



**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 The Carphone Warehouse Group
plc by the Office of Communications (“Ofcom”)

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Section 1

Notification

NOTIFICATION UNDER SECTION 128 OF THE COMMUNICATIONS ACT 2003 REGARDING PERSISTENT MISUSE OF AN ELECTRONIC COMMUNICATIONS NETWORK OR AN ELECTRONIC COMMUNICATIONS SERVICE

1. Section 128(1) of the Communications Act 2003 (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 service in a way that causes annoyance, inconvenience or anxiety. This Notification is issued to The Carphone Warehouse Group plc, company number 03253714¹ (the "Company") for the purpose of:
 - a. setting out Ofcom's determination pursuant to section 128(1) of the Act;
 - b. specifying the use that Ofcom considers constitutes persistent misuse; and
 - c. specifying the period during which the Company has an opportunity to make representations about the matters notified.
2. This Notification also outlines the circumstances in which Ofcom may issue a further notification to the Company under section 129 of the Act and Ofcom's power to impose a penalty on the Company under section 130 of the Act.

Ofcom's determination

3. Ofcom hereby determines that there are reasonable grounds for believing that the Company is and has been misusing an electronic communications network or electronic communications service, 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 the misuse engaged in by the Company 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 within the meaning of section 128(6)(a) of the Act.
4. The reasons for Ofcom's determination are set out in the Explanatory Statement² accompanying this Notification.

The use Ofcom considers to be persistent misuse

5. In making its determination and issuing this Notification, Ofcom has had regard to its statement of Ofcom's general policy with respect to persistent misuse published under section 131 of the Act (the "Guidelines").³

¹ Whose registered office is at 1 Portal Way London W3 6RS.

² The Explanatory Statement must be read in conjunction with Annex 1 to this Notification, which sets out the evidence upon which Ofcom has based its determination.

³ *Statement of policy on the persistent misuse of an electronic communications network or service*, published 1 March 2006, http://www.ofcom.org.uk/consult/condocs/misuse/misuse_state.pdf

6. Applying the principles set out in the Guidelines⁴, Ofcom considers that the Company, by virtue of its use of an Automated Calling System (“ACS”)⁵, is and has been persistently misusing an electronic communications network or electronic communications service, with the effect or likely effect of causing another person unnecessarily to suffer annoyance, inconvenience or anxiety. Specifically, Ofcom considers that the Company has used an ACS to make and repeat, on a sufficient number of occasions so as to amount to a pattern of behaviour or practice:
- a) An Excessive Number of Abandoned Calls⁶.
 - b) Abandoned Calls⁷ without playing an Information Message⁸ (i.e. making “silent calls”);
 - c) Abandoned Calls which were not left to ring for a minimum of 15 seconds before being terminated by the ACS;
 - d) Abandoned Calls in respect of which no CLI⁹ was presented to which a return call may be made which is not charged at a higher rate than the national call rate; and
 - e) repeat calls to a number within 72 hours of that number receiving an Abandoned Call, without ensuring that the call is made by a live operator.

Representations concerning this Notification

7. The Company shall have until 6 December 2006 (the “deadline”) to make representations to Ofcom about the matters set out in this Notification and the accompanying Explanatory Statement.

Other matters

8. If, prior to the deadline, the Company has not secured that its misuse of an electronic communications network or service contrary to section 128 of the Act, as described in paragraph 6 of this Notification, is brought to an end, and is not repeated, then Ofcom may issue the Company a further notification under section 129 of the Act.
9. If the Company has, in one or more of the ways notified above in paragraph 6, , persistently misused an electronic communications network or electronic communications service, Ofcom may impose a penalty on the Company under section 130 of the Act. Under section 130(5) of the Act, in making a determination as to the amount of penalty to be imposed, Ofcom must have regard to:
- a. any representations made by the Company;
 - b. any steps taken by the Company for securing that the notified misuse is brought to an end and is not repeated; and

⁴ See paragraphs 6.11 to 6.16 of the Guidelines as regards misuse by making silent or abandoned calls, and in particular, paragraph 6.16 of the Guidelines in relation to the collective procedures a call centre can adopt which will mitigate the seriousness of a particular act of misuse.

⁵ Defined below in paragraph 10.

⁶ Defined below in paragraph 10.

⁷ Defined below in paragraph 10.

⁸ Defined below in paragraph 10.

⁹ Defined below in paragraph 10

- c. any steps taken by the Company to remedy the consequences of the notified misuse.

Interpretation

10. Words or expressions used in this Notification and the Explanatory Statement have the same meaning as in the Act, except for the following:

"Abandoned Call" means a call that is terminated by an Automated Calling System after the called person tries to answer it;

"Automated Calling System" 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' information;

"Excessive Number of Abandoned Calls" means a proportion of Abandoned Calls to Live Calls made by an ACS over any 24 hour period which exceeds 3%;

"Information Message" means a very brief recorded message, played within two seconds of an Abandoned Call being answered (that does not contain marketing information other than (a) below) and that contains at least the following information:

- (a) the identity of the Company on whose behalf the call is made;
- (b) 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 Company; and

"Live Call" means a call where, when the called person answers a call made by an ACS, they are connected to a live individual.

David Stewart

Director of Investigations

3 November 2006

Section 2

Explanatory Statement

Summary

11. This Explanatory Statement sets out Ofcom's reasons for its determination in paragraph 3 of the Notification that the Company is and has 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, and further, 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.
12. An 'Abandoned Call' is a call that is terminated after it has been answered by the person being called. Abandoned Calls typically occur when an Automated Calling System ("ACS") is used to generate and attempt to connect calls. If there are not enough operators available to handle a call, it is terminated by the ACS when the person being called answers the 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'.
13. On 1 March 2006 Ofcom published, with immediate effect, a revised statement of policy on the persistent misuse of an electronic communications network or service (the "Guidelines").¹⁰ The 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.¹¹
14. The 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. These procedures are listed in full at paragraph 28 below.¹²
15. On 22 June 2006, Ofcom commenced an own-initiative programme of monitoring and enforcement to assess compliance of organisations using ACS with the procedures set out in Ofcom's Guidelines.
16. On the basis of the evidence gathered during its investigation Ofcom has concluded that the Company has been making Abandoned Calls and has been using an ACS in a manner which is inconsistent with the Guidelines. Ofcom has therefore determined that the grounds for issuing a notification under section 128 of the Act have been met. The basis on which Ofcom has made this determination is set out fully in Annex 1.
17. The Company now has until the deadline to make representations to Ofcom on the matters contained in the Notification. If, after this date, the Company has not secured that the persistent misuse in respect of which it has been notified is brought

¹⁰ http://www.ofcom.org.uk/consult/condocs/misuse_state.pdf. The Guidelines were published by Ofcom pursuant to section 131 of the Act.

¹¹ See Guidelines paragraphs 5.1, 5.2 and 6.15.

¹² See Guidelines paragraph 6.16.

to an end, and is not repeated, Ofcom may issue a further notification to the Company.

18. Ofcom may also impose a penalty on the Company in respect of the forms of misuse notified by Ofcom under section 128.

Legislative framework

19. The Notification is made under section 128 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.

20. Section 128(5) defines what is meant by “misuse” as follows:

“(5) For the purposes of this Chapter a person misuses an electronic communications network or electronic communications service 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. “

21. Section 128(6) defines what is meant by “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. “

22. Section 128(7) provides further guidance on determining whether misuse is persistent:

“(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.”

23. Under section 129 Ofcom also has the power to issue a further 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 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.”

24. Should the 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.

25. Ofcom also has the power under section 130 of the Act to 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 £50,000¹³ 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. “

26. 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 “Guidelines”) Further, Ofcom must have regard to the Guidelines when exercising these powers.¹⁴

Ofcom’s Guidelines

27. On 1 March 2006 Ofcom published its Guidelines under section 131 in the form of a revised statement of policy on the persistent misuse of an electronic communications network or service. The Guidelines express Ofcom’s view 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.¹⁵
28. The Guidelines specifically set out the procedures that undertakings operating call centres or using ACS can adopt which, taken as a whole, 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;
 - 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:
 - c. 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);
 - d. 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;
 - e. calls which are not answered must ring for a minimum of 15 seconds before being terminated;

¹³ 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).

¹⁴ Communications Act 2003 section 131(4).

¹⁵ See Guidelines paragraphs 5.1, 5.2 and 6.15.

- f. 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:
- g. for each outbound 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:
- h. 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: and
- i. records are kept for a minimum period of six months that demonstrate compliance with the above procedures.¹⁶

Ofcom's investigation

- 29. On 22 June 2006 Ofcom commenced an own-initiative programme of monitoring and enforcement to investigate compliance of organisations using ACS with the principles set out in Ofcom's revised policy on persistent misuse.¹⁷
- 30. As the first stage of this programme, in order to assess compliance of companies with the procedures set out in the Guidelines, Ofcom gathered evidence from a range of companies who Ofcom had grounds to believe may be either using ACS to make outbound calls themselves or authorising other companies to use ACS to make outbound calls on their behalf. Ofcom identified these companies in a number of different ways, in particular from complaints by members of the public to Ofcom's Contact Centre on the subject of silent calls and also from complaints by members of the public to the Telephone Preference Service ("TPS")¹⁸.
- 31. Ofcom identified the Company as a target of its investigation for the reasons set out in paragraph 1 of Annex 1. In conducting its investigation Ofcom sought from the Company the information outlined in Annex 2.

Ofcom's decision and reasoning

- 32. Ofcom sets out below the basis on which it has exercised its power in section 128(1) of the Act to issue the Notification to the Company.

(i) Use of an electronic communications network or service

- 33. The term "*electronic communications network*" is defined in section 32(1) of the Act as meaning:

¹⁶ See Guidelines paragraph 6.16. Note that the terms used here have the meanings given in the accompanying Notification.

¹⁷ See the Competition Bulletin entry for this investigation at:

http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_905/

¹⁸ The Telephone Preference Service (TPS) is a central opt out register whereby individuals can register their wish not to receive unsolicited sales and marketing telephone calls. It is a legal requirement that companies do not make such calls to numbers registered on the TPS. Research undertaken by the NOP in 2003 indicates that silent calls were a contributory factor in 37% of all registrations on the TPS. Research carried out by the Direct Marketing Association in 2005 found that of the sample interviewed silent calls were directly attributable to 12% of TPS registrations.

“ ...

“(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.”

34. The term “*electronic communications service*” is defined in section 32(2) of the Act, which states:

35. “(2) In this Act “*electronic communications service*” means a service consisting in, or having its principal feature, the conveyance by means of an electronic communications network of signals, except so far as it is a content service.”

36. The term “*signal*” is defined in section 32(10) of the Act 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.”

37. The Company 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 the Company’s provider and/or the network of the provider who provides telephony services to the party being called) and use of an electronic communications service (being the use of the voice telephony service provided to the Company by a communications provider).

38. The initiation of 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 the Company (or in certain situations a third party whom the Company has caused to make calls on its behalf) and the recipients of these Abandoned Calls, and the data comprised therein, therefore falls within this definition.

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

39. Section 128(5) of the Act sets out what constitutes a misuse of an electronic communications network or electronic communications service. In particular, section 128(5)(a) states that misuse occurs if the effect or likely effect of the use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety.

40. Ofcom's Guidelines set out Ofcom's view that Abandoned Calls may cause unnecessary annoyance, inconvenience or anxiety to those who receive them¹⁹ (thereby amounting to misuse within the meaning of section 128(5)(a), and that a persistent failure by an undertaking operating 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 128.²⁰
41. Ofcom notes that the Company has not denied that it makes Abandoned Calls. Ofcom further notes the information contained in the table at Annex 1 relating to those categories of misuse referred to in paragraph 6 of the Notification, which is based on paragraph 6.16 of the Guidelines. On this basis Ofcom considers that it has reasonable grounds for believing that misuse has occurred within the meaning of section 128(5)(a) of the Act and that, unless otherwise indicated, the misuse is ongoing.

(iii) the misuse is persistent

42. Section 128 of the Act applies to misuse which is persistent, as defined in section 128(6) of the Act.
43. Ofcom notes the information contained in the table at Annex 1 regarding the number of the Company's call centres/campaigns engaged in specified acts of misuse over the period under investigation. For the reasons outlined in Annex 1 Ofcom considers that it has reasonable grounds for believing that each type of misuse engaged in by the Company has occurred on a persistent basis within the meaning of section 128(6)(a).

Steps taken to reduce to reduce the degree of concern that Abandoned Calls cause

44. In deciding whether to take enforcement action in a particular case Ofcom is guided by a sense of administrative priority determined by the level of consumer detriment and the steps call centre operators have taken to reduce the degree of concern that Abandoned Calls cause. The procedures that call centres can adopt in this regard, when taken as a package, act as mitigating factors in establishing the gravity of a particular act of misuse.²¹
45. Having considered the information obtained from the Company, as outlined in the table in Annex 1, and applying the principles set out in the Guidelines Ofcom has decided to issue a Notification to the Company.

Other matters set out in the Notification

46. The Company shall have until the deadline to make representations to Ofcom about the matters set out in this Notification and the accompanying explanatory statement.
47. If, after this time, the Company has not secured that the persistent misuse is brought to an end, and is not repeated, then Ofcom may issue the Company a further notification under section 129 of the Act.

¹⁹ For the reasons set out in paragraphs 6.11 to 6.14 of the Guidelines

²⁰ Guidelines, paragraph 6.16

²¹ Guidelines, paragraph 6.16

48. If the Company has, in one or more notified respects, persistently misused an electronic communications network or electronic communications service, Ofcom may impose a penalty on the Company.
49. 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 in when considering the amount of any penalty. The maximum penalty that may be imposed is £50,000 per contravention.²²

²² See 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.

Annex 1

Persistent misuse by the Company

1. In this Annex Ofcom sets out:
 - a. the basis on which the Company was selected for investigation;
 - b. the evidence obtained from the Company upon which Ofcom has based its determination that the Company has persistently misused an electronic communications network or service; and
 - c. the reasons why Ofcom considers that the evidence supports a finding of persistent misuse.
2. This Annex is to be read in conjunction with the Explanatory Statement.

Basis for investigating the Company

3. The Company, which is a provider of communications services and independent retailer of mobile phones and services, was identified as a target for investigation by reason of the fact that the Company and/or some of its various business activities being Carphone Warehouse and Talk Talk, appeared on the TPS list of most complained about companies from January 2006 to May 2006.

Evidence obtained from the Company

4. The evidence obtained from the Company in respect of the matters outline in paragraph 6 of the Notification has been assessed against paragraph 6.16 of the Guidelines in determining whether persistent misuse has occurred.
5. The table below summarises the relevant information provided by the Company relating to the period April 2006 to August 2006 (the “relevant period”).*

* The summary data in this table excludes the call centre/campaigns for which no data was supplied.

Call Centre/Campaign	Data Available on Abandoned Call rate?	(a) No. Of 24 hour periods in which Excessive Number of Abandoned Calls made	(b) Information Message played? (Y/N)	(c) Calls left to ring for 15 seconds before Abandoning?	(d) CLI presented ?	(e) Call made by live agent within 72 hours of an Abandoned Call
[X]	Call data available for 79% of the call centres/campaigns	50% of call centres/campaigns (for which call data was supplied) had at least one 24 hour period in which an Excessive Number of Abandoned Calls were made	84% of call centres/campaigns did not play a recorded Information Message	6% of call centres/campaigns did not allow calls to ring for 15 seconds before abandoning them	6% of call centres/campaigns did not display a CLI	14% of call centres/campaigns did not ensure that a live agent made any repeat call within a 72 hour period
TOTALS	[X] call centres/campaigns in total	124 days of Abandoned Calls across all campaigns/call centres	[X] call centres/campaigns in total playing a recorded Information Message	[X] call centres/campaigns abandoning calls after ringing for less than 15 seconds	[X] call centres/campaigns not displaying a CLI	[X] call centres/campaigns not making repeat call with live agent.

Reasons for Ofcom's determination that the Company has engaged in persistent misuse

6. From column (a) of the table above it can be seen that during the relevant period 50% of the Company's call centres and/or campaigns made an Excessive Number of Abandoned Calls in a total of 124 24 hour periods. In respect of each call centre/campaign Ofcom considers that an Excessive Number of Abandoned Calls was made contrary to the Guidelines and therefore within the meaning of misuse contained in section 128(5)(a) of the Act. Whilst Ofcom is not in possession of data for 21% of the call centres/campaigns Ofcom considers that the threshold of reasonable grounds for believing that the Company has engaged in persistent misuse are nonetheless met.

Making Abandoned Calls without playing an Information Message (i.e. making "silent calls")

7. From column (b) of the table above it can be seen that 84% of the Company's call centres and/or campaigns did not play a recorded Information Message when making Abandoned Calls – that is, 84% of the Company's call centres and/or campaigns made silent calls during the relevant period. In the light of paragraph 6.16 of the Guidelines Ofcom therefore considers that the Company has made silent calls amounting to misuse within the meaning of section 128(5)(a) of the Act.

Making Abandoned Calls which were not left to ring for a minimum of 15 seconds before being terminated by the ACS

8. From column (c) of the table above it can be seen that 6% of the Company's call centres/campaigns made Abandoned Calls which were not left to ring for 15 seconds before being terminated by the ACS. In the light of paragraph 6.16 of the Guidelines Ofcom therefore considers that the Company has made Abandoned Calls which amount to a misuse within the meaning of section 128(5)(a) of the Act.

Making Abandoned Calls in respect of which no CLI was presented to which a return call may be made which is not charged at a higher rate than the national call rate

9. From column (d) of the table above it can be seen that 6% of the Company's call centres/campaigns made Abandoned Calls without providing a CLI for the purpose specified in paragraph 6.16 of the Guidelines. In the light of paragraph 6.16 of the Guidelines Ofcom therefore considers that the Company has made Abandoned Calls which amount to a misuse within the meaning of section 128(5)(a) of the Act.

Making repeat calls to a number within 72 hours of that number receiving an Abandoned Call, without ensuring that the call is made by a live operator

10. From column (e) of the table above it can be seen that 14% of the Company's call centres/campaigns made repeat Abandoned Calls with 72 hours of making the initial Abandoned Call. In the light of paragraph 6.16 of the Guidelines Ofcom therefore considers that the Company has made Abandoned Calls which amount to a misuse within the meaning of section 128(5)(a) of the Act.

The misuse occurs on a persistent basis

11. Ofcom considers that all of the examples cited above give rise to misuse by the Company of an electronic communications network or service. Ofcom notes that the misuse notified occurred over the period April 2006 to August 2006. With reference to the misuse identified in column (a) of the table above, Ofcom notes that the Company made an Excessive Number of Abandoned Calls for a total of 124 days during the relevant period. Ofcom therefore considers that this level of misuse represents a pattern of behaviour or practice amounting to persistent misuse within the meaning of section 128(6)(a).
12. With reference to the misuse identified in column (b) of the table above, Ofcom notes that 84% of the Company's call centres/campaigns failed to play an Information Message during the relevant period. Ofcom therefore considers that this level of misuse involving this many call centres/campaigns represents a pattern of behaviour or practice amounting to persistent misuse within the meaning of section 128(6)(a).
13. With reference to the category of misuse identified in column (c) of the table above, Ofcom notes the Company's advice that for 6% of its call centres/campaigns it does not have procedures in place to ensure that Abandoned Calls are left to ring for a minimum of 15 seconds. Ofcom therefore considers that this conduct represents a pattern of behaviour or practice amounting to persistent misuse within the meaning of section 128(6)(a).
14. With reference to the category of misuse identified in column (d) of the table above, Ofcom notes the Company's advice that for 6% of its call centres/campaigns no CLI has ever been displayed. Ofcom therefore considers that this conduct represents a pattern of behaviour or practice amounting to persistent misuse within the meaning of section 128(6)(a).
15. With reference to the category of misuse identified in column (e) of the table above, Ofcom notes the Company's advice that, with reference to the 14% of call centres or campaigns, no procedures are in place to ensure that a repeat Abandoned Call is not made within 72 hours of an initial Abandoned Call. Ofcom therefore considers that this conduct represents a pattern of behaviour or practice amounting to persistent misuse within the meaning of section 128(6)(a).

Continuing persistent misuse

16. Except where otherwise indicated in paragraphs 6 to 10 above²³, Ofcom has reasonable grounds for believing that the Company is continuing to engage in persistent misuse.

²³ That is, where the Company has informed Ofcom that its procedures or practices have changed since August 2006 so as to conform with the principles set out in the Guidelines.

Annex 2

Information requested from the Company

The following is a list of questions put by Ofcom to the Company under section 135 of the Act for the purpose of deciding whether to issue a notification under section 128 of the Act.

- 1) *Please provide the following records of all calls made by your Group Companies since January 2006 by means of an ACS for outbound call activity, broken down on a daily basis for each Group Companies' outgoing numbers and for each of Group Companies' outgoing call campaign, specifying for each day and number:*
 - a. *the total number of calls attempted;*
 - b. *the total number of calls answered by an answering machine (including BT's 1571 service);*
 - c. *the total number of calls answered by an individual;*
 - d. *the total number of abandoned calls;*
 - e. *the total number of calls passed to a live operator;*
 - f. *the abandoned call rate (i.e. the rate of calls abandoned relative to live calls); and*
 - g. *the number of calls terminated or released by the ACS before being answered by an individual or an answering machine.*
- 2) *How long, in seconds, are ACSs used by your Group Companies programmed to ring before a call is abandoned as unanswered?*
- 3) *Please confirm whether your Group Companies display a calling line identification number (CLI) for each outgoing call centre campaign.*
- 4) *Please detail the procedures you have in place, if any, to manage customer complaints in relation to your Group Companies' outgoing call activities and requests from customers to have their details removed from calling lists i.e. to an in-house suppression file. If your Group Companies operate from multiple sites, explain how each site ensures compliance with this procedure.*
- 5) *Please specify if, within two seconds of a call being answered by an individual and before being terminated or released by the ACS, your Group Companies provide:*
 - a. *a brief recorded information message to inform called party of the identity of the company on whose behalf the calls was made;*
 - b. *details of a no-charge (0800) or a Special Services basic rate number the called party can contact.*
- 6) *Please provide the script of the recorded message referred to in question 5.*
- 7) *Please explain what procedures your Group Companies have in place to ensure that in instances where an ACS makes an abandoned call to a number, any subsequent call to that number in the following 72 hours is made by a live operator.*
- 8) *Please specify the procedures your Group Companies have in place to control the number of silent calls. Also, explain the process by which these procedures are complied with.*