



# Notification under Section 128 of the Communications Act 2003 regarding persistent misuse of an electronic communications network or electronic communications service

**Notice served on MKD Holdings Ltd by the Office of Communications  
("Ofcom")**

**Issued:** 03 May 2005

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**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 of the Communications Act 2003 (the "Act") allows Ofcom to issue a notification to a person where Ofcom has reasonable grounds for believing that a person has engaged in persistent misuse of an electronic communications network or electronic communications services in a way that causes annoyance, inconvenience or anxiety.

**Ofcom's determination**

2. Ofcom hereby determines that there are reasonable grounds for believing that MKD Holdings Ltd ("MKD Holdings") is, or has been, persistently misusing an electronic communications network or electronic communications services in a way that causes or is likely to cause annoyance, inconvenience or anxiety, namely by generating an excessive level of Silent Calls, in contravention of section 128(5)(a) and section 128(6)(a). The reasons for Ofcom's determination are set out in the Explanatory Statement attached to this notification.

**Action required by MKD Holdings**

3. MKD Holdings shall ensure that:

the Drop Rate over any 24 hour period shall not exceed 5% for each outgoing number operated by MKD Holdings for telemarketing purposes.

4. MKD Holdings shall comply with the above requirement by 31 May 2005.

5. MKD Holdings shall provide Ofcom with evidence of compliance with the above requirement on a monthly basis. MKD Holdings shall provide Ofcom with the first monthly written evidence by 4 July 2005 and shall continue to provide this information until 5 September 2005.

**Representations concerning this notification**

6. MKD Holdings shall have until 31 May to make representations to Ofcom about the matters set out in this notification and the accompanying Explanatory Statement.

**Interpretation**

7. Words or expressions used in this notification have the same meaning as in the Act, except for the following:

"Drop Rate" shall mean the proportion of Silent Calls to the total number of Live Calls;

"Live Call" shall mean a call where the called party is able to immediately speak with a person acting on behalf of the calling party;

"Silent Call" shall mean a call which is initiated by automatic calling equipment ("ACE") and is then terminated by the ACE immediately after the called party answers the call.

**David Stewart**

**Director of Investigations**

**29 APRIL 2005**

# Explanatory Statement

## Section 1

### Summary

- S.1 The "persistent misuse" sections of the Communications Act 2003 (the "Act"), sections 128-130, give Ofcom powers to take action, including imposing penalties, against persons who misuse networks or services in a way that causes or is likely to cause annoyance, inconvenience or anxiety.
- S.2 A "silent call" is a call which is initiated by automatic calling equipment ("ACE") and is then terminated by the ACE immediately after the called party answers the call, (usually, because no live operator is available to take the call). Ofcom considers that silent calls can represent misuse as defined at section 128(5) of the Act.
- S.3 A "live call" is a call where the called party is able to immediately speak with a person acting on behalf of the calling party.
- S.4 In a previous investigation, opened on 5 January 2004 (the "Previous Investigation") , Ofcom concluded that the level of silent calls generated by MKD Holdings Ltd ("MKD Holdings") was unreasonably high. The conclusion of that investigation resulted in Ofcom obtaining six written commitments from MKD Holdings which, amongst other things, required MKD Holdings to not exceed a daily silent call level of 5% for each outgoing phone number operated by MKD Holdings for telemarketing purposes. On the basis of the commitments received, Ofcom closed that investigation and required MKD Holdings to provide three reports over the following months to October 2004 so that Ofcom could monitor MKD Holdings' performance.
- S.5 Ofcom reviewed the three reports which MKD Holdings provided to it. The reports showed that MKD Holdings had not fully complied with its commitment to not exceed a daily silent call level of 5% for each outgoing phone number. Therefore, on 16 December 2004, Ofcom opened an own-initiative investigation to determine whether to issue a notification under section 128 of the Act (the "Current Investigation"). For the reasons set out in this Explanatory Statement, Ofcom considers that it has reasonable grounds to believe that MKD Holdings is in contravention of section 128(5)(a) and section 128(6)(a) of the Act and that it has not complied with the first commitment. As a result, Ofcom has served on MKD Holdings a notification of contravention under section 128 of the Act for making persistently high levels of silent calls.
- S.6 The section 128 notification requires MKD Holdings not to exceed a daily silent call level of 5% for each outgoing phone number operated by MKD Holdings for telemarketing purposes.
- S.7 MKD Holdings shall have until 31 May 2005 to make representations to Ofcom about the matters set out in the notification and the accompanying Explanatory Statement. In addition, MKD Holdings is required by the notification to provide Ofcom with evidence on a monthly basis demonstrating its compliance with the notification. MKD Holdings will provide the first set of

monthly data no later than 4 July 2005. MKD Holdings shall continue to supply this information to Ofcom until 5 September 2005. Ofcom will monitor MKD Holdings' performance against the requirement to not exceed daily silent call levels of 5% over a three month period following the expiry of the period for representations.

## Section 2

# Background

### Ofcom's investigations into MKD Holdings

2.1 In the Previous Investigation, opened on 5 January 2004, Ofcom concluded that the level of silent calls generated by MKD Holdings was unreasonably high. As part of that investigation, Ofcom obtained six written commitments from MKD Holdings (the "Commitments"), which are listed below. On the basis of the Commitments, Ofcom closed the Previous Investigation on 30 April 2004.

2.2 In the Commitments, MKD agreed to:

- 1) ensure that the drop rate of abandoned calls of all live calls made over any 24 hour period (the "Drop Rate") would be below 5% for each outgoing number operated by MKD for telemarketing purposes;
- 2) ensure that when a number has received an abandoned call that number is not called again by MKD automatic calling system for a period of 72 hours following the abandoned call;
- 3) retain records of all calls made by MKD on a rolling basis for a period of at least 12 months, broken down on a daily basis for each of MKD outgoing numbers used for ACS-based telemarketing activities, specifying for each day and number:
  - a. the total number of calls attempted;
  - b. the total number of calls to an answering machine (incl. BT's 1571 service);
  - c. the total number of calls connected to a live individual (i.e. live calls);
  - d. the total number of abandoned calls; and
  - e. the Drop Rate;
- 4) continue to display for each outgoing telemarketing call a calling line identification ("CLI") number which should not be charged at a higher rate than the national call rate;
- 5) put in place a recorded message at the CLI under 4) above informing callers of MKD identity, the intended purpose of the abandoned call and that their number will be deleted from MKD data base if they call back:
  - a. stating that this is their wish; and
  - b. leaving their name and telephone number;
- 6) monitor callers messages specified under 5) above on a regular basis and implement the requested data removal without undue delay.

2.3 The first written commitment required that the daily number of silent calls would not exceed 5% of the total number of daily live calls. As part of that commitment, Ofcom required MKD Holdings to provide three reports over the following months to October 2004 so that Ofcom could monitor MKD Holdings' performance against the first commitment.

2.4 The Direct Marketing Association ("DMA") has issued a Direct Marketing Code of Practice for its membership. This Code specifies, amongst other matters, a 5% threshold for silent calls as a proportion of live calls made over a 24 hour period. Whilst Ofcom has not formally endorsed the DMA code, Ofcom stated in the closure letter to the Previous Investigation that it was appropriate for Ofcom to have regard to this code.

2.5 Ofcom reviewed the three reports which MKD provided to it. The reports showed that MKD had not fully complied with the first commitment. These showed that while the number of silent calls generated by MKD overall was below 5% of the total number of daily live calls, its performance across individual numbers was variable, with silent calls in excess of 5% on certain phone numbers on certain days.

2.6 Ofcom's statement of policy on persistent misuse identifies silent calls as a form of behaviour where persistent misuse typically occurs and states that action under section 128 of the Act may be justified. On this basis, on 16 December 2004, Ofcom opened the Current Investigation in order to determine whether MKD Holdings was in contravention of section 128 of the Act.

2.7 On 11 February 2005, as part of the Current Investigation, Ofcom sent a formal notice, under section 135 of the Act, to MKD Holdings requiring it to demonstrate either compliance against each of the Commitments or the measures MKD Holdings had put in place to comply with the Commitments. The information provided by MKD Holdings in response to the formal notice is summarised in the table in Annex 1. The table shows that MKD Holdings is in compliance with five of the Commitments.

## **Legislative framework**

2.7 Section 128 of the Act allows Ofcom to issue a notification to a person where it has reasonable grounds for believing that a person has engaged in persistent misuse of an electronic communications network or electronic communications services in a way that causes annoyance, inconvenience or anxiety.

2.8 Sub-sections 128(1), 128(5), 128(6) and 128(7) of the Act detail the relevant parts of the Act which provide for the persistent misuse test. These sub-sections provide as follows:

"(1) Where OFCOM determine that there are reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services, they may give that person a notification under this section.

...

(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.

(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.

(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."

2.9 It should be noted that Ofcom may give a misuser who has been given a section 128 notification a section 129 enforcement notification where the following conditions are satisfied:

- a) that misuser has been given the opportunity of making representations about the section 128 notification;
- b) the period for making those representations has expired;
- c) Ofcom is satisfied that the misuser has persistently misused an electronic communications network or electronic communications service; and
- d) since giving the section 128 notification, that misuser has not taken all such steps as Ofcom consider appropriate for (i) securing that the misuse is brought to an end and is not repeated; and (ii) remedying the consequence of the notified misuse.

2.10 Should the misuser fail to comply with the section 129 enforcement notification, Ofcom can enforce the duties contained in the section 129 enforcement notification by way of an injunction or by any other appropriate remedy or relief.

2.11 In addition to, or as an alternative to, a section 129 enforcement notification, a misuser who has been given a section 128 notification may also be subject to a penalty. Ofcom may impose a penalty under section 130 of the Act where the following conditions are satisfied:

- a) the misuser has been given the opportunity of making representations about the section 128 notification;
- b) the period for making those representations has expired; and
- c) the misuser has persistently misused an electronic communications network or electronic communications service or where he has contravened a requirement of an section 129 enforcement notification given in respect of the notified misuse.

### **Section 3**

## **Ofcom's decision and reasoning**

### **Reasonable grounds**

3.1 Ofcom's statement of policy on persistent misuse (the "Statement on Misuse") identifies silent calls as a form of behaviour where persistent misuse typically occurs and states that action under section 128 of the Act may be justified .

3.2 The very nature of a silent call, whereby the called party is unable to speak to the caller, is likely to cause inconvenience, annoyance and anxiety. Ofcom has considered the behaviour of MKD Holdings in relation to the Statement on Misuse.

3.3 The Statement on Misuse identifies section 128(5) of the Act as the provision which sets out what constitutes a misuse of an electronic communications network or electronic communications service. The Statement of Misuse identifies a silent call as a potential misuse where the calling party rings off before the called party has time to answer the call. Based upon the information supplied by MKD Holdings during the Current Investigation, Ofcom notes that MKD Holdings has made silent calls during the period of investigation. On this basis, Ofcom considers that section 128(5)(a) has been breached by MKD Holdings.

3.4 The Statement of Misuse also notes that for a breach of section 128 of the Act to occur the misuse must be persistent. Ofcom considers that misuse is persistent within the meaning of section 128(6)(a) of the Act where the misuse represents a pattern of behaviour or practice. The Statement of Misuse identifies certain examples of persistent misuse. One of these examples is misuse by making silent or short duration calls. The Statement of Misuse goes on to state that "properly run call centres will strive to ensure that they do not generate more calls than their operators can handle. A persistent failure to do so may lead to the issue of a notification under section 128." Ofcom notes that the DMA Direct Marketing Code of Practice specifies, amongst other matters, a 5% threshold for silent calls as a proportion of live calls made over a 24 hour period. Whilst Ofcom has not formally endorsed the DMA code, Ofcom stated in the closure letter to the Previous Investigation that it was appropriate for Ofcom to have regard to this code in determining whether the level of silent calls generated by MKD Holdings amounts to a persistent misuse under section 128(6)(a) of the Act.

3.5 As noted, Ofcom previously accepted the Commitments from MKD Holdings in order to close the Previous Investigation. In respect of the first written commitment, MKD Holdings' performance report for the period September to October 2004 and the call data covering the period from November 2004 to 23 January 2005 shows that whilst the number of silent calls generated by MKD Holdings overall is below 5% of the total number of daily live calls, certain individual numbers have made in excess of 5% silent calls on certain days. The information also shows a trend indicating that the overall level of silent calls is slightly increasing. MKD Holdings acknowledged to Ofcom that the initial improvement in curbing silent calls achieved at the beginning of 2004, has not been sustained in the last quarter of 2004. Their overall level of silent calls from October to November 2004 was at 4.43%, up from 4.16% in the period from August to September 2004.

3.6 Based on the information received in the Current Investigation, Ofcom has reasonable grounds to believe that MKD Holdings is or has been in contravention of

section 128(5)(a) and section 128(6)(a). On this basis, Ofcom has decided to issue MKD Holdings with a notification of contravention under section 128 of the Act.

3.7 Ofcom previously accepted the Commitments from MKD Holdings to address the problem of unacceptably high levels of silent calls. Based on the information Ofcom received under formal powers during the course of the Current Investigation, MKD Holdings has already demonstrated compliance against five of the six commitments. A summary of MKD Holdings' performance against the Commitments appears at Annex 1.

### **Period for compliance with the Section 128 notification**

3.8 Ofcom considers that the appropriate notification period during which MKD Holdings shall comply with the notification given to it under section 128 of the Act is one month. Ofcom will continue to monitor MKD Holdings' performance over three months following the representation period.

### **Action required of MKD Holdings**

3.9 The notification requires MKD Holdings to ensure that the drop rate (which is the proportion of silent calls to the total number of live calls) over any 24 hour period does not exceed 5% for each outgoing number operated by MKD Holdings for telemarketing purposes by 31 May 2005.

3.10 The notification also requires MKD Holdings to provide Ofcom with evidence on a monthly basis showing that it has complied with the above requirement. Ofcom expects the evidence to be provided in a form similar to that provided previously to Ofcom. MKD Holdings is required to provide Ofcom with the first monthly evidence by 4 July 2005 and shall continue to provide this information until 5 September 2005.

### **Failure to comply with section 128 notification**

3.11 Following the period for making representations under the section 128 notification given to MKD Holdings, if Ofcom considers that MKD Holdings has failed to comply with the section 128 notification and has not taken all such steps as Ofcom consider appropriate for (i) securing that the misuse is brought to an end and is not repeated; and (ii) remedying the consequence of the notified misuse, Ofcom may consider further action, including issuing MKD Holdings a section 129 enforcement notification and/or impose a penalty under section 130 of the Act.

**Annex 1**

## Table - Summary of MKD Holding's performance against its Commitments

<b>Commitment</b>	<b>Has this commitment been complied with?</b>
(1) Ensure that the drop rate of abandoned calls of all live calls made over any 24 hour period (the "Drop Rate") is below 5% for each outgoing number operated by MKD for telemarketing purposes;	No. A marked improvement was achieved during 2004. This improvement, however, has not been sustained in quarter 4 of 2004. Their overall performance from October to November 2004 was at 4.43% up from 4.16% in the period August – September 2004..
(2) Ensure that when a number has received an abandoned call that number is not called again by MKD automatic calling system for a period of 72 hours following the abandoned call;	Yes. Copies of the screen drafts provided by MKD Holdings show that the diallers are set to recycle dropped numbers after a 72-hour period.
(3) Retain records of all calls made by MKD on a rolling basis for a period of at least 12 months, broken down on a daily basis for each of MKD outgoing numbers used for ACS-based telemarketing activities, specifying for each day and number: a. the total number of calls attempted; b. the total number of calls to an answering machine (incl. BT's 1571 service); c. the total number of calls connected to a live individual (i.e. live calls); d. the total number of abandoned calls; and e. the Drop Rate;	Yes. The reports provided by MKD Holdings during the course of this investigation and the previous investigation show that MKD Holdings is keeping records of call data broken down in the format required over 12 months.
(4) Continue to display for each outgoing telemarketing call a calling line identification ("CLI") number which should not be charged at a higher rate than the national call rate;	Yes. MKD Holdings has provided the order from BT confirming CLI on all MKD outgoing numbers.
(5) Put in place a recorded message at the CLI under 4) above informing callers of MKD identity, the intended purpose of the abandoned call and that their number will be deleted from MKD data base if they call back: a. stating that this is their wish; and b. leaving their name and telephone number;	Yes. This message is in place.
(6) Monitor callers messages specified under 5) above on a regular basis and implement the requested data removal without undue delay.	Yes. MKD Holdings has formally confirmed that this is done on a daily basis.