



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

Statement

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## Section 1

# Ofcom's statement on persistent misuse

## Background

- 1.1 Ofcom is required, under section 131 of the Communications Act 2003 (the "Act"), to prepare and publish a statement of its general policy with respect to its legal powers to deal with persistent misuse of an electronic communications network or electronic communications services. In this context, on 1 March 2006, Ofcom published an updated *Statement of Policy on the persistent misuse of an electronic communications network or service* (the "2006 Persistent Misuse Statement").<sup>1</sup>
- 1.2 The Act allows Ofcom to revise its statement on persistent misuse from time to time as it thinks fit. On 17 December 2007, Ofcom published a consultation<sup>2</sup> on its proposed revisions to the 2006 Persistent Misuse Statement. The consultation closed on 1 February 2008. This document sets out Ofcom's consideration of consultation responses received and its revised statement pursuant to section 131 of the Act in light of those considerations (the "revised Persistent Misuse Statement"). The revised Persistent Misuse Statement will replace the version published in 2006.
- 1.3 The 2006 Persistent Misuse Statement set out the factors that Ofcom would take into account when deciding whether or not to take action in relation to abandoned calls, including silent calls which had been identified as a major cause of annoyance, inconvenience or anxiety for telephone users. An 'abandoned call' is one where a connection is made with a live individual and then terminated. This can occur where call centres use automated diallers (commonly described as automated calling systems or "ACS") to call a number of persons but there are not enough live agents to deal with calls that are answered. A type of abandoned call is a silent call, where a person hears nothing on the end of the line on answering the phone and has no means of establishing whether anyone is at the other end.
- 1.4 Ofcom also stated that its approach to abandoned and silent calls would take into account positive steps that call centre operators may have taken to reduce the impact of such calls. In summary these steps include the following:
  - limiting abandoned calls to a rate not exceeding three per cent of all live calls made on each individual campaign over a 24 hour period;
  - playing a brief information message giving details about any call answered before an agent is available;
  - providing calling line identification (CLI) information on outbound calls, so that consumers are able to make a return call;
  - a 72-hour period before a telephone number receiving an abandoned call may be called again without the guaranteed presence of an agent; and
  - unanswered calls must ring for a minimum of 15 seconds.

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<sup>1</sup> [http://www.ofcom.org.uk/consult/condocs/misuse/misuse\\_state.pdf](http://www.ofcom.org.uk/consult/condocs/misuse/misuse_state.pdf)

<sup>2</sup> [http://www.ofcom.org.uk/consult/condocs/persistent\\_misuse/misuse.pdf](http://www.ofcom.org.uk/consult/condocs/persistent_misuse/misuse.pdf)

- 1.5 Since the publication of the 2006 Persistent Misuse Statement, Ofcom has undertaken a rolling programme of monitoring and investigating alleged instances of persistent misuse by making abandoned calls, including silent calls. The first phase of enforcement culminated in four companies receiving financial penalties of between £32,500 and £45,000 in January 2007 for failure to comply with section 128 of the Act. A second phase of enforcement has so far resulted in two further companies receiving financial penalties of £30,000 and £5,000 in March 2008. The progress of Ofcom's continuing enforcement programme may be tracked on the Competition and Consumer Enforcement Bulletin part of Ofcom's website.<sup>3</sup>
- 1.6 There is evidence to suggest that the procedures in the 2006 Persistent Misuse Statement and the approach to enforcement that Ofcom adopted have had a beneficial impact. Although there is no reliable way of measuring the aggregate of abandoned calls made over any given period, one indicator is the volume of complaints made to communications providers about such calls. Here the record is promising. Complaints to BT's Nuisance Calls Bureau ("BT") were running at a broadly stable level of just under 30,000 a month between June 2006 and March 2007 after the publication of the new requirements. However since then we have seen a continuing downwards trend with complaints over the period between April 2007 and June 2008 averaging around 19,400 a month. In the current financial year complaints are averaging around 18,200. These figures contrast with the 80,000 complaints BT received in January 2006, before the publication of the 2006 Persistent Misuse Statement.
- 1.7 We recognise that the volume of abandoned and silent calls has still not been reduced to an acceptable level. However we believe that the measures adopted have made significant inroads into the problem and that sustained pressure by Ofcom creates a climate in which there are continuing improvements in call centre practice.
- 1.8 In the course of discussing the requirements of the 2006 Persistent Misuse Statement with industry, and in the process of conducting investigations in this context, we identified the need for greater clarity and explanation in our policy statement on persistent misuse. Accordingly Ofcom issued its consultation on proposals for revisions to its statement in December 2007. Ofcom did not propose any radical departures from the 2006 approach given the evidence that there had been some beneficial impact as a result of its approach.

## Proposed revisions

- 1.9 The amendments proposed by the consultation fell into three main categories:
- 1.9.1 Clarification of the steps to be taken and procedures that call centres should adopt to minimise the nuisance caused by silent or abandoned calls, including a fresh proposal for factoring answer machine detection (AMD) false positives into the abandoned call rate calculation;
  - 1.9.2 A set of proposals related to the use of automated messaging; and
  - 1.9.3 A clarification that the unscrupulous exploitation of revenue-sharing numbers represents a form of persistent misuse.

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<sup>3</sup> [http://www.ofcom.org.uk/bulletins/comp\\_bull\\_index/comp\\_bull\\_ocases/open\\_all/cw\\_905/](http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_905/)

- 1.10 The consultation gave rise to a great deal of interest and attracted 54 responses, of which 40 have been published<sup>4</sup> and 14 are confidential.
- 1.11 Section 2, next, reviews the consultation responses in more detail and sets out Ofcom's conclusions.

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<sup>4</sup> [http://www.ofcom.org.uk/consult/condocs/persistent\\_misuse/responses/](http://www.ofcom.org.uk/consult/condocs/persistent_misuse/responses/)

## Section 2

# Responses to the consultation and Ofcom's conclusions

2.1 Ofcom considers it appropriate to categorise its consideration of the issues raised in the consultation under the following headings:

2.1.1 call centre procedures;

2.1.2 automated messages and outbound call steering; and

2.1.3 revenue sharing numbers.

### Call centre procedures

2.2 In the consultation, Ofcom proposed clarificatory changes to the recommendations set out in the 2006 Persistent Misuse Statement for call centre procedures.

2.3 Ofcom asked "Do you agree that the proposed changes make for a clearer set of rules that enable compliance to be achieved with a greater degree of certainty?"

### Answer machine detection

#### *Proposed recommendation*

2.4 The first proposed revised recommendation was:

*"the 'abandoned call' rate shall be no more than three percent of 'live calls', calculated per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over any 24 hour period, and shall include a reasoned estimate of Answer Machine Detection (AMD) false positives".*

2.5 The 'abandoned call' rate formula is:  $\text{abandoned calls (x)} / (\text{abandoned calls (x)} + \text{calls passed to live operator (y)}) \times 100/1$ .

2.6 To date, we have applied this calculation in the context of our enforcement programme. In effect, the calculation seeks to illustrate abandoned calls as a percentage of all calls that are answered by a "live" recipient.

2.7 Specifically, Ofcom noted the issue around "AMD false positives". These arise where an AMD device mistakenly identifies a call as being answered by an answer machine whereas, in reality, it has been answered by a live individual. An AMD device will terminate the call if it believes it has detected an answer machine, and so the call becomes an abandoned call.

2.8 In Ofcom's view, calls abandoned as a result of AMD false positives are unlikely to be accompanied by an information message, so these abandoned calls will also be silent calls. A further aggravating factor is that the detection of an answer machine may lead to repeat calls over a relatively brief period. As a result, in the event of a sequence of false positives, the consumer may receive several silent calls in the same day.

- 2.9 Ofcom suggested that companies using AMD factor false positives into the abandoned call rate and suggested ways of approaching this, either by testing methodologies or by adopting a reasonable estimate representative of false positives, for example 20 per cent, representing one in five answer machine detections being a false positive. Looking at it the other way, this would mean an 80 per cent accuracy rate.

### *Responses*

- 2.10 Amongst companies that make use of AMD technology and support its use, there were two basic responses. The first was that the rate of AMD false positives is subject to so many variables, including the nature of the campaign, the target demographic audience, and whether a particular campaign is fresh or towards its end, that the use of a single per centage figure as a reasoned estimate across campaigns was not practicable. In other words, the accuracy of AMD is not exclusively intrinsic to the technical nature of the device, and so a constant, but rather is also conditioned by external factors.
- 2.11 A second response was that rather than expecting AMD users to produce a reasoned estimate of false positives it would be more sensible to rely on figures provided by the suppliers of AMD devices. This position was backed up by an assertion that AMD false positives are not a significant problem because the standards of accuracy are so high – one confidential response claimed a 99.5 per cent detection rate and a number of published responses claim 98 per cent.
- 2.12 There was in fact much discussion around the correct level of false positives should a reasonable estimate be employed. Some respondents considered that an 80 per cent accuracy rate was reasonable; others that it was too wide of the mark. Several respondents made the point that the number of AMD false positives and AMD false negatives, the latter meaning a call which is answered by an answer phone but is mistakenly categorised as a live individual, should be broadly equivalent and so cancel each other out.
- 2.13 There were also calls for Ofcom to ban the use of AMD, either outright or by adopting an assumed accuracy rate that would, in practice, make the use of AMD incompatible with Ofcom's requirements and therefore effectively prohibited. In the 2006 Persistent Misuse Statement, Ofcom suggested it would be guided in taking enforcement action by the abandoned call rate and at a level of three per cent. If Ofcom assumed an 80 per cent accuracy rate as proposed that would effectively make it impossible for any company not to breach the three per cent level. The example below illustrates the point.
- 2.14 A broadly realistic scenario reflecting typical industry experience involving the use of AMD might assume that of every 1000 calls made:
- 400 are connected live calls, of which two per cent are abandoned;
  - 400 are identified as answer machine responses; and
  - 200 are unconnected.

In these circumstances, if AMD false positives are taken to be 20 per cent (80 out of the 400 identified answer machine responses), the calculation of the abandoned call rate is:



Total live calls	400 connected + 80 AMD false positives = 480
Abandoned calls	2 per cent of 400 = 8 + 80 AMD false positives = 88
Abandoned call rate	$88/480 \times 100/1 = 18.33$ per cent

- 2.15 Even if the assumed accuracy rate is increased to 97 per cent thereby reducing the AMD false positive rate to a far more optimistic three per cent instead of 20 per cent, the effect on the above scenario is:

Total live calls	400 connected + 12 AMD false positives = 412
Abandoned calls	2 per cent of 400 = 8 + 12 AMD false positives = 20
Abandoned call rate	$20/412 \times 100/1 = 4.85$ per cent

This still significantly exceeds the three per cent guide.

- 2.16 One response thought that the statement made in section 1.21.2 of the consultation that “Companies that use AMD need to factor these false positives into their abandoned call rate by subtracting AMD calls from the number of calls categorised as being passed to a live operator” was confusing.
- 2.17 Several responses also suggested that some of the harm caused by AMD false positives could to some extent be alleviated by the playing of the information message wherever an answer machine was detected.

#### *Ofcom's conclusions*

- 2.18 It is clear from the consultation responses that AMD cannot attain total accuracy and will, unavoidably, generate some false positives. Given that the proportion of calls that AMD identifies as being answered by an answer machines typically ranges from around 30 to 50 per cent of the total number of outbound calls being made, depending on the nature of the campaign, what is clear is that even the most accurate AMD will generate a significant number of false positives and therefore abandoned calls.
- 2.19 Given the extent of false positives that may occur, Ofcom considers that account is to be taken of the extra abandoned calls generated by AMD false positives when calculating the abandoned call rate in the context of the persistent misuse rules as proposed in the consultation. By this, we include AMD false positives in the total figure for “abandoned calls”.<sup>5</sup> This has been reflected in paragraph 4.16 of the revised Persistent Misuse Statement.
- 2.20 The issue is how one measures the extent of the false positives made as a result of AMD technology. Given the range of what might be reasonable as evidenced in the responses received, particularly that a single figure is unlikely to be accurate across a range of circumstances, we do not intend to propose any particular figure to stand as an assumed false positive rate.
- 2.21 Rather, in the course of an investigation, when users of AMD technology are providing Ofcom with evidence of AMD false positives, such providers may wish to actually test their equipment. For example, as set out in the consultation, accuracy of

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<sup>5</sup> AMD false positives are included in the formula set out in paragraph 2.5 under “abandoned calls” or “X”.

AMD could be tested by comparing the differing connection rates when it is on and off or by making test calls to a range of numbers where the actual presence of an answering machine is known in advance. One helpful response suggested that an additional test method is simply to listen to a range of calls where AMD is being used. Calls where an answer machine is detected could also be passed to live operators for a limited period and this may help to quantify numbers of false positives.

- 2.22 Alternatively, where testing is not carried out, providers may wish to supply Ofcom with their own reasoned estimate (as a percentage of total calls identified as being answered by an answer machine) of the extent of false positives incurred where AMD is being used. Ofcom will then determine whether such an estimate is in fact reasonable, based on evidence provided to it by a provider to substantiate its estimate.
- 2.23 In this context, Ofcom notes the concern in consultation responses that inclusion of false positives in the abandoned call rate may prohibit the use of AMD technology. This is because, even based on the most optimistic approach to calculation of a figure to represent false positives, it is more than likely that Ofcom's three per cent guideline will be exceeded (see paragraphs 2.14 and 2.15 above). Ofcom's intention is not to ban the use of AMD technology; we consider this could inhibit future innovation in this sector and would be intrusive. However, in light of responses on current accuracy rates for AMD technology, Ofcom recognises that at present, and until accuracy rates improve, it will be very difficult to use AMD technology without breaching the three per cent guideline. We consider this is proportionate, at least for the present, in light of the risk of anxiety caused to consumers from AMD false positives and that it may in fact act as an incentive for improved accuracy rates which should minimise the risk of possible consumer detriment.
- 2.24 Turning to the responses made that false positives and false negatives cancel each other out, Ofcom has not been persuaded, on the evidence, that this indeed is the case. Ofcom would consider the issue in any investigation should an operator wish to raise this point.
- 2.25 The consultation suggested that companies using AMD need to factor AMD false positives into their abandoned call rate by subtracting AMD calls from the number of calls categorised as being passed to a live operator. We note this caused some confusion amongst stakeholders. The intention was to make clear that AMD "calls"; that is calls answered by an answer machine and correctly identified as such should not be included in the abandoned call rate calculation.

## Campaigns

### *Proposed recommendation*

- 2.26 Ofcom proposed that an individual "campaign" for the purposes of calculating the abandoned call rate was a campaign identified by the use of a single call script to make a single proposition to a single target audience. Ofcom said it was possible to run an individual campaign from more than one call centre over a 24 hour period. It is also possible to run more than one campaign (sometimes for different clients) from the same call centre.
- 2.27 Ofcom also proposed that where a company is operating multiple campaigns from one or more call centres, it may, in most circumstances, be appropriate to calculate the abandoned call rate using an aggregation of data.

## *Responses*

- 2.28 The issue of how to define a campaign was not addressed in consultation responses apart from at one stakeholder workshop. Here a stakeholder suggested an alternative definition of campaign: that is “a discrete body of work with a predefined purpose using specific or multiple data sets conducted across one or more sites”.

## *Ofcom’s conclusions*

- 2.29 On the definition of campaign, we do not consider that the proposed alternative definition as set out at paragraph 2.28 above is sufficiently clear to provide the required element of precision for an investigation in the context of section 128 of the Act. Ofcom will be guided by the definition of campaign as set out in its consultation and noted above at paragraph 2.26. This is reflected at paragraph 4.16.1 of the revised Persistent Misuse Statement.
- 2.30 In this context, Ofcom does not consider that the nature of the campaign is relevant when considering whether or not there is persistent misuse. If a consumer receives an abandoned call, and in particular, a silent call, the harm caused is not necessarily mitigated by the reason for which that call is being made.
- 2.31 In addition, Ofcom notes that in some cases calls cannot always be ascribed to a single proposition so as to fit neatly into the definition of a campaign. It has been put to us in the context of our investigations work, for example, that debt recovery calls are not “campaigns”. However, as long as calls are made for identifiable purposes with a single script to a single target audience, then Ofcom will regard this as a campaign. Ofcom will consider the facts of each case on their own particular merits.
- 2.32 Ofcom considers that where a company is operating multiple campaigns simultaneously from one or more call centres, it may be appropriate to calculate the abandoned call rate using an aggregation of data across all call centres and/or all campaigns run by and on behalf of the company. This will provide Ofcom an overall picture of the performance of a company’s outbound dialling activity operations (whether run internally or outsourced) against the requirements of the Act and its guidelines.
- 2.33 Where Ofcom has aggregated a company’s call data and proposes to rely on those figures for the purpose of a notification issued under section 128 of the Act, Ofcom may also set out the underlying information on a disaggregated basis (that is by call centre and/or by campaign). The aim of setting out information in this way is to enable a company to understand the basis of aggregated figures; assess the individual performance of each campaign and/or call centre; identify good practice where applicable; and target any remedial action that may be appropriate. Paragraph 4.16.1 of the revised Persistent Misuse Statement reflects this.

## **Information messages**

### *Proposed recommendation*

- 2.34 Ofcom’s second proposed revised recommendation was:

*“in the event of an ‘abandoned call’, a very brief recorded information message is played within two seconds of an individual beginning to speak, 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 marketing calls from that company*
- *includes no marketing content and is not used as an opportunity to market to the called person”.*

## Responses

- 2.35 The two issues that responses to this recommendation focussed on were the timing of the information message and the contents of the message in a debt recovery context.
- 2.36 Originally Ofcom's guidance was for the information message to be played “within two seconds of the call being answered”. However this wording prompted questions as to whether the timing should begin from the moment the telephone is picked up or from the start of the receiver's spoken salutation. In order to avoid ambiguity we proposed that the two second period should begin from the start of the salutation, i.e. when the called person begins to speak. However several responses argued that implementing this proposal would require expensive upgrades for call centres that have not deployed AMD or voice recognition technology and that it is far more practicable to programme a dialler to play the information message two seconds after the off-hook event rather than introduce a variable timing dependent on an automatic recognition that a salutation has occurred.
- 2.37 The second issue arises from the requirement for information messages to identify the company on whose behalf the call was made. Some debt collection agencies have repeatedly argued that this may place them in breach of Office of Fair Trading (OFT) Debt Collection Guidance<sup>6</sup> requiring them not to act in a way likely be publicly embarrassing to debtors. However the apparently simple solution of omitting the company's name from the information message would not work as the absence of company identification would in itself become an identifier of a debt recovery call, hence tending to compromise the debtor's privacy.
- 2.38 The response of the Credit Services Association rejected the proposal made in the consultation that the adoption of a neutral trading name that does not indicate the nature of the business would overcome the problem. It argued that even a neutral trading name could be subject to an internet search which would reveal the nature of the company. It also believed that the use of a neutral trading name in addition to the company name might mislead a customer into believing that they are being contacted by two companies for the same debt.
- 2.39 The Credit Service Association's response did however welcome Ofcom's proposal to add the word “marketing” to the requirement to publicise a telephone number the called party can use to decline further calls from that source.
- 2.40 The OFT submitted a considered and helpful response. This offered a guarded welcome to Ofcom's suggestion of the adoption of a neutral trading name, while echoing the Credit Services Association point about these being vulnerable to

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<sup>6</sup> [http://www.ofcom.gov.uk/shared\\_ofcom/business\\_leaflets/consumer\\_credit/oft664.pdf](http://www.ofcom.gov.uk/shared_ofcom/business_leaflets/consumer_credit/oft664.pdf)

internet searches. It also acknowledged that Ofcom revised policy has taken account of the requirements of the OFT's Debt Collection Guidance.

#### *Ofcom's conclusions*

- 2.41 Our proposed amendment on the timing of the start of the two second period was not intended to add a new element but simply to clarify the existing guidance. However, we accept the merit of the argument that compliance with the proposed amendment might require systems to be upgraded at considerable cost, which we consider would not be justified. Accordingly, and in light of responses, the wording will be revised (at paragraph 4.16.2 of the revised Persistent Misuse Statement) to read:

*"in the event of an 'abandoned call', a very brief recorded information message is played no later than two seconds after the telephone has been picked up, which contains at least the following information ..."*

- 2.42 With regard to the contents of the information message, Ofcom believes that it has gone as far as it can in seeking to accommodate the concerns of the debt recovery sector. We believe that it is possible to comply both with our statement and the OFT Debt Collection Guidance.
- 2.43 As noted above, responses welcomed the proposal to add the word "marketing" to the guidance to publicise a telephone number the called party can use to decline further calls from that source. Ofcom has modified the revised Persistent Misuse Statement accordingly (at paragraph 4.16.2).
- 2.44 The requirement to exclude marketing content from the information message remains unchanged from the previous version of the statement. Ofcom considers that this is an important prohibition as the possibility of including marketing content in the information message could, perversely, act as an incentive and indeed reward for making abandoned calls.

### **Repeat calls**

#### *Proposed recommendation*

- 2.45 The third proposed revised recommendation was:

*"when an 'abandoned call' has been made to a particular number, any repeat calls to that number in the following 72 hours may only be made with the guaranteed presence of a live operator".*

- 2.46 The existing recommendation said that in the event of an abandoned call any repeat calls to that number in the following 72 hours could only be made by a live operator. There was a risk that this could be read to mean that any repeat calls could only be set up manually. The purpose of this requirement was actually to ensure that a live operator must be available if a repeat call is made within the specified period. This can be achieved even if the call itself is set up using a dialler in progressive mode. It is not intended to prohibit the use of diallers in these circumstances provided the guaranteed presence of an operator is available.

#### *Responses*

- 2.47 This proposal was widely supported.

*Ofcom's conclusion*

- 2.48 Ofcom has modified the revised Persistent Misuse Statement accordingly (paragraph 4.16.4).

**Calling line identification (“CLI”)**

*Proposed recommendation*

- 2.49 Ofcom's final proposal to modify the existing recommendations was:

*“for each outbound call a CLI number is presented to which a return call may be made which is either a geographic number or a non-geographic number adopted as a Presentation Number which satisfies the Ofcom Guide to the use of Presentation Numbers”.*

- 2.50 The intention was to clarify which numbers were acceptable to be delivered as a calling line identification on an outbound dialler call so that customers would be able to return the call without facing excessive call charges. Accordingly the proposal allows the use of geographic numbers and those non-geographic numbers which are permitted to be used as presentation numbers by Ofcom's Guide to the use of Presentation Numbers (the “Guide”).<sup>7</sup> The Guide says that a presentation number “must not be a number that connects to a Premium Rate Service prefixed 09, or to a revenue sharing number that generates an excessive or unexpected call charge”.

*Responses*

- 2.51 One suggestion was that it would be useful to print the Guide as part of the revised Persistent Misuse Statement.
- 2.52 A further response was that the proposed amendment had not been carried forward into the CLI requirements in respect of fax broadcasting.

*Ofcom's conclusions*

- 2.53 We believe that the proposal is a sensible clarification and have amended the revised Persistent Misuse Statement accordingly at paragraph 4.16.5 (including in respect of fax broadcasting). This includes reference to the Guide.

**Revisions concerning automated messages and outbound call steering.**

- 2.54 Ofcom sought to open up a debate about which types of automated messaging were permissible and which might constitute a form of persistent misuse.

- 2.55 Specifically, Ofcom asked:

*Q2. Do you agree with Ofcom's approach to determining whether the use of automated messages constitutes misuse?*

*Q3. Do you believe that it is possible to define objective criteria for applying the public interest test?*

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<sup>7</sup> <http://www.ofcom.org.uk/telecoms/ioi/orp/cli/#a>

*Q4. Do you believe that outbound call steering should only be used with customers who have given their consent?*

### *Proposals*

- 2.56 Automated messages in the context of persistent misuse are calls made without human intervention and without the presence of a live operator. The content of the call is a pre-recorded script.
- 2.57 Ofcom considered that the existing guidance on the use of automated messages in paragraphs 6.4 to 6.10 of the 2006 Persistent Misuse Statement did not address recent applications of this technology. Accordingly, Ofcom was being increasingly asked to provide specific guidance on individual companies' particular implementations of automated messaging technology on an ad-hoc basis. The questions were intended to tease out whether any broad principles could be identified.
- 2.58 The 2006 Persistent Misuse Statement noted that the use of automated messages to make direct marketing calls which do not consist of live speech is unlawful under the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the "2003 Regulations") unless the called person has previously notified the caller that for the time being they consent to such communications.
- 2.59 It also stated that Ofcom considers that persistent use of automated calling systems to transmit recorded messages that are not marketing messages within the meaning of the 2003 Regulations will also be regarded as misuse within the meaning of section 128 of the Act.
- 2.60 However, Ofcom also recognised that some automated messaging which does not consist of direct marketing can confer public benefits and so is not a form of misuse. The examples cited were the use of automated messages to circulate hazard warnings within a defined geographical area and the more specialised application by communications providers to test whether a subscriber's faulty telephone line has been repaired and to inform the customer.
- 2.61 Ofcom's approach that automated messaging should be treated as persistent misuse unless a clear public benefit can be demonstrated has proved difficult to apply to specific cases, because on occasion whilst there was a benefit, it might accrue to an individual or a group of individuals rather than to the public as a whole. It would be possible to make the case that using an automated message to remind someone of a medical appointment benefits the public as a whole by reducing waste of National Health Service resources whereas a similar reminder from a hairdresser may only benefit the individual and the hairdresser. However it is far from clear that the one message is more likely to cause unnecessary annoyance, anxiety or inconvenience than the other.
- 2.62 In addition, there has recently been a refinement of the simple automated message with the development of a technology identified in the consultation that can be described as outbound call steering, but which the industry describes as Interactive Voice Messaging (IVM). In this case the communication opens with a recorded message which then offers the called party a number of interactive options, exercised through the keypad or by voice recognition, which will often include the choice of being connected to a live operator.

- 2.63 In the consultation Ofcom noted that the relatively straightforward ‘public benefit’ test is coming under pressure as IVM is more widely taken up. Its most common use is in managing customer finances, for example by reminding a customer for a payment around the time it falls due and before it has become subject to debt recovery procedures. However there are several other non-debt applications including fraud prevention, credit card activation and arranging deliveries or reminding for appointments.
- 2.64 Ofcom suggested that the effect of automated messaging was likely to cause at least some people to suffer unnecessary annoyance or inconvenience, which is the test set by the persistent misuse provisions. In consequence, Ofcom proposed that it was minded to treat all automated messaging as a form of misuse.

## Responses

- 2.65 Ofcom’s proposals triggered a very substantial set of responses from the financial services industry and suppliers of IVM technology. Perhaps unsurprisingly there was widespread opposition to treating all automated messaging technologies as a form of misuse.
- 2.66 A number of points emerged very strongly from the responses. The first one was that IVM has been used for several years and has been taken up by many providers of financial services. Given the extent of its existing use already it was argued that if there were widespread public disquiet about this technology it would have become apparent by now. In practice the opposite appears to be the case. Companies which have embraced this technology have done so warily at first, assessing what turn out to be generally positive customer reactions before extending it more widely across their customer base.
- 2.67 One confidential response included the findings of independent market research carried out with a group of 130 customers who had received an IVM bill reminder in the preceding ten days. The key responses were that:
- 73 per cent of respondents found the messages useful;
  - 74 per cent thought that IVM was “a very good idea”, a further 12 per cent thought it was “a fairly good idea”;
  - 68 per cent found IVM was convenient;
  - 7 per cent said they would rather be contacted by a real person, 60 per cent “strongly disagreed”;
  - 8 per cent either agreed strongly or slightly with a statement that IVM was annoying, in contrast 60 per cent strongly disagreed and 26 per cent slightly disagreed with this statement.
- 2.68 Although this was a small piece of research restricted to the customers of two companies, one of its findings was confirmed in several other responses. This is the suggestion that many people prefer to interact with an automated message reminding for an unpaid bill rather than with a live agent. The reasons adduced are that embarrassment is curtailed if there is no human interaction, and that the called party feels more in control because it is easier to terminate an interaction with a machine than it is with a human. Respondents underlined that most short-term



unpaid bills by individual consumers are the result of forgetfulness or payment systems error rather than an inability to pay.

- 2.69 A further point made by several respondents was that the financial services sector is regulated in the way that it treats customers and their personal data. Banks are authorised by the Financial Services Authority (FSA) and for banking activities not covered by FSA regulation a similar obligation is imposed through the Banking Code.<sup>8</sup> The code also reinforces obligations under data protection legislation to treat customers' personal information as private and confidential. Financial institutions that use IVM technologies will need to satisfy themselves that they are compliant with financial regulation and that their systems are secure and preserve the customer's privacy.
- 2.70 The responses to Question 3, about defining objective criteria for applying the public interest test were mixed. Where respondents believed that it was possible to define such criteria they tended towards the sectoral, such as the avoidance of indebtedness. One respondent argued that the test should be whether the call was of genuine benefit to its recipient.
- 2.71 The responses to Question 4, about automated messaging being subject to an opt-in choice were largely negative. One point was that where there was a pre-existing contractual relationship the customer would have already consented to being contacted in a variety of ways. Another point was that to suspend the current deployment of IVM while opt-in was sought was impracticable.
- 2.72 Finally, one practical reaction to the consultation has been that in response to Ofcom's perceived threat to the use of IVM technology, suppliers have come together to form a trade group, the IVM Association (IVMA). Ofcom has been in discussion with its potential constituents and has welcomed its intention to outline the general principles and standards under which its members will operate.

#### *Ofcom's conclusions*

- 2.73 Ofcom considers it is right to be concerned about the potential abuse of automated voice messaging technologies. Previous experience has shown that wherever a technology is unlikely to be restrained by significant cost inhibitors and is intrinsically scaleable it is almost inevitable that it will be prone to abuse. The proliferation of spam and the early misuse of automated diallers are examples. There is a risk that IVM could be similarly abused, say by providing an excessive number of messages over a short period or by showing a disregard for the customer's data protection and privacy rights.
- 2.74 The evidence revealed by responses to the consultation however indicate that the current practices of companies that use IVM do not intrinsically constitute a form of misuse in terms of annoyance, inconvenience or anxiety to persons.<sup>9</sup> Key factors in reaching this conclusion are that:

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<sup>8</sup> The Banking Code: Setting standards for banks, building societies and other banking service providers March 2008 [http://www.bankingcode.org.uk/pdfdocs/PERSONAL\\_CODE\\_2008.PDF](http://www.bankingcode.org.uk/pdfdocs/PERSONAL_CODE_2008.PDF)

<sup>9</sup> Responses to the consultation revealed a wide range of automated message services already in use, frequently with an interactive component that typifies IVM. Amongst the uses described were:

- a) Credit/debit card activation;
- b) Checking abnormal patterns of credit card expenditure;
- c) Reminding for medical and other appointments;

- IVM has been largely used in a business area which is already subject to close regulation about treating customers fairly and respecting customers' privacy;
- IVM is almost exclusively used to communicate with customers with whom a company has an existing relationship so there is every incentive to retain their loyalty – this is not a cold-calling scenario directed at an anonymous group of unknown persons;
- The interactive scripting that IVM requires does not necessarily make it a cheap option – most respondents did not believe it offered significant cost savings over conventional call centres;
- Although IVM is already widely used there appears to have been little antagonistic customer reaction – indeed what evidence there is tends to point in the opposite direction.

2.75 Indeed, the Information Commissioner's Office has indicated that it recognises that IVM can be used appropriately with existing customers provided that sufficient weight is given to data protection considerations – in particular, fairness and security.

2.76 It is clear therefore that automated messaging, including IVM may not be an abuse, not just where it benefits the public (in the context of our public benefit test as set out in the Persistent Misuse Statement) but also where it benefits individuals. We will therefore treat each case on its own merits to see whether the provisions of section 128(5) of the Act are fulfilled, or in other words, whether there is misuse due to the effect or likely effect on persons.

2.77 We do not believe that an opt-in solution is workable because it would be impracticable to, say, suspend automated credit card activation or automated investigations into abnormal patterns of credit card use until each customer had been individually given the opt-in choice. However companies may wish to consider offering such an option to new customers or as contracts are renewed or terms and conditions modified. Where customers register a particular hostility to being contacted in this way it would be sensible to respect their wishes, even if this arrangement falls short of being a formal opt-out scheme.

2.78 We also look forward to the self-regulatory initiative undertaken by the IVMA. If the guidance it develops is aligned with the principles underlying the revised Persistent Misuse Statement, compliance with its guidance is likely to prevent forms of behaviour that might constitute misuse.

2.79 Our conclusion therefore is that the non-marketing use of automated messaging does not intrinsically constitute a form of misuse and can, if used responsibly, enable services that confer benefits on customers. However if it is misused – as is the case with any other application or technology – we shall not hesitate to apply the persistent misuse provisions where we believe they are appropriate.

2.80 Paragraphs 4.4-4.7 of the revised Persistent Misuse Statement are amended accordingly.

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d) Reminding for deliveries from on-line or catalogue shops and interactively arranging a fresh delivery time where necessary;

e) Managing customers' accounts and offering an immediate payment facility where a payment has been recently missed;

f) Some forms of debt recovery (largely low-level, ie book club subscriptions).

## Revenue-sharing numbers

2.81 The final question concerned the exploitation of revenue-sharing numbers.

*Q5. Do you agree with Ofcom's clarification that the exploitation of all types of revenue-sharing numbers represents a form of misuse?*

2.82 The 2006 Persistent Misuse Statement stated that exploitation of certain revenue sharing numbers (that is use of such numbers in a way inconsistent with Ofcom's Numbering Plan) was a form of persistent misuse. In the consultation, Ofcom proposed a clarification that the exploitation of revenue sharing numbers in the 08 range is also a form of misuse. A number of scams had been operated that typically invited people to phone a 0871 number in order to receive a prize, an "important message" or delivery instructions for a "valuable shipment". In every case there was no worthwhile prize, no message or no shipment but people were kept on the line for an undue length of time.

### Responses

2.83 The proposed clarification was widely welcomed. However several respondents understood the proposal to mean that all uses of revenue-sharing numbers were forms of misuse which was not Ofcom's intention.

### Ofcom's conclusions

2.84 Our intention behind the clarification in the consultation was to make clear that it was only the unscrupulous exploitation of revenue-sharing that constitutes misuse – in other words where there is element of trickery or deceit so that the customer is duped into phoning a revenue-sharing number that does not arise in a normal commercial transaction. Ofcom has amended the Persistent Misuse Statement accordingly at paragraphs 4.26 to 4.32.

## Other amendments

2.85 Ofcom has made some further minor amendments to the revised Persistent Misuse Statement.

2.85.1 The consultation proposed a clarification that Ofcom's initiative to take action against a form of misuse is not limited because that misuse may also happen to contravene other consumer protection legislation. No responses on this were received and Ofcom has made the necessary amendments at paragraph 1.8 of the revised Persistent Misuse Statement.

2.85.2 Ofcom has also:

- made some minor drafting changes to align the section in the revised Persistent Misuse Guidelines with Ofcom's Penalty Guidelines;<sup>10</sup>
- tidied up the description of abandoned and silent calls (paragraphs 4.8 and 4.9 of the revised Persistent Misuse Statement); and
- included the abandoned call rate formula in the revised Persistent Misuse Guidelines for the avoidance of doubt (paragraph 4.16.1); and

<sup>10</sup> <http://www.ofcom.org.uk/about/accoun/pg/penguid.pdf>

- has made minor drafting amendments to clarify when it may take enforcement action (paragraphs 4.14, 5.3 to 5.5) including clarification that the most serious acts of misuse are non-compliance with the abandoned call rate and the making of anonymous silent calls.

## Annex 1

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

## Introduction and summary

- 1.1 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.
- 1.2 The purpose of this statement is to provide clarity about the operation of the ‘persistent misuse’ provisions in 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 services. These sections also set out enforcement procedures and factors relevant to the application of Ofcom’s Penalty Guidelines<sup>11</sup> where there has been ‘persistent misuse’. Section 131(4) of the Act imposes 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.
- 1.3 The statement addresses the following policy issues:
- i) a definition of what constitutes ‘misuse’ of a network or service;
  - ii) when does misuse become ‘persistent’;
  - iii) examples of persistent misuse;
  - iv) Ofcom’s policy on the issuing of section 128 notifications;
  - v) the consequences of a notification; and
  - vi) factors relevant to the application of Ofcom’s Penalty Guidelines.

## Summary

- 1.4 A person misuses an electronic communications network or service when the effect or likely effect of their behaviour is to cause unnecessary annoyance, anxiety or inconvenience to another person. Misuse also occurs when a person uses the network or service to engage in conduct the effect or likely effect of which 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.
- 1.5 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

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<sup>11</sup> Published by Ofcom in accordance with section 392 of the Act and available at <http://www.ofcom.org.uk/about/accoun/pg/penguid.pdf>

is reckless. Three examples of misuse may be sufficient to constitute persistent misuse.

- 1.6 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:
- i) misuse of automated calling systems ('ACS');
  - ii) misuse by making silent or abandoned calls;
  - iii) number-scanning;
  - iv) misuse of a calling line identification facility;
  - v) misuse for dishonest gain; and
  - vi) misuse of allocated telephone numbers.
- 1.7 These examples are not discrete and misuse may overlap more than one area.
- 1.8 Given the breadth of the legislation, some forms of misuse, say those involving the misuse of automated calling systems or scams, may also represent contraventions of other consumer protection legislation. Where such legislative overlap exists and Ofcom is faced by a particular instance of misuse, it shall determine in consultation with the relevant competent authorities which set of legislative requirements is more appropriate and may be more effectively deployed.
- 1.9 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.
- 1.10 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.
- 1.11 Where Ofcom has issued a notification under section 128 and/or section 129, Ofcom may also impose a financial penalty on a person responsible for acts of persistent misuse. The limit for such a penalty is £50,000 per contravention, increased from £5,000 on 6 April 2006 by what was then the Department for Trade and Industry (which is now referred to as the Department for Business Enterprise and Regulatory Reform). Section 7 of this statement sets out the factors relevant to

the application of Ofcom's Penalty Guidelines in determining penalties for persistent misuse.

## Defining 'misuse' of a network or service

- 2.1 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.
- 2.2 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 by an ACS 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.



## Identifying when misuse becomes 'persistent'

- 3.1 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 so as to be classified as persistent. The misuse must either represent:
- a) pattern of behaviour or practice; or
  - b) recklessness as to whether persons suffer annoyance, inconvenience or anxiety.
- 3.2 The first test in 3.1(a) 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.
- 3.3 The second test in 3.1(b) 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:
- i) that the misuser was informed of the effect of his behaviour but continued with it;
  - ii) that 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; or
  - iii) a failure to take reasonable steps to establish whether or not the behaviour would inconvenience other people.
- 3.4 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.

## Examples of persistent misuse

- 4.1 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 may fall into more than one category.
- 4.2 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.
- 4.3 The six areas are:
- i) misuse of automated calling systems;
  - ii) misuse by making silent or abandoned calls;
  - iii) number-scanning;
  - iv) misuse of a calling line identification facility;
  - v) misuse for dishonest gain (scams); and
  - vi) misuse of allocated telephone numbers.

### Misuse of automated calling systems

- 4.4 Under the Privacy and Electronic Communications (EC Directive) Regulations 2003 (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.
- 4.5 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.
- 4.6 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 on misuse by making silent or abandoned calls below) or fax-scanning calls (see the section

on Number-scanning below) may be persistent misuse within the meaning of section 128.

- 4.7 However some uses of automated calling systems are beneficial, either to the general public or to the individual recipient. An obvious example of a public benefit would be where emergency authorities transmit a recorded hazard warning to subscribers within a defined geographical area. More limited cases, where the benefit is restricted to the individual, are the application of Interactive Voice Messaging ('IVM') technology to activate credit cards, check abnormal credit card use, arrange deliveries or remind for payments and appointments. Ofcom will consider each case on its own merits in terms of assessing whether misuse has occurred in the context of section 128(5) of the Act.

### **Misuse by making silent or abandoned calls**

- 4.8 An abandoned call is where a connection is established but terminated by its originator in circumstances where the call is answered by a live individual. A call may also be regarded as abandoned even if an information message is played (although in those circumstances, it will not be a silent call - see below). 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'. Abandoned calls are likely to cause unnecessary annoyance, inconvenience or anxiety to consumers.
- 4.9 The term 'silent call' is a description for all those types of abandoned calls where the person called hears nothing on answering the phone and has no means of establishing whether anyone is at the other end. 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.
- 4.10 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.
- 4.11 Most abandoned and 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 on 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'. It is silent if the person answering hears nothing on the other end.
- 4.12 One research source suggests 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.<sup>12</sup> 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 2007<sup>13</sup>, showed the high level of public concern and distress caused by silent calls. Sixty seven per cent of adults who are aware of the issue of silent calls say they are concerned, of whom 37 per cent are very concerned. The degree of concern experienced varies for different groups of consumers: 55 per cent of people in the 55-64 age group are very concerned whereas only 19 per cent of people in the 16-24 age group have a similar reaction. Women are more likely to be distressed (42 per cent very concerned) than men (33 per cent very concerned).

- 4.13 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.
- 4.14 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.
- 4.15 Ofcom's primary objective in publishing this statement is to ensure that call centres take steps to avoid, in so far as possible, making abandoned calls; and that when 'unavoidably' abandoned calls are made steps have been taken to reduce the degree of harm caused, in particular that the called person knows who made the call and how they can block further calls.
- 4.16 When considering whether that objective has been met, Ofcom will be guided by the following:
- 4.16.1 the 'abandoned call' rate shall be no more than three per cent of 'live calls', calculated per campaign<sup>14</sup> (i.e. across call centres) or per call centre (i.e. across campaigns) over any 24 hour period<sup>15</sup>, and shall include a reasoned estimate<sup>16</sup> of Answer Machine Detection (AMD) false positives;

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<sup>12</sup> Brookmead Consulting Research 2005

<http://www.brookmeadconsulting.com/TheBrookmeadReport/tabid/360/Default.aspx>

<sup>13</sup> Ofcom Omnibus tracker, September 2007.

<sup>14</sup> Ofcom will be guided by a definition of campaign as the use of a single call script to make a single proposition to a single target audience.

<sup>15</sup> The 'abandoned call' rate shall be calculated according to the following formula:  $\frac{\text{abandoned calls (x)}}{\text{abandoned calls (x) + calls passed to live operator (y)}} \times 100/1$ .

<sup>16</sup> Providers may wish to actually test their equipment in order to provide an actual false positives figure to Ofcom in the course of an investigation. Accuracy of AMD could be tested by comparing the differing connection rates when it is on and off or by making test calls to a range of numbers where the actual presence of an answering machine is known in advance. Providers could listen to a range of calls where AMD is being used. Calls where an answer machine is detected could also be passed to live operators for a limited period and this may help to quantify numbers of false positives. Alternatively, where testing is not carried out, providers may supply Ofcom with their own reasoned estimate (as a percentage of total calls identified as being answered by an answer machine) of the extent of false positives incurred where AMD is being used. Ofcom will then determine whether such an estimate is in fact reasonable, based on evidence provided to it by a provider to substantiate its estimate.

- 4.16.2 in the event of an 'abandoned call', a very brief recorded information message is played no later than two seconds after the telephone has been picked up, 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 marketing calls from that company; and
  - includes no marketing content and is not used as an opportunity to market to the called person.
- 4.16.3 calls which are not answered must ring for a minimum of 15 seconds before being terminated;
- 4.16.4 when an 'abandoned call' has been made to a particular number, any repeat calls to that number in the following 72 hours may only be made with the guaranteed presence of a live operator;
- 4.16.5 for each outbound call a CLI number is presented to which a return call may be made which is either a geographic number or a non-geographic number adopted as a Presentation Number which satisfies the Ofcom Guide to the use of Presentation Numbers<sup>17</sup>;
- 4.16.6 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.
- 4.16.7 Additionally Ofcom expects that where organisations are subject to this statement records are kept for a minimum period of six months that demonstrate compliance with the above rules and procedures.
- 4.17 Ofcom considers that non-compliance with the guidance at paragraphs 4.16.1 and 4.16.2 constitute serious acts of persistent misuse in particular.
- 4.18 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.
- 4.19 Moreover it should be noted that the making of fax calls for direct marketing purposes to individual subscribers who have not given their prior consent is unlawful under Regulation 20 of the 2003 Regulations.

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<sup>17</sup> <http://www.ofcom.org.uk/telecoms/ioi/orp/cli/#a>

- 4.20 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:
- i) 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;
  - ii) calls which are not answered should ring for a minimum of 15 seconds before being terminated;
  - iii) for each outbound call a CLI number is presented to which a return call may be made which is either a geographic number or a non-geographic number that satisfies the Ofcom Guide to the use of Presentation Numbers;
  - iv) 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;
  - v) 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; and
  - vi) Again, records should be kept for a minimum period of six months to demonstrate compliance with the above procedures.
- 4.21 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**

- 4.22 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.
- 4.23 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**

- 4.24 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. 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.
- 4.25 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 - scams**

- 4.26 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.
- 4.27 The first feature they share is that they are primarily aimed at defrauding end-users, rather than communications providers.
- 4.28 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:
- i) 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;
  - ii) the apparently personal text message that invites a return call to a premium rate or revenue sharing number;
  - iii) 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);
  - iv) the use of recorded ringing tone to deceive the caller that charging has not yet started; or
  - v) inviting people to telephone a revenue sharing number on the suppositious pretext that they have won a prize or need to take delivery of an important message or parcel.

- 4.29 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.
- 4.30 PhonepayPlus (previously known as ICSTIS), 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 its Code of Practice, which is available at <http://www.phonepayplus.org.uk/publications/cop/default.asp>
- 4.31 Ofcom will regard the practice of tricking callers into phoning a premium rate or revenue sharing number, including numbers in the 08xx range, 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**

- 4.32 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.



## Ofcom policy on the issuing of section 128 notifications

- 5.1 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.
- 5.2 Under section 128(2) the notification must include the following elements:
- i) a determination that a person has persistently misused an electronic communications network or electronic communications service;
  - ii) a specification of the use that Ofcom considers persistent misuse; and
  - iii) a specification of the period within which the notified person may make representations.

### Ofcom's priorities on issuing notifications

- 5.3 Because persistent misuse is defined in very broad terms and the powers in section 128 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.
- 5.4 First, 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 measures proposed in sections 4.16. This could be described as a qualitative test.
- 5.5 Second, there 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 a significant number of people is inherently more serious than causing annoyance to a small number and is more likely to justify enforcement action. This could be described as the quantitative test.

- 5.6 Third, 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.
- 5.7 Ofcom policy on taking action under its s128 powers will be driven by the three factors set out above.
- 5.8 Ofcom will monitor consumer complaints in this area, and will look at other ways to identify priority cases of persistent misuse. 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.
- 5.9 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, and whether taking action would be a priority for Ofcom.

### **The determination and the specification**

- 5.10 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 communications provider over whose network or service the persistent misuse takes place, unless the communications 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.
- 5.11 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.
- 5.12 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.
- 5.13 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.

## The consequences of a notification

- 6.1 Once the period allowed for the making of representations has expired, Ofcom has three options:
- i) it can decide whether or not to issue an enforcement notification to the misuser under section 129 of the Act;
  - ii) it can impose a penalty under section 130 of the Act; or
  - iii) it can issue an enforcement notification and impose a penalty.

- 6.2 An enforcement notification is appropriate where Ofcom is satisfied that:
- i) the person who has been notified under section 128 (“the notified user”) has persistently misused an electronic communications network or service;
  - ii) 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
  - iii) 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.

- 6.3 The enforcement notification will impose a requirement on the misuser to take the necessary steps:
- i) to end the misuse and not repeat it; and
  - ii) 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.

- 6.4 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.

- 6.5 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, or for the annoyance, inconvenience or anxiety experienced.

- 6.6 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.

- 6.7 Where a quantifiable loss has been registered, the sums involved may be small, say, where someone has been tricked into making a £5.00 premium rate call. However, where such loss or damage has been suffered it is arguable that the 'victim' feels that the inconvenience or anxiety experienced was more traumatic than the actual financial loss sustained, and merits compensation at a higher level. Ofcom is likely to hear such claims sympathetically.
- 6.8 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 prone to anxiety as a result of their age or state of health.
- 6.9 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.

## Factors relevant to the application of Ofcom's Penalty Guidelines

- 7.1 Where Ofcom has issued a section 128 notification, or both a section 128 notification and a 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).
- 7.2 The upper limit for such a penalty is currently £50,000 although this amount may be changed by order of the Secretary of State.
- 7.3 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:
- i) any representations made by the notified misuser;
  - ii) any steps taken by the misuser to bring the misuse to an end and not repeat it; and
  - iii) any steps taken by the misuser to remedy the consequences of the misuse.
- 7.4 Section 130 thus confers discretion on Ofcom to impose a penalty that it considers to be appropriate and proportionate to the notified misuse. Furthermore, under section 392 of the Act Ofcom is required to publish a statement containing the guidelines it proposes to follow in determining the amount of penalties it imposes under the Act. By virtue of section 392(6) of the Act, Ofcom must also have regard to the statement for the time being in force when setting the amount of any penalty under this Act.
- 7.5 The statement on Ofcom's Penalty Guidelines is published at <http://www.ofcom.org.uk/about/accoun/pg/>. The general criteria it sets out are that the amount of any penalty must be appropriate and proportionate to the contravention in respect of which it is imposed. In addition Ofcom must have regard to any representations made to them by the regulated body in breach. Accordingly, Ofcom, in setting the level of penalty will consider all relevant circumstances.
- 7.6 The Penalty Guidelines establish a three-step procedure for determining the level of penalty. First, Ofcom determines a starting figure by reference to such general and specific criteria as it considers relevant in the circumstances of the notified misuse. Secondly, Ofcom considers whether there are any relevant aggravating factors according to which the starting figure should be increased. Thirdly, Ofcom considers whether there are any relevant mitigating factors according to which the starting figure should be decreased.

- 7.7 In accordance with the Penalty Guidelines, Ofcom is likely first to consider the following factors in determining the starting figure of any penalty:
- the seriousness of the contravention;
  - any precedents set by previous cases; and
  - the need to ensure that the threat of penalties will act as a sufficient incentive to comply.
- 7.8 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.
- 7.9 In the context of persistent misuse, Ofcom may consider the following in applying its Policy Guidelines and determining the seriousness of a contravention:
- i) the type of misuse (for example, a serious contravention could include conduct such as the making of a very high number of abandoned calls, or the making of silent calls, or misuse for dishonest gain);
  - ii) the degree of persistence and regularity of misuse;
  - iii) the number of people exposed to the misuse (for example, where an Automated Calling System targets a great number of people)<sup>18</sup>; or
  - iv) the degree of harm caused by the misuse (for example, where does the misuse fall on the spectrum of distress that extends from inconvenience – e.g. *I have to stop what I'm doing to get up to answer a single silent call - through to irritation – e.g. I answer the phone several times to hear a caller chortling, who then rings off - to anxiety – e.g. I have recently emerged from an abusive relationship and receive several silent calls a day - I no longer feel safe in my new home?*)
- 7.10 As at April 2007 Ofcom has imposed penalties under section 130 for contraventions of section 128 in eight cases. Ofcom's penalty determinations can be found at:
- [http://www.ofcom.org.uk/bulletins/comp\\_bull\\_index/comp\\_bull\\_ocases/open\\_all/cw\\_905/](http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_905/)
- [http://www.ofcom.org.uk/bulletins/comp\\_bull\\_index/comp\\_bull\\_ccases/closed\\_all/cw\\_880/](http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_880/)
- [http://www.ofcom.org.uk/bulletins/comp\\_bull\\_index/comp\\_bull\\_ccases/closed\\_all/cw\\_891/](http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_891/)

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<sup>18</sup> In this context, it is also worth drawing attention to the provisions of section 128(7) that make 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.