

Consultation on Silent Calls "enforcement action" - Response

Summary of response

This Statement of Policy is little more than a formal presentation of the improper and ineffective policy that Ofcom has been following for the last two years, in disregard of its previous Statement.

I must repeat again the request made in a complaint submission on 1 December 2003 that the, now previous, Statement of Policy be implemented in the public interest. Some drafting errors in that Statement have come to light; these must be corrected.

All of the revisions to the Statement for which Ofcom seeks consent through this consultation should be removed.

- ABANDONED CALLS THAT RESULT IN AN INFORMATIVE MESSAGE ARE NOT SILENT CALLS
- ANY PATTERN OF BEHAVIOUR THAT INCLUDES MAKING SILENT CALLS MUST BE SEEN AS "PERSISTENT MISUSE"
- NO FURTHER DETAILED SPECIFICATION NEED BE PROVIDED COVERING THE CIRCUMSTANCES UNDER WHICH ACTIVITY INCLUDING ABANDONED CALLS WILL LEAD TO ACTION BY OFCOM
- OFCOM MUST USE THE POWERS IT HAS TO CAUSE THOSE FOUND TO BE PRACTISING PERSISTENT MISUSE TO BRING THEIR MISUSE TO AN END IN ACCORDANCE WITH THE ACT
- OFCOM CONTINUES TO FAIL IN ITS DUTY BY AUTHORISING COMPANIES TO MAKE "ACCEPTABLE SILENT CALLS" UNDER THE TERMS OF THIS REVISED POLICY
- FOLLOWING THIS CONSULTATION OFCOM WILL PRESENT ITS PLANS FOR ACTION.

OFCOM HAS ALREADY OBTAINED EVIDENCE OF A PATTERN OF BEHAVIOUR INCLUDING MAKING SILENT CALLS BY A NUMBER OF COMPANIES.

THE ACTION TAKEN IN RESPECT OF THESE COMPANIES WILL CLEARLY DEMONSTRATE WHETHER OFCOM HAS A POLICY OF "ACCEPTABLE SILENT CALLS" OR "NO SILENT CALLS"

The Informative Message brings a natural process of self-regulation to the issue of abandoned calls making the proposed revisions to the Statement unnecessary.

Presenting measures proposed to apply to all abandoned calls as if they only applied to Silent Calls misleads those responding to the consultation. Any attempt to misinterpret responses, e.g. treating demands for 0% Silent Calls as if these were for 0% abandoned calls, will be seen as an abuse of the consultation process.

Aiming to set a policy position intended to simply balance the interests of call centres against those of citizens would be a grossly misguided and foolish way to approach this issue. Any reference to such a simple balance in future statements on this issue by Ofcom will indicate a persistent failure to properly understand the relevant issues.

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Summarised responses to consultation questions

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

Citizens are concerned about Silent Calls. There is no evidence that citizens are any more concerned about Abandoned Calls that do not result in silence, than other ineffective telephone calls that Ofcom does not treat as "persistent misuse".

What is called "enforcement action", authorising **Ofcom-approved "Acceptable Silent Calls"** and threatening financial penalties and operational restrictions on UK call centres, is the **wrong** way to respond to the concern about Silent Calls.

The concern caused by Silent Calls from a company that completed only 50% of its answered calls that day is exactly the same as if that call had been made in compliance with the "enforcement action" taken by Ofcom under its revised policy.

The enforcement powers granted to Ofcom are for the purpose of causing those found to be practising persistent misuse to **bring their misuse to end**.

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

The so-called "proposed approach" has already been seen in action taken having regard to the revised Statement of Policy. This action is exactly that taken previously; nothing has changed. "A sense of administrative priority" is seen to mean failing to cause those found to be making Silent Calls to end their misuse.

Ofcom's approach must be transparent, using the powers as defined in the Act.

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

Available evidence suggests that **no company has adopted these procedures in the two months since they were announced as "requirements"**. Not even those subject to enforcement action by Ofcom have been required to do so.

The tougher stated position in the previous version of the statement was not seen to have any effect, because Ofcom chose not to implement it. As Ofcom has shown that it does not intend to enforce these "new" requirements, and says so in its Statement of Policy, it is most likely that the new weaker policy will **continue to be ineffective**.

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

This question appears to be seeking further reasons why making Silent Calls should be regarded as acceptable. Following this consultation, Ofcom may then wish to claim that it has reduced the level of nuisance caused by Silent Calls to the very minimum.

Ofcom has no regulatory duty or powers to control the procedures followed by call centres or any other user of telecommunications services.

Ofcom's statutory duty requires it to use its powers by identifying cases of persistent misuse, issuing Notifications and ensuring that the misuse is "brought to an end". **The relevant powers do not allow Ofcom to "reduce the degree" of anything.**

David Hickson

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Detailed response to consultation

The comments that follow provide a more detailed response to the consultation, providing justification for statements made in the summaries. They aim to address both the content of the Statement as drafted and the policy which it presents. It may be helpful to those viewing the responses if the summaries were published separately.

There is supportive evidence for all statements made in this response. This may be provided on request - it is not been possible to include a complete list of references.

I must apologise for the typographical errors that remain after careful checking.

Other materials annexed to this response

Previous communications with Ofcom

Ofcom has not been able to read or respond to many points presented in email messages covering aspects of the policy it has been following in practice in response to my formal complaint, in disregard of its (now previous) published Statement of Policy. Whilst the points made there pre-date the publication of the revised Statement of Policy, they are relevant to this consultation for two reasons:

- They address the policy that Ofcom has actually been following in practice, which resembles the new current Statement of Policy far more closely than that previously in force.
- They relate to the way in which action by Ofcom is seen to fail to have regard to its published Statement of Policy and the provisions of legislation. It is clear that this approach is unchanged by the publication and implementation of a revised Statement of Policy.

I do not restate all of these points here. I must however request that Ofcom's assessment of the consultation responses includes consideration of the many relevant points found in these messages. If asked to, I will publish appropriate extracts from this dated material with necessary explanatory notes to accompany this response, but hope this will not be necessary.

Material published on the Silent Calls Web Site

I would also wish Ofcom's assessment of the responses to include consideration of two documents published on my Silent Calls web site. If asked to, I will present this material directly to accompany this response, but hope this will not be necessary.

- <http://www.users.waitrose.com/~silentcalls/IM notes.doc>

These notes on use of the Informative Message are highly relevant to the change required as a result of the belated discovery that this item must have an impact on Ofcom's policy in relation to Silent Calls. This document was presented to those engaged in the preparation of the new Ofcom policy, but has been disregarded.

- <http://www.users.waitrose.com/~silentcalls/Ofcom%20Silent%20Calls%20Consultation%20respondent%20guide.doc>

These notes pick out the specific changes made when revising the draft of the Statement of Policy and comment on them individually.

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Consultation on Silent Calls "enforcement action" - Response

Detailed responses to consultation questions

Q1

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

Agree!

No respondent to this consultation could have any basis on which to challenge the evidence of concern about Silent Calls already available to Ofcom. The manner in which this consultation was originally presented did not facilitate any further significant evidence of this concern being provided.

One must agree with Ofcom that the degree of public concern on this issue is sufficiently great that any action considered in response to it meets the definition of "an important case" as specified at Section 3(11) of the Communications Act 2003.

Consumers!

Those who make Silent Calls to their customers should be treated in the same way as anyone else practising persistent misuse. **The consumer relationship is irrelevant and cannot be taken to imply consent to receiving Silent Calls.**

Ofcom should recognise that the persistent misuse powers in Sections 128 - 130 of the Communications Act are to be used in performing its principal duty to CITIZENS under section 3(1)(a) of the Act. If any aspect of the separate and potentially conflicting principal duty to CONSUMERS defined at section 3(1)(b) is found to be relevant, then additional considerations must apply.

If issues of competition and markets are relevant to use of the powers, as suggested by the titles of the officers dealing with these matters, then the provisions of Section 3(7) of the Act apply. Ofcom is thereby required to properly understand and explain how it resolves the conflict between its separate duties specified at Sections 3(8) and 3(9).

The approach taken both disregards the proper duty to citizens and represents unnecessary intervention in areas outside Ofcom's responsibility where self-regulation could be effective. Repeated references are made to "consumers" in the Statement of Policy and even in the consultation questions. It is therefore clear that such a conflict exists and Ofcom should have followed the relevant procedure identified in the Act when taking action under this revised policy.

Silent / Abandoned Calls

This question is dangerously misleading as **the revised policy does not propose action against those making "Silent Calls", but those making "Abandoned Calls"**. There are some important differences, which Ofcom is seen to exploit to serve the purpose of promoting "Acceptable Silent Calls".

1. Abandoned calls include those where an Informative Message is used to prevent the call from being silent. The nuisance caused by these is likely to be no greater than that of any intended call for the same purpose that results in no benefit for either party.

Telephone calls that cause inconvenience simply because they are ineffective should not be included in a general classification of "persistent misuse". Abandoned calls that result in an Informative Message should not be classified in this way, unless it is proposed to classify all ineffective calls as "persistent misuse".

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The nature of marketing is such that a very large percentage of any form of marketing activity will have no effect. Many of those canvassed by charities or political parties will fail to respond in the manner sought. A significant number of those invited to participate in market research will decline the opportunity. Many approached by debt collection agencies will choose not to engage in useful discussion toward resolving the issue.

If Ofcom were to regard all such ineffective calls, when dialled directly by an agent, as "persistent misuse" then its inclusion of all abandoned calls within this category could make some sense. It should do neither.

2. Silent Calls are caused by users of automated diallers when **use of Answering Machine Detection equipment** leads to a call being dropped in error after it is answered by a person. Despite being made aware of this whilst preparing its policy, Ofcom has deliberately excluded this type of Silent Call from its definition of "Abandoned Calls" and makes no reference to it as an alternative example of persistent misuse.

3. Silent Calls are caused by users of automated diallers when **the delay in connecting an agent** causes the recipient to form the reasonable view that there is nobody on the line. Despite being aware of this whilst preparing its policy, Ofcom has deliberately excluded this type of Silent Call from its definition of "Abandoned Calls" and makes no reference to it as an alternative example of persistent misuse.

It is significant to note that neither of the latter two examples of Silent Calls would be recorded by an automated dialler as abandoned calls, and do not therefore fit in with the approach of using a percentage to set the level of Silent Calls that is acceptable. As Ofcom is seen to formally promote "Acceptable Silent Calls", primarily by a "percentage approach", these two cases represent a serious embarrassment because they cannot be counted in order to be included in the percentage calculation.

If Ofcom were seeking to eliminate Silent Calls wherever it could, then both would be identified as additional examples of misuse, further to the Ofcom definition of an "abandoned call". Those making Silent Calls in these ways would then be required to employ whatever means would be effective to bring this misuse to an end..

The Informative Message

Prior to the grossly belated realisation that a non-marketing Informative Message could be used without breaching other regulations, it was fair to say that all Abandoned Calls were Silent Calls. As shown above, the converse is not true.

Ofcom cannot claim that there is any evidence of the degree of concern about Abandoned Calls that do not result in silence, because Ofcom itself has been, and remains, complicit in preventing there being any significant public experience of such calls. Many (including the DMA and BT) have used public concern about recorded marketing messages in a cynical attempt to suggest that citizens would prefer abandoned calls to result in silence rather than an Informative Message. Ofcom may have been misled by this absurd and ill-founded suggestion.

Ofcom and the Direct Marketing Association were made aware of the "legality" of the Informative Message on 10 June 2005. Any competent reading of regulation 19 of the PECR, simply as drafted, could have led to this awareness at any earlier time.

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Prior to its announcement on 31 October 2005, **Ofcom was understood to support the wholly mistaken view that the Informative Message was "illegal"**. Despite many attempts to persuade it to do so, Ofcom declined to make any clear public statement on this point during the 5½ months that it was aware of its error.

Ofcom must share a portion of the blame for every Silent Call that has been made since Ofcom came into existence and took on its duties. For most of this time it has been seen to support the odd suggestion that making Silent Calls was a lesser breach of regulations than use of the Informative Message.

Ofcom's share in this blame increased from 10 June 2005 when it learnt of its misreading of the PECR. That share increased still further as a result of the proven ineffectiveness of the announcement on 31 October 2005 - nobody has changed their practice to meet the "requirement" that they "must" now use the Informative Message on "any" abandoned calls. That share will continue to increase as each opportunity to use its powers properly is not taken. In particular, **Ofcom must carry total responsibility in respect of every one of the Silent Calls that has been made with its explicit approval. "Ofcom-approved Silent Calls" began in May 2004, the number being made each day increasing significantly from 31 October 2005.**

Ofcom's reluctance to acknowledge this responsibility may explain why it abuses the distinction between Silent Calls and Abandoned Calls in the wording of this question and elsewhere.

"Enforcement action" taken to date

The revised Statement of Policy expresses the actual policy being followed whilst the previous version of the Statement of Policy was in force far more accurately than that Statement itself.

The so-called "enforcement action", taken by Ofcom in April 2004 and May 2005 did not represent a proper use of the powers.

Activity that unquestionably represented "persistent misuse", as defined in the Statement of Policy in force at the time, had been identified by Ofcom (**1.5 million Silent Calls** in the first case, around **2.4 million Silent Calls** in the second).

In neither case was this covered by a Notification issued under the terms of that Statement and the provisions of the Act. Because it failed to formally specify this "persistent misuse" Ofcom was, and remains, unable to issue an Enforcement Notification so that the misuse may be brought to an end.

This action neither represented a proper use of the powers, nor had regard to the Statement of Policy in force at the time, as required by Section 131(4) of the Act.

The determinations made on 31 October 2005 were made having regard to the revised Statement of Policy, but reflected the same improper approach taken at the conclusion of the earlier cases. Unless Section 131(4) was breached on this occasion these determinations must have been a proper implementation of the revised policy.

In the 2004 case "binding undertakings" to adhere to a "percentage approach" were obtained, despite this being specifically proscribed by the Statement of Policy in force at the time. This is exactly what was done with The Listening Company and MKD Holdings on 31 October 2005. It may be fairly estimated that over the six month period covered by the action this will lead to **125,000 and 720,000 "Ofcom-approved" Silent Calls** respectively.

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In the May 2005 case a Notification was issued effectively specifying that making up to **10,000 "Ofcom-approved" Silent Calls a day was not "persistent misuse"**. This Notification showed high regard for the DMA Code of Practice, applying its provisions in disregard of the Ofcom Statement of Policy in force at the time. This is exactly what was done with Ant Marketing and Thomson Directories on 31 October 2005. As the relevant provisions of the DMA Code of Practice are now incorporated into the Ofcom Statement of Policy, Ofcom can no longer be accused of disregarding its own Statement of Policy. (As these Notifications failed to include a specification of the misuse and there is no external data available, one cannot assess the impact.)

"Enforcement action" to be taken in future

The revised Statement is, perhaps deliberately, unclear about how Ofcom will be continuing to use the powers under the new Statement. Portions of the Statement retained from the earlier version reflect parts of the proper stages of procedure as specified in the Act. Other parts indicate a totally different approach, known as "enforcement action", which has been seen in practice under both versions of the Statement. There is no attempt to reconcile this conflict in the drafting.

Ofcom has said that it understands the legislation to state that everyone using an automated dialler, which inevitably leads to "Abandoned Calls", is thereby practising "persistent misuse". Ofcom does not however wish to prohibit use of this equipment, but to do what it believes to be appropriate to minimise the degree and extent of the nuisance caused. It has proposed a series of procedures that it suggests should be adopted, and sees "enforcement action" using the "persistent misuse" powers as a way of encouraging compliance with these "requirements". Ofcom does not have the general regulatory powers to simply enforce compliance with these procedures, a fact that it perhaps aims to hide behind the smokescreen of "administrative priority".

This approach suggests a complete misunderstanding of the nature and the purpose of the persistent misuse powers as specified in the Act. **The Act DOES NOT provide a specific and inappropriately wide definition of "persistent misuse", so that Ofcom has to decide how and how far this should be constrained.**

The provisions of the Act are as follows.

The Act specifies only the effect that an activity must be likely to have for **Ofcom to make a determination** that a particular "person" has performed "persistent misuse". This is not a specification but a constraint on Ofcom's discretion. Once such a determination has been made and a Notification, that must specify the misuse, has been issued under section 128. Ofcom may take further explicit action to enforce the requirement for that misuse to be brought to an end, should this be necessary.

Section 131 requires a Statement to be published to explain Ofcom's policy with respect to the exercise of these powers and be regarded when the powers are used.

The only "enforcement action" covered by the Act is that which requires anyone practising "persistent misuse" to "bring it to an end" - section 129.

Section 130 allows for the imposition of financial penalties in respect of the notified misuse, a failure to comply with an enforcement notification, or both. Section 129 does however allow enforcement to be carried out through a court injunction.

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In practice this should work as follows.

It is for Ofcom to make a determination of whether "persistent misuse" has occurred in a particular case, constrained by the provisions of the Act, which include having regard to its published Statement of Policy. Having made such a determination, Ofcom should normally issue a Notification, including a clear specification of the actual activity that was determined to represent persistent misuse.

The practice of activity identified in the Statement of Policy as representing "persistent misuse" could be found by Ofcom as a result of a verified report or its own investigations. In all such cases a Case Closure Statement should clearly explain any failure to make a determination of persistent misuse or to issue a Notification.

Lengthy investigation may be necessary to establish the grounds for imposition of a £50,000 penalty, or an order to make compensatory payments to those affected. There is however no reason why a verified report or published admission that someone is engaged in a pattern of behaviour that includes making Silent Calls should not lead to the immediate issuing of a s128 Notification, if the Statement were sufficiently clear.

If the representations made in response to the Notification do not include a verifiable assurance that the misuse will be ended promptly, an investigation may be necessary to determine what enforcement action is necessary in the public interest.

The action taken by Ofcom is not appropriate in respect of the powers that it has nor does it represent a proper response to the public concern, of which it has long been well aware.

A most important feature of the way in which Ofcom intends to take action is totally missing from the information provided to those responding to the consultation. **There is no indication of how Ofcom proposes to discover which companies are "making Silent Calls"**, as suggested by the question. (The Statement of Policy does not actually state that "making Silent Calls" is a reason for "enforcement action".)

Complaints from citizens is identified as the primary way in which Ofcom may be notified of cases of potential persistent misuse. This was seen to be a most ineffective way of Ofcom learning of those making Silent Calls under the previous policy. Ofcom has failed to announce how many such complaints led to action. Now that many other factors have to be taken into consideration this is bound to be even less effective. A most notable reason for this is the **new requirement for all complaints to include all of the evidence necessary for action. Under the previous Statement of Policy, Ofcom acknowledged a duty to investigate complaints.**

Ofcom has failed to gain the ongoing co-operation of telecommunications service providers, most notably BT, which itself admits to making Silent Calls.

BT offers its customers a number of services designed to prevent them receiving Silent Calls from anyone other than its own call centres. BT (as well as other providers and the DMA) all support a service called **Silent CallGard, having the declared objective of preventing Ofcom obtaining evidence of Silent Calls.**

As a result of the intervention of an outside party, some limited co-ordinated action between BT and Ofcom took place early in 2005. Ofcom has sought further intervention from the same party to assist with implementation of the revised policy.

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The passing of information from BT to Ofcom that has taken place should have been the beginning of a regular process for Ofcom receiving this and much other relevant information from all the service providers. The revised Statement of Policy repeats the invitation made in August 2003 for all those with an overview of network activity to report likely cases of persistent misuse to Ofcom. It has however been found that this is unlikely to happen without an assurance that the effort involved in doing this would be worthwhile (i.e. Ofcom will do something with it). Furthermore, proper protocols need to be in place to cover the duties of providers under the Data Protection Act and to their own customers. It is understood that nothing is happening.

An example of the lack of co-ordination between Ofcom and BT is seen by the fact that the Ofcom contract centre is totally unaware of the way in which BT handles information gained from traces of Silent Calls. Ofcom believes that BT does not invoke its right under the Data Protection Act not to reveal the identity of traced Silent Callers to its customers. This is most unfortunate as the means by which Ofcom collects information about Silent Callers relies on their identity being known to the complainant and it does not seek this information from BT in response to individual complaints. **Reports of traced Silent Calls by unknown callers are effectively disregarded by Ofcom, although the necessary information is available to it.**

A matter of great concern, which is significant although sometimes given undue weight, is the engagement of overseas call centres to make calls to the UK, using automated dialling equipment.

The only company known to be making Silent Calls that totally escaped action under the new policy on 31 October 2005 is Toucan Telecom, the only one of those investigated that makes a significant number of its calls from overseas. Ofcom does not explain this significant application of "administrative priority".

Whilst Ofcom continues to focus on call centres, rather than the initiators of calls, the inevitably greater difficulty of obtaining evidence of calls made from overseas will be compounded by Ofcom's inability to impose specific call centre procedures on those outside its jurisdiction.

Ofcom has clearly stated that its powers apply to activity by all those within its jurisdiction, regardless of where the calls are actually made from. It must therefore be seen to have appropriate ways of identifying those responsible for making Silent Calls in this way and collecting the necessary evidence. **Ofcom must clearly and swiftly demonstrate that placing outbound calling work offshore is not an ineffective way of evading action, because the conclusion of the Toucan case under the revised policy has so far given the opposite signal.**

Until Ofcom demonstrates that it has effective methods in place for identifying all those who should be subject to action using its powers, any suggestion that the powers will be used to achieve proper objectives cannot be taken seriously.

Consultation on Silent Calls "enforcement action" - Response

Q2

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

What is meant by "enforcement action" is covered by the response to the previous question. The response here addresses how Ofcom makes a determination of "persistent misuse", which is where the issue of "administrative priority" is introduced.

Administrative priority

There is no clear explanation of what is meant by "administrative priority". One must assume that such a principle underlies all the work of all public bodies at all times, and that its application is subject to proper scrutiny only by those to whom the body is directly accountable under the law.

The Public Accounts Committee of parliament is responsible for scrutinising the way in which Ofcom uses its administrative resources. The Trade and Industry Committee of parliament scrutinises the way in which Ofcom's policy and action reflects proper performance of its two distinct principal duties to Citizens and Consumers in the Telecommunications area. Only these bodies could be expected to make an external determination of how "administrative priority" is being and should be applied.

As the administration of Ofcom includes factors that may not be placed in the public domain, **this question is simply seeking consent for a lack of transparency** in the way that Ofcom performs its duties in this area.

This lack of transparency has already been seen in practice, as no reasons were given for applying different priorities to the Silent Calls being made by Toucan, TLC and Ant when applying the revised policy. The silence will continue to sound the same no matter which of these three is making the call, whereas the action taken was different,

Yet further obfuscation is added by use of the phrase "guided by a sense of". Inclusion of this wholly subjective concept would appear to provide Ofcom with even greater protection from any allegation that it is failing to perform its duty.

If Ofcom wishes to receive consent to being "guided by a sense of administrative priority", this cannot be granted by respondents to a public consultation who cannot be expected to have the slightest idea what this could mean.

Consumer detriment

It is suggested that the one of the factors used in determining "administrative priority" is "the level of consumer detriment". This could never be determined in any specific case of Silent Calls, as most of those affected would rarely be able to be identified. The significant detriment caused by Silent Calls is suffered by those who do not know who is making them or why, and so could not come forward to present their anxiety as evidence in any specific case.

In its first investigation into Silent Calls Ofcom was made aware of the level of detriment caused by 2 of the Silent Calls that it discovered. It was unaware of that caused by the other 1,499,998.

This consideration also misses a vital element of the provisions of the Act, which states that the detriment need only be "likely", it does not have to be seen.

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There is no good reason why the Statement of Policy may not, as previously, identify certain activities that would be likely to cause a degree of consumer detriment sufficient to warrant a determination of misuse - e.g. making Silent Calls.

The level of detriment is irrelevant to a determination of "persistence", this may be shown by "a pattern of behaviour". The determination of persistent misuse and the possible need to follow a Notification with an Enforcement Notification to cause the misuse to be brought to an end is therefore clearly established.

Consideration of the actual level of detriment may be relevant only when considering the possible imposition of a penalty and the need for remedial action in respect of identified victims. These considerations are of little relevance to the issue of Silent Calls.

Steps taken by call centre operators

It is also suggested that the factors used in determining "administrative priority" will include "the steps taken by call centre operators to reduce the degree of concern that silent or abandoned calls cause". This is absurd. **These steps have either been effective in preventing persistent misuse from occurring, or if not then they are irrelevant.**

When considering a possible penalty it may be appropriate to consider whether the misuse has been exacerbated by additional steps taken, such as providing CLI that invites recipients to incur the expense of worthless return calls when the caller does not provide a facility to handle inbound calls.

The only other relevance of the "steps taken" to a proper use of the powers is in the need to make it clear that removal of exacerbating factors such as that referred to above must be part of the action necessary to bring the misuse to an end.

Consultation on Silent Calls "enforcement action" - Response

Q3

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

Effective

Ofcom's earlier publication of a Statement of Policy that clearly declared Silent Calls to be an example of persistent misuse has been seen to be ineffective in causing the practise to be ceased. This provides strong evidence to suggest that **Ofcom's Statement of Policy has little effect on the real world**. It has also been seen that the Statement of Policy has little effect on Ofcom's own policy, as in using the powers Ofcom has been seen to have greater regard for an industry Code of Practice than its own Statement of Policy. For those who believed that the Ofcom press release of 31 October gave an accurate representation of the new Ofcom policy, this same preference for another code over the Ofcom policy was clearly seen to be continued on that very day.

It may be that by taking action that showed a policy different to that as published in a press release, the effectiveness of published policy was perhaps undermined. It could be that **more attention is paid to the action taken by Ofcom than to its published statements**.

Trade associations have been far more effective by publishing their own contradictory interpretations of Ofcom policy, than has Ofcom. Many of those making Silent Calls continue to state that they do so in accordance with Ofcom guidelines, because they follow measures intended to make Silent Calls acceptable.

It is easy to see how a lack of simplicity and clarity in the presentation of policy leaves it open to misinterpretation, rendering it ineffective.

This has been seen again in published and broadcast reactions following the 31 October announcement. These indicate a significant degree of misunderstanding that may have extended to the Ofcom media office and even its Chief Executive. **There is no evidence that this announcement has had any effect in changing the activity of anyone making Silent Calls**. Recent enquiries covering over 400 members of the DMA and the BMRA failed to identify a single company planning to adopt what had been published as being mandatory Ofcom requirements.

If Ofcom wishes to be effective it must make clear statements that are supported by clear action, or better still, take clear action explained by clear statements.

Publicising and implementing the previous Statement of Policy, i.e. saying "Making Silent Calls is persistent misuse" and using the powers to stop someone from making them, could be the most effective way forward for Ofcom!

(It is noted that this was not the conclusion of the published Impact Assessment, which appears not to have seen this obvious possibility to be even worthy of consideration.)

Consultation on Silent Calls "enforcement action" - Response

Reducing the degree of ...

It is important to understand that the persistent misuse powers are not well suited to meet the broad and general objective stated in this question. **These powers permit only for specific practitioners of persistent misuse to be required to bring their misuse to an end.**

However worthy the stated objective may be, the persistent misuse powers could only be used to support this end if the definition of persistent misuse were changed for each specific case. Exceeding a lesser degree of detriment than that currently being caused would have to be specified, so that ending the misuse could effect a reduction. This is however nonsense; the need for consistency in use of the persistent misuse powers prevents them from being used to meet this inappropriate objective.

The DMA claims that the provisions of its Code of Practice, now incorporated into the Ofcom Statement of Policy, represent "best practice". If Ofcom wishes to promote a code of "best practice" for users of automated diallers this should be done away from the Statement of Policy on persistent misuse which may only address unacceptable "worst practice".

"Best practice" is something that one aspires to, but could not be expected to always achieve. Any "Unacceptable practice" cannot be seen to escape action to prevent recurrence. "Normal practice" occupies the large space between the two.

Suggesting that "best practice" is meeting the minimum standard necessary to avoid "enforcement action" neither provides proper guidance for the industry, nor gives a clear indication of Ofcom's policy on use of its powers against persistent misuse. This simply creates further confusion.

It is the duty of Ofcom to use its powers to ensure the elimination of persistent misuse in those cases where it can. That is the only way in which Ofcom may contribute to this feeble objective.

A 60% reduction in the amount of nuisance caused by those against whom Ofcom takes action is not a 60% reduction in the amount of nuisance being caused to citizens.

If Ofcom had additional powers to impose and enforce requirements on all users of automated diallers, then a different situation could prevail. It does not, it does not.

The procedures

The procedures are said to relate to Abandoned Calls, not Silent Calls. **Anyone adopting the second listed procedure is no longer making Silent Calls.** If this were a mandatory requirement, as stated in the 31 October press release, then all of the other procedures, which are promoted by the DMA as part of the campaign for "Acceptable Silent Calls", would be unnecessary to avoid persistent misuse.

Adoption of some of the further procedures by those not making Silent Calls would be not just unnecessary, but positively inappropriate. **In some situations adoption of these procedures would actually amount to persistent misuse in its own right.**

Each of the listed procedures is covered below in the published sequence, grouped for convenience.

Consultation on Silent Calls "enforcement action" - Response

- ;
- The percentage approach
 - *the 'abandoned call' rate shall be no more than three per cent of 'live calls' on each individual campaign over any 24 hour period*

This will not have any positive impact on the degree of nuisance caused by Silent Calls. As clearly stated in the previous version of the Statement, **the number of completed calls made that day makes no difference whatsoever to the effect of any Silent Calls made by the same person.**

Publication of this procedure as a requirement will lead to many more Silent Calls being made than if it had been omitted. Compliance with this procedure will be claimed to be adequate justification for continuing to make Silent Calls, rather than using the Informative Message on abandoned calls. Any evidence of compliance will be used by Ofcom to claim a "measurable achievement", rather than a failure by virtue of the fact that Silent Calls are still being made.

Many reacted to the publication of this requirement as though Ofcom had simply tightened the limit on Silent Calls from 5% to 3%, rather than noting a requirement that there should be no more Silent Calls at any level.

Because the industry has been heavily focussed on percentages it is not surprising that that it is seen this as the key (if not only) element of the new Ofcom policy. Noting how Ofcom has implemented the policy has provided strong support for this idea.

Both the Chief Executive of Ofcom and the Secretary of State for Trade and Industry have announced that Ofcom is only addressing the problem of "excessive" Silent Calls, implying their understanding that a reduction in the percentage is the extent of what is being sought. They both appear to have joined the campaign for "Acceptable Silent Calls".

Whilst they are entitled to join the campaign for "Acceptable Silent Calls", it would be seen as disturbing if these gentlemen misunderstand the purpose of the revisions to the Ofcom policy.

A clearer explanation of the "new policy" could have given a football score of Silent Calls - 0 (%), Abandoned Calls - 3 (%), had it been desired to present such a policy!

There are also ways in which adoption of this procedure may have directly undesirable consequences.

For some, compliance with this requirement may simply lead to more worthless completed calls alongside the same number of Abandoned Calls. Agents may be urged to close their completed calls more quickly simply in order to keep the abandoned rate below 3%.

It is easy to imagine the type of steps that a call centre could take if it were necessary to force the reported drop rate for a campaign down to a specified figure by the end of a day. Reallocating all available agents to making lots of completed calls and hanging up immediately after they had spoken would help the figures towards compliance with any Ofcom percentage requirement. This activity would not breach any Ofcom requirement - quite the reverse, it would however do nothing for the business whilst also causing unnecessary inconvenience, annoyance and possibly anxiety to those called.

Consultation on Silent Calls "enforcement action" - Response

All things being equal, simple compliance with this requirement would cause call centres to have to slow down their diallers, thereby reducing the effectiveness of their operations - **fewer sales, fewer recovered debts, more incentive to go offshore.**

The DMA recently concluded that telemarketing operations in the UK could not be conducted with a maximum drop rate of 3%. One wonders what will happen to those call centres for which this is true.

For those using the Informative Message properly, this provision is probably unnecessary and may be counter-productive if 3% drop rates are accepted as an industry norm. Whilst this is specified as an upper limit, many diallers are configured to simply achieve compliance with a maximum figure and it is generally understood that compliance with a defined target drop rate is simply an operational objective.

Many clients of call centres would be unhappy about their name being broadcast as being responsible for causing inconvenience to 3 in every 100 of those answering calls made in their name. It would be unfortunate if the stated Ofcom level could be used by call centres as a fixed standard to which they operated. (**"Sorry mate! Ofcom says 3%, whether or not you use a message 3% is the rule for the UK. - OK, we'll drop using the message then!"**)

An important purpose of the Informative Message is to ensure a proper relationship of responsibility between the caller and the called.

If someone is content to carry the responsibility for many ineffective calls then it is hard to see why Ofcom should only intervene in respect of one possible reason. The calls could be ineffective because agents are unable to conduct a proper conversation, the script is badly prepared, the product is widely known to be rubbish, the campaign is badly targeted, or there is no agent available to handle an answered call.

These are all matters to be resolved between the caller and the call centre when, or before, complaints are received. If this is ineffective, and Ofcom receives complaints, these should be assessed on the basis of their number and the degree of the detriment, without any need to consider issues relating to the technology involved. The scale and degree of inconvenience and annoyance that will be experienced and the manner in which this is resolved between the caller and the called cannot be pre-determined on the basis of a drop rate percentage.

Those who choose to follow these procedures should not have the support of compliance with Ofcom requirements as a valid excuse for any nuisance they cause by abandoned calls. Many already say that they cannot be accused of causing nuisance because they operate within the Ofcom 5% safe harbor.

Ofcom's detailed consideration of these issues in forming its policy and assessing the impact will have established the likelihood of clients agreeing drop rates with their call centre agents as part of contractual negotiations. Those conducting their own campaigns will be entirely self-regulating. It would be of great interest to know what Ofcom has learned about the type of drop rates which those prepared to have their name included in an Informative Message would be happy to accept.

Finally on this point, I quote from a provision now removed from the Ofcom Statement of Policy **"A percentage approach is not appropriate". It could have been appropriate for Ofcom to ask respondents to the consultation to comment on its decision to remove this most significant, if disregarded, provision.**

Consultation on Silent Calls "enforcement action" - Response

; The Informative Message

- *in the event of an 'abandoned call', a very brief recorded information message is played within one second of the call being answered, which: ...*

Those who comply with this requirement will no longer be making Silent Calls. **(Except through use of AMD, having long transfer times, or never attempting to connect an agent**, where the provisions for "abandoned calls" do not apply!).

Some may have difficulty with what to say on the message - Imagine a call made by an agent answered by someone saying: "Hello, who is that, why are you calling?"

One must assume that Ofcom has confirmed that the one second requirement can be met and that all recipients would be expected not to miss the beginning of the message (probably containing the vital element) as they lift the handset to their ear.

A similar requirement in a industry Code of Practice sets a time limit so low as to be unattainable by those using current technology. This attracts a degree of disrepute to that Code of Practice and also means that this specific provision has to be disregarded in practice, and so there was no limit whatsoever in effect.

One must hope that Ofcom has taken proper care in preparation of its policy to avoid repeating this foolish mistake. Whilst having no limit would be bad, it would be worse if an inability to meet this specific point of detail were used to justify an inability to follow this procedure. It would be most undesirable if compliance with this specific provision prevented many recipients from hearing the name of the caller.

- *identifies the company on whose behalf the call was made;*

The "caller" should be identified in a manner that enables the recipient to discover full contact information for the "company" should they wish to do so. (A telephone number that may be used to contact an answering service in order to be removed from a calling list is not sufficient.) Where this may not be achieved from commonly available sources, e.g. the telephone directory, using the business name alone, then additional identifying information must be provided.

It would have been preferable if Ofcom had approached the issue of Silent Calls from the perspective of anonymous calling rather than from the unnecessarily technical angle that has been used to meet the alleged needs of the call centre industry.

Any pattern of behaviour making voice telephone calls where the caller is not properly identified by a spoken announcement once the call is connected should be treated as persistent misuse, regardless of the technology involved.

It must be noted that present industry practice is focussed on identification only of the company making the call. One trusts that Ofcom has confirmed that companies who engage the services of call centres to act on their behalf are ready to consent to compliance with this requirement, so it could not be found to have retained an unworkable provision in an implemented Statement of Policy.

- *identifies the intended purpose of the call (i.e. "an unsolicited sales call", "a call as part of debt recovery", etc)*

Whilst avoiding a marketing purpose, there could be more freedom of expression than suggested. The messages may not be entertaining so as to fulfil a direct marketing purpose, one must however hope they will not be so bland as to cause annoyance to add to the inconvenience, or to cause anxiety as to why the call was made.

Consultation on Silent Calls "enforcement action" - Response

It must be noted that using a recording does not allow the identity of the person answering a call to be established.

The fact that Ofcom has implemented a policy requiring an announcement that debt recovery was being undertaken to be heard by whoever may answer a call gives one great concern about this Statement of Policy. Such an announcement could risk a breach of the Data Protection Act.

The amount of detail that Ofcom has included in this document is not only inappropriate and totally unnecessary, it also appears to be disproportionate to the amount of care that was able to be taken in its preparation.

- *offers the called person the possibility of declining to receive further calls from that company by contacting a no charge (0800) or Special Services basic rate (0845) number;*

The inclusion of this provision suggests that it has been forgotten that automated diallers are not only used for direct marketing, where the opportunity to decline further calls exists in law. This adds to concern about the way this policy has been prepared, giving undue attention to one sector.

This provision is however inappropriate for intended direct marketing calls anyway, as explained below.

As well as unnecessarily extending its duration, this requirement denies the purpose of the Informative Message in three important respects.

1. **Recital of a telephone number will lead many recipients to believe that they need to write down or remember this number. This will cause unnecessary inconvenience and may cause anxiety to those unable to do so readily.**
2. **Inclusion of a number to dial (whatever the form) may lead many to associate this message with those used to perform scams. This will totally undermine the intended purpose of the message making it a cause of annoyance and anxiety.**
3. If the caller is properly and fully identified (as stated above) any recipient of a call that was otherwise legitimately made would be able to contact the caller by whatever means, and for whatever purpose, they choose.

A request not to be called for direct marketing purposes is best made in writing as this provides a permanent record. This is strongly recommended by the Information Commissioner who states that enforcement of a request not to be called may not be possible without written evidence.

If the call was illegitimate, e.g. an unsolicited sales call to someone registered with the TPS, the proper way to deal with this is by a complaint to the ICO, as this caller is most likely involved in a systematic failure to screen against the TPS.

The call could also be illegitimate if the caller was in breach of the Ofcom 3% provision, although it is hard to see how the recipient could be aware of this. It may be that some recipients would wish to report all such calls to Ofcom, so that an investigation could be mounted to see if the 3% provision had been breached. (This demonstrates the absurdity of the "percentage approach".)

Although based on a possible misunderstanding, the second reason should provide a decisive argument for abandoning this provision.

Consultation on Silent Calls "enforcement action" - Response

The first reason is perhaps the most important. The Informative Message should deal effectively with an undesirable event to prevent serious nuisance. Most recipients should be able to simply replace the handset and get on with their lives, having discovered that a call that they chose to answer was ineffective.

Creating the implication that some onus be placed on the recipient to take action to prevent further Silent Calls by suffering the trouble and expense of making a further call themselves is wholly improper. A similar provision was included in the industry Code of Practice from which these procedures were taken. This was included so that recipients of multiple Silent Calls could be told that this was their own fault for having failed to take action themselves to decline further calls at the first opportunity.

Ofcom should have no part in supporting this reprehensible approach, which was strongly promoted by Alice Beer, on behalf on the DMA, in a recent radio broadcast.

If the degree of nuisance caused is sufficient to warrant the recipient incurring the cost of money and effort in making another call, then they may justly ask why it was acceptable for them to be caused such nuisance in the first place. If it is appropriate to makes this offer, one may wonder what would be assumed by a failure to take it up.. One could believe that a failure to call back would be taken as implicit consent to receiving unlimited unwanted communications from the caller.

Citizens should not have to take action to opt-out from being a victim of misuse

The whole purpose of the Informative Message is to reduce the degree of nuisance caused by an abandoned call to a level where it may be accepted as a tolerable inconvenience, part of the hazard of being connected to a public telephone system and answering calls from unknown callers.

If anyone making such calls believes that recipients are likely to wish to exercise an option to decline further calls, they should not be making them in the first place. If Ofcom believes that this option is necessary, then it must prohibit all abandoned calls.

Compliance with this specific provision adds to the annoyance, inconvenience and anxiety likely to be caused by an Abandoned Call.

- *includes no marketing content and is not used as an opportunity to market to the called person;*

Providing a polite Informative Message on behalf of a named company that may serve to enhance its reputation should not be regarded as "marketing".

; The short duration call

- **calls which are not answered should ring for a minimum of 15 seconds before being terminated;**

This will not have any impact on the degree of nuisance caused by Silent Calls.

This provision should stand in its own right, regardless of the technology used or an intention to connect an agent. It is only found here to extend the list of provisions associated with the campaign to make Silent Calls acceptable.

If those making Silent Calls change their practice to adopt this procedure, it would actually lead to more Silent Calls being made.

A change in practice to adopt this procedure by those using the Informative Message would lead to fewer anonymous calls being made.

Consultation on Silent Calls "enforcement action" - Response

; The follow-up call

- *when an 'abandoned call' is made to a particular number, that number is not called again in the following 72 hours, unless a dedicated operator is available;*

The drafting of this procedure should perhaps have said "called again by the same calling organisation". It is understood that Ofcom does not provide a central database holding a list of numbers with the date and time they received an abandoned call, which must be updated and referred to dynamically by all users of automated diallers. (The point about just who this restriction applies to is covered later).

It is misleading to imply that total compliance with this procedure would ensure that a recipient of a Silent Call will not receive another for three days.

The feasibility of actually requiring an immediate or early follow-up call using a dedicated agent for all abandoned calls should have been explored during Ofcom's policy formation process. Such a requirement would undoubtedly be mandatory as part of a code of "best practice". (As this highly commended procedure is not even thought worthy of mention in the Impact Assessment, it must be assumed that it was rejected from Ofcom's considerations at a very early stage for very good reasons.)

The effect of the requirement for a 72-hour delay is heavily dependent on the drop rate in effect at the time when the second call would be made. If this is low, so that the probability of making contact is high, then leaving the recipient waiting for 3 days before probably discovering the identity of the Silent Caller, or the full purpose of a caller providing an Informative Message, causes an unnecessary addition to the nuisance suffered.

Conversely, if the drop rate is high and many successive failed attempts are made then this would add greatly to the nuisance. This would not necessarily be less true if there were a 3-day interval between the attempts. Given the campaign-based nature of many activities using automated diallers a 3-day delay could well mean that no follow-up were made. This would ensure that the identity of the Silent Caller or the full purpose of a caller providing an Informative Message were never known without the recipient taking action themselves. This could be thought to add to the nuisance.

The pattern of calling is a matter that should be considered in assessing whether this is an exacerbating factor when deciding a penalty for persistent misuse. Both a failure to make follow-up calls or making too many follow-up calls could be seen as exacerbating factors.

Considering all factors, the 72-hour delay cannot in general be said to reduce the nuisance of Silent Calls. Where the Informative Message is being used, each caller would wish to establish the most suitable follow-up approach to continue the relationship established by the first abandoned call - no need for external intervention.

In the case of the debt collection industry one could wonder if the interests of the call recipient are well served by this procedure, given that the call may be intended to enable resolution prior to an inevitable progression to severe recovery measures. (This point has been made by consultation respondents from that sector. It is strange that it did not come to light during the policy preparation.)

Some telemarketers would argue that denying a potential recipient the opportunity of an unrepeatable offer, because of a system failure when they were first called is not serving their interests. The same argument could also be used in relation to reminders to complete one's tax return before a deadline.

Consultation on Silent Calls "enforcement action" - Response

; Misuse of CLI

- *for each outbound call a CLI number is presented to which a return call may be made which is not charged at a higher rate than the national call rate;*

Withholding or providing CLI can serve to exacerbate the nuisance of a Silent Call.

The major problem with the procedures relating to CLI arises because the caller has to select the CLI to provide before it is known whether or not an agent will be available to complete the call. Disregarding Ofcom's intervention, it would be reasonable to provide whatever CLI is appropriate to the intended completed call, given that the vast majority of connected calls will be completed.

The most appropriate use of CLI would depend on whether incoming calls could be handled if made at the convenience of the person originally called, and / or if the caller had a well-publicised number that may be recognised by recipients using Caller Display equipment.

Where a caller is unable to handle inbound calls and does not have a recognisable number then no useful purpose is served by providing CLI. **This procedure demands that some worthless CLI is provided for calls made by automated diallers.**

Where a caller is able to accept inbound calls related to the purpose of the outbound calls, it would be reasonable to provide the appropriate number as CLI. This would simply and naturally facilitate the making of a return call following the original conversation. **The further procedures related to automated diallers serve to deny this entirely proper use of CLI.**

Where a caller has a well-publicised number that could be used for the benefit of those using caller display to identify those making incoming calls and would provide a suitable contact point for return calls then this would seem to be the obvious choice for the CLI. **It is however extremely unlikely that a well-publicised number would meet the conditions required by the further procedures.**

These procedures appear to arise from the misleading attempt by BT and others to suggest that those who do not provide CLI only do so because they seek to remain anonymous. **This attempt to attach undue significance to CLI as representing the actual identity of the caller should be opposed strongly by Ofcom.**

It is those who fail to announce who they are when a voice telephone call is answered who are the anonymous callers. Unless the CLI provided is a number recognised by the person being called it is totally irrelevant to any question of anonymity.

Many people rent so-called Anonymous Caller Rejection services or use Caller Display equipment to reject calls from withheld numbers. **If a silent (i.e anonymous) caller were to provide CLI so as to bypass these devices, the recipient could be caused extreme annoyance.** This could even extend to anxiety if they had been misled into thinking that their "privacy" was being breached by the failure of measures advertised as being for the purpose of defending it.

Consultation on Silent Calls "enforcement action" - Response

It is perfectly reasonable for those who cannot provide a facility to deal properly with return calls at the convenience of those to whom calls were attempted (not even connected) not to provide CLI. **The process of using presentation numbers and worthless answering service announcements provides no public benefit**, although it earns money for the service providers, who are therefore keen to encourage it.

There is no reference in these procedure to a requirement for the CLI presented is be known to the recipient, so they can have no relevance to use of Caller Display. As stated above and below, the procedures actually serve to preclude the possibility of a recognised number being used as CLI. **Despite misleading claims to the contrary, an unrecognised presentation number provides no more information about a caller than the fact that the number was withheld or unable to be handled by the Caller Display presentation feature at the telephone exchange.**

The fact that someone may perhaps be able take steps to discover the identity of an anonymous caller only adds further inconvenience to whatever degree of nuisance was caused by the original call.

Furthermore, **providing CLI so as to solicit a call that cannot be answered by the caller to conduct a conversation is a misuse of CLI**, as it encourages the unexpected cost of money and effort in making a wasted call.

Whilst this procedure is presented here only in the context of abandoned calls arising from use of automated diallers it is seen to reflect a possible view of Ofcom on a broader issue that has been expressed in comments published in its FAQ on Silent Calls. **It is suggested that Ofcom may wish to see provision of CLI made compulsory for a wide range of calls.**

There is no question that most people would like to know the identity of a caller before choosing to answer a call, or after missing a call. There are however many good reasons why this cannot be achieved through use of CLI. There are also circumstances in which one's interests are not best served by knowing only the identity of a caller, without also knowing the purpose of the call.

An ill-considered simplistic approach to the identity of callers and CLI, as promoted by Ofcom, BT and others may cause more harm than it is intended to prevent. This simplistic provision should be removed from these requirements and **if such provisions are to be considered with a wider application they should be subject to a proper review**. Such a review should take care to understand the commercial interests of those likely to express opinions that may be said to represent the interests of their customers. It would also need to note the status of EU Directives.

Use of CLI is presently being promoted as a way of selling caller display equipment, call suppression services (e.g. ACR) and presentation numbers. It is has also played a major part in a very successful customer retention campaign by BT. Many see a number of ways in which this campaign has caused serious damage to the interests of both citizens and consumers. Much activity related to the promotion of CLI is based on suggestions that could be said to amount to misrepresentation.

Ofcom should not get drawn into supporting these misrepresentations.

Consultation on Silent Calls "enforcement action" - Response

- *either a recorded message or a live operator is available at the CLI number presented to inform called persons of the identity of the organisation that called them, the intended purpose of the 'abandoned call' and that the called person's number will be deleted from the organisation's database and added to its in-house suppression list at the called person's request if they leave their name and telephone number;*

The drafting of this procedure should perhaps have said "the organisation on whose behalf the original call was made" (The point about which organisation is referred to is covered later).

It must also be noted that whilst these provisions could be complied with by any organisation this could have inappropriate consequences. Many organisations could comply by maintaining an "in-house suppression list" without being under any obligation to have regard to it. A telephone service provider would be reluctant to honour a request to delete customers' telephone numbers from its database.

One must be realistic and recognise that we are only taking about an automated service. Nobody would use an agent to perform this function operating under such tight constraints.

This wholly inappropriate procedure has been a key feature in the DMA campaign for the "Acceptable Silent Call" for some years. It was however re-announced, as if new, in June 2005, shortly after the DMA was made aware that the Informative Message was not "illegal".

Whilst adoption of this procedure could relieve some of the anxiety already experienced by the recipient of a Silent Call, it does not prevent it from occurring in the first place, and actually adds to the annoyance and inconvenience.

For recipients of originally completed calls it introduces totally unnecessary inconvenience and likely extreme annoyance at the fact that the purpose of their return call to the number given by the CLI cannot be fulfilled because of compliance with an Ofcom requirement that restricts the functions that may be performed.

Ofcom should take "enforcement action" against anyone **practising persistent misuse of CLI by complying with this procedure**. Everyone who called the number leading to such a message should be reimbursed for any cost of the call itself. In addition, they should be reimbursed for the 6p 1471 call-back fee that they incur directly, or as fair compensation for their own efforts in writing down the number or acquiring caller display equipment to avoid the 6p fee.

The most worrying aspect of this feature of this procedure is that it is simply an alternative way of delivering the information provided by the Informative Message. Many would believe that Ofcom sees it as a perfectly acceptable alternative way of delivering this information. In private correspondence BT has said that it is already using the Informative Message by following this procedure. It would seem absurd to follow both procedures. This leads one to question why both have been included in a list for which all items are to be applied.!

Consultation on Silent Calls "enforcement action" - Response

Use of the Informative Message is an alternative to Silent Calls, not a way of mitigating the nuisance caused. It is most certainly not intended to be used in an attempt to repair the damage resulting from a Silent Call after the event, also causing the victim to suffer further inconvenience as well as financial cost.

- *any call made by the called person to the contact number provided shall not be used as an opportunity to market to that person;*

This requirement arises from the need for the Informative Message to be devoid of marketing purpose. If a number is given as part of the Informative Message, then this procedure must be followed.

This provides a further strong reason, in addition to those given above, why there should not be a contact number included in the message.

The recipient of the Informative Message should be left free to contact the caller only if they wish to do so, and by whatever means and for whatever purpose they choose. Attempting to direct such contact into a tightly defined channel denies proper opportunities to both parties.

The original caller is denied the opportunity of trying to win back the favour of those who have, one hopes, suffered only mild inconvenience as a result of the original call. They may wish to offer a full apology and explanation and politely attempt to dissuade someone calling after receiving an abandoned call from declining further marketing calls. This would undoubtedly be regarded as marketing and could not be done if the number called was given in the Informative Message.

A victim with concerns about why they were called, any other broader issues or wishing to see the matter raise at a senior level would want to make contact with someone truly able to represent the company. They would not wish to be told that having their number added to a suppression list was all that could be done about the matter.

A primary purpose of the Informative Message is to encourage a responsible relationship being established between the parties.

This procedure makes the Informative Message a less attractive option from all sides and would therefore discourage its use. This procedure therefore adds to the nuisance caused by Silent Calls.

; Red tape

- *records are kept that demonstrate compliance with the above procedures.*

(There is no indication of where this responsibility lies - this issue is covered later.)

This will not have any direct predictable impact on the degree of nuisance caused by Silent Calls. On balance it is most likely that the impact would be negative.

Inclusion of this procedure helps to serve those who wish to complain about over-regulation and provide this an excuse for moving work offshore

Undoubtedly the way in which those keeping records adjust their processes so to demonstrate compliance will in some cases lead to effects contrary to those that may have been intended to be achieved by the procedure.

Consultation on Silent Calls "enforcement action" - Response

; Further general observations on the "procedures"

Much work using automated diallers is undertaken on an agency basis. There is some basic doubt and inconsistency in these procedures on the question of whether the "caller" is deemed to be the principal or the agent and how issues of responsibility and identity are resolved when there are multiple parties. There will often be very complex situations to address where there perhaps may be a principal company, multiple telemarketing agencies involved in one or more campaigns in addition to the involvement of operational sub-contractors.

As the determination of persistent misuse has itself now been made so complex, it may be difficult to determine who is actually responsible for the misuse where more than one party is deemed to be responsible for performance of the procedures. There then arises the question of how that responsibility may be passed up and down the chain of contracts.

The procedures themselves introduce a further dimension of unnecessary complexity, as they cover inbound as well as outbound activity.

In the context from where they were obtained the "procedures" were rules that could only apply to the members of the association that prepared the code. This would normally be a telemarketing agency or a principal undertaking its own calling.

Although Ofcom only refers to call centres, the persistent misuse powers do not apply only to certain types of business. They must be applied against whoever is responsible for the activity that represents misuse.

The Office of the Information Commissioner has laid out some principles that it follows when dealing with similar circumstances, although unlike Ofcom it has not chosen to get involved in mixing inbound and outbound and aims to keep its regulations relatively simple.

Following the principles of the ICO, the "caller" would normally be the principal, rather than the agent. This, as stated above, is quite different from the situation that prevailed when principals were generally outside the jurisdiction of the body enforcing the rules. It is also different to the way in which Ofcom has chosen to use its powers so far, taking "action" against agencies rather than the principals on whose behalf the Silent Calls were being made.

Given that Ofcom chose to get involved in all of this detail, one must assume that all of this was sorted out in the course of preparing this unnecessarily complex policy.

If Ofcom retains these revisions to its policy then these issues need to be properly explained either within further revisions to the Statement of Policy itself, so that the proposals may be subject to public consultation, or at least to those who aim to follow its procedures. This clarification must address the yet more complex situation found where not all of the parties fall within Ofcom's jurisdiction.

If Ofcom retains all of this nonsense as part of its policy on Silent Calls and aims to struggle through the unnecessary complexity that has been introduced when using the only powers that it has in accordance with the legislation there is little chance that it will have been able to have any meaningful effect on the nuisance caused by Silent Calls.

Consultation on Silent Calls "enforcement action" - Response

Q4

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

Only one; simply stop making them, they used to be deemed by Ofcom to be an example of persistent misuse. (The confusion between Silent Calls and Abandoned Calls is used most effectively in the Impact Assessment as a reason to dismiss this simple option.)

Development, implementation and enforcement of procedures to reduce the degree of anxiety, annoyance and inconvenience caused by their activities is a matter for self-regulation. **It is clear that Ofcom has become drawn into supporting the campaign for "Acceptable Silent Calls".**

By presenting this question as part of the consultation Ofcom appears to wish to get drawn even further into this mire.

The revisions to the Statement of Policy should therefore be abandoned. The Statement of Policy previously in force should be re-instated and implemented.

Ofcom's duty is to ensure that those found to be engaged in activity likely to cause annoyance, inconvenience and anxiety **simply bring it to an end.**

Consultation on Silent Calls "enforcement action" - Response

Notes in reaction to the consultation document

When invited to contribute to a public consultation one is normally part of a process of policy development. This may be at the final stage for a well-developed policy that has already been subject to wide specialist consultation during the course of its development. Alternatively this may be at the initial stage where ideas to contribute to policy formation are invited, or if a well-established policy is being reviewed.

In this case, the revised policy has been fully developed through a process of private consultation with a small select group of stakeholders, and implemented. This process was undertaken whilst Ofcom would / could not engage in any public discussion of the issues because it was also conducting major investigations. At the conclusion of these investigations, Ofcom committed itself to implementation of the revised policy in the actions taken, published the revised Statement of Policy at the same time as applying it, and announced a voluntary consultation into this policy, presenting its contents as if they were proposals.

One is therefore actually being invited to review the policy currently in use, when it could be argued that there has been insufficient time for its effects to be seen. It is of some concern that the attention of those contributing to the consultation is not drawn to the 8 examples of how this revised policy is applied in practice.

Many references to "proposals" could lead some into a mistaken belief that Ofcom is required to consult prior to implementation of its policy and that the policy on which they are invited to comment will not be put into force until after responses have been reviewed. Respondents may also believe that all the ineffective action taken by Ofcom to date, was in implementation of the previous version of the policy.

It is especially unfortunate that there has been no opportunity for refinement of the policy through wider consultation prior to its implementation. Ofcom has also indicated that it has no intention of making any further changes to the Statement of Policy. This consultation is said to be for the purpose of establishing priorities for further action under the policy.

The select group of stakeholders that was chosen to prepare the policy in conjunction with Ofcom was representative of very few narrow interests. Those were:

- the government (the DTI), holding the chair and aiming to also represent "consumers" of some unspecified product or service
- call centres engaged in telemarketing using automated diallers
- "refined" telemarketers, known to view the above with disdain
- those engaged in competitive forms of direct marketing e.g. direct mail

The latter three conflicting interests were all represented by the DMA.

Whilst this consultation provides an opportunity for Ofcom to draw on the views and informed advice of a wider body of stakeholders, it would perhaps be unlikely that Ofcom would wish to make any revisions to a Statement of Policy that was only recently put into force. Despite all of this work, however, the action taken on implementation of the revised Statement of Policy reflected no change in the actual policy that has been followed for the last two years. It is therefore also unlikely that Ofcom would wish to reconsider the action still in effect in respect of the companies it has investigated, (Ofcom-authorized Silent Calls for a period of six months) or to act in any different way in future.

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The options presented in the Impact Assessment

One obvious option is omitted from those presented here - a proper implementation of the previous Statement of Policy. It is assumed that the "policy" followed to date was ineffective because of the content of the previous version of the Statement of Policy. This is quite untrue. The "policy" carried out previously was essentially that defined in this revised Statement of Policy, not that clearly expressed by the Statement of Policy in force previously, but never implemented.

The only apparent explanation for why it was seen to be appropriate to make **revisions that present a weaker, rather than a stronger policy** is to meet what has been understood to be the needs of the call centre industry - "Acceptable Silent Calls".

What Ofcom is doing

Its policy and approach

In respect of the general approach to use of the powers, the policy that has been seen in effect for the last two years could be described as self-regulation by one unrepresentative industry body, with Ofcom doing most of the work.

The Direct Marketing Association has long argued for "Acceptable Silent Calls". This is essentially defined as being Silent Calls made by any organisation that makes 19 times as many completed calls in a day ("a 5% safe harbor"). This is specified in a Code of Practice where other requirements are added to this key provision, which until recently was said to represent Ofcom policy, including a significant provision that prohibits use of the Informative Message by DMA members.

It should be noted that the Statement of Policy which Ofcom inherited from Ofcom and adopted included a provision stating that "a percentage approach would not be appropriate", as the number of completed calls made is totally irrelevant to the actual detriment caused by the Silent Calls.

All action taken by Ofcom in respect of Silent Calls has consisted of a requirement to comply with the DMA Code of Practice. The only difference in the action taken on 31 October 2005 was to narrow the 5% safe harbor to 3%. (reflecting the equivalent provision in US federal regulations known as the "safe harbor").

The revised Statement of Policy has now directly incorporated the "Acceptable Silent Calls" provisions from the DMA Code of Practice. Use of the Informative Message has been added as an additional provision, although the current draft includes a technical requirement which many users of automated diallers may be unable to comply with. This is one of a number of possible explanations for this being the only one of the listed requirements that was not imposed on those against whom action was taken under the new Statement of Policy on 31 October 2005.

To accommodate the "acceptable Silent Call" the Statement of Policy, which should be a relatively simple document, has been disproportionately loaded to address the issue of Silent Calls by telemarketing companies. **It meets its declared objective of providing a basis whereby the making of Silent Calls may be seen as acceptable.**

This distortion is not limited to the specification of the detailed provisions, it extends to the way in which powers intended to simply cause readily identifiable misuse to be ended may be used to enforce the moderation necessary to achieve acceptability.

Consultation on Silent Calls "enforcement action" - Response

Obfuscation is introduced by confusing references to abandoned calls / silent calls, administrative priority, requirements / factors to be considered, "persistent misuse" as including activities that are not "persistent misuse", an undefined term of Ofcom's invention called "enforcement action" and in many other ways.

In respect of others who make Silent Calls, and other types of persistent misuse, the Statement appears ill-prepared and inconsistent. Adherence to the specific provisions of the relevant sections of the Act is disregarded in the revisions, leaving the sections retained from the earlier version in contradiction of newly revised portions.

The interests of citizens

It is the interests of citizens as determined by a supposed representative body for the call centre industry and the DTI, which is prepared to accept its status as such, that have been used to provide the basis for what is called the "consumer" interest.

Because it is the basic interests of citizens that are involved here and the degree of detriment is relatively low (when set against issues involving criminal action), there is no significant lobbying body to press those interests. There is no powerful issue of human rights to raise concerns for those active in this field, nor any aspect of a commercial relationship that would excite consumer groups.

For most of those able to take a strong campaigning position the only effect of Silent Calls on them is one of inconvenience. As there is little purpose in inconveniencing oneself simply in order to avoid inconvenience, there are probably very few involved in campaigning activity from the citizen's perspective.

The policy was therefore prepared and implemented without any stakeholder consultation with representatives of the interests of citizens. Even the post-implementation consultation was undertaken without Ofcom making any attempt to invite or facilitate responses from citizens, other than one quite improper exceptional consultation with a single citizen who holds no representative status whatsoever.

The interests of the call centre industry

Many in the call centre industry wish to see Silent Calls stopped, because of the significant effect they are having on the reputation of the industry, leading to excessive unnecessary levels of registration with the Telephone Preference Service. This is making all compliant outbound calling more difficult, providing incentives for those who may wish to avoid compliance with all regulations.

The competitive nature of the industry makes call centre operators reluctant to place themselves at a competitive disadvantage. Whilst many are heard asking for tighter regulation, they would generally only wish this to have an impact on their competitors. There is no evidence of any meaningful attempt to raise the standards of practice within the outbound sector of the industry. The DMA, which seeks to speak for this industry, recently issued a document containing the conclusion that this sector was in terminal decline and was not worth saving.

In August 2005, the DMA announced that it would consider incorporating a provision to at least allow, if not require, use of the Informative Message in its Code of Practice. It has not gone ahead with this.

On 15 November 2005, the DMA acknowledged the Ofcom announcements of 31 October indicating that a detailed response would be made by 31 December. No such response has been published.

Consultation on Silent Calls "enforcement action" - Response

An outside observer could readily form the view that all those operating within the outbound sector of the call centre industry saw themselves as practising an activity that was fundamentally immoral and were therefore in continual need of reassurance that they should not be punished for it. This reassurance is seen to come in two ways.

Believing that others are behaving in a worse manner than themselves is a commonly used device. One hears many references to "rogue operators", although these are never identified so that action may be taken against them. Offshore and overseas operators are always a good source of reassurance. Their apparent immunity from action for breaches of regulations must be a guarantee that they are behaving badly, despite the fact that no UK operator has suffered any punitive action for breaching regulations.

Adherence to regulations, whether real or imagined, and whether or not carried out in practice is the other source of comfort. Many believe that Ofcom still allows a 5% safe harbor for Silent Calls, when it has never formally accepted any such provision.

Belated formal adoption of the "Acceptable Silent Calls" provisions of the DMA code by Ofcom may be seen to provide more comfort, although this is threatened by the narrowing of the safe harbor to 3%. and the removal of the unique privilege to be able to claim compliance with their Code held by DMA members. The only evidence of the degree of actual compliance with the "Acceptable Silent Calls" Code is the fact that no DMA member has ever suffered action from the Direct Marketing Authority for breaching it. The company owned and run by a member of the DMA Contact Centre and Telemarketing Council, which is responsible for the Code, was found by Ofcom to be operating an abandoned call rate of up to 50%

It is commonly noted that the outbound sector of the call centre industry lacks leadership from within, appears incapable of promoting its own interests and currently looks to Ofcom to provide that leadership. It may be questioned as to how much leadership is provided by adopting the key element of what was provided as leadership during what many have seen as a period of decline to a point where some see inevitable demise.

Many see the "Acceptable Silent Calls" campaign as having played a major part in creating the present situation and would not wish Ofcom to continue it.

The suggestion that an industry which sees its survival threaten by overseas competition competes with overseas operators will actually be forced to comply with tighter regulation and risk heavier fines for breaches of complex requirements is absurd. The "Acceptable Silent Calls" campaign relies on an impressive-sounding list of provisions for which there is always some good reason not to have enforced - "a sense of administrative priority" would be a very good example of such a reason.

Ofcom has published a document that is littered with specific requirements and provisions that were absent from its previous Statement of Policy. Many of these are found to have quite spurious benefits when subjected to the lightest examination.

There can be no expectation that Ofcom will actually seek to enforce these requirements beyond what could be readily accepted by those subject to action.

Like the industry Code of Practice from which much of the new emphasis and content is drawn, the revised Statement of Policy aims to make Silent Calls from UK call centres acceptable. This represents a continuation of the misguided belief that this will best serve their interests.

Consultation on Silent Calls "enforcement action" - Response

What Ofcom should be doing

Very few Silent Calls received in the UK are instigated from beyond the scope of Ofcom's jurisdiction. Ofcom should be focussed on the instigators of the calls, as both the cause of and the solution to the problem of Silent Calls. If they were required to take proper responsibility for what is done in their name, then call centres could get on with carrying out their instructions in the most effective manner possible.

Silent Callers known to the public

The action already taken against Ant Marketing and The Listening Company, under the revised Statement of Policy, failed to identify those on whose behalf these agencies make Silent Calls. I can only say that they have called me on behalf of **HomeCall** and **BSkyB** respectively and perform outbound work on behalf of many other companies. I obtained lists of their current clients before these were removed from their web sites, although cannot say which of these use them for outbound work.

As well as other companies that have been investigated and allowed to continue making Silent Calls for themselves (i.e. **Kitchens Direct** and **Toucan Telecom**) I have also complained to Ofcom about Silent Calls made by, or on behalf of:

- **BSkyB** by two other agencies
- **BT** (shown in its own published admission)
- **HM Customs and Revenue** (shown in its own published admission)
- A well known cancer charity (I will not introduce the specific name to the public domain, but it has been notified and may wish to come forward, or be represented along with other charities who suffer the same damage to their reputation.)
- The **AA**
- **Norton Finance**
- **The Legal Advice Bureau**
- **HBOS** (Halifax / Bank of Scotland)

These companies, and the **very many others** with some positive public reputations that have not happened to come to my attention, should be persuaded to take proper responsibility for what they do themselves, or what is done on their behalf. If this were to be achieved, then Ofcom's policy on Silent Calls would apply wherever they placed contracts for call centre operations.

If Ofcom were to make a very simple statement that restated what was in its previous Statement of Policy, i.e. **making Silent Calls is "persistent misuse"** then it is hard to see how these organisations could defend their present complicity or direct engagement in the practice of making them.

The Informative Message was proposed as an alternative to the Silent Call for two reasons. Firstly, to stop Silent Calls without damaging the UK Call Centre industry by banning use of predictive diallers. Secondly, to ensure **a proper relationship between all of these organisations and those who they call. Ofcom should not obstruct this relationship** by proposing percentages, CLI, machines to add numbers to suppression lists and attempting to imposing other unenforceable and inappropriate regulations, whilst still failing to stop Silent Calls.

Consultation on Silent Calls "enforcement action" - Response

What others may wish to do

Legal issues - 1 - s131(4)

There may be legal concerns about breaches of s131 (4) of the Communications Act 2003 if the action taken by Ofcom on 31 October 2005, i.e. allowing continuation of the practice of making Silent Calls, did not "have regard to" the Statement of Policy on persistent misuse published that day. This was the Statement "for the time being in force" as referred to in the relevant Notifications and Case Closure Statements.

If there is no such concern then there is no question that the current Ofcom policy includes tolerance of making Silent Calls.

Legal issues - 2 - s3(7)

There may be legal concerns over a "conflict in an important case" between Ofcom's "duties under paragraphs (a) and (b) of subsection (1)" of section 3 of the Communications Act 2003 as referred to in subsections (7), (8) and (9) of that section.

The persistent misuse powers are unquestionably relevant only to Ofcom's principal duty to citizens under paragraph (a). The Statement and the consultation document make repeated references to "consumers". The Impact Assessment addresses issues of markets and competition. As these are only relevant to Ofcom's principal duty under paragraph (b) it would appear that this conflict will arise whenever the policy is applied.

The policy was applied to a number of cases on 31 October 2005 without any reference to such a conflict and specifically without following the relevant procedures specified in the Act.

Parliament - Trade and Industry Committee

There may be general concern about the way in which Ofcom is executing its duties and powers under the specific provisions of the Communications Act relating to "persistent misuse". These concerns may only properly be addressed by parliament, to which Ofcom is responsible. This would normally and most effectively begin with an inquiry by the Trade and Industry Committee, which is responsible for scrutinising the behaviour of Ofcom.

It may be that Ofcom would welcome such an inquiry so that it may receive guidance from parliament. This would provide an opportunity to air the possibility of extra powers being granted to Ofcom. This has been suggested by some, and may be seen to be implicitly requested by Ofcom itself through the clearly expressed desire to define procedures to be followed by all call centres.

DTI - Consultation on Increase in maximum penalty for persistent misuse

The DTI is presently conducting a consultation on its intention to grant Ofcom's request for an increase to the maximum penalty that may be applied following a Notification of persistent misuse and / or a breach of an Enforcement Notification requiring that a notified misuse be brought to an end.

As Ofcom may already use the threat of a court injunction against those who may breach an Enforcement Notification, there seems little purpose in having the opportunity to impose a greater financial penalty in these circumstances.

Consultation on Silent Calls "enforcement action" - Response

Those who wish to see Ofcom simply stop Silent Calls from being made will be content that, where necessary, it may use the Enforcement Notification to achieve this, supported by the sanctions available to a court for the criminal act of breaching an injunction.

Many will see the possibility of using financial sanctions against a corporate entity as totally irrelevant, if the objective is simply to stop Silent Calls from being made by those who will comply after being served with a Notification.

Where a financial penalty exists this will simply encourage those who may suffer it to weigh up the risk on a purely commercial basis as if this were a price being put on an activity. Given a fixed limit, this simply makes it a better risk for larger companies who could afford the maximum fine, distorting the relevant market. Risk of detection also becomes a factor in this business equation, encouraging use of overseas agencies or moving operations offshore.

Use of financial penalties would be relevant if Ofcom intends to play around with penalising minor breaches of the procedures designed to make Silent Calls acceptable.

Those who wish Ofcom to only use its powers to stop Silent Calls, will therefore oppose the increase in the maximum penalty.

DTI - Order to Increase the maximum penalty for persistent misuse

Following the consultation, the Secretary of State for Trade and Industry, who wishes only to address excessive Silent Calls, will seek parliamentary approval for the order to increase the penalty.

It may be that parliamentary procedures will be used to register objections to this order and perhaps delay or even attempt to prevent parliament granting its approval.

Consultation on Silent Calls "enforcement action" - Response

Conclusion

Ofcom previously had a Statement of Policy that simply clearly declared making Silent Calls to be an example of persistent misuse and indicated a willingness to use the powers that were granted by parliament in response to a request from Ofcom. For spurious and possibly misguided reasons it failed to implement that policy over a period of nearly two years.

It now has a Statement of Policy that does not declare Silent Calls to be an example of persistent misuse and indicates a preference for its own version of "enforcement action" that is quite different in nature and purpose to the powers granted by parliament.

"ACCEPTABLE SILENT CALLS" SHOULD BE SEEN AS AN OXYMORON

THE REVISED VERSION OF THE STATEMENT OF POLICY MUST BE ABANDONED.

THE PREVIOUS VERSION MUST BE CORRECTED, REINSTATED AND IMPLEMENTED.

This is the first occasion on which I have requested that Ofcom changes its policy.

I acknowledge that very few responses will make this point.

David Hickson