

Annex 1

Revised statement of policy on the persistent misuse of an electronic communications network or service 2010

Introduction

- A1.1 This statement is published in accordance with section 131 of the Communications Act 2003 (“the Act”) and sets out Ofcom’s general policy with regards to the exercise of its powers under sections 128 to 130 of the Act.
- A1.2 The purpose of this statement is to provide clarity about the operation of the ‘persistent misuse’ provisions in sections 128 to 130 of the Act. These sections enable Ofcom to issue notifications if it has reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services.
- A1.3 Sections 128 to 130 also set out enforcement procedures and factors relevant to the application of Ofcom’s Penalty Guidelines⁴⁰ where there has been ‘persistent misuse’. Section 131(4) of the Act imposes a duty on Ofcom to have regard to the statement in exercising the powers conferred on it by the relevant sections. However, the statement cannot bind Ofcom absolutely in exercising those discretionary powers. Section 131(2) also enables Ofcom to revise the statement from time to time as it thinks fit.
- A1.4 The statement addresses the following areas:
1. Defining ‘misuse’ of a network or service.
 2. Identifying when misuse becomes ‘persistent’.
 3. Guidance on persistent misuse by making silent or abandoned calls.
 4. Other examples of persistent misuse
 5. Ofcom’s policy on the issuing of section 128 notifications.
 6. The consequences of a notification.

1. Defining ‘misuse’ of a network or service

- A1.5 Section 128(5) sets out two definitions of what constitutes misuse of an electronic communications network or electronic communications service. A person misuses a network or service if:
- ‘the effect or likely effect of his use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety’. This

⁴⁰ Published by Ofcom in accordance with section 392 of the Act and available at: <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

requires the use of a network or service for example where a person uses a telephone to make an abandoned call (i.e. one which is terminated by an Automated Calling System – ACS as soon as the called person tries to answer it); or

- ‘he uses the network or service to engage in conduct the effect or likely effect of which is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety’. This captures a wider category of behaviour which involves conduct dependent on the use of a network or service for example conduct that results in a person being led unknowingly to dial a premium rate service.

A1.6 In both cases the significance of the words "likely effect" is that the effect has to be probable, not necessarily proven.

A1.7 Section 128 of the Communications Act 2003 applies where “a person has persistently misused an electronic communications network or electronic communications services”. In Ofcom’s view, such misuse may be either direct or indirect. This means a person may be caught by section 128 either where they are misusing a network or services themselves, or where they have engaged another person to use the network or service on their behalf.

A1.8 An example of this may arise in the context of network or service misuse by a call centre. Where a person engages representatives, such as third party call centres to contact UK consumers on its behalf, that person may be the target of an investigation and ultimately action under the Act for persistent misuse by its representatives. This includes where the representative is an offshore centre.

A1.9 To be clear, there may be circumstances where the representatives are also persons who are misusing a network or service in their own right. In those circumstances, Ofcom may also consider investigating these individuals or companies. This decision would be taken on a case by case basis.

2. Identifying when misuse becomes ‘persistent’

A1.10 The misuse also must be persistent. Section 128(6) states that this is where the misuse is repeated on a sufficient number of occasions for it to be clear that the misuse represents:

- ‘a pattern of behaviour or practice’. This is met by instances of repetitive misuse. It is difficult to define in advance what cycle of repetitive behaviour may reasonably be described as forming a pattern. This will need to be determined on a case by case basis. However any such pattern is likely to require a minimum of three instances of the conduct in question in order to be recognised as such; or
- ‘recklessness as to whether persons suffer annoyance, inconvenience or anxiety’. This requires the misuse to represent 'recklessness' on the part of the misuser. This will need to be determined on a case by case basis. Evidence that points to recklessness could be:
 - i) that the misuser was informed of the effect of his behaviour but continued with it;

- ii) that the behaviour in question is so patently annoying that it amounts to misuse (e.g. ringing someone repeatedly in the middle of the night) that a reasonable person would realise it would have that effect; or
- iii) that the misuse has failed to take reasonable steps to establish whether or not the behaviour could cause annoyance, inconvenience or anxiety to other people.

A1.11 In determining whether misuse is persistent or not, section 128(7) states that it is immaterial whether networks were used on some occasions and services on other occasions; that different networks or services were used on different occasions; or that the persons exposed to the misuse were different on different occasions.

3. Guidance on persistent misuse by making abandoned and silent calls

A1.12 This section sets out Ofcom's approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls.

A1.13 In deciding whether to take enforcement action in a particular case Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment and will take account of the steps that have been taken by ACS users to reduce the degree of concern that silent or abandoned calls cause including those set out below.

Abandoned call rate

A1.14 This section sets out:

- i) Terms defined.
- ii) The abandoned call rate formula.
- iii) Calculating the abandoned call rate when AMD is used.
- iv) Calculating the abandoned call rate when AMD is not used.

(i) Terms defined

A1.15 We have defined the terms below which are relevant to calculating the abandoned call rate.

A1.16 24 hour period means between midnight and midnight on a calendar day.

A1.17 An *abandoned call* is where a connection is established but terminated by its originator in circumstances where the call is answered by a *live individual*.

A1.18 The abandoned call rate is the number of *abandoned calls* as a proportion of total *live calls*. It must include a *reasoned estimate of AMD false positives* where AMD is used and may exclude a *reasoned estimate of calls abandoned to answer machines*.

A1.19 An AMD false negative is a call answered by an answer machine but mistakenly categorised as a live call. For the purposes of calculating an abandoned call rate, these should be removed to ensure *the reasoned estimate of AMD false positives* is

not applied to a much bigger total of answer machine calls (i.e. they are not recorded as *live calls*).

- A1.20 An AMD false positive is when an AMD device mistakenly identifies a call as being answered by an answer machine whereas, in reality, it has been answered by a live individual.
- A1.21 A campaign is identified by the use of a single call script to make a single proposition to a single target audience. A campaign can be run from more than one call centre over a 24 hour period. If calls are made for identifiable purposes with a single script to a single target audience, then Ofcom will continue to regard this as a campaign. In the event of an investigation, Ofcom will consider the facts of each case on its own particular merits.
- A1.22 Guaranteed presence of a live operator means to ensure that a live operator is available if a repeat call is made during the specific period. That is, when an ACS user makes a call, they can guarantee a consumer who picks up the call will be connected to a call centre agent.
- A1.23 A *live call* is where a connection is established and the call is answered by a *live individual*. This includes *live calls to a live operator* and *abandoned calls*.
- A1.24 A *live individual* refers to a person who is called by an ACS and/or AMD user.
- A1.25 A *live call to a live operator* is a call where a live operator is put through to a live individual. A *live call to a live operator* does not include calls made by ACS and/or AMD users that are answered by answer machines.
- A1.26 A *reasoned estimate of AMD false positives* is an estimate of the number of AMD false positives as a proportion of total live calls.
- A1.27 A *reasoned estimate of calls abandoned to answer machines* is an estimate of the number of ACS identified abandoned calls that have actually been answered by an answer machine. We will assess the methodology used to factor in the number of calls abandoned to answer machines into an abandoned call rate on a case by case basis.
- A1.28 A silent call is a type of abandoned call where the person called hears nothing on answering the phone and has no means of establishing whether anyone is at the other end.
- A1.29 An *unconnected call* may also be terminated after a predetermined period (i.e. greater than 15 seconds) because it has not been answered, perhaps because no one is there to take it. Within industry terminology and for the purposes of the Revised Statement such calls are not classified as abandoned calls. This is because an abandoned call is one which has been picked up by a live individual.

(ii) The abandoned call rate formula

- A1.30 The abandoned call rate shall be no more than three per cent of live calls per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over a 24 hour period.
- A1.31 The abandoned call rate formula is therefore as follows:

$$\frac{\text{Abandoned calls } (x)}{\text{Abandoned calls } (x) + \text{Live calls to a live operator } (y)} * \frac{100}{1}$$

- A1.32 How the number of abandoned calls is calculated will depend on whether or not AMD is used.
- A1.33 AMD users must include a reasoned estimate of AMD false positives when calculating an abandoned call rate. This is on the premise that AMD false positives are abandoned calls and should be recorded as such.
- A1.34 All ACS users including AMD users may exclude a reasoned estimate of calls abandoned to answer machines from the abandoned call rate.

(iii) Calculating the abandoned call rate when AMD is used

- A1.35 The formula for calculating the abandoned call rate is as follows:

$$\frac{\text{Abandoned calls } (x)}{\text{Abandoned calls } (x) + \text{Live calls to a live operator } (y)} * \frac{100}{1}$$

- A1.36 The abandoned call rate must include a *reasoned estimate of AMD false positives* and may exclude a *reasoned estimate of calls abandoned to answer machines*.

Providing a reasoned estimate of AMD false positives

- A1.37 Current technology means that an AMD false positive cannot be recorded as a call picked up by a live individual. Rather it is wrongly identified as a call to an answer machine that has been disconnected. Because of this, AMD false positives are not recorded by AMD users as abandoned calls. Therefore these are not included in the abandoned calls figure produced by the AMD user.
- A1.38 Ofcom's general policy is that live sampling is likely to be the most practical and comprehensive testing available for AMD users to adopt when producing a reasoned estimate of AMD false positives. This testing methodology is based on sampling real answer machine detected calls to determine a reasoned estimate of AMD false positives. There are a number of different types of live sampling:
- i) **Trunk side recording**⁴¹. Where an answer machine has been identified by the AMD device this should be recorded by the AMD device. These dials can then be retrieved and sample tested by re-playing to identify the rate of AMD false positives.
 - ii) **Agent validation**. A random sample of calls that are identified by the AMD device are passed on to call centre agents rather than being disconnected. The agent can then verify if the answer machine detected call is correct or was in fact an AMD false positive.
 - iii) **Side-by-side comparison**. This testing methodology relies on a comparison of two scenarios: one where an AMD device is switched on and one where it is switched off. From the 'AMD on' scenario, the answer machine rate is recorded and compared to the answer machine rate recorded in the 'AMD off' scenario i.e.

⁴¹ **Trunk side** recording captures the call from the point the call starts ringing until the call is terminated. By comparison **agent side** recording would start recording from the point when the call is started by the agent. Trunk side recording allows reporting on all the calls made by the dialler.

the rate defined by agents listening to all calls. If false negatives are accounted for, the difference will be the reasoned estimate of AMD false positives.

A1.39 Where available and not ruled out by cost, trunk side recorded answer machine calls is generally the most preferable type of live sampling. Side by side comparison testing removes observer interference and is preferred to agent validation testing so long as a robust sampling methodology is followed. Generally these two forms of live sampling are preferred to agent validation due to the risk of observer interference in the testing.

A1.40 Ofcom is not, however, inclined to prescribe testing methodology to be used by all AMD users when producing a reasoned estimate of AMD false positives. Rather, we outline below the types of factors we will look for when assessing the methodology used when testing AMD accuracy. In the event of an investigation, Ofcom would expect that testing be based on this outline. We would also expect to have sight of relevant details of testing such as the date and times of testing, the procedure used and the number of calls made. Furthermore, we expect that any reasoned estimate to be based on high quality data.

A1.41 The following table sets out how we will assess the robustness of testing used to determine a reasoned estimate of AMD false positives:

Data authenticity	Testing based on past/actual call records is always preferred to scenario testing because of the high number of external factors that can influence AMD accuracy rates.
Data relevance	The reasoned estimate of AMD false positives should be based on relevant campaign data. Whenever campaign data is changed, to an extent that it could materially change AMD accuracy rates, the testing should reflect this.
Operational environment	The reasoned estimate should be calculated in an environment the same or materially the same as that in which regular calling occurs. This means that all operational variables (AMD sensitivity, calling windows and other operational metrics) should remain unchanged for the length of the test and should be equivalent to the ongoing non-test environments.
Frequency	The frequency of testing is linked closely to data relevance. That is, testing should be undertaken whenever campaign data is changed. To the extent that it could materially change AMD accuracy rates, the testing should reflect this.

A1.42 The following should also be followed if live sampling is undertaken:

Actual event analysis	Where possible, actual answer machine classifications should be analysed rather than side by side comparisons.
Observer interference	The test should not be allowed to interfere with the process being tested.
Sampling	A sample size needs to be large enough to derive a high confidence level. It should cover different times of the day and different days of the week. Confidence levels of 95% or two standard deviations from the mean, and above are high enough across the population.
Testing periods	Testing should be undertaken during representative times of the day and days of the week.

- A1.43 Following the above, AMD users should undertake testing on a per campaign basis or when material changes are made to an AMD. A material change could be considered to be changing the settings on a dialler (e.g. making the AMD more or less aggressive, a dialler upgrade or a reconfiguration of dialling patterns).
- A1.44 A further option for AMD users would be to seek the services of an independent auditor to assess AMD accuracy. On the condition that this is done on a regular basis and whenever significant changes are made to their use of AMD, Ofcom would take this into account when considering the accuracy of the reasoned estimate of false positives. However it should be noted that AMD users are ultimately responsible for the quality of this auditing in producing an accurate reasoned estimate of AMD false positives.
- A1.45 The Direct Marketing Authority (DMA)'s paper, and others we have seen like it, provides a mathematical explanation of how to calculate an abandoned call rate when ACS users use, and do not use, AMD technology. It expands on our calculation in A1.35 to provide a practical explanation of the abandoned call rate.
- A1.46 We recognise this is potentially a very useful aid which stakeholders may consider using when undertaking their own (abandoned call rate) calculations. The DMA's paper can be found at http://www.dma.org.uk/attachments/resources/5812_S4.pdf.

(iv) Calculating the abandoned call rate when AMD is not used

- A1.47 Calls to answer machines are not live calls and should not be included in calculating the abandoned call rate. Therefore a reasoned estimate of calls abandoned to answer machines may be deducted from the number of abandoned calls.

Applying the formula for calculating the abandoned call rate when not using AMD

- A1.48 The formula for calculating the abandoned call rate is as follows:

$$\frac{\text{Abandoned calls (x)}}{\text{Abandoned calls (x) + Live calls to a live operator (y)}} * \frac{100}{1}$$

- A1.49 The *abandoned call rate* can exclude a *reasoned estimate of calls abandoned to answer machines*

- A1.50 An illustrative example using broadly typical industry experience not involving the use of AMD might assume that of 1000 calls made in a 24 hour period:

- 392 calls are live calls connected to a live operator (y)
- 8 calls are abandoned (dropped by the ACS – and includes calls answered by answer machines) (x)
- 400 are connected to a live operator and classified as answer machines
- 200 calls are unconnected.

The number of answer machines as a percentage of all connected calls is $400 / (392 + 400) = 50.5$ per cent.

Therefore, of the 8 calls that are dropped by the ACS, 50.5% of them will have been answer machines. Thus the reasoned estimate of calls abandoned to answer machines is 4.040404, meaning that the number of abandoned calls answered by live individuals is 3.9595.

The abandoned call rate in this scenario is:

$$\frac{(8 - 4.040404)(x)}{(8 - 4.040404)(x) + 392(y)} * \frac{100}{1} = 1.00\%$$

The abandoned call rate will therefore be 1.00%.

Information messages – timing and content

A1.51 In the event of an abandoned call (other than an AMD false positive), a very brief recorded information message must start playing no later than two seconds after the telephone has been picked up or within two seconds of the call being answered. Within two seconds of the call being answered' means either:

- i) no later than two seconds after the telephone has been picked up; or
- ii) no later than two seconds after an individual begins to speak (or 'start of salutation'); or

whichever is more applicable to the technology deployed.

AMD users can choose to play an information message in the event of an abandoned call from when an individual finishes speaking (or 'end of salutation'). This must be achieved on the condition that the total time taken to start playing an information message is no more than two seconds from start of salutation.

A1.52 The information message must contain at least the following information:

- the identity of the company on whose behalf the call was made (which will not necessarily be the same company that is making the call);
- details of a *Special Services* (080 – no charge) or a *Special Services* basic rate (0845 only) or a *Geographic Number* (01/02) or a *UK wide Number at a geographic rate* (03) number⁴² the called person can contact so they have the possibility of declining to receive further marketing calls from the company; and
- includes no marketing content and is not used as an opportunity to market to the called person.

Unanswered calls

A1.53 Calls which are not answered must ring for a minimum of 15 seconds before being terminated.

⁴² As defined in the National Telephone Numbering Plan
<http://stakeholders.ofcom.org.uk/binaries/telecoms/numbering/numplan280710.pdf>

72 hour policy

A1.54 When an abandoned call (other than an AMD false positive), has been made to a particular number, any repeat calls to that number in the following 72 hours may only be made with the guaranteed presence of a live operator.

24 hour policy

A1.55 When a call has been identified by AMD equipment as being picked up by an answer machine (including AMD false positives), any repeat calls to that specific number within the same 24 hour period may only be made with the guaranteed presence of a live operator.

Caller Line Identification

A1.56 For each outbound call a Caller Line Identification (CLI) number is presented to which a return call may be made which is either a geographic number or a non-geographic number adopted as a Presentation Number which satisfies the Ofcom Guide to the use of Presentation numbers.

A1.57 Ofcom reluctantly accepts that the technological limits of international networking may result in some dialler calls being delivered to the UK without CLI identification but flagged 'international'. In these circumstances it is even more vital that such centres use the information message and a UK based number so that they may be contacted by called parties after an abandoned call.

Marketing

A1.58 Any call made by the called person to the contact number provided shall not be used as an opportunity to market to that person, without the person's consent.

Record management

A1.59 Ofcom expects that where organisations are subject to this statement, records are kept for a minimum of six months that demonstrate compliance with the above policy and procedures.

4. Other examples of Persistent Misuse

A1.60 This section identifies five further general areas where persistent misuse may occur. There is a degree of overlap between these areas; several forms of misuse may fall into more than one category.

A1.61 Given the breadth of the legislation, some forms of misuse, say those involving the misuse of automated calling systems or scams, may also represent contraventions of other consumer protection legislation. Where such legislative overlap exists and Ofcom is faced by a particular instance of misuse, it shall determine in consultation with the relevant competent authorities which set of legislative requirement is more appropriate and may be more effectively deployed.

A1.62 The examples given are intended to be illustrative rather than inclusive and will not prevent Ofcom from investigating and issuing a notification in respect of behaviour which is not identified by this statement. That could occur if, for example, a new technology or new use of technology allowed for the operation of a form of misuse not previously known to Ofcom, which has the potential to cause unnecessary

annoyance, inconvenience or anxiety to consumers. In these circumstances Ofcom would take the necessary measures to prevent further harm and also revise the statement to incorporate the new form of misuse.

Misuse of automated calling systems

- A1.63 Under the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the "2003 Regulations"), it is an offence to use automated calling systems to make direct marketing calls which do not consist of live speech unless the called person has previously notified the caller that for the time being they consent to such communications being sent. An example of such a call is a recorded message for marketing purposes where no operator is present.
- A1.64 The concept of direct marketing that the 2003 Regulations rely on is very broad and applies not just to the advertisement of goods and services but also to the promotion of an organisation's aims and ideals. It therefore applies to political and charitable, in addition to commercial, organisations. However there may be types of unsolicited recorded messages sent by automated calling systems that cause annoyance or inconvenience but which, for whatever reason, fall outside the 2003 Regulations.
- A1.65 Ofcom believes that the persistent use of automated calling systems to transmit recorded messages that are not marketing messages within the meaning of the 2003 Regulations or to make silent or abandoned calls (see the section on misuse by making silent or abandoned calls below) or fax-scanning calls may be persistent misuse within the meaning of section 128.
- A1.66 However some uses of automated calling systems are beneficial, either to the general public or to the individual recipient. An obvious example of a public benefit would be where emergency authorities transmit a recorded hazard warning to subscribers within a defined geographical area. More limited cases, where the benefit is restricted to the individual, are the application of Interactive Voice Messaging ('IVM') technology to activate credit cards, check abnormal credit card use, arrange deliveries or remind for payments and appointments. Ofcom will consider each case on its own merits in terms of assessing whether misuse has occurred in the context of section 128(5) of the Act.

Number-scanning

- A1.67 Another type of silent call arises from the practice of number-scanning (also known as 'pinging') where calls are made to find out which telephone numbers, out of a range of numbers, are in service or not. As soon as a tone is received which establishes the status of a particular number the call is terminated. This activity is carried out in order to develop lists of active telephone numbers. As well as the inconvenience that may be caused to the recipient of an abruptly terminated call such behaviour is detrimental to consumers in general by adding to network congestion without generating any revenue for providers. In a worst-case scenario high-volume number-scanning could overload either the originating or terminating local exchange thus depriving subscribers connected to that exchange of the ability to make or receive any calls at all
- A1.68 A common variant of number scanning is fax scanning where a call is made to determine the presence of a fax receiver at the terminating end. This activity is motivated by the commercial value of a directory of validated fax numbers. Persistent number-scanning or fax-scanning both clearly fall within section 128.

Misuse of a CLI facility

- A1.69 CLI (as defined earlier) is a technology that identifies the number from which a call is made or enables a return call to be made. Ofcom will regard the repeated forwarding of inauthentic or misleading CLI information as persistent misuse. Where users have the ability to choose the CLI number that is forwarded (this is known as a Presentation Number), the deliberate sending of an inauthentic or misleading number from which it is not possible to identify the caller and which does not enable the recipient of a call to return a message is a form of misuse. This is without prejudice to a caller's right to preserve their anonymity by withholding their number.
- A1.70 It will also be regarded as a form of misuse to forward a CLI number that has been allocated to a Premium Rate Service provider. A return caller may suffer annoyance or inconvenience by unwittingly making a return call for which they are charged more than they may reasonably expect.

Misuse for dishonest gain - scams

- A1.71 There are a number of activities associated with the use of electronic communications networks or services motivated by a desire for unscrupulous or dishonest gain. Although this statement will not fully describe all those that have been discovered (so as not to encourage their perpetration) and cannot describe schemes that have yet to be practised, these activities share certain common features.
- A1.72 The first feature they share is that they are primarily aimed at defrauding end-users, rather than communications providers.
- A1.73 The second feature they share is the exploitation of premium rate or revenue sharing services, or in some instances, where these services are not used, by directly billing the person who has been duped into making a call. In either case, the essence of the scam is that users are deceived into phoning a number without realising that it is a premium rate or revenue sharing service or may lead to a fraudulent bill and so costs more than they expect. Examples of this that have come to light in recent years include:
- i) faxing a premium rate or revenue sharing fax number where the terminating fax machine has been set to run deliberately slowly thus increasing the duration of a call;
 - ii) the apparently personal text message that invites a return call to a premium rate or revenue sharing number;
 - iii) making a silent call where any return call connects the caller to a premium rate or revenue sharing number (this latter example is also misuse through silent calls and misuse of CLI facilities);
 - iv) the use of recorded ringing tone to deceive the caller that charging has not yet started; or
 - v) inviting people to telephone a revenue sharing number on the pretext that they have won a prize or need to take delivery of an important message or parcel.
- A1.74 In some circumstances the deception that incites a caller to phone a premium rate or revenue sharing number will be a form of direct marketing and additionally

subject to applicable legislation. For example, under Regulation 8 of The Electronic Commerce (EC Directive) Regulations 2002 any unsolicited commercial communication sent by electronic mail must be clearly and unambiguously identifiable as such as soon as it is received. Regulation 23 of the 2003 Regulations prohibits the practice of disguising or concealing the identity of the sender of electronic mail used for direct marketing purposes and additionally requires the provision of a valid address to enable the recipient to request the cessation of such communications. The definition of "electronic mail" in the 2003 Regulations applies to SMS or text messages as well as email.

- A1.75 PhonepayPlus is the regulatory body for all premium rate telecommunications services. PhonepayPlus prohibits misleading behaviour and requires providers of premium rate services to ensure that consumers are fully informed of the terms of the service (including pricing). Ofcom considers that the deceptions identified in this section are also likely to be in breach of its Code of Practice, which is available at <http://www.phonepayplus.org.uk>
- A1.76 Ofcom will regard the practice of tricking callers into phoning a premium rate or revenue sharing number, including numbers in the 08xx range, or non-revenue sharing service that leads to the presentation of a fraudulent bill as misuse and if repeated, persistent misuse.

Misuse of allocated telephone numbers

- A1.77 Where end-users have been allocated telephone numbers, Ofcom will regard their use in a way that is inconsistent with designations and/or restrictions in the National Telephone Numbering Plan ("the Plan")⁴³ as a form of persistent misuse by either the end-user or a relevant communications provider. An example would be where Personal Numbers (070) are used for anything other than "Personal Numbering" (as defined in the Plan) or Mobile Numbers (077, 078 and 079) are used for services other than those which fall within the definition of "Mobile Service" (as defined in the Plan). Condition 17 of the General Condition of Entitlement requires the range holder and any other communications provider using the number to take all reasonably practicable steps to secure compliance by their customers.

5. Ofcom's policy on the issuing of section 128 notifications

- A1.78 Section 128 authorises Ofcom to issue a notification to a person where it has reasonable grounds for believing that a person has engaged in persistent misuse of a network or service.
- A1.79 In some cases this power may be limited insofar as section 128(8) enables the Secretary of State to make an order that behaviour of a specified description is not to be treated as a misuse of an electronic communications network or service where there is an appropriate alternative means of dealing with it.
- A1.80 There is a general presumption that a notification will not be given where an alternative legal remedy is available, although it should be noted that section 130(8) allows for the imposition of a penalty under the 'persistent misuse' powers in respect of the same conduct for which a person is also liable for an offence under sections 125 to 127 of the Act.

⁴³ The National Telephone Numbering Plan
<http://stakeholders.ofcom.org.uk/binaries/telecoms/numbering/numplan280710.pdf>

A1.81 Under section 128(2) the notification must include the following elements:

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

Ofcom's priorities on issuing notifications

A1.82 Because persistent misuse is defined in very broad terms and the powers in section 128 may be potentially invoked whenever a person believes that they have suffered inconvenience through another person's use of a network or service, Ofcom needs to be guided in the exercise of its enforcement powers by a scale of priorities. We believe that the 'persistent misuse' powers are primarily about protecting consumers and that the more likely a particular form of misuse is to harm consumers by causing them annoyance, inconvenience or anxiety, the more incumbent it is on Ofcom to take enforcement action. In general terms, misuse and the harm it causes the public may be prioritised in three ways.

A1.83 First, there is the degree of harm caused to an individual consumer, on a scale where anxiety is more detrimental than annoyance or inconvenience. As an example, we believe that anonymous silent calls are more likely to give rise to anxiety than those associated with an information message and a CLI. This could be described as a qualitative test.

A1.84 Second, there is the scale or amount of the misuse. Other things being equal, the more people are affected by an act of misuse the more likely it is that Ofcom will take enforcement action. Causing annoyance to a significant number of people is inherently more serious than causing annoyance to a small number and is more likely to justify enforcement action. This could be described as the quantitative test.

A1.85 Third, is where a new serious form of misuse has come to light and Ofcom needs to act quickly in order to stop the misuse and deter others from engaging in the practice. An example might be where a person provides a commercial service offering to overlay outbound phone calls with an inauthentic CLI number, thus enabling callers to send misleading information about their identity and preserve their anonymity. This could be described as the deterrence test.

A1.86 Ofcom policy on taking action under its section 128 powers will be driven by the three factors set out above. In addition, where persistent misuse may have been caused by abandoned and silent calls, Ofcom will consider observance with the policy criteria set out in A1.12 to 58

A1.87 Ofcom will monitor consumer complaints in this area, and will look at other ways to identify priority cases of persistent misuse. In addition, the overview that communications providers have of network activity makes them particularly well placed to pick up on instances of high-volume misuse of which isolated consumers may only have a single experience. Ofcom welcomes such cases being brought to its attention by communications providers.

A1.88 Where Ofcom receives complaints, they will be assessed to ascertain whether there is sufficient evidence to provide reasonable grounds for believing that persistent misuse has occurred, and whether taking action would be a priority for Ofcom.

The determination and the specification

A1.89 The determination will need to refer to the evidential basis that supports the occurrence of persistent misuse. As the notification is required to be given to the person who is responsible for the misuse it will also be necessary for Ofcom to establish the identity of the persistent misuser. As a point of clarification, it will not be possible to take action under this legislation against a communications provider over whose network or service the persistent misuse takes place, unless the communications provider itself is responsible for perpetrating the misuse. A provider over whose network silent or abandoned calls are made cannot be made responsible for those calls.

A1.90 The specification will describe the actual behaviour that constitutes persistent misuse supported by the grounds for believing that this behaviour is likely to give rise to annoyance, inconvenience or anxiety.

A1.91 The specification of the period during which the notified person may make representations must not normally be less than a month but may be as short as seven days, in urgent cases. An urgent case is defined by section 128(4) as one where the misuse is both continuing and causing a degree of harm that requires it to be stopped as soon as is practicable.

A1.92 Whether or not the misuse is continuing is a matter of fact; the degree of harm that it is causing is necessarily a matter of judgement. The factors that would tend towards a shorter period for representations are the scale of the misuse, the number of consumers on whom the misuse is impacting and the degree of detriment caused. An example of an urgent case might be where automated calling systems are being exploited to send a high volume of recorded messages seeking to influence voting in a TV phone-in.

6. The consequences of a notification

A1.93 Once the period allowed for the making of representations has expired, Ofcom has three options:

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

Enforcement notification under section 129

A1.94 An enforcement notification under section 129 is appropriate where Ofcom is satisfied that:

- i) the person who has been notified under section 128 (“the notified user”) has persistently misused an electronic communications network or service;

- ii) the notified user has not, since the giving of the notification, taken all the steps that Ofcom considers appropriate to ensure that the misuse is ended and not repeated; and
- iii) the notified user has not, since the giving of the notification, remedied the consequences of the notified misuse in a manner that Ofcom considers appropriate.

A1.95 The enforcement notification will impose a requirement on the misuser to take the necessary steps:

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

A1.96 It will impose clear and enforceable obligations on a misuser and allow a reasonable period for compliance with them.

A1.97 In many cases of persistent misuse, there may be no pecuniary loss or damage, say in the case of silent or abandoned calls. However a degree of annoyance, inconvenience or anxiety will invariably be present.

A1.98 When considering whether a misuser has remedied the consequences of a breach, Ofcom will consider the factors of the particular case and whether the remedy is proportionate to the harm caused.

A1.99 Section 129(5) of the Act makes compliance with an enforcement notification a duty of the notified user, and enables Ofcom to enforce that duty through civil proceedings which, as set out in section 129(6), may lead to an injunction, a requirement for specific performance of a statutory duty or any other appropriate remedy or relief. The appeal procedures available against notifications and penalties are set out in sections 192 to 196 of the Act.

Issuing a penalty under section 130

A1.100 Where Ofcom has issued a section 128 notification, or both a section 128 notification and a section 129 enforcement notification, Ofcom will be able to impose a penalty on a persistent misuser, once the period for making representations has elapsed.

A1.101 Ofcom may also impose a financial penalty where a notified misuser has contravened a requirement of a section 129 enforcement notification. The upper limit for such a penalty is currently £2 million following the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010⁴⁴.

A1.102 Ofcom is required under section 130(4) to determine an amount, which is both appropriate and proportionate to the misuse. In making such a determination, section 130(5) requires Ofcom to have regard to:

- i) any representations made by the notified misuser;
- ii) any steps taken by the misuser to bring the misuse to an end and not repeat it; and

⁴⁴ <http://www.publications.parliament.uk/pa/cm201011/cmgeneral/deleg2/100913/100913s01.htm>

iii) any steps taken by the misuser to remedy the consequences of the misuse.

A1.103 Section 130 thus confers discretion on Ofcom to impose a penalty that it considers to be appropriate and proportionate to the notified misuse.

A1.104 Furthermore, under section 392 of the Act Ofcom is required to publish a statement containing the guidelines it proposes to follow in determining the amount of penalties it imposes under the Act. By virtue of section 392(6) of the Act, Ofcom must also have regard to the statement for the time being in force when setting the amount of any penalty under this Act. These are Ofcom's Penalty Guidelines which Ofcom will apply when setting the level of penalty on a persistent misuser⁴⁵.

⁴⁵ The current Penalty Guidelines are: <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>