



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

Issued to Abbey National plc by
the Office of Communications ('Ofcom')

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Redactions are indicated by [§<]

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 Abbey National plc ('Abbey') company number 02294747 and whose registered address is Abbey National House, 2 Triton Square, Regent's Place, London NW1 3AN, under section 128 of the Act, on 29 November 2007 and which is annexed to the Explanatory Statement attached (the 'section 128 notification'). Abbey 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 Abbey 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 Abbey under section 130 of the Act in respect of the persistent misuse notified by Ofcom.
5. Abbey made representations to Ofcom on 21 December 2007 (the 'representations') in relation to the matters notified. Ofcom has considered the representations and sets out its Determination below.

Determination made by Ofcom

6. For the reasons set out in the section 128 notification, and having considered the evidence provided by Abbey in its representations, Ofcom hereby determines that it is satisfied that, pursuant to section 130(2) of the Act, Abbey 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').
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.

Imposition of penalty under section 130 of the Communications Act

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 £30,000 on Abbey in relation to Abbey'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 Abbey

11. Abbey has until 5pm on Friday 18 April 2008 to pay to Ofcom £30,000 (thirty 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 Abbey on 17 April 2007 (the 'first information request') and 24 July 2007 (the 'second information request'). Abbey responded on 18 May 2007 and 10 August 2007 and again on 3 October 2007.
- 1.3 Following its investigation, Ofcom concluded that it had reasonable grounds for believing that Abbey persistently misused an electronic communications network or service and issued Abbey with a section 128 notification on 29 November 2007, a copy of which is attached to this Explanatory Statement.
- 1.4 The section 128 notification stated that Ofcom may issue a further notification to Abbey 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 Abbey under section 130 of the Act in respect of the persistent misuse notified by Ofcom.
- 1.5 Abbey had until 7 January 2008 to make representations on the matters contained in the section 128 notification. That period has now expired. Abbey made representations on 21 December 2007.
- 1.6 For the reasons set out in the section 128 notification, and having considered the evidence provided by Abbey in its representations, Ofcom determines that it is satisfied that, pursuant to section 130(2) of the Act, Abbey 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 £30,000 on Abbey in relation to Abbey'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 Abbey on 29 November 2007 after concluding that it had reasonable grounds for believing that Abbey persistently misused an electronic communications network or service. Abbey was allowed the period until 7 January 2008 to make representations about the matters notified, the period which has now expired, and Abbey responded on 21 December 2007. Ofcom is therefore satisfied that section 130 of the Act applies in relation to its assessment of Abbey'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 Abbey in its representations, Ofcom hereby determines that it is satisfied that, pursuant to section 130(2) of the Act, Abbey 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 Abbey 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 Abbey'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.

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

- In determining the seriousness of the contravention by Abbey, 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, Abbey's submissions to Ofcom on 10 August 2007 illustrated that the total number of abandoned calls it had made during the period under investigation, that is from 1 October 2006 to 25 April 2007 (the 'Relevant Period') was 16,123. In this context, Ofcom notes that the Persistent Misuse Guidelines state that even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety.⁷
- 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.⁸ In this case and as also set out in the section 128 notification, Abbey exceeded the 3% abandoned call rate on 138 of the 187 days on which Abbey made calls during the Relevant Period; that is 73.7% of the days set out in Annex 2 of the section 128 notification.⁹

3.6 Ofcom recognises that none of the calls made by Abbey 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."¹⁰ Ofcom recognises too, as noted above, that the Persistent Misuse Guidelines suggest compliance with certain procedures goes to an assessment of seriousness such as playing of an information message within 2 seconds of the call

⁷ Paragraph 6.15.

⁸ Paragraph 6.16.

⁹ As set out at footnote 22 of the section 128 notification, 24 hour periods which fall within the Relevant Period, but for which no call data was provided by Abbey have not been included in Ofcom's assessment of the number of days during which Abbey exceeded the 3% abandoned call rate.

¹⁰ Paragraph 6.11.

being answered for example. Ofcom notes Abbey's conduct in this regard - for example the call centre in this case had played an information message (as set out in the section 128 notification). However, in light of the level of abandoned calls and the relatively high percentage of days on which calls were made during the Relevant Period over which the abandoned call rate exceeded 3% in this particular case, Ofcom considers that Abbey's misuse remains a serious contravention of the persistent misuse provisions of the Act.

- 3.7 In terms of precedents set by previous cases, Ofcom has imposed penalties for persistent misuse of an electronic communications network or service in relation to the making of abandoned calls in four previous cases.¹¹ In those cases, the starting point of the penalties ranged from £32,500 to £45,000. Ofcom considers that whilst these precedents are useful to some degree, it is not appropriate to attach too much weight to those amounts as the starting point in each case is assessed against the circumstances of that particular case in the round.
- 3.8 In addition, Abbey's contravention in part occurred after four companies were fined in January 2007. Ofcom therefore considers that there is and remains a need to ensure that the threat of penalties will act as a sufficient incentive to comply with section 128 and the Persistent Misuse Guidelines across industry and for Abbey specifically.
- 3.9 In light of all of these considerations and the facts of this case, Ofcom considers that it is appropriate and proportionate to set the penalty starting point at £30,000. The starting point is sufficiently high that it reflects the seriousness of the contravention; 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

- 3.10 The Penalty Guidelines state that certain specific criteria may be relevant in adjusting the starting figure of the penalty, depending on the type of contravention.¹² These include, but are not limited to:
- a) Any gain (financial or otherwise) made by the regulated body in breach (or any connected body);
 - b) The degree of harm caused, or increased cost incurred by consumers or other market participants;
 - c) Size and turnover of the regulated body;
 - d) The extent to which any contravention was caused by a third party, or any relevant circumstances beyond the control of the regulated body;
 - e) The duration of the contravention; and
 - f) Whether a penalty in respect of the same conduct has already been imposed by Ofcom or another body.

¹¹ 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/

¹² See paragraph 5 of the Penalty Guidelines.

- 3.11 Ofcom has no evidence to suggest that the calls made by Abbey resulted in any gain (financial or otherwise) to Abbey or any connected body. In light of this, no adjustment is made to the starting figure in relation to paragraph (a).¹³
- 3.12 In relation to paragraph (b), Ofcom has already considered the degree of harm in respect of Abbey's contravention, as set out at paragraph 3.5 above. In light of this, no adjustment is made to the starting figure in relation to the degree of consumer harm.
- 3.13 Ofcom also has no evidence of increased cost incurred by consumers or other market participants due to Abbey's contravention. Ofcom does not consider any adjustment to the starting point is necessary in relation to this factor.
- 3.14 As regards paragraph (c), Ofcom has taken into account the size of Abbey and its turnover. According to the latest available financial information (the Annual Report and Accounts for the year ended 31 December 2007), Abbey had a total operating income of £2.47 billion for the year ending 31 December 2006 and a pre-tax profit of £428 million. In light of the fact that Ofcom considers that Abbey's breach was serious, as set out above at paragraph 3.5, Ofcom does not consider that the starting point of £30,000 is disproportionate in terms of Abbey's size and turnover.
- 3.15 Paragraph (d) does not result in any adjustment to the starting point because there is no evidence of any third party involvement in this case.
- 3.16 In considering the issue of duration as set out in paragraph (e), Ofcom has already taken into account the fact that Abbey's contravention continued even after Ofcom fined four companies for persistent misuse in January 2007.
- 3.17 Finally, paragraph (f) does not apply since neither Ofcom nor any other body has already imposed a penalty for the same conduct on Abbey.
- 3.18 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 £30,000.
- 3.19 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.
- 3.20 This is the first time that Ofcom has taken action against Abbey 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.

¹³ 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.

- 3.21 Ofcom notified Abbey on 29 November 2007 that it had reasonable grounds for believing that Abbey 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. Abbey was therefore made aware at this point that Ofcom considered Abbey to have contravened section 128 of the Act. Ofcom has no evidence at this stage that Abbey has continued its contravention after 29 November 2007. For this reason Ofcom has not increased the level of the penalty in relation to this factor.
- 3.22 There is no evidence to suggest that Abbey's senior management was aware that Abbey was in contravention of section 128 of the Act during the Relevant Period. As stated in its representations, it was only from mid-April 2007 that Abbey recognised its "underperformance" (Ofcom's first information request was sent to Abbey on 17 April 2007). Ofcom has no reason to consider that Abbey's senior management knew that Abbey was in contravention of section 128 of the Act during the Relevant Period. Furthermore, Ofcom does not consider that senior management ought to have been aware of the contravention in this case. In Ofcom's view, Abbey's senior management's general duty was to oversee the management and operation of the business and that that did not necessarily extend to a position where it ought to have been aware of the number of abandoned calls being made on a daily basis. This is especially true in this case given, as Abbey submitted in its representations that its "outbound activity was limited to a small area of ...[its] business". For this reason Ofcom has not increased the level of the penalty in relation to this factor.
- 3.23 However, Ofcom is of the view that there was an absence of, ineffective or repeated failures of internal procedures to prevent contravention of section 128 during the Relevant Period. It is evident from Abbey's representations that it was only after mid-April 2007, when Ofcom issued the first information request, that Abbey put in place operational steps they claim would address the key issues causing "underperformance". In light of this, and the fact that Abbey should have been aware from at least 1 March 2006 of Ofcom's policy towards silent and abandoned calls (that is the date of publication of the Persistent Misuse Guidelines), Ofcom considers that an increase in the level of the penalty is appropriate and proportionate for this reason.
- 3.24 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.
- 3.25 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.
- 3.26 Ofcom considers that Abbey 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, it appears that it was only Ofcom's formal requests for information that were the catalysts for work undertaken by Abbey to reduce its abandoned call rate. Ofcom has been provided with no evidence to suggest that Abbey took steps prior to Ofcom's requests for information to identify and mitigate potential contravention of section 128.

- In response to the first information request dated 18 May 2007, Abbey submitted that it had monitored its abandoned call rate and managed its outbound calling activity. Ofcom was not provided with any details of steps taken by Abbey prior to the information request to bring its performance in line with the Persistent Misuse Guidelines.
- On 10 August 2007 as part of its response to the second information request, Abbey did refer to an action plan that had been put in place. It stated:

“we have put in place an action plan to reduce the abandoned call rate. We expect the abandoned call rate to fall below the 3% maximum threshold in the near future and to be maintained below this level.”

- 3.27 Ofcom considers that the work undertaken by Abbey to identify and mitigate external factors was only as a result of Ofcom bringing Abbey's attention to its outbound calling programme, rather than a result of pro-active steps being taken independently of contact with Ofcom. This is supported in Abbey's representations to the section 128 notification where it stated that "Underperformance in this area was recognised by Abbey in mid-April [2007] and immediate steps instigated to address the key issues causing such problems". Ofcom first contacted Abbey regarding its outbound call operations, by way of the first information request, on 17 April 2007.
- 3.28 Ofcom therefore has no evidence which shows that Abbey 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.
- 3.29 Ofcom notes that the Persistent Misuse Guidelines set out that the abandoned call rate shall be no more than 3% of live calls on each individual campaign over any 24 hour period.¹⁴ Abbey asked Ofcom in its representations to take into consideration that the overall 12 month average percentage and volume of abandoned calls was low. Specifically, Abbey said it had made a total of 553,532 live calls in "12 months", 15,291 of which were abandoned live calls, representing an average of a 2.7% abandoned call rate over the "last 12 months". As the relevant percentage rate is that for a 24 hour period per campaign, and this is set out clearly in the Persistent Misuse Guidelines, not an average over 12 months, Ofcom does not consider that this factor should lead to any decrease in the level of penalty.
- 3.30 In its representations, Abbey has provided evidence of actions taken to end its contravention and remedy the consequences of its contravention. In summary, the representations stated that Abbey had taken steps to improve its performance in 4 areas; that of a) technology and processes; b) Key Performance Indicators ('KPIs') and reporting; c) real-time dialler operation and; d) [redacted] as follows:

¹⁴ Paragraph 6.16.

- **Technology and processes:** Abbey said it had reduced the number of “distinct dialler lists” from 432 to 43, enabling improved management of outbound dialling and that as a result of appointing BT as consultants in order to find ways to improve compliance, it had switched from a practice of ‘predictive’ dialling to ‘progressive’ dialling;¹⁵
- **KPIs and reporting:** Abbey stated that it had a) introduced Ofcom compliance metrics into daily performance reporting to senior management; b) introduced compliance into weekly reports reviewed by the Chief Risk Officer and Retail Risk Director group; c) introduced reports to monitor the performance of call centre agent behaviour that would unknowingly cause a call to be abandoned;
- **Realtime dialler operation:** Abbey submitted that it had introduced three “campaign management” roles to monitor and manage outbound dialling during opening hours and a policy of passing answer machine calls to agents, in order to mitigate the risk of answer machine detection (‘AMD’) equipment failing to recognise a live individual;¹⁶
- [3<]
- Abbey also outlined plans for 2008 which it said would safeguard future performance. These consisted of automated solutions, forecast and resource modelling and ongoing consultancy.

3.31 Although Ofcom is satisfied that the extent and timeliness of these actions should be sufficient to end the contravention as stated in the section 128 notification and to ensure that it is not repeated, Ofcom considers that these steps should have been undertaken by Abbey 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 Abbey ought to have undertaken in any event.

3.32 Ofcom is satisfied that Abbey has taken appropriate steps to remedy the consequences of its breach. Abbey states in its representations that it “has a policy of offering customers who experienced distress and inconvenience a gesture of goodwill relative to their personal circumstances”. Ofcom would usually expect a company to actively remedy any consequences of its breach, whereas in this case Abbey 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 Abbey were silent, Ofcom is satisfied that Abbey’s complaint handling process is sufficient for Ofcom to consider that steps have been taken to remedy the consequences of Abbey’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.

3.33 Abbey 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. Abbey has additionally made representations

¹⁵ Ofcom understands that making calls in ‘progressive’ mode should ensure a call centre agent is always available to speak to a live individual.

¹⁶ See footnote 12 of the section 128 notification, where Ofcom notes potential inaccuracies that may result from false positives generated by AMD equipment.

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 what would be expected.

3.34 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.

3.35 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.¹⁷ Similarly, the greater the number of people affected by the misuse, the higher the level of penalty that it is appropriate to impose.¹⁸

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

3.37 The Persistent Misuse Guidelines also set out some objective elements that Ofcom will take into consideration when assessing the seriousness of persistent misuse.¹⁹ 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 3.20, Abbey 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 Abbey's senior management was aware that Abbey 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 Abbey 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 3.30 to 3.32 explain how Ofcom has taken into account the actions by Abbey to end the contravention and remedy the consequences of contravention. These actions would appear to demonstrate good faith by Abbey.

¹⁷ See paragraph 9.6 of the Persistent Misuse Guidelines.

¹⁸ See paragraph 9.7 of the Persistent Misuse Guidelines.

¹⁹ Paragraphs 9.8, 9.9 and 9.10 of the Persistent Misuse Guidelines.

- How great is the damage/harm done? Ofcom has taken into account the number of abandoned calls made during the relevant period and considered the level of consumer harm in light of this in determining the seriousness of the case.
- Where does the misuse fall on the spectrum of distress that extends from inconvenience through irritation to anxiety? Ofcom has taken the spectrum of distress of the calls made in this case into account in assessing seriousness – 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%.

3.38 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 these elements have already been taken into account in determining the level of the penalty following the Penalty Guidelines.

Final amount of penalty

3.39 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, Abbey'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.

3.40 Therefore, having taken into account sections 130(4) and 130(5) of the Act, including Abbey'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 Abbey in relation to its contravention of section 128 of the Act in this case is £30,000.

Conclusion

3.41 Ofcom has concluded that the criteria in section 130 of the Act have been met and that it may impose a penalty on Abbey in relation to its contravention of section 128 of the Act.

3.42 Having taken into account all the relevant circumstances, Ofcom has decided that it is appropriate and proportionate to impose on Abbey a penalty of £30,000 in relation to Abbey's contravention of section 128 of the Act.

3.43 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 Abbey National plc by the
Office of Communications ("Ofcom")

Date: 29 November 2007

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Notification under section 128 of the Communications Act 2003

1. This Notification is issued to Abbey National plc (“Abbey”), whose company number is 02294747. 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 Abbey 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 25 April 2007 (the “Relevant Period”), Abbey 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 Abbey 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 Abbey, 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 Abbey 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. Abbey 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, Abbey 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 Abbey a further notification under section 129 of the Act.
11. Ofcom notes the information provided by Abbey on 10 August and 3 October 2007 regarding the ‘action plan’ put in place by Abbey for the purpose of reducing its Abandoned Call Rate. Ofcom also notes the monthly performance figures submitted by Abbey on 3 October 2007. To date, Ofcom has not received details of the “action plan” referred to by Abbey. Ofcom invites Abbey to make representations, in response to this Notification, on the matters raised in its letters of 10 August and 3 October and, specifically, the steps it has taken to secure that the misuse is brought to an end and is not repeated.
12. If Abbey 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 Abbey 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 Abbey;
 - b) any steps taken by Abbey for securing that the notified misuse is brought to an end and is not repeated; and
 - c) any steps taken by Abbey to remedy the consequences of the notified misuse.

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.

Interpretation

13. 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:

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

“Automated Calling System” (ACS) means a system which is capable of automatically initiating a sequence of calls to more than one destination in accordance with instructions stored 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 Abbey 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 Abbey'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, Abbey 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 Abbey is engaging in persistent misuse on an ongoing basis. Since beginning its investigation Abbey has advised Ofcom that it has implemented an 'action plan' with the aim of ensuring that its use of ACS is consistent with the Persistent Misuse Guidelines and therefore section 128 of the Act. Ofcom invites Abbey to make representations in response to the Notification on the details of its 'action plan' and the steps it has taken for securing that the misuse is brought to an end and is not repeated.
- 2.6 Abbey 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, Abbey has not secured that any persistent misuse still occurring in respect of which it has been

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

notified is brought to an end, and is not repeated, Ofcom may issue a further notification to Abbey under section 129 of the Act. Ofcom may also impose a penalty on Abbey under section 130 of the Act in respect of the persistent misuse notified by Ofcom.

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 –

- (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

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.

- 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, 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.

⁹ See the Persistent Misuse Guidelines, paragraph 6.15.

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

- 2.20 Where Ofcom has aggregated a company's calling 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 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 Abbey as one such company.
- 2.23 On 17 April 2007, Ofcom issued to Abbey a request for information under section 135 of the Act (the "First Information Request"), requiring Abbey 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 18 May 2007, Abbey replied to the First Information Request providing the specified information for its one call centre, "Debt Management Organisation" which operates one campaign, for each 24 hour period of calling between 1 October 2006 and 25 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, Abbey 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 On 24 July 2007 Ofcom issued to Abbey a second request for information under section 135 of the Act (the "Second Information Request"), requiring Abbey to re-calculate its Abandoned Calls data (as provided in its response to the First

Information Request) by removing answer machine call data, and using the Ofcom formula to calculate its Abandoned Call Rate.¹¹

- 2.27 On 10 August 2007, Abbey responded to the Second Information Request. In this response Abbey stated:

"We have put in place an action plan to reduce the abandoned call rate. We expect the abandoned call rate to fall below the 3% maximum threshold in the near future and to be maintained below this level."

- 2.28 In the same response, Abbey advised Ofcom that it had estimated the number of calls classified as answer machine call data, in order to re-calculate its Abandoned Calls data and hence calculate its Abandoned Call Rate. Abbey explained its reasoning for this in the following way:

"Abbey's ACS uses industry standard software and components. When a call is connected this software makes a record of the connection and marks a code indicating whether an answer machine was detected or not. Where this connection is dropped because no live operator is operator is available, this marker is over-written with a code indicating that the call was abandoned. This marker does not distinguish between calls abandoned where an answer machine was detected and those where no answer machine was detected. This prevents precise measurement of the data requested".¹²

- 2.29 Ofcom does not seek to challenge the methodology used by Abbey in performing the necessary estimations described in paragraph 2.28 above. Ofcom notes Abbey's statement in its response of 10 August 2007 that it has "begun consultations with British Telecom to develop a solution [to the issue of estimating Abandoned Call figures]", and that "Abbey will implement a solution at the earliest practical opportunity".

- 2.30 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, Abbey operated one call centre and one campaign. Accordingly, Ofcom considers that there is no need in Abbey's case to aggregate any data as all calls were undertaken by the same call centre for the purpose of the same campaign.

- 2.31 Using the information supplied by Abbey on 10 August 2007, in response to the Second Information Request, Ofcom calculated Abbey's Abandoned Call Rate for each 24 hour period during the Relevant Period using the Abandoned Call Rate formula set out in paragraph 13 of the Notification.

¹¹ 'Answer machine call data' means calls answered by an answering machine which were subsequently terminated by the ACS.

¹² Where diallers are linked to answer machine detection ("AMD") equipment, Ofcom is aware that the number of Abandoned Calls may be understated due to false positives, as detection rates are unlikely to be totally accurate. In this context a false positive occurs when AMD equipment incorrectly records a terminated call as being answered by an answer machine when in fact it was answered by an individual. The call is therefore logged as answer machine call data, when it should be recorded as an Abandoned Call.

- 2.32 Ofcom then identified the number of 24 hour periods during the Relevant Period in which Abbey made an Excessive Number of Abandoned Calls as defined in paragraph 12 of the Notification.
- 2.33 On 3 October 2007, Abbey again wrote to Ofcom enclosing an updated spreadsheet containing information on its Abandoned Call Rate for the period 1 May 2007 to 28 September 2007. Abbey stated that its Abandoned Call Rates for August and September were "within the maximum threshold required of abandoned calls" and that these improvements "are a direct result of the implementation of the action plan referred to in [their] letter dated 10 August". Ofcom has not, however, received details of steps taken by Abbey pursuant to the 'action plan' referred to in its letters of 10 August and 3 October 2007.

Ofcom's assessment and decision

- 2.34 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.
- 2.35 This section sets out the basis on which Ofcom has decided to issue the Notification to Abbey, taking into account the elements outlined above.

Use of an electronic communications network or services

- 2.36 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

(iii) software and stored data."¹³

- 2.37 The Act defines "electronic communications service" to mean:

¹³ Section 32(1) of the Act.

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

2.38 The Act defines “signal” as including:

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

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

2.39 Abbey 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 Abbey’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 Abbey by a communications provider).

2.40 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 Abbey and the recipients of these Abandoned Calls, and the data comprised therein, therefore falls within this definition.

2.41 Ofcom therefore considers that, for the reasons outlined at paragraphs 2.39 and 2.40 above, Abbey 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

2.42 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.

2.43 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.¹⁶ 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 128.¹⁷

2.44 Ofcom has assessed Abbey’s conduct against the requirements of the Persistent Misuse Guidelines insofar as they relate to the use of an ACS, particularly at

¹⁴ Section 32(2) of the Act.

¹⁵ Section 32(10) of the Act.

¹⁶ For the reasons set out in paragraphs 6.11 to 6.14 of the Persistent Misuse Guidelines.

¹⁷ Persistent Misuse Guidelines, paragraph 6.15.

paragraph 6.16 of the Persistent Misuse Guidelines.¹⁸ The results of that analysis are contained in Part 2 of Annex 1 to this Notification.

- 2.45 On the basis of the information provided to Ofcom, Abbey engaged in misuse by making Abandoned Calls which amounted to an Excessive Number of Abandoned Calls on a total of 138 out of 187 of the 24 hour periods during the Relevant Period. 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.¹⁹
- 2.46 Using the information submitted by Abbey on 3 October 2007, Ofcom has calculated the following monthly figures for the period 1 May 2007 up to and including 28 September 2007:

Month (2007)	Number of 24 hour periods during which Abbey made an Excessive Number of Abandoned Calls
May	7
June	21
July	21
August	9
September	0

- 2.47 Ofcom notes the advice received from Abbey that an ‘action plan’ is now in place, the implementation of which aims to ensure that its use of an ACS is now consistent with the Persistent Misuse Guidelines and section 128 of the Act. Further, Ofcom notes the new data provided which covers 1 May to 28 September 2007 and Abbey’s assertion that “...improvements are a direct result of the implementation of the action plan [...]”. Ofcom invites Abbey to make representations in response to the Notification on the details of its ‘action plan’ and the steps it has taken for securing that the misuse is brought to an end and is not repeated.

The misuse is persistent

- 2.48 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.
- 2.49 On the basis of Abbey having made an Excessive Number of Abandoned Calls on 138 out of 187 of the 24 hour periods during the Relevant Period, Ofcom considers that it has reasonable grounds for believing that the misuse engaged in by Abbey has occurred on a persistent basis within the meaning of section 128(6)(a).²⁰

¹⁸ Also set out at paragraph 2.17 above.

¹⁹ In accordance with the requirements of Ofcom’s Second Information Request, Abbey’s Abandoned Call Rate calculation excludes calls answered by an answer machine which were subsequently terminated by the ACS. As noted in paragraph 2.28 above, Abbey has estimated the number of such calls. As noted previously in footnote 12, Ofcom is aware of the effect of the use of AMD on Abandoned Call data. Ofcom does not seek to challenge the methodology used by Abbey in performing the necessary estimations described in paragraph 2.28 above. Ofcom notes Abbey’s statement in its response of 10 August 2007 that it has “begun consultations with British Telecom to develop a solution [to the issue of estimating Abandoned Call figures]”, and that “Abbey will implement a solution at the earliest practical opportunity”.

²⁰ A summary of call centre activity reports sent by Abbey covering the relevant 187 24 hour periods is set out at Annex 2. Note in particular the explanation included at footnote 24 of the total number of 24 hour periods during the Relevant Period on which Ofcom’s assessment is based.

- 2.50 On the basis of the information contained in Part 2 of Annex 1 and Annex 2, and the assessment set out in paragraphs 2.45 to 2.49, Ofcom has decided to issue a Notification to Abbey.

Other matters set out in the Notification

- 2.51 Abbey has until the Deadline to make representations to Ofcom about the matters set out in this Notification and the accompanying Explanatory Statement.
- 2.52 If, after this time, Abbey has not secured that the persistent misuse is brought to an end, and is not repeated, then Ofcom may issue Abbey a further notification under section 129 of the Act.
- 2.53 If Abbey has, in one or more notified respects, persistently misused an electronic communications network or electronic communications service, Ofcom may impose a penalty on Abbey under section 130 of the Act .
- 2.54 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.

Annex 1

Summary of relevant information and evidence

Part 1 - Abbey

Company	Abbey National plc
Address	Abbey National House, 2 Triton Square, Regent's Place, London, NW1 3AN
Company number	02294747
Short description	Providers of financial services to UK consumers
Use of ACS	One call centre using ACS for outbound calls by Abbey Retail Credit Risk directorate

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 138 of the 187 x 24 hour periods during the Relevant Period. ²¹ This figure is based on Abbey's own estimation of abandoned calls which exclude those made to an answer machine, as described at paragraph 2.28 and footnote 19.
Information Message played?	The call centre played an Information Message.
Calls left to ring 15 seconds before terminating?	The call centre 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 call centre presented a CLI.

Part 3 - Ofcom's investigation

Date programme began	22 June 2006
Why information requested	Abbey was identified as having purchased an ACS.
Date of information requests	17 April 2007 and 24 July 2007
Date information received	18 May 2007, 10 August 2007, 3 October 2007.
Deadline for Response to Notification	7 January 2008

²¹ Ofcom has based its assessment of Abbey's persistent misuse solely on information provided by Abbey which relates to the Relevant Period. However Ofcom notes the further information provided by Abbey which relates to the period 1 May to 28 September 2007, and invites Abbey to make representations, in response to the Notification, on the steps it has taken to secure that the misuse is brought to an end and is not repeated.

Annex 2

Summary of call centre activity reports supplied by Abbey National plc²²

Date	Passed to Live Operator	Abandoned Calls (excluding calls answered by answering machine)	Abandoned Call Rate	Abandoned % >3%
01/10/2006	[X]	[X]	[X]	Yes
02/10/2006	[X]	[X]	[X]	Yes
03/10/2006	[X]	[X]	[X]	Yes
04/10/2006	[X]	[X]	[X]	Yes
05/10/2006	[X]	[X]	[X]	Yes
06/10/2006	[X]	[X]	[X]	Yes
07/10/2006	[X]	[X]	[X]	Yes
08/10/2006	[X]	[X]	[X]	Yes
09/10/2006	[X]	[X]	[X]	Yes
10/10/2006	[X]	[X]	[X]	Yes
11/10/2006	[X]	[X]	[X]	Yes
12/10/2006	[X]	[X]	[X]	Yes
13/10/2006	[X]	[X]	[X]	Yes
14/10/2006	[X]	[X]	[X]	Yes
15/10/2006	[X]	[X]	[X]	Yes
16/10/2006	[X]	[X]	[X]	Yes
17/10/2006	[X]	[X]	[X]	Yes
18/10/2006	[X]	[X]	[X]	Yes
19/10/2006	[X]	[X]	[X]	Yes
20/10/2006	[X]	[X]	[X]	Yes
21/10/2006	[X]	[X]	[X]	Yes
22/10/2006	[X]	[X]	[X]	Yes
23/10/2006	[X]	[X]	[X]	Yes
24/10/2006	[X]	[X]	[X]	Yes
25/10/2006	[X]	[X]	[X]	Yes
26/10/2006	[X]	[X]	[X]	Yes
27/10/2006	[X]	[X]	[X]	Yes
28/10/2006	[X]	[X]	[X]	Yes
30/10/2006	[X]	[X]	[X]	Yes
31/10/2006	[X]	[X]	[X]	Yes
01/11/2006	[X]	[X]	[X]	Yes
02/11/2006	[X]	[X]	[X]	Yes
03/11/2006	[X]	[X]	[X]	Yes
04/11/2006	[X]	[X]	[X]	Yes

²² 24 hour periods which fall within the Relevant Period, but for which no data was supplied by Abbey, are not included in the above summary. Ofcom notes that whilst ACS data is available for 8 November 2006, no calls made by Abbey's call centre on that date were answered by individuals, therefore resulting in a nil return for that date. Ofcom has included 8 November 2006 in the total number of days on which its assessment is based during the Relevant Period.

Imposition of penalty under section 130 of the Communications Act

Date	Passed to Live Operator	Abandoned Calls (excluding calls answered by answering machine)	Abandoned Call Rate	Abandoned % >3%
06/11/2006	[X]	[X]	[X]	Yes
07/11/2006	[X]	[X]	[X]	Yes
08/11/2006	[X]	[X]	[X]	No
09/11/2006	[X]	[X]	[X]	Yes
10/11/2006	[X]	[X]	[X]	Yes
11/11/2006	[X]	[X]	[X]	Yes
13/11/2006	[X]	[X]	[X]	Yes
14/11/2006	[X]	[X]	[X]	Yes
15/11/2006	[X]	[X]	[X]	Yes
16/11/2006	[X]	[X]	[X]	Yes
17/11/2006	[X]	[X]	[X]	Yes
18/11/2006	[X]	[X]	[X]	Yes
19/11/2006	[X]	[X]	[X]	Yes
20/11/2006	[X]	[X]	[X]	Yes
21/11/2006	[X]	[X]	[X]	Yes
22/11/2006	[X]	[X]	[X]	Yes
23/11/2006	[X]	[X]	[X]	Yes
24/11/2006	[X]	[X]	[X]	Yes
25/11/2006	[X]	[X]	[X]	Yes
27/11/2006	[X]	[X]	[X]	Yes
28/11/2006	[X]	[X]	[X]	Yes
29/11/2006	[X]	[X]	[X]	Yes
30/11/2006	[X]	[X]	[X]	Yes
01/12/2006	[X]	[X]	[X]	Yes
02/12/2006	[X]	[X]	[X]	Yes
03/12/2006	[X]	[X]	[X]	Yes
04/12/2006	[X]	[X]	[X]	Yes
05/12/2006	[X]	[X]	[X]	Yes
06/12/2006	[X]	[X]	[X]	No
07/12/2006	[X]	[X]	[X]	Yes
08/12/2006	[X]	[X]	[X]	No
09/12/2006	[X]	[X]	[X]	Yes
11/12/2006	[X]	[X]	[X]	No
12/12/2006	[X]	[X]	[X]	No
13/12/2006	[X]	[X]	[X]	No
14/12/2006	[X]	[X]	[X]	No
15/12/2006	[X]	[X]	[X]	No
16/12/2006	[X]	[X]	[X]	Yes
17/12/2006	[X]	[X]	[X]	Yes
18/12/2006	[X]	[X]	[X]	Yes
19/12/2006	[X]	[X]	[X]	Yes
20/12/2006	[X]	[X]	[X]	No
21/12/2006	[X]	[X]	[X]	No
22/12/2006	[X]	[X]	[X]	Yes
23/12/2006	[X]	[X]	[X]	Yes
27/12/2006	[X]	[X]	[X]	No

Imposition of penalty under section 130 of the Communications Act

Date	Passed to Live Operator	Abandoned Calls (excluding calls answered by answering machine)	Abandoned Call Rate	Abandoned % >3%
28/12/2006	[X]	[X]	[X]	No
29/12/2006	[X]	[X]	[X]	No
30/12/2006	[X]	[X]	[X]	No
02/01/2007	[X]	[X]	[X]	Yes
03/01/2007	[X]	[X]	[X]	No
04/01/2007	[X]	[X]	[X]	Yes
05/01/2007	[X]	[X]	[X]	Yes
06/01/2007	[X]	[X]	[X]	Yes
08/01/2007	[X]	[X]	[X]	No
09/01/2007	[X]	[X]	[X]	Yes
10/01/2007	[X]	[X]	[X]	Yes
11/01/2007	[X]	[X]	[X]	Yes
12/01/2007	[X]	[X]	[X]	Yes
13/01/2007	[X]	[X]	[X]	Yes
14/01/2007	[X]	[X]	[X]	Yes
15/01/2007	[X]	[X]	[X]	Yes
16/01/2007	[X]	[X]	[X]	Yes
17/01/2007	[X]	[X]	[X]	No
18/01/2007	[X]	[X]	[X]	Yes
19/01/2007	[X]	[X]	[X]	Yes
20/01/2007	[X]	[X]	[X]	Yes
21/01/2007	[X]	[X]	[X]	Yes
22/01/2007	[X]	[X]	[X]	No
23/01/2007	[X]	[X]	[X]	Yes
24/01/2007	[X]	[X]	[X]	Yes
25/01/2007	[X]	[X]	[X]	No
26/01/2007	[X]	[X]	[X]	No
27/01/2007	[X]	[X]	[X]	Yes
28/01/2007	[X]	[X]	[X]	Yes
29/01/2007	[X]	[X]	[X]	No
30/01/2007	[X]	[X]	[X]	No
31/01/2007	[X]	[X]	[X]	Yes
01/02/2007	[X]	[X]	[X]	No
02/02/2007	[X]	[X]	[X]	Yes
03/02/2007	[X]	[X]	[X]	Yes
05/02/2007	[X]	[X]	[X]	Yes
06/02/2007	[X]	[X]	[X]	No
07/02/2007	[X]	[X]	[X]	No
08/02/2007	[X]	[X]	[X]	Yes
09/02/2007	[X]	[X]	[X]	Yes
10/02/2007	[X]	[X]	[X]	Yes
11/02/2007	[X]	[X]	[X]	Yes
12/02/2007	[X]	[X]	[X]	Yes
13/02/2007	[X]	[X]	[X]	Yes
14/02/2007	[X]	[X]	[X]	Yes
15/02/2007	[X]	[X]	[X]	Yes

Imposition of penalty under section 130 of the Communications Act

Date	Passed to Live Operator	Abandoned Calls (excluding calls answered by answering machine)	Abandoned Call Rate	Abandoned % >3%
16/02/2007	[X]	[X]	[X]	No
17/02/2007	[X]	[X]	[X]	Yes
18/02/2007	[X]	[X]	[X]	Yes
19/02/2007	[X]	[X]	[X]	No
20/02/2007	[X]	[X]	[X]	No
21/02/2007	[X]	[X]	[X]	No
22/02/2007	[X]	[X]	[X]	Yes
23/02/2007	[X]	[X]	[X]	Yes
24/02/2007	[X]	[X]	[X]	Yes
25/02/2007	[X]	[X]	[X]	Yes
26/02/2007	[X]	[X]	[X]	Yes
27/02/2007	[X]	[X]	[X]	Yes
28/02/2007	[X]	[X]	[X]	No
01/03/2007	[X]	[X]	[X]	Yes
02/03/2007	[X]	[X]	[X]	Yes
03/03/2007	[X]	[X]	[X]	Yes
05/03/2007	[X]	[X]	[X]	Yes
06/03/2007	[X]	[X]	[X]	Yes
07/03/2007	[X]	[X]	[X]	Yes
08/03/2007	[X]	[X]	[X]	No
09/03/2007	[X]	[X]	[X]	No
10/03/2007	[X]	[X]	[X]	Yes
12/03/2007	[X]	[X]	[X]	Yes
13/03/2007	[X]	[X]	[X]	Yes
14/03/2007	[X]	[X]	[X]	No
15/03/2007	[X]	[X]	[X]	No
16/03/2007	[X]	[X]	[X]	Yes
17/03/2007	[X]	[X]	[X]	No
18/03/2007	[X]	[X]	[X]	Yes
19/03/2007	[X]	[X]	[X]	No
20/03/2007	[X]	[X]	[X]	No
21/03/2007	[X]	[X]	[X]	No
22/03/2007	[X]	[X]	[X]	Yes
23/03/2007	[X]	[X]	[X]	Yes
24/03/2007	[X]	[X]	[X]	Yes
26/03/2007	[X]	[X]	[X]	No
27/03/2007	[X]	[X]	[X]	No
28/03/2007	[X]	[X]	[X]	Yes
29/03/2007	[X]	[X]	[X]	Yes
30/03/2007	[X]	[X]	[X]	Yes
31/03/2007	[X]	[X]	[X]	No
02/04/2007	[X]	[X]	[X]	Yes
03/04/2007	[X]	[X]	[X]	No
04/04/2007	[X]	[X]	[X]	No
05/04/2007	[X]	[X]	[X]	Yes
06/04/2007	[X]	[X]	[X]	Yes

Imposition of penalty under section 130 of the Communications Act

Date	Passed to Live Operator	Abandoned Calls (excluding calls answered by answering machine)	Abandoned Call Rate	Abandoned % >3%
07/04/2007	[<]	[<]	[<]	Yes
10/04/2007	[<]	[<]	[<]	Yes
11/04/2007	[<]	[<]	[<]	Yes
12/04/2007	[<]	[<]	[<]	Yes
13/04/2007	[<]	[<]	[<]	Yes
14/04/2007	[<]	[<]	[<]	Yes
16/04/2007	[<]	[<]	[<]	No
17/04/2007	[<]	[<]	[<]	No
18/04/2007	[<]	[<]	[<]	Yes
19/04/2007	[<]	[<]	[<]	Yes
20/04/2007	[<]	[<]	[<]	No
21/04/2007	[<]	[<]	[<]	No
23/04/2007	[<]	[<]	[<]	No
24/04/2007	[<]	[<]	[<]	No
25/04/2007	[<]	[<]	[<]	Yes
187 24 hour periods				138