



**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”)

This is the non-confidential  
version. Confidential information  
and data have been redacted.

Redactions are indicated by [X]

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.<sup>1</sup>

## 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

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<sup>1</sup> 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 Guidelines<sup>2</sup>, 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.<sup>3</sup>

### **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.

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<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup> 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

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<sup>4</sup> 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 £50,000<sup>5</sup> 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.<sup>6</sup>

### **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.<sup>7</sup> 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.<sup>8</sup>

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<sup>5</sup> 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).

<sup>6</sup> Communications Act 2003 section 131(4).

<sup>7</sup> See the Persistent Misuse Guidelines, paragraph 6.4.

<sup>8</sup> 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.<sup>9</sup> 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;<sup>10</sup>
- 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.

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<sup>9</sup> See the Persistent Misuse Guidelines, paragraph 6.15.

<sup>10</sup> 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.<sup>11</sup>

- 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".<sup>12</sup>

- 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.

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

<sup>12</sup> 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."<sup>13</sup>

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

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<sup>13</sup> 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.”<sup>14</sup>

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.”<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup>

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

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<sup>14</sup> Section 32(2) of the Act.

<sup>15</sup> Section 32(10) of the Act.

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

<sup>17</sup> Persistent Misuse Guidelines, paragraph 6.15.

paragraph 6.16 of the Persistent Misuse Guidelines.<sup>18</sup> 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.<sup>19</sup>
- 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).<sup>20</sup>

<sup>18</sup> Also set out at paragraph 2.17 above.

<sup>19</sup> 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”.

<sup>20</sup> 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

<b>Part 1 - Abbey</b>	
<b>Company</b>	Abbey National plc
<b>Address</b>	Abbey National House, 2 Triton Square, Regent's Place, London, NW1 3AN
<b>Company number</b>	02294747
<b>Short description</b>	Providers of financial services to UK consumers
<b>Use of ACS</b>	One call centre using ACS for outbound calls by Abbey Retail Credit Risk directorate
<b>Part 2 - Persistent misuse</b>	
<b>Individual elements considered in Ofcom's assessment of whether Company's conduct amounts to persistent misuse</b>	
<b>Excessive Number of Abandoned Calls</b>	An Excessive Number of Abandoned Calls were made in 138 of the 187 x 24 hour periods during the Relevant Period. <sup>21</sup> 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.
<b>Information Message played?</b>	The call centre played an Information Message.
<b>Calls left to ring 15 seconds before terminating?</b>	The call centre allowed calls to ring for 15 seconds before terminating the call.
<b>Calls made within 72 hours of an abandoned call made by a live agent?</b>	Yes
<b>CLI presented</b>	The call centre presented a CLI.
<b>Part 3 - Ofcom's investigation</b>	
<b>Date programme began</b>	22 June 2006
<b>Why information requested</b>	Abbey was identified as having purchased an ACS.
<b>Date of information requests</b>	17 April 2007 and 24 July 2007
<b>Date information received</b>	18 May 2007, 10 August 2007, 3 October 2007.
<b>Deadline for Response to Notification</b>	7 January 2008

<sup>21</sup> 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 plc<sup>22</sup>**

<b>Date</b>	<b>Passed to Live Operator</b>	<b>Abandoned Calls (excluding calls answered by answering machine)</b>	<b>Abandoned Call Rate</b>	<b>Abandoned % &gt;3%</b>
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

<sup>22</sup> 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.

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

<b>Date</b>	<b>Passed to Live Operator</b>	<b>Abandoned Calls (excluding calls answered by answering machine)</b>	<b>Abandoned Call Rate</b>	<b>Abandoned % &gt;3%</b>
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

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

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
<b>187 24 hour periods</b>				<b>138</b>