Redress, by virtue of its use of an automated calling system (ACS), has persistently misused an electronic communications network or electronic communications services by making multiple (and certainly more than three) abandoned calls during each of 11 separate 24 hour periods. In total we estimate it made approximately 5,500 abandoned calls on those days. We consider it appropriate to take enforcement action in respect of these periods because the abandoned call rate also exceeded three per cent of live calls.
11. Ofcom considers that the effect or likely effect of such use of the network or service has been to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety and that this use constitutes "misuse" under the Act.
12. Ofcom also considers that the misuse is persistent as the misuse has been repeated on a sufficient number of occasions for it to be clear that the misuse represents a pattern of behaviour or practice.

Representations concerning this notification

13. Redress has until 5pm on **24 September 2013** (the "deadline") to make representations to Ofcom about the matters set out in this notification as explained in the accompanying explanatory statement and to take steps for securing that the misuse is brought to an end and is not repeated and remedying the consequences of the notified misuse.

Other matters

14. Following expiry of the deadline, if Ofcom is satisfied that Redress has in one or more of the notified respects persistently misused an electronic communications network or electronic communications services and has not taken all such steps as Ofcom considers appropriate for securing that the misuse is brought to an end and is not repeated and remedying the consequences of the notified misuse, then Ofcom may issue to Redress a further notification under section 129 of the Act.
15. Additionally or alternatively, if Redress has, in one or more of the ways set out in this notification, persistently misused a network or services, Ofcom may impose a penalty on Redress under section 130 of the Act.

¹ <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>.



**Neil Buckley (Director of Investigations, Competition Group) and Lynn Parker
(Director of Consumer Protection, CCEA) as decision makers for Ofcom**

22 August 2013

Section 2

Explanatory statement

Summary

2.1 This explanatory statement sets out Ofcom's reasons for its determination in paragraph 10 of the attached notification ("the notification") that Redress Financial Management Limited, trading as Redress Claims ("Redress"), has persistently misused an electronic communications network or electronic communications services.

Abandoned and silent calls

2.2 The notification concerns persistent misuse of an ECN or ECS by making abandoned calls. Most abandoned and silent calls are not generated with malicious or mischievous intent but by automated calling systems (ACS), used by call centres.

2.3 Use of ACS (also known as "power diallers" or "predictive diallers") means that calls can be initiated without the need for human intervention. If a telephone number is dialled by an ACS, but when the call is answered by the called person there is no call centre agent available to handle it or presented with the opportunity to handle it, then it becomes an abandoned call. In this instance, Ofcom considers that the recipient of an abandoned call should – as a minimum – hear a recorded information message identifying the caller.

2.4 A silent call is a type of abandoned call where the person called hears nothing on answering the phone and has no means of establishing whether anyone is at the other end. Silent calls may occur for a variety of reasons. They can occur for example when an ACS user does not include an information message in the scenario described above or as the result of a handling error by a call centre agent.

2.5 Ofcom – through its Consumer Complaints Team (CCT) – received 31,097 complaints about silent calls in 2012.² Ofcom-commissioned research published in May 2013³ showed that 82% of UK adults with a landline phone reported experiencing a nuisance call⁴ in the four week fieldwork period.⁵ 54% reported experiencing a silent call, and an estimated 17% received an abandoned call. Calls about payment protection insurance (PPI) claims made up 22% of all nuisance calls where respondents were able to provide a description of the product or service⁶. The research also found that consumers found abandoned calls to be annoying (86%), worrying (10%) and distressing (4%).

² Telecoms Complaints Bulletin, February 2013, http://stakeholders.ofcom.org.uk/binaries/enforcement/telecoms-complaints-bulletin/Telecoms_Complaints_feb13.pdf

³ Landline Nuisance Calls Panel, Figure 3.1, <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/nuisance-calls-research/nuisance-calls.pdf>

⁴ Defined as "unwanted" calls. This includes unsolicited sales calls, silent and abandoned calls.

⁵ 14 January to 10 February 2013

⁶ This was the largest identifiable sector.

Legislative framework

2.6 Section 128(1) of the Act enables Ofcom to issue a notification to a person where it has reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services.

2.7 Section 128(5) of the Act defines “misuse” as follows:

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

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

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

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

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

(a) a pattern of behaviour or practice; or

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

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

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

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

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

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

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

“(1) This section applies where –

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

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

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

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

- (a) securing that his misuse is brought to an end and is not repeated, and
- (b) remedying the consequences of the notified misuse,

as may be specified in the notification.”

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

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

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

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

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

electronic communications network or electronic communications service.

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

(4) The amount of penalty imposed is to be such amount not exceeding £2,000,000⁷ 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."

2.13 Under section 131 Ofcom has a duty to publish a statement of its general policy with respect to the exercise of its powers under sections 128 to 130 of the Act. Ofcom must have regard to the statement of general policy in exercising these powers.⁸

Ofcom's policy

2.14 Ofcom's current statement of general policy (required by section 131 of the Act) was published on 1 October 2010 as the *Revised Statement of policy on the persistent misuse of an electronic communications network or service 2010* (the "policy statement").⁹

2.15 The policy statement provides examples of the types of behaviour that Ofcom considers may be forms of persistent misuse. One such example is making abandoned calls as a result of the use of ACS. In the document *Tackling abandoned and silent calls* (the regulatory statement in which the policy statement was published), Ofcom notes that "*Abandoned and silent calls will almost invariably result in consumer harm, which may range from inconvenience and annoyance through to genuine anxiety*"¹⁰.

2.16 In deciding in any case whether to take enforcement action, Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment.

⁷ Section 130(4) of the Act as amended by the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010-, SI 2010/2291, section 2(1).

<http://www.legislation.gov.uk/ukxi/2010/2291/article/2/made>

⁸ Communications Act 2003 section 131(4).

⁹ <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>.

¹⁰ 1.6, *Tackling abandoned and silent calls*

2.17 Ofcom will also take account of steps taken by ACS users to reduce the degree of consumer harm that abandoned or silent calls cause. Paragraphs A1.12-A1.59 of the policy statement provide guidance to ACS users as to how they can achieve this, and sets out the following measures:

- a) ACS users should ensure that the abandoned call rate is no more than three per cent of live calls per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over a 24 hour period. The policy statement provides the formula for calculating this.
- b) As the abandoned call rate will depend on whether or not answer machine detection technology (AMD) is used, AMD users must include a reasoned estimate of AMD false positives¹¹ when calculating an abandoned call rate (because AMD false positives are abandoned calls and should be recorded as such).
- c) In the event of an abandoned call (other than an AMD false positive), the ACS should start playing a very brief recorded information message no later than two seconds after the telephone has been picked up or within two seconds of the call being answered¹². The information message should contain 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 *Special Service* (080 – no charge) or a *Special Services* basic rate (0845 only) or a *Geographic Number* (01/02) or a *UK wide Number at a geographic rate* (03) number¹³ the called person can contact so they have the possibility of declining to receive further calls from that company; and
 - the information message should not include marketing content and should not be used as an opportunity to market to the called person.
- d) Where a call is not answered, the phone should ring for a minimum of 15 seconds before the call is terminated.
- e) When an abandoned call (other than an AMD false positive), has been made to a particular number, the ACS user should ensure that any repeat calls to that number in the following 72 hours are made with the guaranteed presence of a live operator (the “72 hour policy”).
- f) When a call has been identified by AMD equipment as being picked up by an answer machine (including AMD false positives), the ACS user should ensure that any repeat calls to that number within the same 24-hour period are made with the guaranteed presence of a live operator (the “24 hour policy”).

¹¹ AMD false positives occur when the technology mistakes a live person for an answer machine and terminates the call. In such circumstances the called party will experience a silent call.

¹² “within two seconds of the call being answered” means either (i) no later than two seconds after the telephone has been picked up; or (ii) no later than two seconds after an individual begins to speak (or “start of salutation”); or whichever is more applicable to the technology deployed. (A1.51 of the policy statement)

¹³ As defined in the National Telephone Numbering Plan as published from time to time by Ofcom under section 56 of the Act. The version referred to in the policy statement has been updated. The current version is at <http://stakeholders.ofcom.org.uk/binaries/telecoms/numbering/numbering-plan201212.pdf>

- g) For each outbound call, the ACS user should present a number to which customers can make return calls. This should be either a geographic number or a non-geographic number adopted as a Presentation Number that satisfies the Ofcom Guide to the use of Presentation numbers¹⁴.
- h) If a consumer calls the contact number provided, this should not be used as an opportunity to market to that consumer without his or her consent.
- i) The ACS user should keep records for a minimum of six months that demonstrate compliance with the above procedures.

Ofcom's programme of monitoring and enforcement

- 2.18 On 22 June 2006 Ofcom opened an own-initiative programme of monitoring and enforcement of principles preventing annoyance caused to consumers by silent and abandoned calls (the "programme"). The programme has been ongoing since that time.
- 2.19 In December 2010, we published an open letter¹⁵ to ACS users about the 24 hour policy, the threat of enforcement action should this and other elements of our persistent misuse policy not be complied with, and the increased maximum penalty level for persistent misuse which came into effect on 25 September 2010¹⁶. Since the new maximum penalty and the policy statement came into force, we have issued penalties against three companies for persistent misuse¹⁷.

The investigation

Background

- 2.20 We wrote to Redress on 17 May 2011¹⁸ to inform it that we had received a number of complaints about abandoned calls allegedly being generated by Redress, and asking it to reply in writing explaining what it was doing to operate in accordance with the policy statement. Redress responded to this letter on 9 June 2011¹⁹. We wrote again to Redress on 11 July 2012²⁰ to inform it that Ofcom had continued to receive complaints about abandoned and silent calls allegedly being generated by or on behalf of Redress, and asked it again to explain what action Redress was taking to ensure compliance with Ofcom's policy statement. Redress responded to this letter on 24 July 2012²¹ and provided a further response on 31 July 2012²².
- 2.21 Ofcom continued to receive complaints against CLIs associated with Redress. We therefore sought to obtain information about Redress' use of ACS using our formal information gathering powers.

¹⁴ Annex 1 of <http://stakeholders.ofcom.org.uk/telecoms/policy/calling-line-id/caller-line-id/#a>

¹⁵ http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/acs_users.pdf

¹⁶

<http://news.bis.gov.uk/content/Detail.aspx?ReleaseID=415608&NewsAreaID=2>

¹⁷ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/

¹⁸ Annex 1.

¹⁹ Annex 2.

²⁰ Annex 3.

²¹ Annex 4.

²² Annex 5.

Information gathering

- 2.22 Ofcom issued a Notice under section 135 of the Act to Redress on 21 January 2013 (the “First Notice”).²³ The First Notice required Redress to provide information on its outbound dialling activity using an ACS and its measures to ensure compliance with the policy statement.
- 2.23 Redress provided a response to the First Notice on 2 February 2013 (the “First Response”).²⁴
- 2.24 In the First Response, Redress told us that:
- a. Redress Financial Management also trades as Redress Claims;
 - b. Redress Financial Management has a call centre. Call activity is conducted under the trading name of Redress Claims;
 - c. Redress Financial Management operates only one call centre and that there are no call centres operated on behalf of Redress;
 - d. There was only one campaign during the relevant period using the presentation CLI 0844[<]. Redress “*ran this campaign for [a third party claims management company]*”;
 - e. Redress played the following recorded message for each call that was “*connected and not answered by an agent (Drop²⁵)*”.

“You were called by Redress Claims for marketing purposes, there is nothing to worry about, if you wish to be removed from our calling list please call us on 01274 [<].”
 - f. Its ACS terminated calls as unanswered after 18 seconds;
 - g. Its ACS had “*a universal setting per campaign with the ACS system that prevents DROPS being dialled within 72 hours*”; and
 - h. It did not use AMD over the relevant period.
- 2.25 Ofcom issued a second Notice under section 135 of the Act to Redress on 20 June 2013 (the “Second Notice”).²⁶ The Second Notice required Redress to provide information on:
- a. The nature of relationships between Redress and [a third party claims management company];
 - b. The names and contact details of Redress’ communications provider(s);
 - c. Whether Redress:

²³ Annex 6.

²⁴ Annexes 7 and 8.

²⁵ Redress refers to abandoned calls as “drops”. We understand that this is common industry terminology.

²⁶ Annex 9.

- (i) displayed two other CLIs (01274[redacted] and 0844[redacted]) during the relevant period (including confirmation that Redress had included all relevant calls in its response to the First Notice); and
- (ii) whether Redress was aware of anyone else displaying these CLIs; and

d. Details of when an advertising campaign was running and how these calls were included in the response to the first Notice.

2.26 Redress provided a response to the request on 28 June 2013 (the “second response”)²⁷. In it, Redress stated that [redacted] is “a trading style of [a third party claims management company]”. Redress provided a copy of its agreement to provide call centre services to [a third party claims management company].

2.27 Redress also told Ofcom that

“Redress uses ISDN circuits, the circuits have a default main number, this is 01274 [redacted]. The equipment used by Redress has the facility to display a different CLI it was used to display 0844[redacted]. Some of the numbers may have had the 01274 CLI displayed.”

2.28 On 3 July 2013 (in response to an email from Ofcom seeking clarification of one of Redress’ answers to the questions in our Second Notice²⁸) Redress confirmed that the data provided in response to the First Notice included all calls for the relevant period.

Ofcom’s assessment and decision

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

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

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

Use of an electronic communications network or electronic communications services

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

²⁷ Annex 10.

²⁸ Annex 11. Email from Phil Jones (Ofcom) to J Khan (Redress), 2 July 2013, and reply from J Khan to Phil Jones (Ofcom), 3 July 2013.

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

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

(i) apparatus comprised in the system;

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

(iii) software and stored data.”²⁹

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

“...a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except so far as it is a content service.”³⁰

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.”³¹

2.34 In its responses to the First and Second Notices, Redress told us that it made calls using an ACS in the relevant period. Redress therefore uses voice telephony to make outbound calls. Making these calls comprises the use of an electronic communications network (‘ECN’) as defined in the Act and use of electronic communications services (‘ECS’) as defined in the Act.

2.35 Paragraph A1.7 of the policy statement states:

“Section 128 of the Communications Act 2003 applies where “a person has persistently misused an electronic communications network or electronic communications services”. In Ofcom’s view, such misuse may be either direct or indirect. This means a person may be caught by section 128 either where they are misusing a network or services themselves, or where they have engaged another person to use the network or service on their behalf.”

2.36 In its response to the First Notice, Redress told us that it ran the campaign that it was operating over the relevant period “for [a third party claims management company]”.

2.37 Nevertheless, we consider that Redress was making calls on its own behalf for the reasons set out in the following paragraphs.

2.38 Paragraph A1.52 of the policy statement clearly states that the information message must identify the company on whose behalf the calls are being made. The

²⁹ Section 32(1) of the Act.

³⁰ Section 32(2) of the Act.

³¹ Section 32(10) of the Act.

information message played in the event of an abandoned call stated that the calls were being made by Redress:

“You were called by Redress Claims for marketing purposes, there is nothing to worry about, if you wish to be removed from our calling list please call us on 01274 [X].”

- 2.39 We consider Redress is the person who used the electronic communications network or service notwithstanding its statement that it made the calls on behalf of “[a third party claims management company]” and notwithstanding evidence that there was an agreement between Redress and [a third party claims management company] trading as [X] for the provision of call centre services by Redress, provided as part of Redress’ response to the Second Notice (the “agreement”). The agreement contains no provisions suggesting that it was the intent of either party that the conduct of Redress in making the calls should be attributable to [a third party claims management company], and the fact that Redress’s recorded message says that the calls were made by Redress seems to us the most important factor in this case.
- 2.40 Ofcom therefore considers that there are reasonable grounds for believing that Redress has used an ECN and ECS as defined in the Act.

Misuse

- 2.41 As stated above, section 128(5) of the Act sets out what constitutes a misuse of an ECN or ECS; that is the effect or likely effect of that use, or of conduct arising from that use, is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety so as to amount to misuse.
- 2.42 Evidence obtained from Redress using our formal powers³² demonstrates on the balance of probabilities that Redress made multiple abandoned calls during the relevant period (see Table 1 below). Ofcom research shows that consumers find abandoned calls “annoying”, “worrying” and “distressing” (see paragraph 2.5). Ofcom therefore considers that Redress’ use of an ECN or ECS in this case constitutes misuse.
- 2.43 Our policy statement sets out details of procedures that should be adopted to reduce the consumer detriment and/or the degree of concern that silent or abandoned calls cause. This includes monitoring the abandoned call rate using the formula set out in the policy statement to ensure that it does not exceed three per cent of live calls. Evidence provided in its First Response shows that Redress failed to adhere to the policy statement, as it did not ensure that its abandoned call rate, as calculated in accordance with the policy statement, remained below three per cent of live calls during the relevant period on 11 separate 24 hour periods.
- 2.44 Accordingly, Ofcom considers that there are reasonable grounds for believing that the effect or likely effect of Redress’ use of an electronic communications network and electronic communications services to make abandoned calls in a way contrary to the procedures in the policy statement – as set out above – has been to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety so as to amount to misuse. Ofcom makes this finding having regard, in particular, to the policy statement and the evidence referred to in paragraphs 2.5 and 2.42 above.

³² The First Response.

The misuse is persistent

- 2.45 As set out in paragraphs 2.8 and 2.9, sections 128(6) and 128(7) of the Act set out the basis on which misuse may be considered persistent.
- 2.46 Organisations using ACS should ensure, as far as possible, that they do not generate more calls than they can handle. A persistent failure to do so will constitute an act of persistent misuse and may lead to the issue of a section 128 notification.
- 2.47 The Act makes it clear that misuse becomes persistent when the behaviour in question is repeated on a sufficient number of occasions for it to be clear that the misuse represents a pattern of behaviour or practice or recklessness as to whether persons suffer annoyance, inconvenience or anxiety.
- 2.48 Ofcom is of the view that there are reasonable grounds for believing that in this case the misuse was repeated often enough to represent a pattern of behaviour or practice. The policy statement states that although what constitutes a cycle of repetitive behaviour will need to be determined on a case by case basis, it is likely to require a minimum of three instances of the conduct in question.³³
- 2.49 Ofcom considers that Redress' misuse was persistent because Redress made multiple abandoned calls, and certainly more than three abandoned calls, during each of the 11 days we have identified. We estimate the total number of abandoned calls on those days to be 5,500. In line with the policy statement, we consider it appropriate to take enforcement action in respect of these periods because during each of the 11 separate 24 hour periods, the abandoned call rate exceeded 3% of live calls. Table 1 sets out our determination of the abandoned call rates on these 11 occasions using data provided by Redress in the First Response.
- 2.50 Ofcom considers that there are reasonable grounds for believing that the misuse engaged in by Redress was persistent in that it was repeated on a sufficient number of occasions for it to be clear that the misuse represents a pattern of behaviour or practice as set out in section 128(6)(a) of the Act.

³³ Paragraph A1.10 of the policy statement

Table 1: abandoned call rates in excess of 3% during the relevant period

A	B	C	D	E	F	G	H
Date	Drops ¹	AMs ² to Live Operator	Live call to Live Operator	Ratio of AM to all calls passed to live operator	Estimated abandoned to AM	Estimated abandoned calls excluding calls abandoned to AM	Abandoned call rate
				= C/(C+D)	= B*E	= B-F	= G/(G+D)
Redress data				Ofcom calculations			
18/09/12	546	3632	4115	0.47	256	290	6.58%
21/09/12	604	3716	4239	0.47	282	322	7.06%
27/09/12	802	4392	4976	0.47	376	426	7.89%
01/10/12	549	4442	5392	0.45	248	301	5.29%
02/10/12	859	5242	5918	0.47	403	456	7.15%
03/10/12	954	4439	4922	0.47	452	502	9.25%
04/10/12	1326	4079	4096	0.50	662	664	13.96%
05/10/12	1367	5955	6790	0.47	639	728	9.69%
19/10/12	1068	2654	8150	0.25	262	806	9.00%
01/11/12	1027	5724	8221	0.41	422	605	6.86%
14/11/12	624	3737	9356	0.29	178	446	4.55%

Source: Data is sourced from the First Response.

Note 1: Drops are abandoned calls

Note 2: Answer machines

Note 3: See Annex 12 for Ofcom's calculation of the abandoned call rates.

Other matters set out in the notification

- 2.51 Redress has until 5pm on **24 September 2013** (the "deadline") to make representations to Ofcom about the matters set out in this notification as explained in this explanatory statement.
- 2.52 Redress has until the same deadline to take appropriate steps for securing that the misuse is brought to an end and is not repeated and remedying the consequences of the notified misuse.
- 2.53 Following expiration of the deadline, if Ofcom is satisfied that Redress has in one or more of the notified respects persistently misused an electronic communications network or electronic communications services and has not taken all such steps as Ofcom considers appropriate for securing that the misuse is brought to an end and is not repeated and remedying the consequences of the notified misuse then Ofcom may issue to Redress a further notification under section 129 of the Act.
- 2.54 Additionally or alternatively, if Redress has persistently misused a network or services, as set out in this Notification, Ofcom may impose a penalty on Redress under section 130 of the Act and in accordance with the Penalty Guidelines

published on 13 June 2011 under section 392 of the Act³⁴ and the policy statement. The maximum penalty that may be imposed is £2,000,000³⁵.

³⁴ <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

³⁵ The maximum level of penalty in section 130(4) of the Act was increased from £50,000 to £2m in September 2010, 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)*, SI 2010/2291, section 2(1).