



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

Issued to Bracken Bay Kitchens Ltd

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Statement

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## Section 1

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

- 1.1 Section 130 of the Communications Act 2003 (the “Act”) allows Ofcom to impose a penalty on a person who has been given a notification under section 128 of the Act if that person has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.
- 1.2 A notification was issued to Bracken Bay Kitchens Ltd, company number 03382700 (the “Company”) under section 128 of the Act on 3 November 2006 (the “Persistent Misuse Notification”).<sup>1</sup> The Company was given until 6 December 2006 to carry out the actions required by the Persistent Misuse Notification and to make representations on the matters notified.

## Determination Made by Ofcom

- 1.3 For the reasons set out in the Persistent Misuse Notification Ofcom has determined that the Company has persistently misused an electronic communications network and/or service with the effect or likely effect of causing another person unnecessarily to suffer annoyance, inconvenience or anxiety.<sup>2</sup>
- 1.4 Ofcom has decided to impose a penalty in this case. The reasons for Ofcom’s determination and its assessment of the level of penalty are set out in the accompanying Explanatory Statement.

## Action required by the Company

- 1.5 The Company has until 28 February 2007 to pay to Ofcom the sum of £40,000.
- 1.6 Words or expression used in this Notice have the same meaning as in the Act and as otherwise defined in the Persistent Misuse Notification.

David Stewart

Director of Investigations

30 January 2007

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<sup>1</sup> The Persistent Misuse Notification is included at Annex 1.

<sup>2</sup> See paragraphs 6, 33 to 43 and Annex 1 of the Persistent Misuse Notification.

## Section 2

# Explanatory Statement

### Summary

- 2.1 This Explanatory Statement sets out Ofcom's reasons for imposing a penalty on the Company in relation to the persistent misuse of an electronic communications network or electronic communications service as set out in Ofcom's Persistent Misuse Notification, and for setting the level of that penalty.

### Background

- 2.2 On 3 November 2006, Ofcom issued the Persistent Misuse Notification to the Company (included at Annex 1).
- 2.3 In that Persistent Misuse Notification, Ofcom set out its determination that, as at the date of that Notification, the Company was and had been misusing 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.<sup>3</sup> In the Persistent Misuse Notification Ofcom also set out the reasons for its determination that such misuse was persistent as it was 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.<sup>4</sup>
- 2.4 The Persistent Misuse Notification requested the Company's representations on the matters contained therein, and the accompanying Explanatory Statement, by 6 December 2006.
- 2.5 On 6 December 2006, the Company submitted representations in response to Ofcom's Persistent Misuse Notification.
- 2.6 Ofcom has now considered those representations.

### Legislative framework

- 2.7 Ofcom's power to issue a notification under section 128(1) of the Act in relation to the persistent misuse of an electronic communications network or electronic communications service is described in paragraphs 19 to 23 of the Persistent Misuse Notification.
- 2.8 Ofcom also has the power under section 130 of the Act to impose penalties for persistent misuse following the issue of a notification under section 128, 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;*

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<sup>3</sup> See in particular paragraph 6, paragraphs 33 to 43, and Annex 1 of the Notification dated 3 November 2006.

<sup>4</sup> See in particular Annex 1 at paragraphs 11 to 15 of the Notification dated 3 November 2006.

*(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. “*

*(6) Where Ofcom impose a penalty on a person under this section, they shall -*

*(a) notify the person penalised: and*

*(b) in that notification, fix a reasonable period after it is given as the period within which the penalty is to be paid.”*

*(7)A penalty imposed under this section –*

*(a) must be paid to Ofcom; and*

*(b) if not paid within the period fixed by them, is to be recoverable by them accordingly.*

2.9 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 (the “Persistent Misuse Statement”<sup>6</sup>) Further, Ofcom must have regard to the Persistent Misuse Statement when exercising these powers.<sup>7</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> See *Statement of Policy on the persistent misuse of an electronic communications network or electronic communications service*, [http://www.ofcom.org.uk/consult/condocs/misuse/misuse\\_state.pdf](http://www.ofcom.org.uk/consult/condocs/misuse/misuse_state.pdf)

<sup>7</sup> Communications Act 2003 section 131(4).

## The Company's representations

2.10 The Company made representations to Ofcom on 6 December 2006.

2.11 In its representations the Company:

- admitted that it had failed to comply with the procedures required of it under Ofcom's Persistent Misuse Statement;
- set out the actions it has taken since the issue of the Persistent Misuse Notification in order to details address the issues identified therein, namely:

Replacing its existing ACS with a new dialler which the would allow the Company to:

- Maintain the abandoned call rate below 3%;
  - Deliver a recorded message<sup>8</sup>;
  - Ensure calls ring for a minimum of 15 seconds; and
  - Ensure that after an abandoned call is made, no further call is attempted for 72 hours;
- requesting that a free phone number with limitless capacity to receive calls be presented as the CLI on all calls made from the new dialler (as opposed to an ISDN bearer number which can present an engaged signal when a customer attempts to return a missed call);
  - instituting a system of daily monitoring of dropped call rates by way of a director level report and by ensuring that responsibility for maintaining the drop rate below the 3% threshold rests with the shift manager. Shift managers have received training on how to achieve this;
  - ordering a new service to automate customers' requests to opt-out of further calls without the need to speak to an operator and at no cost to themselves. The Company expects this service to be available in January 2007 with opt-outs being processed manually until then;
  - committing to screen all records against the SilentCallgard file which contains the numbers of people who have complained to their telecom operators about receiving silent calls; and
  - appointing external advisors (UK Data IT) to monitor all areas of compliance and report back to the Company's directors as necessary.<sup>9</sup>

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<sup>8</sup> The Company notes that a recorded message had been set up on the previous ACS, and that this message has now been transferred to the new dialler.

<sup>9</sup> The Company also made representations about the steps it had in the past taken to deal with issues relating to the Telephone Preference Service, however these are not relevant to the matters raised in the Persistent Misuse Notification.

## Ofcom's power to impose penalties

- 2.12 Each of the elements required in subsection 130(1) for the imposition of penalties for persistent misuse is present in respect of the Company and the Persistent Misuse Notification.
- 2.13 After considering the Company's representations, and the evidence gathered in its investigation, Ofcom has decided to impose a penalty in this case.
- 2.14 Ofcom's decision to impose a penalty also takes into consideration the nature of the persistent misuse involved in this case and, in particular, the level of consumer concern about nuisance and abandoned calls arising as a result of the use of automatic calling systems in a manner that unnecessarily causes consumers inconvenience, annoyance or anxiety. Ofcom's Persistent Misuse Statement makes it clear that this form of conduct will be a priority for enforcement action (including, where appropriate, penalties).
- 2.15 In determining the level of penalty to be imposed on the Company Ofcom must ensure that the penalty imposed:
- a) does not exceed £50,000;
  - b) is appropriate; and
  - c) is proportionate to the misuse in respect of which it is imposed<sup>10</sup>; and
- have regard to:
- d) any representations made to Ofcom by the Company;
  - e) any steps taken by the Company for securing that the misuse is brought to an end and is not repeated; and
  - f) any steps taken by the Company for remedying the consequences of the notified misuse.<sup>11</sup>
- 2.16 Ofcom has published guidelines setting out the factors it will generally take into consideration in determining the level of penalty (the "Penalty Guidelines").<sup>12</sup>
- 2.17 In determining an appropriate and proportionate level of penalty in accordance with subsection 130(4) Ofcom has had regard to the Penalty Guidelines.

## Applying Ofcom's Penalty Guidelines

- 2.18 Ofcom's Penalty Guidelines set out a series of both general and specific criteria which may be considered in arriving at a starting figure for penalties.
- 2.19 The general criteria relevant to the calculation of a starting point are:
- a) the seriousness of the contravention;

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<sup>10</sup> Subsection 130(4) of the Act, as amended by subsection 2(1) of the *Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2006*, SI 2006/1032.

<sup>11</sup> Subsection 130(5) of the Act, as set out previously in paragraph 2.8

<sup>12</sup> Published under section 392 of the Act (<http://www.ofcom.org.uk/about/accoun/pg/penguid.pdf>)

- b) precedents set by previous cases; and
- c) the need to ensure that the threat of penalties will act as a sufficient incentive to comply.

2.20 The Penalty Guidelines list the following specific criteria which may be relevant depending on the contravention:

- 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.

2.21 Additionally, the Guidelines suggest a list of factors that may lead to an increase or a decrease in the level of any penalty, as follows:

Factors tending to lead to an increase in the level of any penalty (“aggravating factors”) include:

- a) repeated contravention by the same regulated body;
- b) continuation of the contravention after either becoming aware of the contravention or being notified of a contravention by Ofcom;
- c) the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur; and
- d) the absence, ineffectiveness or repeated failure of internal mechanisms or procedures intended to prevent contravention by the regulated body concerned or other bodies in the same group; and

Factors tending to decrease the level of any penalty (“mitigating factors”) include:

- a) the extent to which the regulated body has taken steps in advance 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 in question, and any steps taken for remedying the consequences of the contravention; and
- c) co-operation with Ofcom’s investigation.



## Ofcom's assessment of penalties

2.22 Ofcom sets out below its application of the issues relevant to the factors listed in the Penalty Guidelines to the facts of this case.

### *Calculation of a starting point*

2.23 In assessing the seriousness of the persistent misuse, Ofcom has taken into consideration the following factors, consistent with Ofcom's Persistent Misuse Statement<sup>13</sup>:

Criterion	Company's conduct between April 2006 and September 2006 <sup>14</sup>
Number of Abandoned Calls	[X]
Percentage of (a) call centres; and (b) campaigns making Abandoned Calls which did not play a recorded Information Message ("Silent Calls")	(a) 100% (b) 100%
Percentage of (a) call centres; and (b) campaigns making Abandoned Calls which did not display a CLI to which a return call could be made	(a) 0% (b) 0%
Number of 24 hour periods in which an Excessive Number of Abandoned Calls were made by the Company by (a) call centre; and (b) campaign. <sup>15</sup>	(a) 118 (b) N/A <sup>16</sup>
Percentage of (a) call centres; and (b) campaigns making Abandoned Calls which were not left to ring for a minimum of 15 seconds before being terminated by the ACS (the "15 second rule")	(a) 100% (b) 100%
Percentage of (a) call centres; and (b) campaigns making Abandoned Calls where repeat calls were made to a number within 72 hours of that number receiving an Abandoned Call without ensuring that the call was made by a live operator (the "live repeat calls rule")	(a) 0% (b) 0%

Note: Defined terms have the meaning given in the Persistent Misuse Notification

2.24 In particular, and consistent with Ofcom's Persistent Misuse Statement, Ofcom has taken into account the number of people affected by the misuse and, specifically

<sup>13</sup> In particular, paragraphs 9.5 to 9.8 of the Persistent Misuse Statement.

<sup>14</sup> Being the 'relevant period' in this case.

<sup>15</sup> Note that in the case of multiple call centres and/or campaigns, there can be more than one instance of this observed on any particular day.

<sup>16</sup> Data not available. Ofcom based its Persistent Misuse Notification on call centre data supplied by the Company and this was not raised as an issue in the Company's representations made in response to the Persistent Misuse Notification.

Ofcom's policy that "...the greater the number of people targeted the higher the penalty should be".<sup>17</sup>

- 2.25 Ofcom considers that the annoyance, anxiety and distress caused by silent and abandoned calls means that these forms of persistent misuse are particularly serious contraventions. However, Ofcom considers that the making of silent calls is a relatively more serious form of persistent misuse than the making of calls which are simply abandoned (followed by the use of a recorded message). Where an abandoned call is a silent call due to the absence of a recorded message, the likelihood that the consumer will suffer anxiety and distress is greater, given that they will not know the identity of the caller. This is supported by consumer research that Ofcom has previously undertaken in this area.<sup>18</sup>
- 2.26 Addressing the problem of silent calls, and reducing the number of abandoned calls continues to be a priority for Ofcom. The importance of reducing the harm they cause is a policy objective which Ofcom takes seriously when determining a starting figure for the penalty. Ofcom will take into consideration the fact that the penalty for a contravention it considers to be serious should act as an incentive for companies using automatic calling equipment to refrain from persistent misuse of this nature.
- 2.27 Ofcom therefore considers that, in the light of the high number of Abandoned Calls and the fact that all of those calls were also Silent Calls, the persistent misuse engaged in by the Company is of a serious nature.<sup>19</sup>
- 2.28 Ofcom has determined a starting figure for the penalty to be imposed in this instance to be £40,000, taking account of:
- a. the serious nature of the contravention; and
  - b. the need to ensure that the threat of penalties will act as a sufficient deterrent.
- 2.29 Ofcom notes that there are no precedents for the setting of penalties in respect of a contravention of section 128 of the Act.

*Application of specific criteria, aggravating and mitigating factors*

- 2.30 Ofcom has also considered the specific criteria referred to in the Penalty Guidelines. Of those criteria that are relevant to this case some have already been taken into account in arriving at an appropriate starting point, and some are taken into consideration as part of Ofcom's assessment of aggravating and mitigating factors.
- 2.31 With reference to the aggravating factors set out above, Ofcom notes that during the relevant period the Company had in place procedures to monitor the drop rate, but

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<sup>17</sup> See Ofcom's Persistent Misuse Statement at paragraph 9.7.

<sup>18</sup> Research carried out for Ofcom by the BMRB in August 2005 shows that qualitatively the level of consumer detriment caused by silent calls is high- 63% of adults were "concerned of very concerned" by such calls, and 84 % were "inconvenienced or very inconvenienced". Ofcom's research shows that 68% of those receiving such calls would prefer an information message.

<sup>19</sup> Ofcom's consideration of the seriousness of the contravention using the criteria set out in the table at paragraph 4.9 is consistent with the approach noted in Ofcom's statement of policy on persistent misuse, which considers the degree of persistence, the number of people exposed to the misuse and the seriousness of the misuse.

that these procedures failed to ensure compliance with Ofcom's Persistent Misuse Statement<sup>20</sup>.

- 2.32 With reference to the mitigating factors set out above, Ofcom is satisfied that, on the basis of the representations made by the Company that it has now taken steps to ensure that all its call centres and/or campaigns comply with Ofcom's Persistent Misuse Statement.

### **Final determination of penalty**

- 2.33 Taking into account the matters referred to in paragraphs 2.23 to 2.32 above Ofcom considers that on balance a penalty of £40,000 is appropriate and proportionate in these circumstances.
- 2.34 Ofcom has also considered the level of penalty as a proportion of the Company's turnover which, for the year ended 2006 was £[redacted]<sup>21</sup> (i.e. 0-3% of turnover). Ofcom considers that there is no evidence that the penalty would be disproportionate, given the Company's turnover.

### **Action Required by the Company**

- 2.35 The Company has until 28 February 2007 to pay Ofcom the penalty imposed of £40,000 for contravening section 128 of the Act in respect of the instances of persistent misuse set out in Ofcom's Persistent Misuse Notification.

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<sup>20</sup> When asked in a formal information request issued by Ofcom using its powers under section 135 of the Act to specify the procedures the company had in place to control the number of silent calls, the company stated that it relied on individual shift managers to monitor the drop rate, but this had subsequently proved insufficient.

[http://www.ofcom.org.uk/consult/condocs/misise/misuse\\_state.pdf](http://www.ofcom.org.uk/consult/condocs/misise/misuse_state.pdf)

<sup>21</sup>[redacted]

## **Annex 1**

[A copy of the section 128 notification published on Ofcom web site on 12 December 2006 is included separately]