



Statement of policy on the persistent misuse of an electronic communications network or service

Statement

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Section 1

Introduction and summary

Background to the consultation

- 1.1 This document sets out Ofcom's new policy towards silent and abandoned calls. It will be of greatest relevance to organisations using predictive diallers in call centres.
- 1.2 Under sections 128-130 of the Communications Act 2003 (the "Act"), Ofcom is empowered to take enforcement action when it has reasonable grounds for believing that a person (either an individual or a legal entity) has persistently misused an electronic communications network or electronic communications service. A person misuses a network or service if the effect or likely effect of their behaviour is to cause unnecessary annoyance, inconvenience or anxiety to another person.
- 1.3 Under section 131 of the Act Ofcom is required to publish a statement of its general policy with regard to the exercise of its powers under sections 128-130. Section 131(2) of the Act enables Ofcom to revise the statement, from time to time, as it sees fit. On 31 October 2005 Ofcom launched a consultation on significant changes it proposed to make to the statement. Although the Act does not impose a statutory obligation on Ofcom to consult on revisions to the statement, we took the view that it was appropriate to bring the proposed amendments to the attention of Ofcom's stakeholders and to invite their views.

Persistent misuse and silent calls

- 1.4 The changes to the statement have been prompted by the growing public concern about the distress caused to consumers by silent and abandoned calls. Most silent calls arise when call centres misuse predictive diallers to generate more calls than their agents can handle. When a consumer answers such a call and no agent is available, the consumer either hears silence or the call is automatically terminated, resulting in an abandoned call.
- 1.5 Ofcom has concluded that organisations making a significant number of silent or abandoned calls are behaving in a way that constitutes persistent misuse under the Communications Act.
- 1.6 The generation of silent calls had already been identified as a form of persistent misuse in previous versions of the statement. Ofcom, at its own-initiative, investigated seven companies regarding the annoyance caused to consumers by short duration and silent calls, completing its work on 31 October 2005 (see http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_835). We have also carried out research into consumer attitudes. We concluded that companies using predictive diallers needed guidance that goes beyond that previously given. This was the reason for our consultation on amendments to our statement of policy on 31 October 2005.
- 1.7 This document sets out our new policy statement. It sets out the factors we will take into account in deciding whether or not to take enforcement action under the persistent misuse powers. These factors establish an approach to prioritising enforcement action, which depends on the seriousness of the misuse, its impact on consumers and the value of a deterrent effect.

1.8 In deciding whether to take enforcement action in a particular case Ofcom will also be influenced by the positive steps that call centre operators may have taken to reduce the impact of silent or abandoned calls. There are a number of operating procedures that call centres can adopt which, taken as a package, will act as mitigating factors in establishing the gravity of a particular act of misuse. In summary, these procedures include the following:

- Limiting abandoned calls to a rate not exceeding three per cent of calls made;
- Playing a brief information message giving details about the call in the event that a call is answered before an agent is available;
- Maintaining a 72-hour period before a number receiving an abandoned call may be called again;
- Providing calling line identification (CLI) information on outbound calls, so that consumers can know the number that is calling;
- Maintaining a minimum 15 second ring time.

These procedures are set out in more detail in paragraph 6.16 of the statement.

1.9 Ofcom has concluded that persistent misuse may also take the form of fax distribution to phone lines. The statement identifies the steps that fax broadcasters can take to reduce the level of annoyance caused when a fax call is made to a phone line. They are set out in paragraph 6.18 of the statement.

1.10 Ofcom firmly believes that the recommendations contained in this statement, and our approach to enforcement, will have a real impact on the nuisance caused by abandoned calls. We intend to review their effect after twelve months in order to determine whether further changes to the statement are required.

Section 2

Consultation responses

Analysis of responses to the four questions

- 2.1 The consultation opened on 31 October 2005 and the closing date for responses was 9 January. The consultation generated a lively degree of public interest and attracted some media attention. In all 235 responses were received of which 71, those clearly intended for publication, have been posted at <http://www.ofcom.org.uk/consult/condocs/misuse/responses/?a=87101>. Responses came from a wide variety of sources and reflected a range of attitudes. The degree of popular interest is reflected by the fact that some 160 responses came from members of the general public.
- 2.2 A number of respondents complained about Ofcom's consultation processes. We have improved some aspects of these processes already, including providing an on-line response form for each consultation document. A comprehensive review of our consultation processes is underway and we are grateful to those who have contributed their views on improvements.

Responses to Question 1

Q1 Do you agree that consumers are concerned by silent calls and that Ofcom is right to take enforcement action against the companies that make them?

- 2.3 There was broad agreement with both parts of the proposition advanced by Question 1. A number of corporate respondents believe that the degree of concern has been overstated and exacerbated by media attention but these were very much in a minority. One response argued it was illogical to base enforcement action on consumers' subjective feelings – however a test of what forms of behaviour are likely to trigger unnecessary feelings of annoyance, inconvenience or anxiety are at the heart of the 'persistent misuse' legislation and demonstrates the need for a statement of this type.
- 2.4 Several responses alleged that silent calls were largely generated by offshore call centres and that it was unfair for enforcement action to be concentrated on UK-based centres. Although there are no reliable statistics about the proportion of silent calls generated from offshore centres, Ofcom wishes to dispel any ambiguity about offshore immunity. We wish to make it clear that we are willing to take action against any company with a UK presence on whose behalf calls are made from an offshore centre where those calls constitute acts of persistent misuse.
- 2.5 There was almost complete unanimity in the responses from members of the public who regard silent calls as a major cause for concern. Many were extremely angry and believe that Ofcom should approach a zero-tolerance approach to silent calls with severe penalties for the companies that make them. A significant number were hostile to any form of cold-calling and said they would never buy products or services advertised in this manner. Although the group of individuals who responded do not represent a statistically significant sample their responses bear out Ofcom's belief that many people are troubled by receiving silent calls and will support initiatives to take action against the problem.

- 2.6 We believe that an opt-in solution to telemarketing would be disproportionate and that the current opt-out arrangements involving registration with the Telephone Preference Service (TPS) are working well – the most recent survey showed that 85 per cent of people registered with the TPS were very or fairly satisfied with its performance. Some respondents believed that because their numbers were not listed in telephone directories this should prevent their receiving marketing calls. However there is no automatic carry-over from being ex-directory to being added to ‘do not call’ lists; TPS registration is the only way of recording a wish to receive no marketing calls.
- 2.7 A complete ban on silent calls was considered as a policy option but would effectively prohibit the use of predictive diallers in the UK. We believe that this would be a step too far, because it would result in significant additional costs to call centres operating in the UK, and that the measures implemented in this statement will have a big impact on the nuisance that silent calls cause without having disproportionate cost impacts. However we will be reviewing the effectiveness of the present measures after they have had time to be adopted and do not rule out further revisions to the statement if they become necessary.

Responses to Question 2

Q2 Do you agree with Ofcom’s proposed approach to taking enforcement action, guided by a sense of administrative priority?

- 2.8 There was broad agreement with Ofcom’s proposed approach, although some doubts were expressed about the practical implications of what it means to be “guided by a sense of administrative priority”. Some corporate respondents drew a distinction between responsible companies who tried to abide by the rules and rogue call centres, probably offshore, that made no efforts to comply. Another set of distinctions was drawn between the specific guidance that Ofcom is proposing and Ofcom’s willingness to enforce them. The merits of the former counted for very little unless there was a genuine desire to enforce.
- 2.9 Some individual responses felt that ‘administrative priority’ represented a dilution of Ofcom’s powers and responsibilities and was, in essence, a recipe for letting persistent misusers off the hook.
- 2.10 What we understand by ‘administrative priority’ is that in a context where, say, BT’s Nuisance Calls Bureau is handling nearly 100,000 complaints a month, mostly to do with silent calls, it is evidently beyond the resources of any organisation to take enforcement action against each perpetrator. The case for taking enforcement action, in any individual case, needs to be evaluated against a set of priorities so that it is effective and targets the worst cases.
- 2.11 What the statement does is to set out a list of our priorities, which include qualitative, quantitative and deterrence tests in Section 7 of the statement. A further measure is the degree to which makers of silent calls have attempted to abide by the guidance set out in Section 6 of the statement. Intelligent enforcement needs to distinguish between human or mechanical error on the part of an organisation that has taken the guidance on board and strives to treat its customers with respect and those that have made little or no effort to comply and continue to behave in a manner that takes no account of the feelings of the people on its calling list. We will be guided by the degree to which organisations have adopted the specific procedures set out in paragraphs 6.16 to 6.19 of the statement but this is more than just a box-ticking

exercise. We have to take each individual case on its merits and try to assess the degree to which the organisation is acting within the spirit of the guidance.

- 2.12 There are two further points which respondents raised. Firstly, there was a concern that organisations that do not withhold their CLI will be more liable to enforcement action because they are easier to identify. They sought reassurance that enforcement investigations will not just be based on consumer complaints but on evidence supplied by telephone companies' nuisance calls bureaux which are better placed to establish the identities of companies hiding behind withheld CLIs. We are able to confirm that such evidence provided a basis for some of the cases involved in the most recent trencher of investigations (http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_835) and will continue to be used as a source for future investigations.
- 2.13 Secondly, respondents also sought guidance on an implementation period before they are able to adopt the recommended procedures. Some features, such as recorded information messages will require software and hardware upgrades and cannot be introduced overnight. A period of six months was proposed as a period of grace. We do not propose to define a set timetable for the implementation of the recommended procedures. However, we will take each case on its merits and where there is an incomplete implementation we will determine what practicable steps within its power an organisation has already taken. Not having an information message facility, but having placed the necessary order with your vendor clearly places you on a different footing from an organisation that has no apparent implementation timetable.

Responses to Question 3

Q3 Do you agree that the range of procedures proposed in the statement will be effective in reducing the degree of anxiety, annoyance and inconvenience caused by silent calls?

- 2.14 The responses to this question focussed largely on the detailed procedures set out in paragraph 6.16. It will be easier to review the responses to each of these procedures in turn.
- 2.15 *The 'abandoned call' rate shall be no more than three per cent of live calls on each individual campaign over any 24 hour period.* Responses were divided on this proposal with a narrow margin of industry respondents preferring to retain the Direct Marketing Association's (DMA) five per cent target. Some industry respondents believe that three per cent is an acceptable target and one respondent thought that adopting such a target would result in some diallers being speeded up. There was a degree of consensus that the percentage reduction would not result in much actual change. These views need to be counterbalanced by those individual respondents for whom any margin of tolerance for abandoned calls is unacceptable.
- 2.16 Given our overall policy objective of trying to reduce the volume of silent or abandoned calls we believe that the three per cent target over a 24 hour period is achievable, proportionate and represents a move in the right direction. We do not see why the public should not benefit from some share of the efficiency gains which dialling technology enables.
- 2.17 *In the event of an 'abandoned call, a very brief recorded information message is played within one second of the call being answered ...* There was general agreement with the proposal of an information message with some concerns about

the expense and time required to upgrade equipment. However there were a number of questions about when the 'one second' period begins, what precisely is meant by a call being answered (off-hook or salutation) and whether the one second period can be extended to allow for answer machine detection (AMD) technology.

- 2.18 In response to these concerns we have modified this recommendation by extending the timeframe within which the message must be played from one to two seconds. The primary consideration is that a person answering a dialler-generated call should not be confronted by silence but receive a message placing that call in context. As long as this occurs we do not believe the difference between one second and two is material. We will monitor the effectiveness of this recommendation as part of our overall review of these proposals.
- 2.19 Some respondents asked whether an operator who has become available may interrupt the information message. We believe that such a practice is completely unacceptable as it would create a temptation to speed up diallers to make more calls where no agent is available in the expectation that one might become free while the message is playing. This would lead to more, not fewer, nuisance calls.
- 2.20 There was a concern amongst some respondents that the information message might become a new type of nuisance call giving rise to inconvenience or annoyance. We recognise this risk but believe that to the extent that information messages allay the anxiety of a silent call they represent a customer benefit. This is not to say that an organisation that bombards a particular number with numerous information messages over a short period will not be committing an act of persistent misuse.
- 2.21 *...identifies the intended purpose of the call (ie "an unsolicited sales call", "a call as part of debt recovery", etc)...* Numerous respondents from various sections of the financial services industry pointed out that identifying the intended purpose of the call as debt recovery might breach an individual's privacy rights if the recorded message were heard by a person other than the intended recipient of the call. It also appears to run counter to provisions of the Banking Code and the Office of Fair Trading's Debt Collection Guidance. An individual's privacy rights may also be jeopardised where the intended purpose of the call is not a marketing call but arises out of an existing relationship with a company or a public authority, such as a local area health authority.
- 2.22 Having taken the advice of the Information Commissioner's Office we do not believe that the 'intended purpose of call' can be limited to marketing calls only as the absence of an 'intended purpose' statement in the information message would point to the presence of an existing relationship which will, in certain circumstances, be a breach of individual privacy. Accordingly we have decided to withdraw this recommendation.
- 2.23 *... offers the called person the possibility of declining to receive further calls from that company by contacting a no charge (0800) or special services basic rate (0845) number ...* Financial services and other companies have objected to this recommendation on the grounds that no one should be given the opportunity to decline further calls in circumstances where they have been phoned for debt recovery or credit management purposes. This is clearly a sensible point and we had not intended to confer an absolute right; hence the use of the word 'possibility'. There is a legal basis for callers declining to receive further unsolicited direct marketing calls arising from Regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the '2003 Regulations').

- 2.24 One alternative would be to limit the possibility of declining to receive further calls to marketing calls. However this falls foul of the same privacy problem that arises in the context of the 'intended purpose' information requirement. The absence of this possibility being offered would indicate the receipt of a non-marketing call. Such information, taken together with the name of the company on whose behalf the call was made and the CLI of the call might undermine an individual's privacy rights.
- 2.25 Some respondents pointed out that calls to 0800 or 0845 numbers are often charged at normal tariffs on calls from mobiles. This is a valid point. However we do not believe it is necessary to make special recommendations for mobile networks at present as all the indications are that few silent calls are delivered to mobiles.
- 2.26 Having taken the advice of the Information Commissioner's Office we have concluded that this part of the information message must be retained. However, when a person phones to decline further calls they may be informed that this is not an option in their particular circumstances.
- 2.27 Some respondents pointed out that this recommendation which involves the use of telephone numbers within the UK national numbering scheme might be onerous for offshore call centres. However given that such centres may not be technically capable of releasing their CLI (see paragraph 2.30 below) it is particularly vital that they comply with the information message requirement and offer callers a national contact point.
- 2.28 *... when an abandoned call is made to a particular number, that number is not called again in the following 72 hours unless a dedicated operator is available ...* A number of respondents who are not involved in telemarketing argued that this proposal is inappropriate in a non-marketing environment, where for example, it may be vital to contact a credit card customer at short notice to query unusual and possibly fraudulent patterns of expenditure. However some respondents misinterpreted this section as imposing a blanket ban on redialling a number within 72 hours of an abandoned call. It does no such thing, provided a live operator is on hand when the number is redialled. On balance we believe that if it is essential to contact a particular individual who has received an 'abandoned call' in the preceding 72 hours then it is not unreasonable, given the importance of the call, to assign a live agent to it. Accordingly we have retained this requirement but redrafted it to achieve greater clarity.
- 2.29 *... 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 ...* We believe that this is one of the key measures that call centres can adopt to alleviate the anxiety that silent and abandoned calls can cause. The proposal was supported by virtually all respondents.
- 2.30 However a handful of responses noted that CLI information is not always carried across national boundaries and that as a result offshore call centres may not be able to present a CLI number. Moreover if an international CLI were to be presented a return call to that number would be likely to cost more than a national call. Ofcom reluctantly accepts that the technological limits of international networking may result in some dialler calls being delivered to the UK without CLI identification but flagged 'international'. In these circumstances it is even more vital that such centres use the information message and a UK based number so that they may be contacted by called parties after an abandoned call.

- 2.31 ... *either a recorded message or a live operator is available at the CLI number presented to inform called persons of the identity of the organisation that called them, the intended purpose of the 'abandoned call' and that the called person's number will be deleted from the organisation's database and added to its in-house suppression list at the called person's request if they leave their name and telephone number ...* Ofcom has decided to withdraw this proposal. This is because where a number of campaigns are run from one call centre simultaneously it is not technically possible to ascribe a different CLI to each campaign. Accordingly the recorded message can not be tailored to an individual campaign or identify the company on whose behalf the call was made. Where people want to stop receiving calls from a particular company they will be able to do so using the number provided by the information message.
- 2.32 ... *any call made by the called person to the contact number provided shall not be used as an opportunity to market to that person...* A number of responses made the point that a prohibition on marketing content when a person phones the CLI number presented is unreasonable if the person themselves wants to discuss the nature of the call. You might have been phoned to remind that an MOT test is due. It would not be reasonable for the person answering your return call not to be able to make an appointment for you. Accordingly the words "without that person's consent" have been added to the recommendation. The same words have also been added to paragraph 6.18.
- 2.33 ... *records are kept that demonstrate compliance with the above procedures ...* A number of responses claimed that this proposal lacked clarity. However given that diallers maintain a call log and that it is industry practice to maintain these logs for a reasonable period of time - the DMA Code of Practice suggests two years - we do not believe this is an onerous recommendation. Companies should also know the date they began to apply the information message to abandoned calls and its contents, and whether or not they withhold their CLI. The other matters would appear to be covered by in-house desk instructions. For the avoidance of doubt this section will be redrafted to specify that records should be kept for at least six months.

Responses to Question 4

Q4 Are there any additional procedures which call centres could adopt to reduce the degree of anxiety, annoyance and inconvenience caused by silent calls?

- 2.34 Several individual respondents argued that Ofcom should prohibit unsolicited calls in unsocial hours. We do not believe it would be appropriate for us to use the statement to define time limits outside which unsolicited calls would automatically count as persistent misuse. However the existing guidance on persistent misuse would enable us to take action where calls are made at a time that in the judgement of any reasonable person are likely to cause unnecessary annoyance, inconvenience or anxiety.
- 2.35 A suggestion that arose in several responses was that Ofcom should establish an accreditation scheme for diallers, either by licensing them or through an approval mark. Ofcom has neither the expertise nor the remit to engage in the detailed regulation of terminal equipment; the Radio and Telecommunications Terminal Equipment Directive (99/5/EC) prevents national regulations for terminal equipment. However we believe that there is a valuable role that the dialler industry could play in the education and training of users towards compliant behaviour.

- 2.36 There were parallel suggestions that Ofcom should become engaged in the direct regulation of call centres, by a licensing and audit scheme. Given there are over 4000 call centres in the UK (there is no precise figure because no precise definition of a call centre) this would be impracticable and probably beyond Ofcom's powers. However we will certainly request detailed statistics when a call centre is investigated under the persistent misuse provisions.
- 2.37 One suggestion was that an abandoned call should be followed by an instant apology call. We believe this idea has merit although some people may have been so frustrated by receiving an abandoned call that they may ignore a successive call. But we do not wish to over-prescribe how call centres relate to their customers and do not think that this should become a recommended practice.
- 2.38 Some respondents from the financial services industry favour the use of a recorded 'holding message' once a call has been answered but before an agent becomes available. However this is problematic for two reasons. Firstly, if the message includes any marketing contents it would appear to run counter to the 2003 Regulations and their prohibition on the use of automated calling systems to transmit recorded matter for direct marketing purposes. Secondly, in a non-marketing environment it may, when considered as one element of the circumstances of a particular case, constitute misuse. This is because the use of holding messages would enable diallers to be speeded up to make more calls where no agent is available in the expectation that one might become free while the holding message is playing. This would lead to more, not fewer, silent calls.
- 2.39 The National Consumer Council proposed that communications providers should provide a simple facility for consumers to report nuisance calls automatically.

Number scanning

- 2.40 Number scanning involves the automated calling of a sequence of telephone numbers to determine which ones are currently in service. The statement identifies number scanning as a form of persistent misuse, because of the possibility that it will generate silent calls and may cause network congestion. One respondent suggested that number scanning should be allowed as long as CLI was not withheld and the scanner was licensed by Ofcom. A further suggestion was that number scanning would not be necessary if a database of numbers in service was made available on a commercial basis.
- 2.41 We have considered this latter proposal. BT's Operator Services Information System (OSIS) database is commercially available and provides regular updates on in-service numbers. However we have been advised by the Information Commissioner's Office that a complete list of numbers would need to exclude 'ex-directory' numbers and that the absence of certain numbers from a numerical sequence may only serve to flag them up, thus defeating the purpose of 'ex-directory' status.

Other changes to the statement

- 2.42 In paragraph 6.9 the intended meaning has been restored by clarifying that the transmission of recorded messages with no marketing content may be persistent misuse.
- 2.43 In paragraph 6.29 the statement now makes it clear that the practice of tricking callers into phoning a non-revenue sharing service that leads to the presentation of a fraudulent bill constitutes misuse.

Statement of policy on the persistent misuse of an electronic communications network or electronic communications service

Section 3

Statement of policy on the persistent misuse of an electronic communications network or service – Introduction and summary

Introduction

- 3.1 This statement is published in accordance with section 131 of the Communications Act 2003 ("the Act") and sets out Ofcom's general policy with regard to the exercise of its powers under sections 128 to 130 of the Act.
- 3.2 The purpose of this statement is to provide clarity about the operation of the 'persistent misuse' sections 128 to 130 of the Act. These sections enable Ofcom to issue notifications if it has reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications service. These sections also set out enforcement procedures and penalties where there has been 'persistent misuse'. Section 131(4) of the Act lays a duty on Ofcom to have regard to the statement in exercising the powers conferred on it by the relevant sections. However the statement cannot bind Ofcom absolutely in exercising those discretionary powers. Section 131(2) enables Ofcom to revise the statement from time to time as it thinks fit.
- 3.3 The statement addresses the following policy issues:
- a definition of what constitutes 'misuse' of a network or service;
 - when does misuse become 'persistent';
 - examples of persistent misuse;
 - Ofcom's policy on the issuing of section 128 notifications;
 - the consequences of a notification; and
 - Ofcom's policy on penalties for persistent misuse.

Summary

- 3.4 A person misuses an electronic communications network or service when the likely effect of their behaviour is to cause unnecessary annoyance, anxiety or inconvenience to another person. In this context a person means either a living individual or a legal entity.
- 3.5 Misuse becomes persistent when the behaviour in question is repeated often enough to represent a pattern of behaviour or practice or it is clear that the misuse is reckless. Three examples of misuse may be sufficient to constitute persistent misuse.
- 3.6 There are many forms that misuse can take. The legislation is broad enough to capture new ways of misusing a network or service that have not yet been

encountered. However the statement identifies six general areas where misuse can occur. These are:

- misuse of automated calling systems;
- misuse by making silent or abandoned calls;
- number-scanning;
- misuse of a calling line identification facility;
- misuse for dishonest gain;
- misuse of allocated telephone numbers.

These examples are not discrete and misuse may overlap more than one area.

- 3.7 Where Ofcom believes that misuse is occurring it may issue a section 128 notification to the misuser, determining that a person has persistently misused a network or service, specifying the nature of the misuse and the period within which the notified person may make representations. In issuing section 128 notifications Ofcom will be guided by a scale of priorities and take account of the severity of the harm that the misuse causes to individual members of the public, the volume of the misuse and the number of people affected by it, or the need to indicate that certain forms of misuse are unacceptable.
- 3.8 Once a section 128 notification has been issued and the period for making representations has expired, Ofcom may issue a section 129 enforcement notification if it is still satisfied that the misuse is persistent and that the misuser has not taken all steps Ofcom considers appropriate to bring the misuse to an end, avoid its repetition and remedy its consequences. The section 129 enforcement notification imposes an enforceable requirement on the misuser to take all the necessary steps to end the misuse, avoid its repetition and remedy its consequences. The required remedial action may involve the payment of compensation to persons who have suffered as a result of the misuse.
- 3.9 As an addition or an alternative to a section 129 enforcement notification Ofcom may also impose a financial penalty on a person responsible for acts of persistent misuse. The current limit for such a penalty is £5,000 per contravention but this sum is under review and the Secretary of State has the power to increase it.

Section 4

Defining 'misuse' of a network or service

4.1 Section 128(5) sets out two definitions of what constitutes misuse of an electronic communications network or electronic communications service. A person misuses a network or service if:

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

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.

4.2 In both cases the significance of the words "likely effect" is that the effect has to be probable, not necessarily proven. The two cases may be distinguished insofar as the former requires the direct use of a network or service whereas the latter captures a wider category of behaviour which involves conduct dependent on the use of a network or service. An example of the former is where a person uses a telephone to make an abandoned call (i.e. one which is terminated as soon as the called person tries to answer it); an example of the latter is conduct that results in a person being led unknowingly to dial a premium rate service.

Section 5

Identifying when misuse becomes 'persistent'

5.1 To fall within the provisions of sections 128 to 130 it is not sufficient to misuse an electronic communications network or service. The misuse must be persistent; in other words it must be "repeated on a sufficient number of occasions". Section 128(6) offers two ways of determining whether misuse has been repeated sufficiently to count as persistent. The misuse must either represent:

a pattern of behaviour or practice; or

recklessness as to whether persons suffer annoyance, inconvenience or anxiety.

5.2 The first test is met by instances of repetitive misuse. It is difficult to define in advance what cycle of repetitive behaviour may reasonably be described as forming a pattern. This will need to be determined on a case by case basis. However any such pattern is likely to require a minimum of three instances of the conduct in question in order to be recognised as such. More generally, the episodes that compose a pattern are subject to three variables: those of number, frequency and regularity. 'x' instances of a silent or abandoned call on successive days is more likely to be considered to form a pattern than '2x' instances at random intervals over a twelve-month period.

5.3 The second test requires the misuse to represent 'recklessness' on the part of the misuser. This will need to be determined on a case by case basis. Evidence that points to recklessness could be that:

- the misuser was informed of the effect of his behaviour but continued with it;
- the behaviour in question is so patently annoying (e.g. ringing someone repeatedly in the middle of the night) that no reasonable person could not have realised it would have that effect;
- a failure to take reasonable steps to establish whether or not the behaviour would inconvenience other people.

5.4 In determining whether misuse is persistent or not, section 128(7) makes it clear that it is immaterial whether networks were used on some occasions and services on other occasions; that different networks or services were used on different occasions; or that the persons exposed to the misuse were different on different occasions.

Section 6

Examples of persistent misuse

- 6.1 Having analysed the reasonable grounds for believing that behaviour may be persistent misuse, this section identifies six general areas within which such forms of behaviour typically occur. There is a degree of overlap between these areas; several forms of misuse will fall into more than one category.
- 6.2 The examples are intended to be illustrative rather than inclusive and will not prevent Ofcom from issuing a notification in respect of behaviour which is not identified by this statement. That could occur if, for example, a new technology or new use of technology allowed for the operation of a form of misuse not previously known to Ofcom, which has the potential to cause unnecessary annoyance, inconvenience or anxiety to consumers. In these circumstances Ofcom would take the necessary measures to prevent further harm and also revise the statement to incorporate the new form of misuse.
- 6.3 The six areas are:
- misuse of automated calling systems;
 - misuse by making silent or abandoned calls;
 - number-scanning;
 - misuse of a calling line identification facility;
 - misuse for dishonest gain; and
 - misuse of allocated telephone numbers.

Misuse of automated calling systems

- 6.4 Power or predictive diallers offer the possibility of initiating calls to a sequence of numbers in accordance with stored instructions without the need for each individual number to be dialled in turn. They are widely used in call centres. For the purpose of the 2003 Regulations power diallers are more commonly known as automated calling systems with the additional qualification that the calls are made without human intervention. In this context, this means that the contents of the call do not involve an operator or live speech.
- 6.5 Under the 2003 Regulations it is an offence to use automated calling systems to make direct marketing calls which do not consist of live speech unless the called person has previously notified the caller that for the time being they consent to such communications being sent. An example of such a call is a recorded message for marketing purposes where no operator is present.
- 6.6 The concept of direct marketing that the 2003 Regulations rely on is very broad and applies not just to the advertisement of goods and services but also to the promotion of an organisation's aims and ideals. It therefore applies to political and charitable, in addition to commercial, organisations. However there may be types of unsolicited recorded messages sent by automated calling systems that cause annoyance or inconvenience but which, for whatever reason, fall outside the 2003 Regulations.

- 6.7 Under the previous regulatory framework based on the Telecommunications Act 1984 the use of automated calling systems (then described as automatic calling equipment) for purposes other than direct marketing was regulated under a licence condition included in both individual and class telecommunications licences which applied to all communications providers and end-users running a licensed system. The effect of the condition was to prohibit the use of such systems without the consent of called parties to initiate calls that consisted of:
- recorded messages;
 - silent calls;
 - fax-scanning calls; and
 - fax messages.
- 6.8 As a result of consultation in 2003, Oftel did not include a similar condition in the General Conditions of Entitlement (which only apply to communications providers and not end-users) on the basis that it would have been disproportionate regulation and might limit the development of new services which require some kind of automatic notification sent on an individual basis.
- 6.9 In its response to the consultation Oftel explained that the provisions of sections 128 to 131 (which have the advantage of applying to end-users as well as communications providers) and the previous restrictions on the use of automated calling systems in the Telecommunications (Data Protection and Privacy) Regulations 1999 (and now in the 2003 Regulations) will provide adequate protection for consumers against the misuse of such systems. Ofcom believes that the persistent use of automated calling systems to transmit recorded messages that are not marketing messages within the meaning of the 2003 Regulations or to make silent or abandoned calls (see the section Misuse by making silent or abandoned calls below) or fax-scanning calls (see the section Number-scanning below) is persistent misuse within the meaning of section 128.
- 6.10 Oftel also recognised that some uses of automated calling systems offer benefits to the public. One example is the possibility of emergency authorities being able to send a recorded hazard warning to subscribers within a defined geographical area; a second is the kind of automated services offered by some communications providers that test a subscriber's line or obtain a subscriber's confirmation that a faulty line has been repaired.

Misuse by making silent or abandoned calls

- 6.11 The term “silent call” is a generic description for all those types of calls where the person called hears nothing on answering the phone and has no means of establishing whether any one is at the other end. A specific type of silent call is the “abandoned call”, where a connection is established but terminated by its originator, either on answer or before the called person has had time to answer. Any type of silent call is almost certain to cause inconvenience and is very likely to cause annoyance to the called person. The level of distress will be exacerbated where lack of calling line identification (“CLI”) information precludes the possibility of a return call. Anxiety may also be caused, in particular when individuals have received a number of such calls over a short period, and may conclude that they are being specifically targeted.
- 6.12 There are a number of circumstances which give rise to silent calls. The most serious are silent calls made with a malicious intent to deliberately frighten or annoy the

person called. In such cases, where intention can be demonstrated, the caller may be guilty of a criminal offence under section 127(2). However, there are also less serious instances, where the behaviour may more fairly be judged as mischievous rather than malicious; an act of irresponsibility comparable to ringing a door bell and then running away. In such cases, where the behaviour is repeated, action under section 128 would be justified.

- 6.13 Most silent calls are not generated with malicious or mischievous intent but are caused by automated calling systems such as predictive or power diallers used by call centres (see the section Misuse of automatic calling systems above). The diallers are programmed to generate and attempt to connect calls. If there are not enough call centre agents available to handle a call it is abandoned if the call is answered by a live individual, that is, it is a 'live call'. The industry term for a live call terminated in this way is an "abandoned call" and subsequent references to "abandoned calls" in this Statement have this specific meaning. A call may also be terminated after a predetermined period, say 15 seconds, because it has not been answered, perhaps because no one is there to take it. Within industry terminology and for the purposes of this Statement such calls are not classified as "abandoned calls".
- 6.14 One research source suggests that that phone owners receive an average of 5.7 abandoned calls a month, although this figure rises to 7.3 for people over 65, who may spend more time at home. However such calls are not evenly distributed and some unfortunate people will have received a similar number of calls over a single day. Ofcom consumer research carried out in September 2005 revealed the high level of public concern and distress caused by silent calls. 63 per cent of adults say they are concerned of whom 35 per cent are very concerned. The degree of concern experienced varies for different groups of consumers: 63 per cent of people over 65 are very concerned whereas only 24 per cent of people in the 15-24 age group have a similar reaction. Women are more likely to be distressed (38 per cent) than men (33 per cent).
- 6.15 It is undeniable that even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety and properly managed call centres will strive to ensure that they do not generate more calls than their agents can handle. A persistent failure to do so will constitute an act of persistent misuse and may lead to the issue of a notification under section 128. However, in deciding whether to take enforcement action in a particular case Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment and will take account of the steps taken by call centre operators to reduce the degree of concern that silent or abandoned calls cause. There are a number of procedures that call centres can adopt which, taken as a package, will act as mitigating factors in establishing the seriousness of a particular act of misuse.
- 6.16 These procedures are:
- the 'abandoned call' rate shall be no more than three per cent of 'live calls' on each individual campaign over any 24 hour period;
 - 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;
 - includes no marketing content and is not used as an opportunity to market to the called person;
 - calls which are not answered must ring for a minimum of 15 seconds before being terminated;
 - 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;
 - 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;
 - 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;
 - records are kept for a minimum period of six months that demonstrate compliance with the above procedures.
- 6.17 Another source of silent calls, where the called person is not able to speak to a person on answering the phone arises from fax broadcasting. Obviously, fax broadcasters do not make abandoned calls in the conventional sense (where calls are terminated because no operator is available). The most common cause of nuisance calls generated by fax broadcasters is where they phone a number associated with a voice line rather than a fax receiver. If the called person answers such a call they are likely to hear the high-pitched tones of the fax 'handshake' protocol. Some callers will be able to identify this as an abortive fax call – others may not. Fax calls to non-fax numbers undoubtedly cause unnecessary annoyance, inconvenience or anxiety and making such calls repeatedly may constitute persistent misuse.
- 6.18 Although it would not be feasible for fax broadcasters to ensure that they only make calls to fax lines, there are procedures they can adopt which would lessen the degree of nuisance caused. These include ensuring that:
- unsolicited communications are not sent via fax to any telephone number unless that number has been 'cleaned' against:
 - the Fax Preference Service (FPS) file within the previous 28 days; and
 - the caller's in-house suppression list.
 - calls which are not answered should ring for a minimum of 15 seconds before being terminated;
 - 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;
 - either a recorded message or a live operator is available at the CLI number presented to inform called persons of the identity of the organisation that called them and that the called person's number will be deleted from the organisation's database and added to its in-house suppression list at the called person's request if they leave their name and telephone number;
 - any call made by a called person to the contact number provided should not be used as an opportunity to market to that person without that person's consent;

- records are kept for a minimum period of six months that demonstrate compliance with the above procedures.
- 6.19 Fax broadcasters also need to develop ways of establishing why a fax call has failed – for example, distinguishing between an engaged tone and a voice line so that they can avoid repeat calls in the second case. Repeatedly making fax calls to the same voice line is unlikely to be justifiable.

Number-scanning

- 6.20 Another type of silent call arises from the practice of number-scanning (also known as ‘pinging’) where calls are made to find out which telephone numbers, out of a range of numbers, are in service or not. As soon as a tone is received which establishes the status of a particular number the call is terminated. This activity is carried out in order to develop lists of active telephone numbers. As well as the inconvenience that may be caused to the recipient of an abruptly terminated call such behaviour is detrimental to consumers in general by adding to network congestion without generating any revenue for providers. In a worst-case scenario high-volume number-scanning could overload either the originating or terminating local exchange thus depriving subscribers connected to that exchange of the ability to make or receive any calls at all.
- 6.21 A common variant of number scanning is fax scanning where a call is made to determine the presence of a fax receiver at the terminating end. This activity is motivated by the commercial value of a directory of validated fax numbers. Persistent number-scanning or fax-scanning both clearly fall within section 128.

Misuse of a calling line identification facility

- 6.22 CLI is a technology that identifies the number from which a call is made or enables a return call to be made. Ofcom will regard the repeated forwarding of inauthentic or misleading CLI information as persistent misuse. A similar restriction was imposed on all end-users and some communications providers through a class licence condition. Where users have the ability to choose the CLI number that is forwarded (this is known as a Presentation Number), the deliberate sending of an inauthentic or misleading number from which it is not possible to identify the caller and which does not enable the recipient of a call to return a message is a form of misuse. This is without prejudice to a caller's right to preserve their anonymity by withholding their number.
- 6.23 It will also be regarded as a form of misuse to forward a CLI number that has been allocated to a Premium Rate Service provider. A return caller may suffer annoyance or inconvenience by unwittingly making a return call for which they are charged more than they may reasonably expect.

Misuse for dishonest gain

- 6.24 There are a number of activities associated with the use of electronic communications networks or services motivated by a desire for unscrupulous or dishonest gain. Although this statement will not fully describe all those that have been discovered (so as not to encourage their perpetration) and cannot describe schemes that have yet to be practised, these activities share certain common features.

- 6.25 The first feature they share is that they are primarily aimed at defrauding end-users, rather than communications providers.
- 6.26 The second feature they share is the exploitation of premium rate or revenue sharing services, or in some instances, where these services are not used, by directly billing the person who has been duped into making a call. In either case, the essence of the scam is that users are deceived into phoning a number without realising that it is a premium rate or revenue sharing service or may lead to a fraudulent bill and so costs more than they expect. Examples of this that have come to light in recent years include:
- faxing a premium rate or revenue sharing fax number where the terminating fax machine has been set to run deliberately slowly thus increasing the duration of a call;
 - the apparently personal text message that invites a return call to a premium rate or revenue sharing number;
 - making a silent call where any return call connects the caller to a premium rate or revenue sharing number (this latter example is also misuse through silent calls and misuse of CLI facilities); and
 - the use of recorded ringing tone to deceive the caller that charging has not yet started.
- 6.27 In some circumstances the deception that incites a caller to phone a premium rate or revenue sharing number will be a form of direct marketing and additionally subject to applicable legislation. For example, under Regulation 8 of The Electronic Commerce (EC Directive) Regulations 2002 any unsolicited commercial communication sent by electronic mail must be clearly and unambiguously identifiable as such as soon as it is received. Regulation 23 of the 2003 Regulations prohibits the practice of disguising or concealing the identity of the sender of electronic mail used for direct marketing purposes and additionally requires the provision of a valid address to enable the recipient to request the cessation of such communications. The definition of "electronic mail" in the 2003 Regulations applies to SMS or text messages as well as email.
- 6.28 ICSTIS, the Independent Committee for the Supervision of Standards of Telephone Information Services, is the regulatory body for all premium rate telecommunications services, and requires that providers of premium rate services must state clearly in all promotional material the likely charge for the calls, and must not seek to mislead consumers by inaccuracy, ambiguity, exaggeration, omission or otherwise. Ofcom considers that the deceptions identified in this section are also likely to be in breach of the ICSTIS Code of Practice. The ICSTIS Code of practice is available on the ICSTIS website at www.icstis.org.uk
- 6.29 Ofcom will regard the practice of tricking callers into phoning a premium rate or revenue sharing number or non-revenue sharing service that leads to the presentation of a fraudulent bill as misuse and if repeated, persistent misuse.

Misuse of allocated telephone numbers

- 6.30 Where end-users have been allocated telephone numbers, Ofcom will regard their use in a way that is inconsistent with designations and/or restrictions in the National Telephone Numbering Plan ("the Plan") as a form of persistent misuse by either the end-user or a relevant communications provider. An example would be where Personal Numbers (070) are used for anything other than "Personal Numbering" (as

defined in the Plan) or Mobile Numbers (077, 078 and 079) are used for services other than those which fall within the definition of "Mobile Service" (as defined in the Plan). Condition 17 of the General Condition of Entitlement requires the range holder and any other communications provider using the number to take all reasonably practicable steps to secure compliance by their customers.

Section 7

Ofcom policy on the issuing of section 128 notifications

7.1 Section 128 authorises Ofcom to issue a notification to a person where it has reasonable grounds for believing that a person has engaged in persistent misuse of a network or service. In some cases this power may be limited insofar as section 128(8) enables the Secretary of State to make an order that behaviour of a specified description is not to be treated as a misuse of an electronic communications network or service where there is an appropriate alternative means of dealing with it. There is a general presumption that a notification will not be given where an alternative legal remedy is available, although it should be noted that section 130(8) allows for the imposition of a penalty under the 'persistent misuse' powers in respect of the same conduct for which a person is also liable for an offence under sections 125 to 127 of the Act.

7.2 Under section 128(2) the notification must include the following elements:

- a determination that a person has persistently misused an electronic communications network or electronic communications service.
- a specification of the use that Ofcom considers persistent misuse.
- a specification of the period within which the notified person may make representations.

Ofcom's priorities on issuing notifications

7.3 Because persistent misuse is defined in very broad terms and may be potentially invoked whenever a person believes that they have suffered inconvenience through another person's use of a network or service, Ofcom needs to be guided in the exercise of its enforcement powers by a scale of priorities. We believe that the 'persistent misuse' powers are primarily about protecting consumers and that the more likely a particular form of misuse is to harm consumers by causing them annoyance, inconvenience or anxiety, the more incumbent it is on Ofcom to take enforcement action. In general terms, misuse and the harm it causes the public may be prioritised in three ways.

7.4 Firstly, there is the degree of harm caused to an individual consumer, on a scale where anxiety is more detrimental than annoyance or inconvenience. As an example, we believe that anonymous silent calls are more likely to give rise to anxiety than those associated with an information message and a CLI, hence the remedial measures proposed in paragraph 6.16. This could be described as a qualitative test.

7.5 The second consideration is the scale or amount of the misuse. Other things being equal, the more people are affected by an act of misuse the more likely it is that Ofcom will take enforcement action. Causing annoyance to thousands of people is inherently more serious than causing annoyance to hundreds and is more likely to justify enforcement action. By the same token if a person on a single occasion accidentally and in good faith misdials a telephone number and thereby

inconveniences the called person, the misuse they are responsible for is of a negligible scale. This could be described as the quantitative test.

- 7.6 The third priority factor is where a new serious form of misuse has come to light and Ofcom needs to act quickly in order to stop the misuse and deter others from engaging in the practice. An example might be where a person provides a commercial service offering to overlay outbound phone calls with an inauthentic CLI number, thus enabling callers to send misleading information about their identity and preserve their anonymity. Such services exist in the US but have not been offered in the UK to date. This could be described as the deterrence test.
- 7.7 Ofcom policy on issuing notifications will generally be consumer driven. It is expected that representations made by consumers will be one of the most likely ways in which instances of persistent misuse are brought to Ofcom's attention. In addition, the overview that communications providers have of network activity makes them particularly well placed to pick up on instances of high-volume misuse of which isolated consumers may only have a single experience. Ofcom welcomes such cases being brought to its attention by communications providers. Where Ofcom receives complaints, they will be assessed to ascertain whether there is sufficient evidence to provide reasonable grounds for believing that persistent misuse has occurred.

The determination and the specification

- 7.8 The determination will need to refer to the evidential basis that supports the occurrence of persistent misuse. As the notification is required to be given to the person who is responsible for the misuse it will also be necessary for Ofcom to establish the identity of the persistent misuser. As a point of clarification, it will not be possible to take action under this legislation against a communication provider over whose network or service the persistent misuse takes place, unless the communication provider itself is responsible for perpetrating the misuse. A provider over whose network silent or abandoned calls are made cannot be made responsible for those calls.
- 7.9 The specification will describe the actual behaviour that constitutes persistent misuse supported by the grounds for believing that this behaviour is likely to give rise to annoyance, inconvenience or anxiety.
- 7.10 The specification of the period during which the notified person may make representations must not normally be less than a month but may be as short as seven days, in urgent cases. An urgent case is defined by section 128(4) as one where the misuse is both continuing and causing a degree of harm that requires it to be stopped as soon as is practicable.
- 7.11 Whether or not the misuse is continuing is a matter of fact; the degree of harm that it is causing is necessarily a matter of judgement. The factors that would tend towards a shorter period for representations are the scale of the misuse, the number of consumers on whom the misuse is impacting and the degree of detriment caused. An example of an urgent case might be where automated calling systems are being exploited to send a high volume of recorded messages seeking to influence voting in a TV phone-in.

Section 8

The consequences of a notification

8.1 Once the period allowed for the making of representations has expired, Ofcom has three options:

- it can decide whether or not to issue an enforcement notification to the misuser under section 129 of the Act;
- it can impose a penalty under section 130 of the Act; or
- it can issue an enforcement notification and impose a penalty.

8.2 An enforcement notification is appropriate where Ofcom is satisfied that:

- the person who has been notified under section 128 (“the notified user”) has persistently misused an electronic communications network or service;
- the notified user has not, since the giving of the notification, taken all the steps that Ofcom considers appropriate to ensure that the misuse is ended and not repeated; and
- the notified user has not, since the giving of the notification, remedied the consequences of the notified misuse in a manner that Ofcom considers appropriate.

8.3 The enforcement notification will impose a requirement on the misuser to take the necessary steps:

- to end the misuse and not repeat it; and
- to remedy the consequences of the misuse.

It will impose clear and enforceable obligations on a misuser and allow a reasonable period for compliance with them.

8.4 Section 129(5) of the Act makes compliance with an enforcement notification a duty of the notified user, and enables Ofcom to enforce that duty through civil proceedings which, as set out in section 129(6), may lead to an injunction, a requirement for specific performance of a statutory duty or any other appropriate remedy or relief. The appeal procedures available against notifications and penalties are set out in sections 192 to 196 of the Act.

8.5 In order to remedy the consequences, a misuser may be required to pay the person who has suffered the effects of misuse an appropriate sum of money. In determining what is an appropriate amount in the circumstances of a particular case Ofcom may take account of how much is required to provide compensation for the loss and damage suffered, and/or for the annoyance, inconvenience or anxiety experienced.

8.6 A policy on quantifying compensation payments needs to recognise that in many cases of persistent misuse there will be no pecuniary loss or damage, say in the case of silent or abandoned calls or where there has been misuse of automated calling systems. However a degree of annoyance, inconvenience or anxiety will invariably be present. A second consideration is that even where a quantifiable loss has been registered, the sums involved may be negligible, say, where someone has been tricked into making a £5.00 premium rate call. Even where loss or damage has been suffered it is arguable that the 'victim' feels that the irritation or inconvenience

experienced was more traumatic than the actual loss sustained, and merits compensation at a higher level. Ofcom is likely to hear such claims sympathetically.

- 8.7 It is not appropriate for Ofcom to propose an ex ante tariff of compensatory payments in advance of applying this legislation. The intention is that over a period of time a scale will be developed that is internally consistent and will offer a degree of expectation. The reason for this is that the amount of compensation will have to be weighed according to the factors of a particular case and should be proportionate to the distress that has been experienced. Clearly, where misuse has given rise to anxiety the compensation would normally be greater than in cases that have only caused annoyance or irritation. Another factor is the individual susceptibility of the person experiencing the misuse. It might be reasonable to assume that silent or abandoned calls made to a rugby club bar would have a less distressing impact than similar calls made to an individual who is vulnerable as a result of their age or state of health.
- 8.8 Individual susceptibility will normally be a less significant factor when it comes to quantifying the compensation payable for misuse that has caused annoyance or inconvenience. A person does not deserve more compensation simply because they are irascible by nature. In these cases Ofcom will need to be guided by a normative concept of the average or reasonable individual. In assessing the level of compensation due, Ofcom would in general expect to follow ordinary principles of law relating to damages. Ofcom will also seek guidance, where applicable, from comparable compensation claims passing through the civil courts.

Section 9

Ofcom policy on penalties for persistent misuse

- 9.1 As either a supplement or an alternative to the section 129 enforcement notification, Ofcom will be able to impose a penalty on a persistent misuser, once the period for making representations has elapsed. Ofcom may also impose a financial penalty where a notified misuser has contravened a requirement of a section 129 enforcement notification. Additionally, section 130(8) of the Act allows for the imposition of a penalty where a person is liable for an offence under sections 125 to 127 of the Act. (These sections relate to the offences of dishonestly obtaining electronic communication services, possession or supply of apparatus which may be used for dishonestly obtaining such services, or improper use of a public electronic communications network).
- 9.2 The Act currently sets £5000 as the upper limit for such a penalty, although this amount may be changed by order of the Secretary of State. The Department of Trade and Industry recently consulted on raising the upper limit to £50,000 and a decision is awaited (see http://www.dti.gov.uk/industries/telecoms/Silent_calls_consultation_document_latest_version.pdf)
- 9.3 Ofcom is required under section 130(4) to determine an amount, which is both appropriate and proportionate to the misuse. In making such a determination, section 130(5) requires Ofcom to have regard to:
- any representations made by the notified misuser;
 - any steps taken by the misuser to bring the misuse to an end and not repeat it; and
 - any steps taken by the misuser to remedy the consequences of the misuse.
- 9.4 Clearly, where a misuser has taken the necessary measures to bring the misuse to an end and agreed to pay an appropriate level of compensation, this argues for a penalty toward the lower end of the scale or even no section 130 penalty at all. Conversely, failure to do these things aggravates the misuse and argues for a higher penalty.
- 9.5 Where Ofcom thinks that the imposition of a penalty is justified, it will take account of three factors in setting the appropriate level of penalty that will invariably be present in any case of persistent misuse. They are:
- the degree of persistency;
 - the number of people exposed to the misuse; and
 - the seriousness of the misuse.
- 9.6 There are varying degrees of persistency. Acts of misuse repeated ten times or one thousand times may both count as persistent but, other things being equal, the second example merits a higher penalty.
- 9.7 Ofcom will also need to take into account the number of people affected by the misuse. Where automated calling systems are used to send a recorded message it

seems reasonable that the greater the number of people targeted the higher the penalty should be. As set out in paragraph 7.5, causing annoyance to thousands of people is inherently more serious than causing annoyance to hundreds and is more likely to justify a more serious penalty. In this context, it is also worth drawing attention to the provision of section 128(7) that makes it immaterial whether the persons who are the victims of any misuse are different on different occasions. It would not be a defence to say that each person only received a single recorded message.

- 9.8 The seriousness of persistent misuse will be a key factor in determining a section 130 penalty. However the development of a calibrated scale of seriousness involves a degree of subjective judgement and Ofcom recognises that people will have differing perceptions of how various forms of behaviour should be ranked.
- 9.9 However there are some objective elements which Ofcom will take into account. Is this the misuser's first offence or do they have a previous history of persistent misuse? Other things being equal, repeated acts of misuse deserve a higher penalty. (For the avoidance of doubt, a persistent misuser may be notified more than once). What was the misuser's intention? There is a clear line to be drawn between accidental misuse, such as a mistakenly programmed fax machine making repeat calls to a wrong number and a scam motivated by greed. Has the misuser done everything required of him by the enforcement notification? Has good faith in making amends been demonstrated?
- 9.10 Aside from these considerations, many of the factors discussed in the section on compensation, as set out in paragraphs 8.6 to 8.8, will also come into play. How great is the damage done? Where does the misuse fall on the spectrum of distress that extends from inconvenience (I have to stop what I'm doing to get up to answer a single silent call) through irritation (I answer the phone several times to hear a caller chortling, who then rings off) to anxiety (I have recently emerged from an abusive relationship and receive several silent calls a day - I no longer feel safe in my new home)?

Annex 1

Impact assessment

Introduction

- A1.1 Impact Assessments form a key part of best practice policy making, which is reflected in Ofcom's statutory duty to carry them out. They provide a way of considering different options for regulation and then selecting the best option. In selecting and analysing options, the need to further the interests of citizens and consumers is of paramount importance. Impact Assessments are also useful tools for reviewing existing regulation. They provide a framework for weighing up the costs and benefits of removing regulation, as well as analysing other options.
- A1.2 Where appropriate, more risk-based, targeted approaches to regulation are explored and Ofcom considers whether there are alternatives to formal regulation, such as co-regulation.
- A1.3 In developing policy proposals, Ofcom's aim is to think widely about the possible impacts, taking account of the whole value chain and knock-on effects across the communications sector. By doing so, Ofcom seeks to minimise any unintended consequences.

Purpose of this impact assessment

- A1.4 This impact assessment focuses on the material changes Ofcom is making with regard to the exercise of its powers under sections 128 to 130 of the Act regarding the persistent misuse of an electronic communications networks or electronic communications service.
- A1.5 The changes represent, in particular, Ofcom's current policy in relation to the making of abandoned calls, commonly known as 'silent calls', and fax calls to non-fax numbers. There are also some editorial changes to this statement.
- A1.6 The rest of this Impact Assessment looks at the options Ofcom could have taken in amending its policies, assesses the impact on key stakeholder groups - consumers call centre operators and suppliers - and gives an overall assessment of each option. The options are:
- Option 1 - no change in policy - all abandoned calls are unacceptable. Ofcom will rely on self-regulation by industry, together with its powers under sections 128 to 130 of the Act.
 - Option 2 - all abandoned calls are unacceptable. In deciding whether to take enforcement action Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment and steps taken by persons to reduce the degree of concern that abandoned calls and fax calls to non-fax numbers cause. Ofcom will rely on self-regulation by industry, together with its powers under sections 128 to 130 of the Act. One important aspect of the procedures which would act as mitigating factors in establishing the gravity of a particular act of misuse is limiting the number of abandoned calls to three per cent.
 - Option 3 - this is the same as Option 2, but the guidance on the level of abandoned calls is zero per cent

Background

- A1.7 In terms of assessing the impact of each option on consumers, it is necessary to know first the extent to which consumers receive abandoned calls. It is also necessary to know whether their incidence is distributed uniformly or not, because if some consumers receive disproportionate numbers of abandoned calls the impact of a change in the average level of such calls made will have little impact on the detriment to them. It would also be desirable to be able to quantify the detriment caused to consumers by abandoned calls, however, difficulties in measuring this and limited time available have meant Ofcom was unable to do this.
- A1.8 Research carried out by for Ofcom by the BMRB ¹ indicates that households with a landline receive 9.6 abandoned calls per month on average, equivalent to about 2.6 billion calls per year. This compares to a figure of 5.7, according to research carried out for the DMA ². The range of people affected by abandoned calls is large, 73 per cent of adults claim to receive them in the BMRB survey. The BMRB survey shows that qualitatively the level of consumer detriment is high – 63 per cent of adults were “concerned or very concerned” by abandoned calls, and 84 per cent were “inconvenienced or very inconvenienced”.
- A1.9 Ofcom’s research also indicates that that the distribution of abandoned calls is highly skewed. Whereas 55 per cent of respondents to the BMRB survey received 1-5 abandoned calls per month, five per cent received 50 or more calls per month. This implies that the effectiveness of any action to reduce the detriment to consumers should also be judged on how it addresses those who receive a disproportionately high number of abandoned calls.
- A1.10 There is some doubt over whether all the abandoned calls reported by the public are generated by the UK call centre industry. If all call centres were operating to the level of five per cent abandoned calls, then on average households would receive 0.33 abandoned calls per month. This compares with between 5.7 and 9.6 as recorded by the surveys mentioned above. Research for Ofcom concludes that it is unlikely that the gap can be explained entirely by UK call centre operators exceeding the five per cent level. Other suggested reasons were off-shore call centre activity and number scanning.

Impact on consumers

- A1.11 The impact of each option on consumers is summarised in the table below. The proposals contained in the options only relate to UK call centre operators, therefore it is difficult to judge the full impact on the number of abandoned calls received. In addition, the impact on consumers will depend on the extent to which the option is effective, therefore it should be noted that the full consumer benefits will not be realised if UK call centre operators do not fully comply with the law.

¹ A survey of 1995 adults carried out in August 2005

² Brookmead Report, 2005

Option 1	Option 2	Option 3
Consumers continue to experience high levels of anxiety in general.	If all UK call centres comply the level of detriment to consumers will be reduced, though some generators of abandoned calls may be unaffected.	No abandoned calls made from UK call centres, therefore significant improvements for consumers, but abandoned calls are unlikely to be eliminated even with full compliance.
Some individuals continue to experience disproportionately high levels of abandoned calls. The situation is likely to deteriorate because more households will sign up to the TPS ³ meaning that call centre activity is focused on a dwindling pool of numbers.	Uneven incidence on individuals mitigated by policy of no ring back within 72 hours after an abandoned call is made.	Uneven incidence on individuals mitigated by policy of no ring back within 72 hours after an abandoned call is made.
Those able to benefits from telemarketing (BMRB research shows that seven per cent have bought during a marketing call) are fewer because of increasing TPS registrations.	The use of CLI should reduce the level of anxiety from abandoned calls, although the level of inconvenience would not be greatly affected.	The use of CLI should reduce the level of anxiety from abandoned calls, although the level of inconvenience would not be greatly affected.
	Informational messages reduce consumer detriment - Ofcom's research shows 68 per cent of those receiving abandoned calls would prefer an informational message.	Informational messages reduce consumer detriment – Ofcom's research shows 68 per cent of those receiving abandoned calls would prefer an informational message.
	Slowdown in TPS registrations so more may benefit from telemarketing.	Slowdown in TPS registrations so more may benefit from telemarketing.

³ The Telephone Preference Service was not designed to provide a solution to abandoned calls, though it may have some impact and it is seen by many as a way of reducing abandoned calls - 37 per cent cite this issue as a reason for registering.

Impact on call centre operators

A1.12 The table below shows the impact of the options on call centre operators. Complying with the law imposes a direct cost on each individual operator. The productivity of call centre agents rises the less time they have to wait between calls. Restricting the number of abandoned calls will tend to increase the likelihood that an agent will have to wait between calls and the length of the wait. Therefore, reducing abandoned calls will also reduce productivity. There is a counter effect in that the level of employee attrition tends to rise the more calls they have to handle per hour, though research and interviews carried out on Ofcom's behalf suggests that this is a much weaker effect than the impact on productivity.

A1.13 In addition to the direct costs, there are also indirect costs. The extent to which call

Option 1	Option 2	Option 3
Some operators bear the cost of complying with industry guidelines, others do not.	Some impact on productivity, though incremental impact for those already complying with DMA guidelines will be limited.	Considerable impact on productivity for many users - twice as high as for Option 2 based on Ofcom's research.
Increasing registrations to TPS reduces the pool of available households for telemarketing.	May have positive benefits in slowing down rate of registrations to TPS and reducing negative perceptions of telemarketing.	May have positive benefits in slowing down rate of registrations to TPS and reducing negative perceptions of telemarketing.
Consumers attitudes to telemarketing worsen as a result of increased incidence of abandoned calls on those not signed to TPS.	Greater clarity for call centre operators will make complying with the regulations easier.	Research by CM Insight suggests that increased costs could lead some marketers to use off-shore companies, though it is very difficult to judge how likely this is.
		Greater clarity for call centre operators will make complying with the regulations easier.

centre operators do not comply with the law will affect the whole industry.

Impact on suppliers

A1.14 The impact on suppliers is summarised in the table below. The impact mainly depends on the impact of the options on call centre operators.

Option 1	Option 2	Option 3
No direct impact on suppliers, however if outbound calling declines because of registrations on the TPS, then supplier revenues will fall.	Little or minimal impact on sales as predictive diallers will still be used.	Predictive dialler revenues decline in favour of progressive diallers. Ofcom's research suggests that potential losses in revenue could amount to £15 million ⁴ .

Overall assessment

Option 1 - No change to current policy

A1.15 Advantages

1.15.1 The main advantages appear to fall to suppliers of predictive diallers and those call centre operators currently not complying with the law and which have little incentive to comply.

A1.16 Disadvantages

1.16.1 The disadvantages of this option seem to outweigh the advantages. Firstly, there is the consumer detriment caused by abandoned calls. The combination of industry self-regulation and enforcement action as cases of potential abuse are brought to Ofcom's notice does not seem to have been effective at preventing abandoned calls, creating a high level of consumer detriment. The reasons for this are summarised below.

1.16.2 It has been unclear to industry the extent to which guidelines set by industry groups such as the DMA and the Market Research Society (MRS), would be taken into account by Ofcom and this has undermined their effectiveness, as evidenced by the reported number of abandoned calls and Ofcom's investigation into seven companies under section 128 of the Act. Moreover, guidelines set by these groups differ - the DMA advises a five per cent maximum abandonment rate and the MRS, four per cent.

1.16.3 Secondly, indirect costs for call centre operators are being created by the lack of adherence to the DMA and other guidelines. This weakens the incentives for all call centre operators to comply with the guidelines and has the undesirable side-effect of reducing the number of available households for direct marketing by increasing the rate of registrations on the TPS. It also makes households in general less receptive to direct marketing activity.

1.16.4 Finally, the increase in registrations on the TPS may also increase the volume of abandoned calls on those not registered with the TPS and increase the level of detriment those consumers face.

⁴ Based on information sourced from Gartner

Options 2 and 3 - principle of administrative priority and clarification of call centre procedures

A1.17 These options clarify that in deciding whether to take enforcement action Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment and steps taken by persons to reduce the degree of concern that abandoned calls and fax calls to non-fax numbers cause. This option includes a number of procedures that persons can adopt which, taken as a package, will act as mitigating factors in establishing the gravity of a particular act of misuse. Two important elements of these procedures in terms of their potential impact are: a limit on the rate of abandoned calls and the playing of an informational message in the event of an abandoned call. Ofcom considered two options for the upper limit on the rate of abandoned calls: zero per cent (achieved using progressive diallers) and three per cent.

A1.18 Advantages common to options 2 and 3

1.18.1 Greater clarity of and consistency in the procedures that call centres should take to minimise the possibility of misuse through abandoned calls, together with the approach of administrative priority to enforcement action, should increase the threat of enforcement action against those persons most likely to generate unacceptably high numbers of abandoned calls. It should also provide a clear incentive for persons to minimise the making of abandoned calls.

1.18.2 Consumers should therefore benefit from a reduction in the general incidence of abandoned calls, although as discussed above, these measures might not address the part of the problem that may be caused by number scanning and off-shore call centres. The extent that consumers will benefit will also be affected by the level of compliance by call centres. This depends partly on enforcement and partly on the costs of complying with the law. This differs for Options 2 and 3 and is discussed in the specific analysis of each option below.

1.18.3 The level of anxiety caused to consumers by abandoned calls will be reduced by the use of informational messages and providing CLI information. However, the impact of this should be set in context. Informational messages may still cause some consumer detriment in terms of inconvenience, though they are far less likely to cause anxiety. Moreover, the requirement to provide informational messages might not generate incentives for call centre operators to eliminate abandoned calls.

1.18.4 Consumer benefits will also arise through the impact on those consumers who receive disproportionately high levels of abandoned calls. This effect will be mitigated by the policy of not ringing a number that has received an abandoned call within at least 72 hours of the event.

1.18.5 Call centre operators should benefit from a reduction in the negative reactions of consumers to direct marketing and a slow down in registrations on the TPS.

A1.19 Disadvantages common to options 2 and 3

1.19.1 Call centre operators will incur the costs of reduced productivity whichever of options 2 and 3 were chosen. However these costs should be mitigated by the positive effects on the industry that a reduction in abandoned calls would achieve

related to the public's reaction to direct marketing. The extent to which higher costs are passed on to consumers will affect the distribution of those costs. However the overall impact on economic welfare will remain the same regardless of how the costs are shared.

1.19.2 Ofcom believes that the disadvantages common to options 2 and 3 are likely to be outweighed by the advantages, though it is difficult to make a like for like comparison of the benefits and costs.

1.19.3 An indirect comparison of the costs and benefits of the two options, however, can be derived. Taking charges for call barring as a proxy for the amount consumers may be willing to pay to avoid abandoned calls gives a figure of £4 per month⁵. Ofcom has estimated the cost of the reductions in productivity from imposing both a zero per cent and three per cent upper limit on abandoned calls. This is based on data provided for three typical call centre types. Averaging these costs over all households gives a monthly cost in terms of reduced productivity of £1.60 (£3.30) for a three (zero) per cent limit. Although this is far from a detailed cost benefit analysis, it does suggest that it is reasonable to assume that, under either options 2 and 3, the benefits could outweigh the costs if companies comply fully.

A1.20 The specific advantages and disadvantages of options 2 and 3 are assessed in the next section.

Advantages and disadvantages specific to the limit on abandoned calls

A1.21 The following table summarises the assessment of the two options considered for an upper limit of abandoned calls as part of the procedures call centre operators should undertake to mitigate the gravity of misuse.

⁵ This is based on BT's charges for call barring service in the UK, www.bt.com

	Advantages	Disadvantages
Option 2 - three per cent limit on abandoned calls	<p>Eliminates a substantial proportion of abandoned calls from UK based call centres.</p> <p>Suppliers and users more likely to recognise that this solution protects their interests and to comply with the proposals.</p>	<p>Call centre operators suffer reductions in productivity.</p> <p>UK call centres still generate a number of abandoned calls, though Ofcom's research suggests that there would be a significant reduction in annoyance and anxiety from abandoned calls.</p> <p>Suppliers of diallers could see sales fall if call centre operators exit the market as a result of this option. However, Ofcom does not believe this is likely given the incremental nature of the changes.</p>
Option 3 - zero per cent limit on abandoned calls	<p>Eliminates abandoned calls from UK based call centres, but other sources of abandoned calls may remain.</p>	<p>Call centre operators suffer reductions in productivity.</p> <p>Some direct marketing activity may move off-shore as a result, though the strength of this effect is very uncertain.</p> <p>Will eliminate predictive dialler revenues in favour of progressive diallers with an estimate impact on supplier revenues of £15m pa⁶</p>

A1.22 Ofcom concludes that a three per cent upper limit is preferable to a zero per cent limit, because it still delivers substantial benefits to consumers while being less likely to produce unintended consequences such as displacing call centre activity off-shore.

Conclusions

A1.23 Ofcom believes that the net advantages of option 2 are likely to be significantly greater than the net advantages of options 1 and 3. In particular, Ofcom believes that its proposals will be far more effective in getting call centre operators as a whole to change their behaviour and limit the abandoned calls they make.

A1.24 Ofcom prefers option 2 to option 3 because it carries less risk in terms of its effectiveness at reducing the level of abandoned calls received by households (less risk that activity moves off-shore) and imposes less costs on industry and suppliers so the costs are likely to be more proportionate to the benefits.

Business sectors affected

⁶ Source CM Insight, Gartner

Statement of policy on the persistent misuse of an electronic communications network or electronic communications service

A1.25 The following business sectors are affected by this statement:

- Call centre industry
- Market research companies
- Direct marketing companies
- Financial services, including debt collection
- Manufacturers and vendors of Automated Calling Systems
- Communications providers