



# Review of how we use our persistent misuse powers

Focus on silent and abandoned calls

Consultation

Publication date: 2 December 2015

Closing Date for Responses: 24 February 2016

## About this document

Ofcom has powers to take action if a person 'persistently misuses an electronic communications network or service'.

We are required by law to publish a 'general policy' on how we are likely to use these powers and to consider this when exercising them. The current policy sets out examples of those activities which Ofcom considers to represent 'persistent misuse', including the making of silent and abandoned calls.

We have reviewed the current policy (including issuing a call for inputs in October 2014) and are now consulting on proposals to change it.

This consultation closes on 10 February 2016. Subject to the responses, Ofcom plans to issue a final statement and publish a revised policy in Q1 2016-17. The revised policy would come into force after a two-month implementation period starting on the date of publication.

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## Section 1

# Summary

## Overall position

- 1.1 We have reviewed our statutory policy statement on the exercise of our powers relating to the persistent misuse of electronic communications networks and services. In particular, misuse in the form of nuisance telephone calls and messages, especially silent and abandoned calls. We are proposing to reset our policy, tightening it up to give us the best chance to take effective and efficient enforcement action.
- 1.2 We have done this because nuisance calls and messages continue to be a significant problem for consumers, despite our current policy and the enforcement action we have taken under it. Our position is that no-one should make these kinds of calls and send these kinds of messages, and our proposed revised policy reflects that.
- 1.3 We are particularly keen that callers do not make silent calls, which the evidence shows cause most harm to consumers. We propose to adopt a policy that such calls must not be made under any circumstances. We will focus our enforcement action against those who make them, as our highest priority.
- 1.4 We are similarly keen to deter callers from making abandoned calls, which also harm consumers. We are concerned that our current policy has in practice given callers scope to make these kinds of calls as long as they amount to less than three per cent of calls made. We propose to make clear that is not the case.
- 1.5 Our proposed new policy is that Ofcom may take enforcement action in any case where a caller makes abandoned calls. Where we have to prioritise our enforcement resources between cases, we will likely take into account the number of abandoned calls and/or the rate at which they are made. Cases where the abandoned call rate is three per cent or above, or where both silent and abandoned calls have been made, are likely to be a higher priority, but by no means the only ones in which we take action.
- 1.6 We also propose to make changes to our enforcement process, so we can take more, and more effective, enforcement action more quickly. We propose to streamline the evidence gathering process and to issue provisional penalty notices in appropriate cases at the same time as we issue breach notifications, in order to reduce the time enforcement procedures take.

## Background

- 1.7 Sections 128 – 130 of the Communications Act 2003 (the Act) prohibit persistent misuse of electronic communications networks and services. Section 128 sets out that such misuse involves causing harm to consumers by using those networks and services to cause unnecessary annoyance, inconvenience or anxiety.
- 1.8 Ofcom has powers under sections 128 – 130 to take action against any person who commits persistent misuse. Under section 131, we are required by law to publish a

statement of general policy with respect to the exercise of those powers and to have regard to it when exercising them.

- 1.9 We published a revised statement of policy in 2010 (the 2010 policy). It describes conduct Ofcom is likely to regard as persistent misuse under the Act and factors we are likely to take into account in prioritising action in relation to certain examples of such misuse.
- 1.10 A particular focus of the 2010 policy is on the making of silent and abandoned calls. Very broadly, these are calls in which a connection is made with a live individual call recipient and then terminated by the caller, with the recipient hearing either silence (a silent call) or a recorded message (an abandoned call). They are often the result of call centres using automated dialling equipment to make large numbers of outbound calls and having too few agents to handle all those which connect to live individual call recipients.
- 1.11 The 2010 policy sets out that Ofcom is likely to regard the making of such calls as persistent misuse. It also says that, in prioritising action against these, Ofcom will usually take into account a number of factors, including whether three per cent or more of the live calls a party makes in a 24-hour period are abandoned.
- 1.12 Notwithstanding the position set out in the 2010 policy and the programme of enforcement action Ofcom has undertaken, UK consumers continue to receive large numbers of silent and abandoned calls. Using consumer research data, we estimate that they receive around 1.5 billion silent and 200 million abandoned calls a year.
- 1.13 Consumer research indicates that consumers consider the majority of these types of calls (86% of silent and 82% of abandoned calls) annoying. Ofcom continues to receive high numbers of complaints about them, with around 44,900 received in the 12 months up to October 2015. This demonstrates the continued capacity of these calls to cause the types of harm contemplated by section 128 to some of those who receive them.
- 1.14 Alongside these sorts of calls, consumers also receive very large numbers of live and recorded marketing calls and messages. Our estimate, based on consumer research data, is that UK consumers receive around 1.7 billion live sales calls and 940 million recorded sales messages annually.
- 1.15 Consumer research also indicates that the majority of these types of calls (74% of live sales calls and 83% of recorded sales calls) are considered annoying and the Information Commissioner's Office (ICO), which shares enforcement responsibilities for nuisance calls with Ofcom, received over 146,000 complaints, around 88% of which concern live calls and recorded messages, between 1 January and 31 October 2015. Such calls and messages are not, however, an express focus of the 2010 policy.

## **Review and proposed new approach**

- 1.16 In the above circumstances, and as we set out in our Annual Plan for 2015 – 2016, tackling these various kinds of nuisance calls is a priority for Ofcom. We have also established a Joint Action Plan with the ICO, a priority identified in which is the taking of ongoing, targeted enforcement action.
- 1.17 A key aspect of this commitment, in light of the above, is to review the 2010 policy. It is important to consider whether there are areas in which that policy may not deal as

effectively as it could with the issues described and can therefore be improved, to help us to take more effective enforcement action. Likewise to ensure that our policy prioritises the use of our resources (which are not unlimited) in those areas where harm is greater and they are most needed.

1.18 As part of our review we have:

- sought stakeholder views through a call for inputs in October 2014;
- commissioned consumer and industry research; and
- considered whether our policy gives appropriate effect to legislation made by Parliament prohibiting persistent misuse.

1.19 We have carefully considered the responses to the call for inputs and the results of the research, to make sure we understand the way the outbound call centre industry operates, the causes of persistent misuse and the ways in which that misuse harms consumers. We have also considered the scope to improve how our policy addresses these causes and effects, and assessed the impacts of different changes to it.

1.20 Having done so, we make a number of proposals to change the 2010 policy, on which we are now consulting. These comprise a number of changes to the examples of conduct we are likely to regard as persistent misuse and changes to the factors we are likely to take into account in assessing the harm caused by the misuse and in prioritising our enforcement action. The proposed revised policy is at Annex 5 to this consultation document.

1.21 The most important proposals relate to silent and abandoned calls. They include:

- making the definitions of these calls, and so the conduct we regard as persistent misuse, clearer;
- setting out an explicit policy position that consumers must not be subject to silent calls under any circumstances and that enforcement action against those who make them will be our highest priority, however they are caused, whatever the number they make (wherever it is more than three) and whatever the rate at which they make them; and
- making similarly explicit that consumers should not be subject to abandoned calls and that:
  - we may take enforcement action in any cases where the caller makes more than three abandoned calls;
  - where we have to prioritise enforcement resources, we are likely to take into account the number of abandoned calls made and/or the rate at which they are made (the higher these are, the more likely it is we would act);
  - we are likely to regard cases in which a caller's abandoned call rate is three per cent or more or which also involve silent calls as a higher priority for enforcement action and that callers in such cases can expect us to act; and

- where we take enforcement action, we will take into account all abandoned calls a caller makes, not just those on any days in which its abandoned call rate is three per cent or more.
- 1.22 The effect of these changes would be that we may take enforcement action against a greater number of silent and abandoned calls and, in consequence, may impose higher penalties against those who make them. Callers who do not wish to face any prospect of Ofcom action should ensure they do not make any.
- 1.23 We also propose to make other important changes to the examples of conduct we are likely to regard as persistent misuse, including:
- updating two of the existing examples of misuse in the 2010 policy:
    - misuse resulting from automated calling systems (to make clear that misuse may arise from the use of various types of technology); and
    - misuse of calling line identification numbers (CLI) (to make clear the circumstances in which persistent misuse can arise, the CLIs callers should present with calls and the information they should provide when return calls are made to those CLIs); and
  - setting out that we may take action for persistent misuse where callers make or send unsolicited calls or messages in breach of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECRs).
- 1.24 As to the factors Ofcom will take into account in assessing the harm caused by misuse and prioritising cases for action, other important proposed changes include making explicit that we will consider:
- whether the misuse is repeated in respect of the same number or recipient, and the time period over which any repetition occurs;
  - the time(s) of day any misuse occurs i.e. during unsociable hours;
  - the time taken to connect recorded messages to called parties;
  - whether CLI numbers presented to call recipients enable them to make return calls in which they are able to identify the original caller and opt-out of future calls (without being subjected to marketing activity); and
  - the management processes and practices callers have in place.
- 1.25 These changes should help calling organisations avoid committing persistent misuse and to minimise their risk of facing Ofcom enforcement action. Our aim is to make clear to those organisations what they should do and the likely consequences if they do not do it. Persistent misuse, and silent and abandoned calls in particular, pose significant risks of harm to consumers. We want to ensure that our policy on the exercise of our powers is not a factor in perpetuating the problem and does what it can to help tackle it.
- 1.26 We have also considered what we can do to make our enforcement procedures more efficient and effective. We want to be able to take more enforcement action more quickly, whilst still ensuring we act fairly and that those accused of misuse have proper chance to defend themselves.

- 1.27 We therefore propose to streamline our enforcement procedures. In particular, we propose that, where we issue notifications under section 128 of the Act setting out that we have reasonable grounds to believe a person has committed persistent misuse, we would, in appropriate cases, also give notice of the penalty we may be minded to impose under section 130. The recipient of the notification would generally have a chance to make representations on both matters at that stage. Our provisional view is that this would make our action quicker and more effective while providing for fair rights of defence.
- 1.28 We have taken careful account, as far as we can, of the impact of our proposals. In some respects, like our proposed approach to silent calls and to prioritising certain cases involving abandoned calls, our proposals make more explicit the sort of position that applies under the 2010 policy.
- 1.29 Nonetheless, we recognise that, where they currently make silent or abandoned calls and change their behaviour in light of our proposals, organisations may incur costs, some of which may exceed the directly quantifiable benefits to consumers. The same applies in respect of some of our other proposals. Having carefully considered the evidence available to us, however, we have made a provisional assessment that those costs may be justified.
- 1.30 Parliament has decided that behaviour which, by definition, has harmful effects on individuals, should be prohibited and punishable by penalties of up to £2 million. In these circumstances, and in light of the evidence of the enduring nature and scale of the problem of persistent misuse, and of silent and abandoned calls in particular, our provisional judgment, on public policy grounds, is that we need to make changes to the 2010 policy in order to enforce that prohibition more effectively.
- 1.31 The changes proposed follow our careful assessment of the causes and effects of the problem and the identification of scope to improve the way our policy addresses those. It is always liable to be more expensive for organisations to comply with the law than to break it. That they may only be able to achieve efficiency gains at the costs of non-compliance and harm to consumers would not, in our provisional view, justify those efficiencies.
- 1.32 Ofcom's further provisional view is that the proposed changes to the 2010 policy would secure the performance of our general duties to further the interests of citizens and consumers under section 3 of the Act. They would, we propose, help to secure their additional protection from the harm caused by persistent misuse.
- 1.33 We invite views on our proposals, including any evidence respondents can provide to support those views. Our next steps will be informed by the responses to this consultation. Currently, we plan to publish a final statement in Q1 2016-2017, including a revised statement of policy under section 131. We propose that that new policy would come into force after a two month implementation period starting on the date of publication.
- 1.34 Please provide any response to this consultation by 24 February 2016.



## Section 2

# Introduction

2.1 There are various types of calls and messages people regard as a nuisance. These include:

- unsolicited live and recorded marketing calls and unsolicited marketing text messages;<sup>1</sup>
- silent calls (where the consumer receives a call but hears nothing on answering the phone); and
- abandoned calls (where the consumer receives a call but where the person making the call terminates the call after playing an information message).

These types of nuisance calls and messages are often caused by outbound call centres. They can cause annoyance and, in some cases, distress for consumers.

2.2 Ofcom does not have specific statutory powers to regulate call centres. But, there are a number of legal provisions that deal with different types of nuisance calls and messages and, together with the ICO, we have responsibility for taking action in respect of those which are unlawful.<sup>2</sup>

- the ICO has lead responsibility for tackling those making unlawful live and/or recorded marketing calls, or unlawfully sending unsolicited marketing text messages to consumers, under the PECRs and the Data Protection Act 1998 (DPA); and
- Ofcom primarily uses its powers under sections 128 to 130 of the Act, relating to persistent misuse of networks and services, to tackle silent and abandoned calls.

This consultation document is concerned with the latter.

2.3 Ofcom has commissioned research (landline panel research) into consumers' experience of nuisance calls using a diary study among UK adults to record all nuisance calls<sup>3</sup> personally received on their home landline phone over a four week period (12 January to 8 February 2015). This research found that the incidence of nuisance calls remains high:

- 86% of all participants received a nuisance call over the four week period;

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<sup>1</sup> Which are unlawful where the requirements for making marketing contact under the PECRs have not been met.

<sup>2</sup> Further information on the different types of nuisance calls and who to complain to is available at <http://consumers.ofcom.org.uk/complain/phone-and-broadband-complaints/privacy/>

<sup>3</sup> Ofcom and GfK (2015), 'Landline nuisance calls panel research Wave 3 (January – February 2015)'. Data Tables: [http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015May/consumer\\_concerns\\_March\\_2015.pdf](http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015May/consumer_concerns_March_2015.pdf). The survey asked about unwanted silent calls, abandoned calls, live sales calls and recorded live sales calls which we refer to in this document as nuisance calls.

- 70% of all participants reported experiencing a live marketing/sales call;
- 60% reported receiving a silent call; and
- 17% reporting receiving an abandoned call with a message.

Ofcom estimates (see Annex 7) that UK consumers receive around 1.5 billion silent and 200 million abandoned calls, and around 1.7 billion live sales calls and 940 million recorded sales messages, annually.

- 2.4 The landline panel research also indicated that the majority of nuisance calls (80%) were thought to be annoying, with relatively few reported as being not a problem (12%) or distressing (5%), and very few considered useful (1%). Looking at specific types of nuisance calls, 86% of silent and 82% of abandoned calls were considered annoying, as were 74% of live sales calls and 83% of recorded sales calls.<sup>4</sup>
- 2.5 The research also showed that the feeling that nuisance calls were annoying applies across all ages, socio-economic groups and working status. Although overall a relatively small proportion of calls (5%) were reported as distressing, those aged 16-24 (11%) and 25-34 (11%), as well as students (12%) and those working part-time (10%), were more likely than those over 35 (4%), working full-time (5%), homemakers (4%) or retired (3%), to report the nuisance calls they receive to be distressing.
- 2.6 Ofcom and the ICO continue to receive high numbers of complaints about nuisance calls. In the 12 months up to October 2015, we received around 44,900 complaints about calls that fall under our powers.<sup>5</sup> The ICO, meanwhile, received over 146,000 complaints, around 88% of which concern live calls and recorded messages, between 1 January and 31 October 2015.<sup>6</sup>
- 2.7 We are committed to using the powers we have to help reduce the harm these calls cause. As set out in our Annual Plan for 2015 – 2016, tackling nuisance calls is a priority for Ofcom.<sup>7</sup> Both we and ICO have wide ranging programmes of work in place to help tackle this problem, which we have set out in our joint nuisance calls action plan. An update to the plan was published in December 2014 and a further update is published alongside this document.<sup>8</sup> This consultation is related to our work under the ongoing ‘targeted enforcement action’ strand of that plan.

## Relevant legal framework

- 2.8 Ofcom has the following general duty set out in section 3(1) of the Act:

‘It shall be the principal duty of OFCOM, in carrying out their functions—

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<sup>4</sup> See footnote 3 for data tables.

<sup>5</sup> See section 3 of the Telecoms Complaints Bulletins at <http://stakeholders.ofcom.org.uk/enforcement/telecoms-complaints-bulletin/>. We receive a small number of complaints from businesses about silent and abandoned calls which are not included in these figures.

<sup>6</sup> <https://ico.org.uk/action-weve-taken/nuisance-calls-and-messages/>

<sup>7</sup> [http://www.ofcom.org.uk/content/about/annual-reports-plans/ann-plans/Annual\\_Plan\\_Statement.pdf](http://www.ofcom.org.uk/content/about/annual-reports-plans/ann-plans/Annual_Plan_Statement.pdf)

<sup>8</sup> <http://stakeholders.ofcom.org.uk/consultations/silent-calls/joint-action-plan/> and [http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/JAP\\_update\\_Dec2014.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/JAP_update_Dec2014.pdf)

- (a) to further the interests of citizens in relation to communications matters; and
- (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.'

2.9 Section 3(3) supplements this, saying that:

'In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—

- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
- (b) any other principles appearing to OFCOM to represent the best regulatory practice.'

2.10 So, too, does, section 3(4), which says:

'OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances—

.....

- (d) the desirability of encouraging investment and innovation in relevant markets; ....'

2.11 Section 3(7), meanwhile, provides that, 'Where it appears to OFCOM that any of their general duties conflict with each other in a particular case, they must secure that the conflict is resolved in the manner they think best in the circumstances.'

2.12 Sections 128 to 130 of the Act give Ofcom functions in the performance of which we must fulfil these duties. They prohibit persistent misuse of electronic communications networks and services and give Ofcom powers to issue notifications to those committing such misuse, to require those doing so to stop and to impose penalties of up to £2 million on them.

2.13 Section 128 specifies when a person 'misuses' a network or service, and when that misuse would become 'persistent':

- a person 'misuses' a network or service if (i) his use of the network or service causes or is likely to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety<sup>9</sup> or (ii) he uses the network or service to engage in conduct that has that effect or is likely to do so; and
- the misuse would become 'persistent' if it represents a pattern of behaviour or practice, or recklessness as to whether persons suffer annoyance, inconvenience or anxiety.

2.14 Section 128 also enables Ofcom to issue a notification if we have reasonable grounds for believing that a person has persistently misused an electronic

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<sup>9</sup> In this consultation, we refer to "distress" which we consider could arise from one of or a combination of annoyance, inconvenience or anxiety.

communications network or service. If, after a section 128 notification has been issued, the person has failed to stop his persistent misuse and prevent it from happening again, and failed to remedy its consequences, Ofcom may issue an enforcement notification under section 129. That notification would require the person to bring the misuse to an end, prevent it from happening again and remedy its consequences. Section 130, meanwhile, enables Ofcom to apply penalties (in addition to a section 129 notification), up to a maximum of £2 million, for persistent misuse.

- 2.15 Under section 131 of the Act Ofcom has a duty to publish a statement of our general policy on the exercise of our persistent misuse powers under sections 128 to 130. We must have regard to the policy in exercising these powers. When deciding whether to take enforcement action, we also consider how we can best focus our resources to reduce consumer harm, recognising that we will not have the resources to be able to take action in every case.
- 2.16 The policy (last revised in 2010 and referred to in this consultation document as the '2010 policy'),<sup>10</sup> includes examples of the activities which Ofcom considers to be misuse of an electronic communications network or service, like making silent or abandoned calls, and when such misuse may become persistent. It also describes a number of factors Ofcom is likely to take into account in assessing the harm caused by particular types of misuse and in prioritising cases for action, and sets out our policy on issuing notifications and penalties under sections 128 - 130. It is described in more detail in section 3 below.

## This consultation

- 2.17 The volumes of nuisance calls, the harm they cause, and the numbers of complaints about them, are all at the levels referred to above notwithstanding what we say in the 2010 policy and the programme of enforcement action we have undertaken since we published it. We have taken formal action under sections 128 – 130 in nine cases since then, imposing penalties in eight of them.<sup>11</sup> We have also dealt with a substantial number of cases on an informal basis each year.
- 2.18 In light of this, and given consumers' ongoing concerns about nuisance calls, silent and abandoned ones in particular, Ofcom has explored whether there is more that we can do through our policy to help reduce the likelihood of these calls being made and/or the harm they cause. During our review, we have considered:
- **Causes:** we have taken steps to understand the way the outbound call centre industry operates and the potential causes of persistent misuse, silent and abandoned calls especially. This has included looking at whether there have been technological developments or changes in the industry that it would be appropriate for us to take into account when reviewing the 2010 policy. For example, developments in the accuracy and/or the use of answer machine detection (AMD) equipment, and whether there are new developments or activities which may be relevant to the areas which Ofcom considers to be persistent misuse.

<sup>10</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>.

<sup>11</sup> [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_905/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/)

- **Effects:** the nature and magnitude of the harm these calls cause and how this may have changed since we last reviewed our policy.
- **Possible solutions:** whether the 2010 policy addresses these causes and effects in the most effective way or there are changes or clarifications that we could make to the 2010 policy and the way we use our powers, so it is easier for stakeholders to understand what is required of them and to enable more effective enforcement.

2.19 We have borne in mind our experience of enforcing the relevant provisions of the Act under the 2010 policy and considered the evidence available to us, including:

- **Industry evidence:** evidence we have gathered about the way calling organisations work, the effects this has and the implications of possible changes in Ofcom policy, from sources including:
  - A call for inputs<sup>12</sup> published in October 2014, which asked stakeholders a series of questions about what causes nuisance calls, especially silent and abandoned ones, the effects of using AMD and changes in its use, the size of the outbound call centre industry and the costs of its operation, and the costs and benefits of possible changes to the 2010 policy. We received 46 responses, with the majority from those carrying out outbound dialling or working in the outbound dialling industry, which are referred to in the main body of this document and summarised more fully in Annex 8.
  - Quantitative industry research conducted by Contact Babel on Ofcom's behalf between 31 March and 8 May 2015 with 159 respondents providing answers to some or all of the questions. This asked organisations making outbound calls questions about their dialling activity, the technology used, call volumes, the impact on organisations of potential changes to dialling activity, the causes of silent and abandoned calls and how to reduce the likelihood of them being made. The full report is at Annex 6.
  - A report prepared for Ofcom by the consultants, Mott MacDonald in October 2013, on 'Developments in call centre and network answer phone detection.'<sup>13</sup> This reported on a review of developments since 2009 affecting the use of AMD technology in outbound call centres and the resulting consequences for consumers.
  - The report for Ofcom by Ember, in July 2010, on 'Use of AMD – Economic Impact'<sup>14</sup> about the economic impact of a number of different policy positions relating to the use of AMD by those carrying out outbound dialling.
  - The report for Ofcom by Verint Consulting in July 2009 entitled, 'Report on the accuracy of AMD technology', which looked at the reliability of AMD, the rates at which those using AMD might make abandoned calls, information available

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<sup>12</sup> <http://stakeholders.ofcom.org.uk/consultations/review-persistent-misuse-powers/>

<sup>13</sup> Mott MacDonald, October 2013, Developments in call centre and network answer phone detection: <http://stakeholders.ofcom.org.uk/binaries/research/technology-research/2013/call-centre-report.pdf>.

<sup>14</sup> Ember, July 2010, 'Use of AMD – Economic Impact', [http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/Ember\\_analysis.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/Ember_analysis.pdf)

to those using AMD to help estimate the accuracy of their technology and the likely efficiencies attributable to their use of the technology.<sup>15</sup>

- **Consumer evidence:** evidence from research involving consumers about the numbers of nuisance calls they receive and their attitudes and responses to them, most of which is more fully explained in Annex 7:
  - The landline panel research referred to above, which is the latest wave in a series of research exercises in which a nationally representative sample of UK consumers with home landline phones were recruited to record details of all unwanted calls personally received on those phones across a four week period. A total of 860 participants returned their diary and were included in the analysis.<sup>16</sup>
  - A ‘consumer issues omnibus survey’ tracking landline and mobile users’ experience of nuisance calls,’ which Ofcom conducts every other month. This involves a nationally representative sample of approximately 1,000 UK adults who are asked about their experience of receiving different types of nuisance calls (for example, silent, abandoned and telesales calls) on their home landline and mobile phones in the previous four weeks.<sup>17</sup>
  - Ofcom’s ‘Nuisance calls consumer behaviour research March and May 2015,’ which was a face to face omnibus survey among UK landline and mobile users,<sup>18</sup> run in March and May 2015. The research asked 2,085 consumers about their reactions to nuisance calls and their willingness to pay to stop them.<sup>19</sup>
  - Relevant results from Ofcom’s Technology Tracker research, which Ofcom conducts twice a year. This study measures awareness, access, usage and attitudes towards fixed and mobile telecoms, internet, multi-channel TV and radio among UK adults (aged 16+). In Wave 1 2015, approximately 3,700 UK adults were interviewed.<sup>20</sup>

A further source of evidence we have relied upon is data relating to the complaints made to Ofcom about silent and abandoned calls and, in some cases, to the ICO about other kinds of nuisance calls.

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<sup>15</sup> Verint, July 2009, ‘Research into the accuracy of AMD technology’,

[http://stakeholders.ofcom.org.uk/binaries/consultations/persistent\\_misuse/summary/verint.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/persistent_misuse/summary/verint.pdf)

<sup>16</sup> See footnote 3.

<sup>17</sup> Consumer issues survey – experience of nuisance calls, Data tables:

[http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015September/Consumer\\_issues\\_survey\\_Sept\\_2015.pdf](http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015September/Consumer_issues_survey_Sept_2015.pdf)

<sup>18</sup> Nuisance calls consumer behaviour research, March and May 2015, Data tables:

<http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance-calls-consumer-behaviour-research/>

<sup>19</sup> Consumer issues survey – experience of nuisance calls, Data tables:

[http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015September/Consumer\\_issues\\_survey\\_Sept\\_2015.pdf](http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015September/Consumer_issues_survey_Sept_2015.pdf)

<sup>20</sup> Source: Technology tracker –

[http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015April/Ofcom\\_Technology\\_Tracker\\_Wave\\_1\\_2015\\_Data\\_Tables1.pdf](http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015April/Ofcom_Technology_Tracker_Wave_1_2015_Data_Tables1.pdf)

[http://stakeholders.ofcom.org.uk/binaries/research/statistics/2014sep/technology-tracker-wave-2-2014/main\\_set.pdf](http://stakeholders.ofcom.org.uk/binaries/research/statistics/2014sep/technology-tracker-wave-2-2014/main_set.pdf)

- 2.20 Some of this evidence has limitations. Most significantly, the response rate to certain questions in the industry research was very low. In some aspects it may provide only indicative or anecdotal evidence. We take this into account in making our overall provisional assessment of how we might amend the 2010 policy.
- 2.21 We have also taken a step back and considered the broader public policy position. We have looked at the nature and intended effects of the persistent misuse provisions in the Act and whether the 2010 policy gives appropriate effect to the objectives that lay behind them. We have considered in particular whether we have given undue focus to possible efficiencies in the operation of outbound call centres and should give more effect to the Act's prohibition of persistent misuse.

## **Impact Assessment and Equality Impact Assessment**

- 2.22 In assessing options for changing the 2010 policy, we have sought to consider the impacts these may have, using the evidence available to us. The analysis presented in the entirety of this consultation document represents an impact assessment, as defined in section 7 of the Act.
- 2.23 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that generally Ofcom has to carry out impact assessments where its proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in our activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the majority of our policy decisions. Further information about our approach to impact assessments is contained in our guidelines.<sup>21</sup>
- 2.24 Pursuant to section 7, an impact assessment must set out how, in our opinion, the performance of our general duties (within the meaning of section 3 of the Act) is secured or furthered by or in relation to what we propose. This consultation document does that.
- 2.25 Ofcom is also required under the Equality Act 2010 to have due regard to any potential impacts our proposals may have as a result of any inequality in relation to particular "equality groups" including gender, disability or ethnicity. An Equality Impact Assessment (EIA) is our way of fulfilling this obligation and also assists us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers regardless of their background or identity.
- 2.26 We have not identified any particular impact of our proposals in relation to the identified equality groups. Specifically, we do not envisage the impact of any outcome to the detriment of any particular group of society. Nor have we seen the need to carry out separate EIAs in relation to the additional equality groups in Northern Ireland: religious belief, political opinion and dependants. This is because we anticipate that our proposals will not have a differential impact on citizens and consumers in Northern Ireland compared to those elsewhere.

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<sup>21</sup> [http://www.ofcom.org.uk/consult/policy\\_making/guidelines.pdf](http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf)

## Consultation Process

- 2.27 Having now conducted our review, we are making a series of proposals to amend the 2010 policy based on the evidence and assessment described. This consultation invites stakeholders' views on our proposals and the proposed revised policy in Annex 5 by 24 February 2016. Ofcom will then publish a statement setting out our conclusions in Q1 2016-2017, having taken account of stakeholders' responses.



## Section 3

# Examples of misuse: causes and harm

- 3.1 In this section we consider some of the potential causes and effects of persistent misuse. We set out our understanding of how those making relevant calls, and the call centre industry in particular, operate, and how this is liable to give rise to such misuse and the harm it may cause.
- 3.2 We do this with a particular, but not exclusive, focus on silent and abandoned calls and on the reasons why tackling such calls has been Ofcom's priority to date. We examine the extent of consumer harm caused by these calls, as part of our consideration of whether tackling them should continue to be the main focus of our policy.
- 3.3 Our overall aim is to make sure that our policy addresses the main causes and effects of the problems consumers face and is the most appropriate basis for enforcement action going forward. We start, therefore, by summarising the 2010 policy before looking at the kinds of issues it needs to deal with now and in future.

## The 2010 policy

- 3.4 The 2010 policy identifies both:
- behaviour that Ofcom is likely to regard as misuse; and
  - where we are likely to regard that behaviour as persistent – it identifies that a pattern of behaviour or practice is likely to require a minimum of three instances of the conduct in question.
- 3.5 It also sets out that, when deciding whether to take enforcement action in any particular instance of persistent misuse, we will be guided by a sense of administrative priority determined by the level of consumer harm, the scale or amount of misuse and whether enforcement action will act as a deterrent. It identifies measures calling organisations can take to limit consumer harm and which we will take into account when deciding whether we should act.
- 3.6 The main focus of the 2010 policy is on silent and abandoned calls, which it identifies as misuse. It defines them as follows:
- 'An abandoned call is where a connection is established but which is terminated by the person making the call after the consumer answering picks up the receiver.'
  - 'Silent calls are where the consumer receives a call but can hear nothing on answering the phone and has no means of establishing whether anyone is at the other end of the line.'

The policy sets out that, in the event of an abandoned call, an information message should be played by the person making the call. This scenario is sometimes referred to as 'an abandoned call with message.'

- 3.7 Our focus has been on silent and abandoned calls because such calls to consumers will almost always be unwanted. We have relied on research and complaints data

that, over a number of years, has shown that silent and abandoned calls are the biggest cause of consumer complaints to Ofcom, and that such calls cause annoyance and, in some cases, distress.<sup>22</sup> The harm they cause could include wasted time, intrusion of privacy or a fear that calls may be malicious.

- 3.8 We have also taken account that such calls will not necessarily be prevented by other legislation. For example, the PECRs prohibit organisations from making, among other things, unsolicited live marketing calls to subscribers who have registered their number with the Telephone Preference Service (TPS)<sup>23</sup> or who have notified the caller that they do not wish to receive such calls. They also prohibit automated direct marketing calls to subscribers who have not consented to receiving such messages. However, while the ICO has powers to enforce the PECRs,<sup>24</sup> and this should also help in reducing related silent and abandoned calls, it will not necessarily capture all of them (where such calls would have complied with the PECRs).
- 3.9 Abandoned or silent calls have tended to be made by organisations using automated calling systems (ACS), rather than malicious or prank callers. ACS are used by many types of organisation, including telemarketing companies, market research companies, debt collection agencies, charities carrying out fundraising activities and companies wishing to contact existing customers.
- 3.10 Organisations use ACS to maximise the amount of time their call centre agents spend speaking to consumers. For example, they can be used to dial telephone numbers automatically at a rate aiming to synchronise with call centre agent availability (i.e. predictive dialing) and to connect the call recipient to an agent as soon as the recipient answers the phone.
- 3.11 Silent or abandoned calls have tended to occur, however, when all the call centre agents are busy when the call recipient answers. The ACS may disconnect the call immediately or a message may be played to the recipient when the ACS is unable to connect the call to an agent.
- 3.12 Silent calls have also tended to occur where organisations use technology to detect answer machines in order to maximise the efficiency of call handling agents. This technology, referred to as AMD, may generate silent calls by mistaking a call recipient for an answering machine and disconnecting the call. In these circumstances, the recipient would hear nothing on answering the call.
- 3.13 The 2010 policy sets out the types of measures organisations using ACS could take to help avoid making abandoned or silent calls and to limit the consumer harm they cause. It says that, when deciding whether to take enforcement action, we will take into account whether an organisation has taken these measures:

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<sup>22</sup> See section 3 of the Telecoms Complaints Bulletins at <http://stakeholders.ofcom.org.uk/enforcement/telecoms-complaints-bulletin/>. We receive a small number of complaints from businesses about silent and abandoned calls which are not included in these figures. Consumers, including those taking part in the consumer research and who report complaints to Ofcom, may view silent or abandoned calls differently from the definitions set out in the 2010 policy. We considered the circumstances in which this might happen in our call for inputs (see Annex 8 for a summary of the responses to the call for inputs).

<sup>23</sup> The TPS is a free service. It is the official central opt-out register on which consumers can record their preference not to receive unsolicited sales or marketing calls.

<sup>24</sup> The ICO also has powers to enforce the DPA, which regulates how organisations should use consumers' personal information.

- Letting the phone ring for at least 15 seconds before it terminates the call.
- In the event of an abandoned call, the playing of a brief recorded information message no later than two seconds after the telephone has been picked up or no later than two seconds after the consumer begins to speak. The message should, as a minimum, identify the company on whose behalf the call was made, provide a free or basic/geographic rate number the consumer can call to decline further calls and should not be used to market goods or services.<sup>25</sup>
- Providing a CLI so consumers could return the call should they wish to. Any call the consumer makes to that number should not be used as a marketing opportunity without their consent.
- Guaranteeing the presence of a live call centre agent if a further call is made within 72 hours of a consumer receiving an abandoned call or within 24 hours in cases where AMD equipment used by the call centre has identified an answer machine (whether correctly or not).
- Limiting the number of abandoned calls made to 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 – this is known as ‘the abandoned call rate’ or ‘ACR’. The 2010 policy also sets out guidance on how to calculate the ACR in cases where an organisation is using AMD and where it is not.
- Keeping records that demonstrate compliance with the above for at least six months.

The point in the penultimate bullet has in practice been particularly important. The broad effect is that Ofcom prioritises cases in which a caller’s ACR is three per cent or more and we focus our action on days in which that rate is exceeded (not other days on which abandoned calls may also have been made). Action where the rate is lower is less likely (though not precluded) and in practice has not tended to occur.

3.14 The 2010 policy also identifies other examples of misuse that Ofcom may regard as persistent misuse:

- misuse of automated calling systems – for example, to transmit certain recorded messages;
- number-scanning – where calls are made to find out which telephone numbers out of a range are in service;
- misuse of a CLI facility – where the information passed from the telephone number of the user making a call to the recipient, sometimes referred to as the ‘Caller ID,’ is inappropriate;
- misuse for dishonest gains – scams; and
- misuse of allocated telephone numbers – using telephone numbers in ways that are inconsistent with designations and/or restrictions in the National Telephone Numbering Plan.

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<sup>25</sup> There are specific requirements in the PECRs, which are primarily enforced by the ICO, relating to recorded marketing messages that organisations need to comply with.

## What causes silent and abandoned calls?

- 3.15 According to a general report on the industry by ContactBabel, there are around 6,000 UK based contact centres and around 700,000 agent positions, with around 21% engaging in outbound dialing activity.<sup>26</sup> Using the consumer research data referred to in section 2 above, we estimate that UK consumers receive around 4.8 billion nuisance calls annually, of which we estimate 1.5 billion are silent and 200 million are abandoned.
- 3.16 Given the focus of the 2010 policy on such calls and the numbers of complaints Ofcom receives about them, a key part of our review is to seek to identify and confirm the various reasons consumers may continue to receive abandoned and silent calls (from outbound call centres, in particular). We want to make sure our policy and our enforcement action are targeted on the areas most likely to generate consumer harm.
- 3.17 Our call for inputs set out, among other things, a number of possible reasons why consumers may receive silent or abandoned calls and which we suggested were likely to be a key driver of overall volumes. The reasons were drawn from our enforcement work, existing research and stakeholder discussions. The identified reasons were grouped as:
- actions taken by organisations (for example, use of ACS, use of AMD, intentional non-compliance, lack of awareness, management and process failures, number scanning and intentional behaviour by agents);
  - timing issues (for example, delays in connection and simultaneous pick up/disconnection); and
  - other causes (for example, errors or intentional behaviour by individuals, errors by agents and poor mobile coverage).
- 3.18 We also sought information on whether there had been technological developments or changes in the call centre industry that it would be appropriate for us to take into account when reviewing the 2010 policy. For example, developments in the accuracy and/or use of AMD equipment and whether there are new developments or activities which may be relevant to our review.
- 3.19 Nearly half of the 46 respondents to our call for inputs made submissions about the reasons consumers may receive silent and abandoned calls. Annex 8 provides a summary of these responses. We have considered these alongside other sources of relevant evidence, including Contact Babel's quantitative industry research on our behalf (see Annex 6).
- 3.20 Overall, this evidence suggests we have largely captured the range of relevant reasons why silent and abandoned calls occur. It leads us to a number of provisional conclusions, including that a principal cause of these calls is the actions of calling organisations, and their use (or 'misuse') of ACS and AMD in particular.

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<sup>26</sup> ContactBabel, UK Contact centres in 2015: The state of the industry and technology penetration (12<sup>th</sup> edition).

<http://www.contactbabel.com/pdfs/feb2015/UK%20SOITP%202015%20Marketing%20v3.pdf>

## Actions taken by organisations

- 3.21 Our review suggests the way calling organisations operate is a key cause of silent and abandoned calls. A principal factor is their use of ACS and AMD, but there is also evidence that other aspects of their operations are a contributory factor in some cases.
- 3.22 Looking first at ACS, the industry research found that 83% of 122 respondents used an automated outbound dialler. It also indicated (based on 65 responses) that predictive dialling (where diallers initiate calls and connect call recipients to an agent as soon as one becomes available) was the most commonly used dialling mode across all types of outbound calls.<sup>27</sup>
- 3.23 Respondents to both the call for inputs and the industry research considered the use of ACS a cause of silent and abandoned calls. Thirteen respondents to the call for inputs, for example, agreed that its use was a key or main cause.
- 3.24 A number of respondents to the call for inputs and industry research also said a cause was the management or 'misuse' or 'inappropriate use' of ACS (sometimes deliberately). For example, where the pace of dialling is set at a level higher than the number of agents available to receive calls. There were 11 such respondents to the call for inputs. In the industry research, 55 respondents provided multiple reasons why silent and abandoned calls occur. The most commonly cited (by 26 respondents) was poor dialler management.
- 3.25 Similarly, 41 industry research respondents also commented on the most important characteristics of a campaign or ongoing outbound calling activity that would minimise silent and abandoned calls. Of those, 24 cited improved dialler system management.
- 3.26 All this evidence appears to us to point towards:
- ACS continuing to be commonly used by calling organisations; and
  - that use continuing to give rise to silent and abandoned calls.
- 3.27 As for AMD, the position was more mixed. In the industry research just over a quarter of the 94 respondents said they used AMD. 18 respondents to the call for inputs, meanwhile, said their AMD use had stopped or reduced (of whom ten thought this was as a result of seeking to comply with the 2010 policy), although four others said AMD is still used by certain types of organisations, such as debt recovery firms, or for only limited periods, such as when consumer contact rates are low.
- 3.28 Nonetheless, 11 respondents to the call for inputs explicitly agreed that AMD use was a key or main cause of silent and abandoned calls (although three others questioned whether AMD could be a key cause if its use had reduced). Such calls can be caused where AMD technology falsely identifies that a call has connected to an answer machine, rather than a person, and terminates the call (known as an 'AMD false positive').

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<sup>27</sup> This is in contrast to other dialling modes, such as preview dialling (where an agent is ready for a call and previews the customer details before the call is initiated), progressive dialling (the call is initiated as soon as an agent is ready), and manual dialling.

- 3.29 We sought information on the accuracy with which AMD technology detects answer machines, as part of the industry research. Twelve respondents said they checked the accuracy of their equipment, with six doing so by listening to a substantial number of calls each month or quarter. Others said they switch AMD on but still pass all calls through to live agents at certain times in order to monitor accuracy rates. Others still said they do not estimate AMD accuracy but rely on the systems to work. As to the accuracy rates they achieve, nine respondents provided data, mainly indicating rates between 75% and 100%.
- 3.30 Other evidence also suggests inaccuracy. The technology has tended to use speech pattern recognition and this can be unreliable. The 2009 report by Verint Consulting<sup>28</sup> found a broad range of negative results: from 0% to 45% of calls that AMD technology falsely identified as being answered by an answering machine. The research found that the false positive rates were affected most by the equipment used and how it was managed in practice (i.e. how it was set to classify answer machine connections).
- 3.31 The 2013 report by Mott MacDonald,<sup>29</sup> meanwhile, found that “testing performed on systems with AMD shows considerable variations.” It also said that “considerable discrepancies have been observed between tests in controlled environments which may show results as good as 99% compared with tests in an operational environment which may be as low as 75% accurate.”
- 3.32 Looking at changes to AMD technology and improvements in accuracy rates, views were again mixed. We note in this connection that in 2013 the Mott Macdonald report had found that advances in AMD technology were unlikely to raise accuracy levels such that call centres could keep within a three per cent ACR. The responses to the call for inputs did not offer a strong suggestion of changes and improvements.
- 3.33 In particular, six respondents considered that there had been no significant changes or improvements, or noted that there was little evidence AMD accuracy had improved. One said that it would not be possible for AMD always correctly to identify an answer machine (i.e. that it would not be possible to achieve a zero per cent false positive identification rate) and another noted that there are more false positives with calls to mobiles as they are more likely to be answered in noisy environments which can confuse AMD technology.
- 3.34 Only one respondent considered that there had been significant improvement in AMD technology. Two others noted that network based AMD, which does not rely on speech recognition, may improve accuracy. Four more, however, acknowledged that such network based AMD was not “fool-proof” and one noted that it may not represent a viable solution at present due to high costs and lack of consistent availability.
- 3.35 Taken together, all these findings suggest AMD technology retains the capacity to cause silent and abandoned calls. That chimes with what respondents to the industry research who used AMD told us: which indicated that around 1.3% of their outbound calls would be classed as AMD false positives (albeit based on a sample of nine). Ofcom’s recent enforcement experience has also found that some call centres have

<sup>28</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/persistent\\_misuse/summary/verint.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/persistent_misuse/summary/verint.pdf).

<sup>29</sup> Mott MacDonald, October 2013, Developments in call centre and network answer phone detection, page 47: <http://stakeholders.ofcom.org.uk/binaries/research/technology-research/2013/call-centre-report.pdf>

made large numbers of silent calls that are AMD false positives: a recent case examined a centre that had made 53,750 such calls.<sup>30</sup>

- 3.36 We have also considered the use and effects of other types of technology. For example, around a third of 111 respondents to the industry research said they used Interactive Voice Messaging (IVM), which is technology that automates telephone contact between humans and machines and typically includes prompts for the consumer to either press a button or speak a response. Depending on the consumer's input, the automated phone system may play some recorded information, route the caller to another prompt or connect the caller with a human operator.
- 3.37 The respondents provided very little information on the actual volume of calls made by IVM, but twenty explained how they used it. The majority said they play messages asking customers to press 1 to speak to an agent and ensuring agents are free to take any 'press 1' calls. Others said that if an agent is unavailable they play an abandoned call message, which is indicative of the capacity of IVM to lead to abandoned calls.
- 3.38 Respondents to the industry research also identified other actions by calling organisations that are liable to lead to silent and abandoned calls. Among the six most mentioned causes of such calls were:
- rogue or offshore operators – mentioned by 16 respondents,<sup>31</sup>
  - overly aggressive business techniques - 14 respondents;
  - agent behaviour - 10 respondents; and
  - poor data - five respondents.
- 3.39 In addition, when commenting on the most important characteristics of a campaign or ongoing outbound calling activity that would minimise silent and abandoned calls, respondents cited the following actions by callers:
- improved dialler system management - mentioned by 24 respondents;
  - better understanding and management of data and calling periods - 13 respondents;
  - agent scheduling and behaviour - 10 respondents; and
  - improved management practices - nine respondents.
- 3.40 Each of these findings also indicate, in our provisional view, the potential for the actions of calling organisations to cause silent and abandoned calls.

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<sup>30</sup> Xs-Remarketing / DMD: [http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_905/XS\\_Remarketing\\_under\\_s128\\_of\\_the\\_Communications\\_Act\\_2003.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/XS_Remarketing_under_s128_of_the_Communications_Act_2003.pdf)

<sup>31</sup> We note that this was also a cause identified in our call for inputs, in which 22 respondents agreed that such operators are a key or main cause of silent and abandoned calls.

## Timing issues

- 3.41 We also asked in the call for inputs whether timing issues, such as delays in connection and simultaneous pick up/disconnection, cause consumers to receive silent or abandoned calls. Very few respondents commented on this, and of those most did not consider such issues to be key causes. One respondent noted that regardless of the minimum ring time chosen there will always be the risk of simultaneous pick up/disconnection.

## Other causes

- 3.42 Only a small number of the call for inputs responses commented on other reasons consumers may receive silent or abandoned calls (such as errors or intentional behavior by individuals, errors by agents,<sup>32</sup> and poor mobile coverage). None identified these as key causes.

## Provisional conclusion on causes of silent and abandoned calls

- 3.43 We note the limitations of responses we received to both the call for inputs and the industry research. Both, nonetheless, enable us to draw some provisional conclusions on the basis of such evidence as is available, as described above. In particular, that:
- there are a large number of organisations making outbound calls to UK consumers;
  - they are likely to be responsible for a large number of the silent and abandoned UK consumers receive (and quite likely the majority, since other callers are unlikely to be making large numbers of silent calls or abandoned calls in which they play a recorded information message);
  - the ways to prevent or reduce them are within the control of the organisations (the management of their ACS, for example);
  - it is likely a large number of these calls continue to be caused by the use of ACS, particularly where there has been poor management of that technology by the call centre;
  - while the evidence is mixed, the use of AMD is also likely to continue to cause silent calls, because there do not appear to have been any significant recent developments which would improve the accuracy of the technology; and
  - the use of IVM technology by industry has the potential to cause abandoned calls in the same way as ACS where call centre agents are not available to speak to consumers.

These would tend to support a continued focus on silent and abandoned calls in our policy.

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<sup>32</sup> We mean errors which are a result of a genuine one-off mistake rather than those caused by more systemic issues such as poor training, management or behaviour of agents generally.



## Causes of other persistent misuse

3.44 We have similarly considered causes of other examples of persistent misuse described in the 2010 policy, particularly misuse of a CLI and of an ACS (other than by making silent or abandoned calls). We have done the same in relation to other behaviour that might fall within the definition of persistent misuse in section 128 of the Act, including calls and messages in breach of the PECRs and conduct by call centre agents. Our findings provide a provisional basis for the view that persistent misuse is still liable to arise by other means, as well as silent and abandoned calls, and our policy should continue to address them.

### Scope of 2010 policy

3.45 Considering first the scope of the 2010 policy, five respondents to our call for inputs agreed that all five examples of misuse in that policy remain relevant (though two said that some of the examples, like scams, should be prioritised for enforcement action over others (like number scanning, which is less common now)). Respondents also provided specific comments in relation to two of the examples of persistent misuse in the 2010 policy: misuse of a CLI and misuse of ACS.

### Misuse of CLIs

3.46 The provisions of the Privacy Directive and the PECRs, which implement that Directive in the UK, reflect that the presentation by a caller of a valid CLI<sup>33</sup> can provide important protection for call recipients' privacy. It can enable them to identify calling organisations, to decide whether to answer calls and make return calls (for example, to request that a caller makes no further calls to them).

3.47 On that basis, misuse of a CLI has the potential to cause harm to consumers. Such misuse could, for example, involve the presentation of a CLI which is not valid for the making of a return call or which would connect the caller to a premium rate service. Nineteen respondents to our call for inputs indicated agreement that presentation of invalid CLIs would be liable to cause persistent misuse (although, in the industry research, almost all the 74 organisations who responded said they presented returnable CLIs).

3.48 There is also evidence that suggests withholding a CLI could cause consumer harm. Seventeen respondents to our call for inputs offered that view. Whilst it is not currently unlawful to withhold a CLI, since the PECRs allow it, doing so has the potential to aggravate the harm from other forms of misuse such as silent or abandoned calls (by stopping the recipient identifying the caller and making a return call).<sup>34</sup> This was something noted specifically by six respondents who said that repeated silent calls could be especially annoying where no CLI number is provided.

3.49 This sort of harm is also reflected in the complaints Ofcom receives about silent and abandoned calls. Around 6,900 of the approximately 44,900 complaints received in last 12 months (up to October 2015) noted that the caller had not provided a CLI.

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<sup>33</sup> The information passed from the telephone number of the user making a call to the person receiving the call. It is sometimes referred to as the 'Caller ID'.

<sup>34</sup> Although we do not think the (currently) lawful withholding of a CLI by a calling party could by itself amount to persistent misuse, we note that the Government has indicated an intention to consult on amending the PECRs to propose to require direct marketing callers to provide their CLI. Were the law to change, Ofcom may consider withholding such CLIs to be persistent misuse.

- 3.50 On these sorts of grounds, it appears to us that certain misuses of CLIs remain relevant in the context of our persistent misuse policy.

### Misuse of ACS

- 3.51 As to misuse of ACS, we have already considered in paragraphs 3.36 - 3.37 above how the use of IVM has the capacity to cause persistent misuse in the form of abandoned calls. Though mixed, some evidence suggests its use could also give rise to other types of misuse.
- 3.52 On one hand, nine respondents to the industry research said using IVM was beneficial to consumers. Seven said it was an efficient and effective way for a contact centre to operate.
- 3.53 These sorts of comments were also made by respondents to the call for inputs. Several said they use IVM where they have pre-existing relationships with consumers, such as fraud prevention, appointment or payment reminders, usage limit warnings and debt collection. Eleven considered that if well managed and used responsibly, IVM benefits consumers. Its use can prevent silent calls, remove the need to use AMD and/or the risk of AMD technology falsely identifying connections to answer phones<sup>35</sup> and it allows consumers to deal with callers without having to speak to call centre agents.<sup>36</sup>
- 3.54 Against that, however, some respondents to both the industry research and the call for inputs provided responses that demonstrate the capacity for IVM to give rise to persistent misuse. Several respondents to the latter, for example, acknowledged that its use could result in those who elect to speak to agents being placed on hold for long periods. In the call for inputs, we also recognised the potential for harm to arise if limited information about the calling organisation is provided to the consumer whilst they are held in a queue. These points suggest, in our provisional view, that the misuse of ACS is another area that should continue to fall within the scope of our policy.

### **Misuse involving breaches of the PECRs**

- 3.55 We have also considered the possibility that unsolicited live calls and messages in breach of the PECRs might cause consumer harm and amount to persistent misuse. It appears to us, provisionally, that they are capable of doing so.
- 3.56 We take account of the 21% of the 6,000 or so UK based contact centres, using around 700,000 call agents, engaging in outbound dialing activity.<sup>37</sup> Likewise, and as set out more fully in Annex 7, of the estimate, based on the consumer research data, that UK consumers receive around 1.7 billion live sales calls and 940 million recorded sales messages annually.
- 3.57 Other pieces of evidence suggest these calls and messages have the potential to give rise to the sort of harm falling within the persistent misuse provisions of the Act. For example, the consumer research, again more fully described in Annex 7,

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<sup>35</sup> This is because IVM is used to detect a human response to the message.

<sup>36</sup> They considered this was quicker for the consumer and avoids embarrassment if the call is about payment collection.

<sup>37</sup> ContactBabel, UK Contact centres in 2015: The state of the industry and technology penetration (12<sup>th</sup> edition).

<http://www.contactbabel.com/pdfs/feb2015/UK%20SOITP%202015%20Marketing%20v3.pdf>

indicates that the majority of these types of calls (74% of live sales calls and 83% of recorded sales calls) were considered annoying by their recipients.

- 3.58 By itself, that evidence would not necessarily mean persistent misuse has occurred in all those cases. Marketing calls and messages made and sent in accordance with the PECRs are lawful and would not, in the legal sense contemplated by section 128 of the Act, give rise to unnecessary annoyance.
- 3.59 However, there is evidence from which it can be reasonably inferred that a number of such calls and messages were in breach of the PECRs. In particular, complaints to the Telephone Preference Service (TPS) and to the ICO.
- 3.60 Consumers can register with the TPS that they do not wish to receive unsolicited live sales calls. Any such calls they subsequently receive would, unless they have specifically consented to them, be in breach of PECRs. In the 12 months to October 2015, the TPS received 63,000 complaints about unwanted marketing calls from those registered with the service.<sup>38</sup> The ICO, meanwhile, and as is noted elsewhere in this document, enforces the PECRs and received over 146,000 complaints, around 88% of were about live calls and recorded messages, between 1 January and 31 October 2015.<sup>39</sup>
- 3.61 Not all such complaints will necessarily indicate a breach of the PECRs (just as there may be calls and messages in breach of PECRs not reflected in the complaints numbers), but it appears to us reasonable to suppose that a number will be. Moreover, if live sales calls and recorded message generally cause annoyance to the majority of recipients, it is not unreasonable to suppose they would likely cause greater annoyance to those who receive them after registering with the TPS and/or without consenting to their receipt. In those cases, it appears to us plausible to regard the annoyance caused as unnecessary within the terms of section 128 of the Act, and this is another area our policy should continue to cover.

### **Call centre agent conduct**

- 3.62 Responses to both our call for inputs and the industry research also provide evidence that the conduct of call centre agents can cause persistent misuse which, in our provisional view, we should address in our policy.
- 3.63 In response to the call for inputs, two respondents suggested that agent conduct is only likely to cause small numbers of silent and abandoned calls. Against that, however, seven considered that deliberate actions by agents, such as terminating live calls after they have been put through, could cause silent or abandoned calls.
- 3.64 Six others thought agent conduct could give rise to misuse. They cited things like delays in connection, which may occur if agents are trained badly or are slow at unmuting their headsets, and cases where agents deliberately choose not to connect calls that are made just before their rest breaks or the ends of their shifts. Another respondent referred to online fora in which consumers complain about call centre agent behaviour, such as rudeness and being able to hear background noise. Four respondents referred to misuse arising because of agents not identifying themselves to call recipients.

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<sup>38</sup> See [http://stakeholders.ofcom.org.uk/binaries/enforcement/telecoms-complaints-bulletin/Telecoms\\_Complaints\\_Bulletin\\_November\\_2015.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/telecoms-complaints-bulletin/Telecoms_Complaints_Bulletin_November_2015.pdf)

<sup>39</sup> See <https://ico.org.uk/action-weve-taken/nuisance-calls-and-messages/>

- 3.65 In the industry research, meanwhile, 55 respondents put forward multiple reasons why silent and abandoned calls may occur. Ten of them cited call centre agent behaviour, such as not adhering to correct procedures, logging out for breaks and poor management or monitoring of agents.

### **Provisional conclusion on other causes of persistent misuse**

- 3.66 Again, there are limitations on the extent of the evidence. However, having carefully considered it, it appears to Ofcom to support the provisional conclusions that silent and abandoned calls are not the only means by which persistent misuse may occur, nor that the use of ACS and AMD are the only underlying causes. Such misuse can occur by a number of means and a number of causes, including each of those above, and this would tend to indicate that our policy should target them too.

### **Consumer harm caused by silent and abandoned calls**

- 3.67 A further aspect of our consideration of whether our policy addresses the right kinds of conduct and behaviour in the appropriate way is to assess the harm which different kinds of misuse are liable to cause. Again, given the content of the 2010 policy, and the evidence that suggests silent and abandoned calls caused by the actions of calling organisations are the prime example of persistent misuse, our assessment focuses mainly on those calls. The assessment in respect of those calls is set out in full in Annex 7, but the main aspects of it are as follows.

### **Consumer harm caused by silent and abandoned calls**

- 3.68 Over a number of years, research and complaints data has shown that silent and abandoned calls are a cause for concern for consumers.<sup>40</sup> As they will almost always be unwanted by a consumer, those who receive them can be considered, generally, to be harmed. That harm can arise in various ways including wasted time and invasion of privacy. Such calls are also, the evidence has consistently shown, liable to cause recipients the kinds of harm specifically contemplated by section 128 of the Act (unnecessary annoyance, inconvenience or anxiety (characterised in this document as distress)).
- 3.69 In assessing the effects of silent and abandoned calls, and whether the 2010 policy is appropriately focussed, it appears to us reasonable to take into account all the harm such calls, amounting to persistent misuse, cause. We have considered the types and volumes of calls consumers receive and their attitudes and responses to them and estimated the harm they cause.
- 3.70 Having done so, our provisional assessment is that silent calls cause consumers harm in the order of magnitude of £139-169m and abandoned calls in the order of £12-17m. This, too, would suggest a continued need for our policy to continue to focus on these calls.
- 3.71 A number of background points are relevant to this assessment. They support our hypothesis that silent and abandoned calls cause significant harm to consumers and illustrate the nature of that harm.

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<sup>40</sup> We note that consumers, including those taking part in the consumer research and that report complaints to Ofcom, may view silent or abandoned calls differently from the definitions currently set out in the 2010 policy. See footnote 22.

- 3.72 One is that complaints to Ofcom about silent and abandoned calls have remained at consistently high levels with, as noted elsewhere in this document, around 44,900<sup>41</sup> in the 12 months to October 2015. They remain one of the most complained about issues to Ofcom<sup>42</sup> despite the enforcement action we have taken since we published the 2010 policy.
- 3.73 A second is that, in response to our call for inputs, 19 stakeholders broadly agreed that consumers experience harm from nuisance calls generally, and 20 did so in relation to silent and abandoned calls specifically. Eight respondents considered there were many factors affecting the level of harm, as one person may find a call inconvenient but another may find the same call distressing.
- 3.74 A third relates to the types of harm caused:
- seven respondents to the call for inputs explicitly agreed with our initial view that wasted time and emotional harm (such as annoyance, inconvenience or anxiety (distress)) were the primary types of harm;
  - two respondents considered that financial harm can also be caused through scams or mis-selling;
  - three considered that physical harm could be caused if, for example, people tripped on the way to answering the phone; and
  - two respondents noted other types of harm caused, such as the loss in value to the consumer of their phone (for example, if they stop answering the phone and/or miss out on beneficial calls).
- 3.75 Three respondents provided estimates of the time it would likely take a consumer to deal with nuisance calls. One respondent stated that tests indicated the average time to answer a landline phone is 20 seconds and a mobile phone 12 seconds and, if an abandoned message is played and gives a consumer a key-pad option to remove themselves from the caller's call list, this takes around 30 – 40 seconds. Another stated that most consumers calling its nuisance call advice line say it takes them a few seconds to deal with nuisance calls, with several saying it takes about a minute.
- 3.76 Also related to the type of harm, our research and complaints data suggests to us that consumers receive more silent calls than abandoned calls, make more complaints about silent calls than abandoned ones and a higher proportion of silent calls are considered annoying and distressing than any other type of call. We note:
- Ofcom's latest consumer issues omnibus survey shows that more respondents received silent calls than abandoned calls - see figure 1 below.<sup>43</sup> Our latest landline panel research also shows that respondents recorded that they had received more silent calls than abandoned calls (with the higher volume of silent

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<sup>41</sup> See section 3 of the Telecoms Complaints Bulletins at <http://stakeholders.ofcom.org.uk/enforcement/telecoms-complaints-bulletin/>. We receive a small number of complaints from businesses about silent and abandoned calls which are not included in these figures.

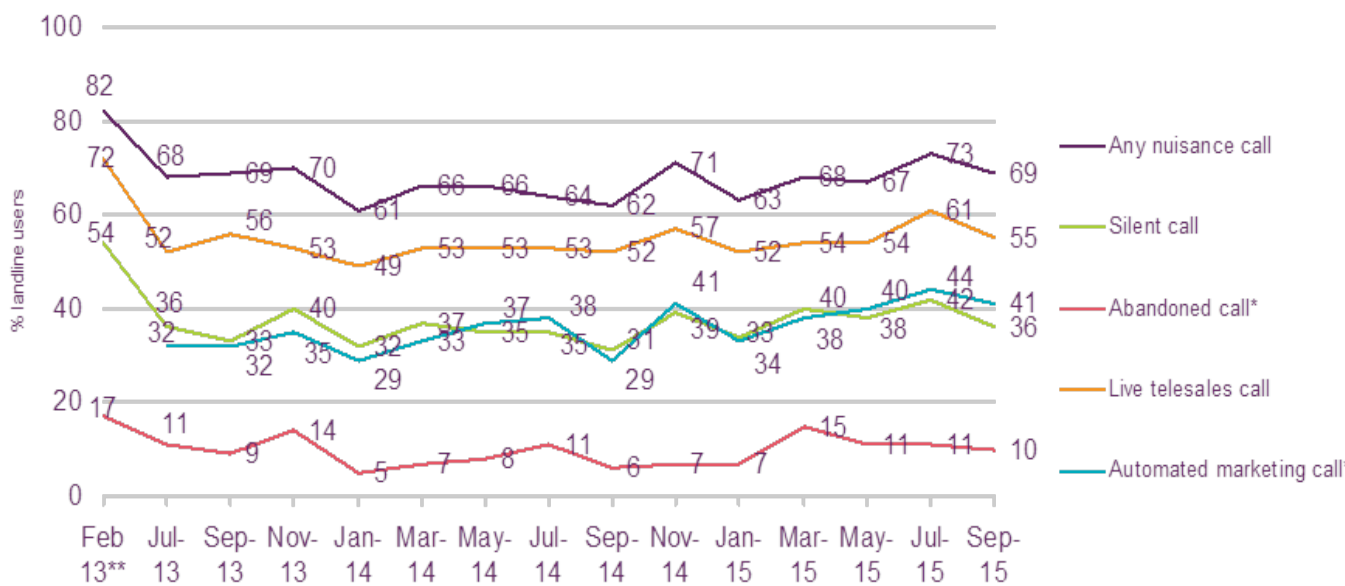
<sup>42</sup> We also note complaint volumes to the TPS and ICO have remained high and some consumers may also have complained to their Communications Provider (for example in response to our October 2014 call for inputs BT stated that its nuisance calls advice line receives an average of 22,000 calls per month and 25,000 hits on its nuisance calls webpage.) or Which?.

<sup>43</sup> See footnote 17 for link to data tables.

calls made up of both more recipients of these types of calls as well as more silent calls per recipient).<sup>44</sup>

- The majority of complaints to Ofcom about silent and abandoned calls are about silent ones. For example, we received around 29,300 about the former, compared to around 8,900 about the latter, between January and October 2015.
- The landline panel research indicates that a higher proportion of silent calls were considered annoying (86%) than any other type of call (including live and recorded sales calls)<sup>45</sup> (although we note that the most recent landline panel research suggests that fewer consumers consider silent calls (along with recorded and live sales calls) to be distressing than in 2013).
- Ofcom’s nuisance calls consumer behaviour research found that 35% of respondents with a mobile and landline phone would prefer to hear an abandoned call message and five per cent of respondents would prefer to receive a silent call (although 55% did not prefer either type of call over the other).<sup>46</sup>

**Figure 1: Unsolicited/ nuisance calls received on landline or mobile in ‘the last four weeks’**



Source: Kantar Media face to face omnibus. Base All with a landline phone or mobile phone (July 2013, 1050); (Sept 2013, 1067); (Nov 2013, 960); (Jan 2014, 1038); (Mar 2014, 1097); (May 2014, 1030); (July 2014, 1003); (Sept 2014, 1011); (Nov 2014, 1036); (Jan 2015, 1063); (Mar

<sup>44</sup> See footnote 3 for link to data tables. 60% of adults with a landline received at least one silent call over the four weeks compared with 17% of adults with a landline who received at least one abandoned call. The average number of silent calls received was 0.7 per week compared with 0.1 per week for abandoned calls. We recognise that there is a possibility that some nuisance calls may have been classified by the recipient as silent, if they had hung up before an information message was played or being connected to a live agent. However, we think the risk of this happening is fairly low because recipients were specifically asked to pick up their phone and wait for five seconds before hanging up.

<sup>45</sup> The figure for abandoned calls was 82%.

<sup>46</sup> See footnote 18 for link to data tables.

2015, 992); (May 2015, 1003); (July 2015, 1069); (Sept 2015, 1041). \*These percentages are derived from a low base size- indicative only.

## Assessing the extent of consumer harm caused by silent and abandoned calls

3.77 Taking these points and, in order to understand, in so far as we can, the likely magnitude and nature of the harm silent and abandoned calls cause, we have made an assessment of the evidence available to us. In doing so, we have estimated the total volume of silent and abandoned calls made to UK recipients, described consumers' reported attitudes to them and estimated the absolute harm they cause using a range of approaches.

### Total volumes

3.78 To estimate total volumes of calls we have taken the findings from the landline panel research in which respondents kept a diary of the number of nuisance calls, including silent and abandoned ones, received over a four week period. We have scaled up the reported number of nuisance calls<sup>47</sup> to a national level by adjusting for the proportion of the UK adult population with landlines and scaling up to the total size of the UK population.

3.79 Our estimates suggest (shown in Table 3.1 below) that around five billion nuisance calls are made to UK consumers a year, of which around a third are likely to be silent and four per cent abandoned. The higher volume of silent calls is made up of both more recipients of these types of calls as well as more silent calls per recipient.<sup>48</sup> The landline panel research also indicates that incidence levels have been broadly similar between 2013 and 2015.

**Table 3.1 Estimated total volume of nuisance calls per year**

	All <sup>49</sup>	Silent	Abandoned	Recorded	Live	Other
Average calls per week per adult with a landline	2.1	0.7	0.1	0.4	0.7	0.2
Total calls per annum in UK (million) <sup>50</sup>	4,846	1,530	200	943	1,715	380

Source: Ofcom and GfK (2015), 'Landline nuisance calls panel research Wave 3 (January – February 2015)'.

<sup>47</sup> See footnote 3 for link to data tables. Ofcom's 2015 nuisance calls landline panel research found that among those who received a nuisance call in the four week period, the average number of nuisance calls received was 9.7 (or around two a week). The majority of nuisance calls (80%) were thought to be annoying. Relatively few nuisance calls were reported as being not a problem (12%) or distressing (five per cent), and very few were considered useful (one per cent).

<sup>48</sup> See footnote 44.

<sup>49</sup> 'All' is not equal to sum of specific types, because each category (including all) is calculated directly from research data, which are weighted separately.

<sup>50</sup> Calculated based on an ONS mid-year 2014 population estimate of 52m UK adults aged 16+ and an Ofcom research estimate of 84% of adults having a landline. ONS annual mid-year population estimates for 2014, extracted from ONS Analysis Toolkit, <http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/mid-2014/rft--mid-2014-population-estimates-analysis-tool.zip> Ofcom research estimate: Figure 1.6, [http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr15/CMR\\_UK\\_2015.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr15/CMR_UK_2015.pdf)

### Reported attitudes to calls

- 3.80 As well as finding that overall the incidence of nuisance calls has remained broadly similar between 2013 and 2015 and remains high, our landline panel research<sup>51</sup> also found that the majority of silent (86%) and abandoned (82%) calls were considered to be “annoying”.<sup>52</sup> Some consumers did find them distressing, with more considering silent calls and live sales calls distressing (seven per cent and five per cent respectively) than recorded sales calls (two per cent). Relatively few consumers regarded silent and abandoned calls as “not a problem” (six per cent silent, nine per cent abandoned) or “useful” (zero per cent silent, one per cent for abandoned calls). The research also asked why respondents felt annoyed or distressed by the call, with the main reasons being the inconvenience of the call (interrupting what they were doing), repeated calls and silence on the line.
- 3.81 We have also taken into account our nuisance calls consumer behaviour research.<sup>53</sup> This found that a small number of respondents said they regularly take action to avoid / not have to answer nuisance calls from organisations. For example:
- nine per cent of landline users and six per cent of mobile user say that they regularly ‘do not answer calls at certain times of the day’;
  - three per cent of landline users and seven per cent of mobile users switch the ringtone down or off; and
  - three per cent of landline users unplug their phone (In addition, our Technology Tracker research showed that among those who are not intending to take up a landline phone at home in the next twelve months, one per cent said this was in order to avoid unsolicited calls).<sup>54</sup>

Although only a small number of consumers take such action, this evidence is another indication of nuisance calls causing harm to some people.

### Approach to estimating harm

- 3.82 Taking the information about call volumes and consumer attitudes, we have used two approaches to determine our overall estimates of harm:
- A **“time cost approach”** which quantifies harm based solely on recipients’ value of wasted time in dealing with these calls. This approach does not account for any hassle/psychological distress resulting from the receipt of these calls.

<sup>51</sup> See footnote 3 for link to data tables.

<sup>52</sup> This survey has been running since 2013. Ofcom’s 2015 nuisance calls landline panel research found that the overall incidence of nuisance calls remained stable 2013-15. Among those who received a nuisance call in the four week period, the average number of nuisance calls received was 9.7 (or around two a week). The majority of nuisance calls (80%) were thought to be annoying. Relatively few nuisance calls were reported as being not a problem (12%) or distressing (five per cent), and very few were considered useful (one per cent).

<sup>53</sup> See footnote 18 for link to data tables.

<sup>54</sup> Source: Technology tracker – [http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015April/Ofcom\\_Technology\\_Tracker\\_Wave\\_1\\_2015\\_Data\\_Tables1.pdf](http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015April/Ofcom_Technology_Tracker_Wave_1_2015_Data_Tables1.pdf)  
[http://stakeholders.ofcom.org.uk/binaries/research/statistics/2014sep/technology-tracker-wave-2-2014/main\\_set.pdf](http://stakeholders.ofcom.org.uk/binaries/research/statistics/2014sep/technology-tracker-wave-2-2014/main_set.pdf)



- A “**willingness to pay**” approach which estimates harm by considering the amount consumers state they would be willing to pay to avoid these calls. This should capture both time cost and hassle/distress in a single metric and, on that basis we consider it should be the preferred approach.

To inform both approaches, we have used further information from the landline panel research, the consumer issues omnibus survey, Ofcom’s Communications Market Report 2015,<sup>55</sup> the Office for National Statistics<sup>56</sup> and other sources.

- 3.83 The harm experienced from nuisance calls can relate to both the receipt of the calls themselves as well as from actions that consumers may have taken to try and mitigate the effect of receiving them. We have therefore also considered harm from these mitigation actions.
- 3.84 As a result of that consideration, we have added the financial and time related costs of purchasing call-blocking to our estimates under the time cost approach. We have not, however, included it in our calculations on the ‘willingness to pay’ approach because it is unclear how those who already have call blockers have responded to the nuisance calls consumer behaviour research on which we base our assessment. We are unsure if they have only stated the additional amount they would be prepared to pay to eliminate the residual nuisance calls they receive despite having call-blocking or have incorporated the cost of call-blocking into their willingness-to-pay estimate.
- 3.85 We are aware there are other types of mitigation activity (for example, disconnection of landlines). We have not, however, sought to quantify the harm arising from these. This is one reason our estimates of consumer harm may be underestimated, as explained further below.

### Estimated harm from silent and abandoned calls

- 3.86 Figure 2 below shows our estimates under both the time cost and willingness to pay approaches. A number of points are relevant in considering these estimates.
- 3.87 One is that our quantification of the harm from silent and abandoned calls is intended to be indicative only of the magnitude of that harm. This reflects the inherent difficulties in monetising non-financial harm.
- 3.88 A second is that while, as stated above, our preferred approach is based on the willingness to pay, it is notable that the estimates under both approaches identified are similar. Our provisional view is that this supports the validity of the orders of magnitude of harm shown in Figure 2.
- 3.89 A third is that the quantified estimates are likely to understate the overall harm caused by silent and abandoned calls to consumers in the UK. They do not include calls to mobiles (our industry research has suggested that just over half of calls made by the 82 survey respondents are made to mobiles) and may not capture all sources of harm (for example, those who have disconnected their landline phone as a result of nuisance calls).

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<sup>55</sup> Figure 1.6, [http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr15/CMR\\_UK\\_2015.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr15/CMR_UK_2015.pdf)

<sup>56</sup> ONS, annual mid-year population estimates for 2014, extracted from ONS Analysis Toolkit, <http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/mid-2014/rft---mid-2014-population-estimates-analysis-tool.zip>

3.90 These points noted, under the willingness-to-pay approach our estimate of the harm caused by all nuisance calls to landlines is £406m per year. We estimate £139-169m of this is caused by silent calls and £12-17m by abandoned calls.<sup>57</sup> This is equivalent to harm per call of between £0.10–£0.12 for each silent call and between £0.07-£0.10 for each abandoned call.

3.91 These estimates are based on harm from the calls received excluding harm arising from the cost of call blocking technology. These two components are shown separately in Figure 2 below, with the uncertainty around the appropriateness of inclusion of call blocking under the willingness-to-pay approach reflected by the dashed area. If we were to include the cost of call blocking then our estimates of aggregate annual harm are £203-246m for silent calls and £17-25m for abandoned calls. Either way, the estimates suggest consumer harm on which, in our provisional judgment, the policy needs to continue to focus.

**Figure 2 Estimates of aggregate harm from silent and abandoned calls**



Note: Total harm is estimated as the addition of the cost of call blocking (constant across approaches) and the cost of harm from the calls themselves.

### Consumer harm caused by other persistent misuse

3.92 We have also considered the harm that other forms of persistent misuse may cause. There appear to us plausible bases to consider that those forms give rise to some level of harm.

<sup>57</sup> The ranges reflect different approaches to allocating willingness-to-pay between call types. See Table A7.5.

- 3.93 Our overall estimate of annual harm to UK consumers of £406m takes into account all types of ‘nuisance’ calls, not just silent and abandoned ones. Based on our estimates of the annual harm from those latter types of calls (£156-181m<sup>58</sup>), that would suggest other types of calls consumers regard as a nuisance cause annual harm in the order of magnitude of £225-250m.
- 3.94 Not all such ‘nuisance’ calls will be unlawful nor amount to persistent misuse.<sup>59</sup> It is likely, however, that some will and that, in our provisional view, a proportion of that harm can be attributed to them.
- 3.95 One example is unsolicited live sales calls and recorded marketing messages in breach of PECRs. It is likely, on the kinds of bases set out in paragraphs 3.55 – 3.61 above, that significant numbers of such calls are made and that they are liable to cause harm, such as annoyance, to consumers.<sup>60</sup> Some respondents to our call for inputs noted that possibility.
- 3.96 Similarly, misuse of ACS, by way of IVM, could on the bases previously described give rise to persistent misuse in the form of abandoned calls or calls in which consumers are placed on hold for long periods (particularly if they are given little or no information whilst on hold). Such calls are liable to give rise to the same or similar sorts of harm as abandoned calls from other sources.
- 3.97 We also take account that some of the other forms of misuse we are considering have as their aim causing undue cost or financial harm to consumers. For example, CLIs may be misused so as to cause consumers to call expensive premium rate services. Similarly, persistent misuse in the form of scams is, by design, liable to cause consumers financial harm. Where consumers suffer harm in these ways it would be on top of the harm estimated by time costs and willingness to pay approaches.
- 3.98 Each of these points would tend to indicate harm to consumers that, we are minded to think, our policy should also seek to address.

## Provisional conclusions

- 3.99 Drawing together the analysis above, we make a number of provisional conclusions. These relate to:
- the types of persistent misuse consumers continue to suffer;
  - the causes of that misuse;
  - the harm it causes to them; and

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<sup>58</sup> This range stems from different approaches to allocating willingness-to-pay between call types. Allocating based on ‘distressing calls’ gives estimates of £169m for silent and £12m for abandoned and £181m in total. Allocating based on ‘distressing and annoying calls’ gives estimates of £139m for silent and £17m for abandoned calls and £151m in total. See Table A7.5.

<sup>59</sup> For example, marketing calls and messages made and sent in accordance with the PECRs are lawful and would not, in the legal sense contemplated by section 128 of the Act, give rise to unnecessary annoyance.

<sup>60</sup> While we are minded to think our policy should also seek to address this harm, as set out in Section 2, ICO has lead responsibility for tackling those making unlawful live or and/or recorded marketing calls, or unlawfully sending unsolicited marketing text messages to consumers, under the PECRs and the DPA.

- the need to ensure that our policy addresses those causes and effects in the most appropriate way.

- 3.100 In particular, on the basis of the available evidence, silent and abandoned calls remain the form in which persistent misuse most commonly occurs and in respect of which consumers suffer harm. The evidence also suggests that consumers receive more silent than abandoned calls and more of the former are considered harmful within the terms of section 128 of the Act.
- 3.101 A large number, probably the majority, of such calls are likely to be the result of organisations trying to contact consumers, and to result from matters within their control. Particular causes are likely to include the use of ACS, especially where it is poorly managed by call centres. They are also likely to include the use of AMD. There do not appear to have been any significant developments in recent years which would improve its accuracy. The use of IVM technology also has the potential to cause abandoned calls in the same way as ACS.
- 3.102 Given the numbers of these calls, our estimates being that UK consumers receive approximately 1.5 billion silent and 200 million abandoned calls annually, they are liable to harm considerable numbers of consumers. More than 80% of both kinds of calls were considered annoying in our landline panel research. That harm is also likely to manifest itself in inconvenience and wasted time in answering the calls (and, in some cases, taking other steps to avoid them and to report them to regulators).<sup>61</sup> Estimates of the harm are in the magnitude of £139 - 169m for silent calls and £12 - 17m for abandoned calls (even excluding the cost of call blocking, the harm caused by calls to mobiles and that caused to those who have disconnected their landline phone as a result of such calls).
- 3.103 These provisional conclusions point to a need to ensure that our policy continues to focus on tackling silent and abandoned calls. They also suggest a need to assess whether the 2010 policy should be amended with the aim of more effectively addressing the causes and effects of this type of persistent misuse.
- 3.104 Alongside that, there are also bases for the view that persistent misuse, and harm to consumers, may also arise in other ways. These include those already identified in the 2010 policy, misuse of CLI and of ACS, through the use of IVM, especially. They also include calls made and messages sent in breach of the PECRs and persistent misuse caused by call centre agent conduct. Our view is that it is also appropriate to consider further how the policy should address those.
- 3.105 We therefore go on, in section 4 of this document, to set out our assessment of ways in which the 2010 policy might be amended. We propose changes which, in our preliminary view, may help to reduce persistent misuse and the harm it causes.

## Consultation questions

*Q1: Should Ofcom's policy on persistent misuse continue to have as its main focus the tackling of silent and abandoned calls?*

<sup>61</sup> Some consumers may also spend time reporting complaints about silent and abandoned calls or taking steps to try and minimise the chance they receive these calls again in the future and reduce the harm they experience.

*Q2: Have we identified the main causes and effects of silent and abandoned calls, and are there any others we should take into account?*

*Q3: Do you agree with the other forms of misuse we propose to include in the policy?*

*Q4: Is there any other evidence we should take into account in relation to the causes and effects of the other types of misuse identified (misuse of ACS, misuse of a CLI facility and breaches of the PECRs)?*

*Q5: Do you have any comments on:*

- (a) the evidence of consumer harm from the forms of persistent misuse we propose to include in the policy (and on silent and abandoned calls in particular); and*
- (b) our approach to estimating the consumer harm from those forms of misuse?*

*In all your responses, please state your reasons and provide evidence to support your views.*

## Section 4

# Proposed changes to the 2010 policy

- 4.1 In light of the analysis in section 3 above, and the very high numbers of nuisance calls, especially silent and abandoned ones, that consumers continue to receive and of complaints they continue to make to Ofcom (and the ICO) about them, we have reviewed our 2010 policy. We have considered whether there is more that we can do, through the policy, to help reduce the likelihood of these calls being made and/or the harm they cause. In particular, by:
- targeting in more effective ways the causes and effects of various types of persistent misuse;
  - by making clearer the factors we are likely to take into account in assessing the harm caused by the misuse and prioritising our enforcement action; and
  - providing examples of steps calling organisations should take to avoid committing persistent misuse and to mitigate harm to consumers.
- 4.2 This has involved considering whether our policy gives appropriate effect to the statutory prohibition on persistent misuse in section 128 – 130 of the Act. We have assessed whether we have given undue focus to possible efficiencies in the operation of outbound call centres and considered whether, on public policy grounds, we should re-focus the policy.
- 4.3 It has also involved making an assessment of where we should prioritise our resources. We do not have unlimited resources to enable us to take enforcement action in every case so, when deciding whether to take action, we need to focus our efforts on reducing consumer harm in the most effective way. That involves setting the right priorities in our policy.
- 4.4 We have assessed the impact of different changes to the 2010 policy, concentrating in particular on:
- the overall number of silent and abandoned calls to consumers and the harm they cause;
  - Ofcom’s ability to take enforcement action to tackle misuse effectively and efficiently;
  - the efficiency of call centres, including, for example, the impact on the use of outbound calling technology and the possible effects of reducing call agent utilisation time;
  - whether the changes could require one-off costs or investment in new or replacement technology;
  - whether they may result in costs which may be passed on in whole or part to call-centres’ clients and/or consumers; and
  - making the policy clearer and seeking to reduce the bureaucratic burden it places on calling organisations.

- 4.5 This assessment was carried out using the evidence we have available to us from consumer and industry research like that referred to in section 2 above, responses to our call for inputs and information we hold from complaints and enforcement cases. Some parts of this evidence carry greater weight than others.
- 4.6 In particular, the industry research data may be less robust than the consumer research due to the low sample sizes for certain questions and a potential risk of bias by respondents when asked about potential cost or efficiency impacts (for example, of operating at different ACR levels). We have no way of verifying the accuracy of the data. This means that our ability to assess the impacts on industry (based on agent utilisation<sup>62</sup> and agent costs), particularly efficiency impacts (i.e. of operating at different ACR levels) is limited.
- 4.7 Accordingly, despite our best efforts in gathering data to assist our assessment, there are considerable information or evidence gaps. In light of this, we put limited weight on the quantitative results treating them only as an indication of the magnitude and direction of any impact a potential policy change may have on the industry. We consider them as part of our overall, and at this stage, provisional, assessment of what, as a matter of public policy, our section 131 policy should focus on.
- 4.8 The proposals we have decided to make cover both the examples included in the policy of conduct we are likely to regard as persistent misuse and changes to the factors we are likely to take into account in assessing the harm caused by the misuse and prioritising our enforcement action. The most important relate to the way we use our persistent misuse powers to help us take enforcement action against silent and abandoned calls, though we make a series of other proposals targeted at other forms of misuse. We also propose to change the structure and drafting of the 2010 policy to make the policy clearer for organisations making outbound calls. A copy of the proposed revised policy is in Annex 5.
- 4.9 Our proposals in relation to silent and abandoned calls include:
- setting out an explicit policy position that consumers must not be subject to silent calls under any circumstances, however caused and in whatever number, and that enforcement action against those who make any silent calls will be our highest priority;
  - making similarly explicit that consumers should not be subject to abandoned calls and that:
    - we may take enforcement action in any cases where the caller makes more than three abandoned calls;
    - where we have to prioritise enforcement resources, we are likely to take into account the number of abandoned calls made and/or the rate at which they are made (the higher these are, the more likely it is we would act);
    - we are likely to regard cases in which a caller's ACR is three per cent or more or which also involve silent calls as a higher priority for enforcement action and that callers in such cases can expect us to act; and

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<sup>62</sup> We are aware there are various variables which may affect agent utilisation rates. For example, respondents state that predictive dialling is more likely to be used where data quality is low.

- where we take enforcement action, we will take into account all abandoned calls a caller makes, not just those on any days in which its ACR is three per cent or more.
- 4.10 Other important proposed changes to the examples of conduct we are likely to regard as persistent misuse, include:
- setting out that misuse resulting from using automated calling systems may be caused by the use of various types of technology;
  - making clearer how persistent misuse can arise from the misuse of CLIs, identifying the CLIs callers should present with calls and the information they should provide when return calls are made to those CLIs; and
  - setting out that we may take action for persistent misuse in respect of conduct in breach of the PECRs.
- 4.11 As to the factors Ofcom will take into account in assessing harm and prioritising cases, other proposed changes include making explicit that we will consider:
- whether the misuse is repeated in respect of the same number or recipient, and the time period over which any repetition occurs;
  - the time(s) of day any misuse occurs i.e. during unsociable hours;
  - the time taken to connect recorded messages to called parties;
  - whether CLI numbers presented to call recipients enable them to make return calls in which they are able to identify the original caller and opt-out of future calls (without being subjected to marketing activity); and
  - the management processes and practices calling organisations have in place.
- 4.12 In making these proposals, we are conscious that, as well as targeting the causes and effects of persistent misuse, changes to our 2010 policy may have an impact on other types of calls. They have the potential, for example, to increase the number of live calls outbound dialling organisations make.
- 4.13 We also take account that there are some organisations that do not act in accordance with the law and pay no attention to our 2010 policy. These organisations could be the cause of a large number of silent and abandoned calls. We expect, therefore, that changes to the 2010 policy are part of addressing the problem of silent and abandoned calls but will not stop all of them. We will still need to raise awareness of the law on persistent misuse and of our policy, and take enforcement against those who break that law.
- 4.14 Our overall provisional assessment, nonetheless, is that by making proposals which:
- target enforcement action at causes and effects of persistent misuse causing most harm to consumers; and
  - take due account of the use of efficient calling technology and the costs to the call centre industry,



we reflect an appropriate balance between taking action where it would be needed and encouraging investment and innovation, so as to further consumers' interests in line with section 3 of the Act.

## The statutory provisions

- 4.15 An important consideration in reviewing the 2010 policy is the need to make sure it gives appropriate effect to the statutory provisions in sections 128 – 130 of the Act.
- 4.16 As set out section 2 above, section 128 of the Act defines persistent misuse as the use of an electronic communications network or service which has the effect of harming consumers in certain ways (such as causing them unnecessary annoyance). Sections 128 – 130 of the Act provide for Ofcom:
- to serve notifications where we have reasonable grounds to believe a person has engaged in persistent misuse;
  - to serve further notifications requiring such misuse to stop, not to be repeated and to be remedied; and
  - to impose penalties of up to £2 million on those who have engaged in persistent misuse.
- 4.17 In other words, Parliament has decided that conduct which, by definition harms consumers, is unlawful, should be stopped and is serious enough to be punishable by significant financial penalties. The effect is that that conduct, persistent misuse, is prohibited. It should not occur.
- 4.18 This is reflected in comments made to Parliament by the relevant Ministers of State when putting forward legislation to increase the penalties for persistent misuse. In 2006,<sup>63</sup> the Minister for Industry and the Regions said:
- “I hope that all Members will agree that in view of the number of silent calls received by consumers, we need to take effective and decisive action.”
  - “In order to enforce Ofcom’s additional requirements and to make it clear that Parliament and Committee members from all parties take its requirements and powers seriously, we are giving Ofcom the increased penalty. We need to put forward the message, “We expect you to use your powers to eradicate the nuisance of silent calls.””
  - “What we are about here is the electronic equivalent of antisocial behaviour orders: stopping the behaviour and ensuring that the nuisance does not persist...”
  - “It will be a great encouragement to Ofcom to know that this House is behind it in saying that we want the powers and the penalties to be used if appropriate.”<sup>64</sup>

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<sup>63</sup> When introducing the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2006, which increased the maximum penalty for persistent misuse to £50,000.

<sup>64</sup> See <http://www.publications.parliament.uk/pa/cm200506/cmstand/deleg5/st060328/60328s01.htm> and <http://www.publications.parliament.uk/pa/cm201011/cmgeneral/deleg2/100913/100913s01.htm>

- 4.19 In 2010, the Parliamentary Under-Secretary for Business, Innovation and Skills, again in putting forward similar legislation,<sup>65</sup> told Parliament:
- “The hon. Member’s constituent is one of thousands of consumers who have been plagued by this nuisance .... In the previous Parliament, 64 Members signed an early-day motion to highlight their concern about the nuisance. There is, therefore, a requirement for us to take effective action, to ensure that consumers are adequately protected.”
  - “I take from this Committee a strong message that, although the increase in fine is welcome, Ofcom must be seen to do more to tackle the issue.”
- 4.20 Section 131 of the Act, meanwhile, gives Ofcom a duty to publish a statement about our policy on exercising the powers we are given in sections 128 – 130. While this would indicate an element of discretion, what we are required to set out is a policy about how we will use our powers to enforce the prohibition contained in those sections.
- 4.21 In our provisional view, these should be important factors in making our judgments about how to amend the 2010 policy, particularly in assessing different options for changes. Parliament intended to prohibit certain conduct. Some calling organisations continue to engage in it, in defiance of that prohibition and of Ofcom’s 2010 policy on enforcing it. We therefore need to consider the changes necessary to give appropriate effect to that prohibition.

## **Changes to the 2010 policy on the use of our persistent misuse powers in relation to silent and abandoned calls**

- 4.22 The sorts of public policy considerations described above are particularly relevant in considering our approach to silent and abandoned calls. For all the reasons set out in section 3 above, these continue to be made in very large numbers, harming large number of consumers, and many of the causes are within the control of those making the calls (for example, their use of ACS and/or AMD technology). We have considered changes to the 2010 policy with the aim of reducing the incidence of such calls and the harm they cause, so as to give better effect to the prohibition of persistent misuse.

### **Proposed policy on silent calls**

- 4.23 The 2010 policy makes a number of references to silent calls. We have considered whether it makes clear enough Ofcom’s policy position on the making of such calls. We have also examined whether, in light of the statutory prohibition, the 2010 policy takes the right approach to the number of silent calls, if any, any caller might make before becoming a priority for enforcement action.
- 4.24 At present, some parts of the 2010 policy refer to silent and abandoned calls as separate types of persistent misuse (paragraph A1.13, for example, refers to them in the alternative) and indicate that we will regard the former as liable to be more harmful (see paragraph A1.83). In others, (paragraph A1.28, for example) it refers to silent calls as a type of abandoned call.

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<sup>65</sup> The Draft Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010, which increased the maximum penalty for persistent misuse to £2 million.

- 4.25 Those different references could give rise to a degree of uncertainty about, or inconsistency in, what Ofcom means by silent (and abandoned) calls and our position in relation to them. In particular, in relation to the extent to which such calls should be taken into account in calculating the ACR which Ofcom uses as a guide in assessing harm and prioritising cases for action, and about where Ofcom may take action in respect of silent calls.
- 4.26 Considering first what we mean by silent calls, there is evidence (see section 3 above) that these are the most harmful form of commonly caused persistent misuse, compared even to abandoned calls. The consumer research indicated, for example, that a third of consumers would rather hear an abandoned call than a silent call.
- 4.27 There is, on that basis, a need to make sure our policy sets out clearly what we mean by silent calls and that our definition captures the calls liable to cause the relevant harm. We also need to create the appropriate distinction from abandoned calls, where the harmful effects may not occur to the same extent. Our policy position on both kinds of calls will only be clear where both are clearly defined.
- 4.28 We therefore propose a fuller definition of silent calls (as opposed to abandoned ones – see below), as follows:

“When the call recipient experiences one of the following, we consider that they have received a “silent call”, or a call equivalent to a silent call and which we are likely to treat as such:

- they hear nothing on answering the phone (silence);<sup>66</sup>
- they are disconnected by the calling party as soon as or shortly after they pick up the phone;
- they hear background or distant noise, whether spoken or otherwise, such as chatter (but the conversation is not directed at the call recipient), breathing or electronic beeps;
- they hear something else which falls short of a message (whether spoken or otherwise) directed at the call recipient; or
- they experience a combination of the above, such as a short period of silence followed by disconnection by the calling party (known as a short duration call).”

- 4.29 Turning then to the way we treat silent calls, we can illustrate the possible uncertainty and inconsistency by looking at the way the 2010 policy sets out how we are likely to calculate a caller’s ACR. The methodology used includes in the calculation calls where AMD technology has wrongly identified a connection to an answer phone, when in fact it has been answered by a live individual who hears only silence (i.e. an AMD false positive identification).
- 4.30 The consequence of that methodology is that a certain number of what are, in effect, silent calls are taken into account in the ACR. Where that rate is less than three per cent, the effect of the 2010 policy is that we are less likely to take action (even

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<sup>66</sup> Except for calls as described in Section 3.14 of Annex 5, where the caller would have played an automated message but the recipient hangs up before the message plays. We treat these as abandoned calls.

though some of the calls made were silent). In this way, Ofcom's approach to AMD technology offers a degree of leniency for these kinds of silent calls, notwithstanding the harm they are liable to cause.

- 4.31 We have considered a number of options for relevant changes to the 2010 policy. In the call for inputs, we sought views on, amongst other things:
- having a lower threshold for enforcement action against silent calls specifically compared to abandoned calls; or
  - having an absolute number as a threshold for enforcement, rather than a rate.
- 4.32 Thirteen respondents agreed we should adopt a lower threshold for silent calls than abandoned ones, because they create more harm. Five others thought the 2010 policy already provided for a lower enforcement threshold and that enforcing it would minimise silent calls.
- 4.33 One respondent said Ofcom should make clear no silent calls are acceptable. Four, however, explicitly said that a zero threshold was unrealistic.<sup>67</sup> They said some margin of error is required (for example, if there are technical issues leading to silent calls). One respondent suggested Ofcom should allow a silent call rate of around 0.1%.
- 4.34 We have carefully considered these responses and the evidence in section 3 above. Our provisional view is that our policy should set out an explicit policy position that silent calls (which we will define clearly) are a form of misuse and that consumers should not be subject to any such calls, however caused, under any circumstances. We would not make any allowance for the use of AMD, in calculating the ACR or otherwise. Enforcement action against those who make any silent calls would be our highest priority.<sup>68</sup>
- 4.35 This proposal takes particular account of the consistently high numbers of silent calls and the complaints we receive about them. Likewise, the evidence in section 3 that consumers consider more of these calls harmful than other calls, including abandoned calls, and suffer more harm per call from them.<sup>69</sup> Each of these points indicate that silent calls continue to be a major problem for consumers and that they should be the main priority to which Ofcom should devote enforcement resources.
- 4.36 It takes similar account of the evidence in that section about the use (and misuse) by callers of ACS. Likewise of the evidence of the limitations on the accuracy of AMD technology and the consequent possibilities of AMD false positive identifications leading to silent calls. We give weight to the evidence we have received that there do not appear to have been significant and sustainable improvements in the technology or its accuracy. This evidence shows that the use of AMD technology remains liable to be a significant cause of silent calls.

<sup>67</sup> Twelve respondents commented on a zero threshold being unworkable but it was not explicitly clear if this was about abandoned calls, silent calls or both abandoned and silent calls.

<sup>68</sup> Wherever they make more than three and their misuse can, accordingly, be regarded as persistent.

<sup>69</sup> Our consumer harm estimates suggest silent calls cause more harm per call than abandoned calls. Under the willingness-to-pay approach, which incorporates the harm from annoyance/distress, the harm per call for each silent calls lies between £0.10–£0.12 i.e. above the equivalent figure of between £0.07–£0.10 for each abandoned call. Paragraph A7.27 and Table A7.6 in Annex 7 have more detail.

- 4.37 We note in that connection what we said in our consultation<sup>70</sup> and final statement documents on the 2010 policy. We set out why the use of AMD technology is liable to cause repeated silent calls to some recipients and may be responsible for a significant majority of repeated such calls.<sup>71</sup> We said then that, unless there was a continued reduction in the harm from misuse caused by AMD technology (evidenced by fewer complaints to Ofcom and moves by industry towards using more accurate and reliable AMD technology), we might reconsider our approach. We indicated that this could include a policy that requires AMD to be 100% accurate.
- 4.38 In making this proposal we have also, as far as we can, assessed its likely impact. We set out that assessment below. We also take full account of the way, in our provisional judgment, the prohibition of persistent misuse supports our proposal.

### Impact of proposal

- 4.39 A number of points are relevant in our assessment of the impact of our proposal. One is that the 2010 policy describes silent calls as an example of misuse which we may regard as more harmful than abandoned calls (where the caller plays an appropriate message). On that basis, a calling organisation is liable to Ofcom action where it makes silent calls. In that respect, while our proposal should make our policy position even clearer, it would have limited impact on calling organisations.
- 4.40 However, as set out above, a certain degree of leniency is afforded to some silent calls caused by AMD false positives which are included in the ACR. The effect, as explained, is that calling organisations might make a certain number of silent calls with a limited (if not non-existent) likelihood of facing enforcement action (where they are part of an overall ACR of less than three per cent).
- 4.41 The impacts of the proposed change include that false positives would no longer form part of the ACR calculation. Such calls would be as likely to be the subject of enforcement action as other silent calls. One effect should be to reduce the overall number of silent calls. Another, however, is on calling organisations' abilities to use AMD technology. They may, for example, have to stop using it if they cannot guarantee its accuracy.
- 4.42 We recognise that there could be costs to organisations stemming from a reduction or removal of the use of AMD in light of the revised policy. We do not consider that it is appropriate to fully incorporate these costs into an impact assessment, given that the effect of the 2010 policy is that silent calls are examples of misuse and organisations should already have taken steps to minimise the volume of such calls that they generate. We have nevertheless attempted to understand what the impact on organisations might be of our proposed change and how this compares to the likely benefits, recognising that it may not be appropriate to reflect the full extent of the costs.

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<sup>70</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/summary/condoc.pdf>

<sup>71</sup> This is because a number of external factors, such as the type of phone called and the consumer's location (and background noise), affect whether an AMD false positive occurs. AMD technology is not sensitive to these factors and, if they remain constant, further calls made to the same number (which may well be made, since the caller is seeking to speak to the called person) are also likely to result in false positive identifications of an answer machine and further silent calls.

*Basis for quantified impact assessment*

- 4.43 Ofcom's impact assessment guidelines indicate that where possible we will attempt to quantify impacts.<sup>72</sup> For this proposal, however, there is significant uncertainty around the quantification of several of the inputs which would feed into a quantified impact assessment, particularly in relation to costs to organisations. Nevertheless, we have attempted to complete a quantified assessment by identifying the threshold for efficiency impacts at which costs would outweigh benefits and then comparing the limited evidence that we do have on costs and efficiencies against this threshold.
- 4.44 We do that by considering the way industry may respond to our proposal, taking into account the reduction of harm those responses might produce, and making such assessment as we can of the possible costs to calling organisations. That leads us to provisional view that there is plausible scope for the benefits to outweigh the costs but, even if they do not, the costs are justified by the need to give proper effect to the statutory prohibition of persistent misuse passed by Parliament.

*Possible industry responses to proposed policy change*

- 4.45 Among organisations carrying out out-bound dialling activities, there would be limited or zero cost impact if they do not currently use AMD. As to those who do currently use AMD, we do not know exactly how many organisations there are. However, the industry research suggests that three quarters do not use AMD (as just over a quarter of 94 respondents reported that they did). The responses to the call for inputs also indicated that some organisations (four respondents) still used AMD, but fifteen did not. Of the twelve respondents to the industry research who provided more detailed information on their use of AMD, six stated that they used it all the time, with the other six limiting its use (i.e. turning it off and on).
- 4.46 Organisations that do use AMD and generate silent calls might be affected by our proposal in any one of the following ways:
- having to ensure and demonstrate near 100% accuracy of their AMD;
  - ceasing their use of AMD to avoid generating silent calls caused by false positives; or
  - using AMD and IVM in combination (albeit taking account of other factors such as whether it was appropriate to use ACS in this way and the number of repeat calls made).
- 4.47 As far as we understand, the first of these methods may require innovation in AMD technology and as such the costs are inherently uncertain. We have therefore assumed that this technological change will not be an option in practice immediately and have therefore focused our assessments on the assumption that only the second and third forms of possible response to the proposed change in policy are currently feasible.

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<sup>72</sup> Paragraph 2.1, [http://stakeholders.ofcom.org.uk/binaries/consultations/better-policy-making/Better\\_Policy\\_Making.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/better-policy-making/Better_Policy_Making.pdf)

### *Impact assessments on possible industry responses to the proposed policy change*

- 4.48 Taking that assumption, we first consider the case where the industry response to the policy change results in organisations ceasing to use AMD and, as a result, silent calls caused by AMD false positives are eliminated and there may be further impacts on other silent calls through enhanced deterrence and ease of enforcement.
- 4.49 The first stage of the quantified impact assessment is to consider the expected reduction in harm caused by silent calls from changing the 2010 policy. Here we consider two different scenarios, both of which rely on the harm figures presented in section 3 which, as previously discussed, are likely to be under-estimates.
- In the first scenario, we assume that the extent of the impact is solely to remove a volume of silent calls equal to a three per cent ACR against all live calls. This represents the maximum number of silent calls (assuming there are no abandoned calls) that could currently be made that would be consistent with a lower (but not non-existent) risk of enforcement action.
  - In the second scenario, and for purposes of estimating an upper bound of the expected reduction in harm (at least in respect of calls to landlines), we assess a situation where all silent calls are eliminated. In effect, we assume that the change to the 2010 policy enhances our ability to take enforcement action against silent calls and acts as a sufficiently strong deterrent that the full extent of the current volume of silent calls is addressed.
- 4.50 We then turn to assessing costs to organisations. As noted above, we have some evidence on the degree of costs that might be incurred, but there is significant uncertainty. We review this evidence in detail below, but first calculate the cost impact threshold at which the reduction in harm from the policy would exactly equal costs to organisations.
- 4.51 In order to calculate the relevant cost base that might be affected by the policy (i.e. the size of the agent-salary cost base<sup>73</sup> associated with those out-bound dialling organisations that use AMD), we have drawn on evidence from independent industry research. If we assume that salaries in UK contact centres amount to £17bn per annum,<sup>74</sup> that approximately 21.7% of activity is outbound,<sup>75</sup> and that 26% of calls centres use AMD,<sup>76</sup> we generate an estimate of relevant costs equivalent to £959m per year.
- 4.52 Next, we calculate the break-even cost impact threshold by dividing the reduction in harm by the cost base. For example, £5m / £959m = 0.5%. In this (first) scenario this implies that a cost increase of greater than 0.5% for an organisation using AMD (at the average industry rate) would outweigh the reduction in harm. The scope for cost increases in scenario 2 is greater. These calculations are shown in Table 4.1 below.

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<sup>73</sup> We focus on salary costs because we consider these are most likely to be affected by the change to the policy whereas other costs are likely to be relatively fixed.

<sup>74</sup> ContactBabel, 'UK Contact Centres in 2015: The State of the Industry & Technology Penetration', P23.

<sup>75</sup> ContactBabel, 'UK Contact Centres in 2015: The State of the Industry & Technology Penetration', P49.

<sup>76</sup> Figure 25 of the Ofcom commissioned industry research (see Annex 6) shows 26% of call centres used AMD (based on 94 respondents). This does not imply that all of these call centres use AMD 100% of a time.

**Table 4.1 Indicative quantified impact assessment—Silent calls eliminated**

	Scenario 1: Proposed change eliminates silent calls below three per cent ACR	Scenario 2: Proposed change eliminates all silent calls
Live calls (m per annum) <sup>1</sup>	1,715	1,715
Silent calls addressed by change in policy (m per annum) <sup>2</sup>	53	1,530
Reduction in harm (willingness to pay approach) (£m per annum) <sup>3</sup>	5 – 6	139 - 169
Relevant industry cost base (£m per annum)	959	959
Break-even efficiency <sup>4</sup>	0.5% - 0.6%	14.5% - 17.6%

Notes: <sup>1</sup> See Table 3.1.

<sup>2</sup> Scenario 1 is calculated by applying the ACR to live calls  $3\% / (1-3\%) * 1,715\text{m} = 53\text{m}$ . For scenario 2 see Table 3.1. Both of these scenarios may give an underestimate if the volume of live calls was understated in our landline panel research since respondents were only asked to record unwanted live calls.

<sup>3</sup> The range for the reduction in harm corresponds to the two different approaches to the allocation of willingness to pay harm to each call type. See Table A7.5 of Annex 7. Scenario 1 harm is calculated by applying the harm per call to the relevant volume of calls. We recognise that this is likely to be an underestimate since calls to mobiles and businesses are not included.

<sup>4</sup> The break-even efficiency here corresponds to an organisation that is using AMD for the proportion of its operations equal to the current industry average among those which use AMD. This may not be 100%.

Source: Ofcom calculations.

4.53 We also consider the case where the industry response to the policy change results in silent calls being converted to abandoned calls. This may be through greater use of IVM in conjunction with AMD. Our assessment of this is shown in Table 4.2 and follows a similar approach to that in Table 4.1. It indicates that, in one scenario, costs could possibly increase by up to 0.3% before they exceed benefits, while in another the figure is 14% - 17.2%.



**Table 4.2 Indicative quantified impact assessment—Silent calls converted to abandoned calls**

	Scenario 3: Silent calls below three per cent ACR affected	Scenario 4: All silent calls affected
Live calls (m per annum) <sup>1</sup>	1,715	1,715
Silent calls converted to abandoned calls by change in policy (m per annum) <sup>2</sup>	53	53
Silent calls eliminated by change in policy (m per annum) <sup>2</sup>	-	1,477
Reduction in harm from silent calls converted to abandoned calls (willingness to pay approach) (£m per annum)	0 - 3	0 - 3
Reduction in harm from eliminated silent calls (willingness to pay approach) (£m per annum) <sup>3</sup>	-	134 - 163
Total reduction in harm (£m per annum)	0 - 3	134 - 165
Relevant industry cost base (£m per annum)	959	959
Break-even efficiency	0.0% - 0.3%	14.0% - 17.2%

Notes: Numbers may not sum due to rounding.

<sup>1</sup> See Table 3.1.

<sup>2</sup> Scenario 3 is calculated by applying the ACR to live calls  $3\% / (1-3\%) * 1,715m = 53m$ . For scenario 4 this 53m may be converted to abandoned calls within the ACR, but there are 1,477 remaining calls that could be eliminated. Both of these scenarios may give an underestimate if the volume of live calls was understated in our landline panel research since respondents were only asked to record unwanted live calls.

<sup>3</sup> The range for the harm saving corresponds to the two different approaches to the allocation of willingness to pay harm to each call type. See Table A7.5 of Annex 7. Scenario 3 harm is calculated by applying the difference in harm per call between silent and abandoned calls (£0.00—£0.05) to the relevant volume of calls. The same approach is taken within Scenario 4 alongside elimination of the full harm per call associated with the remaining 1,477 silent calls.

Source: Ofcom calculations.

4.54 We note that the break-even efficiency impacts in Table 4.2 are lower than those in Table 4.1. However, if industry was to respond to the change in policy in a way which lead to the scenarios in Table 4.2 being the appropriate ones, then we would expect the actual cost impacts to be different (and lower) than those applicable to Table 4.1. For example, it may be that the cost of using IVM in conjunction with AMD (such that any silent calls previously caused by AMD false positives are converted to calls that go through IVM and become either live or abandoned calls) is less than ceasing to use AMD entirely.

#### Current evidence on efficiencies

4.55 Having set-out the break-even cost-impact thresholds above, we next consider the evidence we currently have regarding likely cost impacts. The aim is to look, as far as possible, at whether the likely costs of our proposal are such that the relevant thresholds are breached, so as to suggest that the costs (any lost efficiencies) would outweigh the benefits (the harm saved).

- 4.56 If organisations decide to cease their use of AMD to avoid generating silent calls, it is not clear what the efficiency impact will be since we do not have robust evidence on the level of AMD efficiencies. The evidence we do have is as follows.
- 4.57 When asked if a policy change would have an impact on agent utilisation rates,<sup>77</sup> five out of eight relevant respondents to the industry research<sup>78</sup> said that it would and the remaining three said it would not, though we note that this is a very small sample size. Those that said it would affect agent utilisations rates did not quantify what that impact would be. However, when asked what their experience had been when they had restricted or switched AMD on and off to see what the impact was, 12 respondents provided anecdotal comments. These included that consumer contact rates improved with AMD switched on; but the volume of numbers dialled was lower and agent morale and performance dropped when AMD was switched off.
- 4.58 Three respondents to the call for inputs stated that not using AMD would lead to or had led to increased costs (i.e. through increased staffing levels). However, 14 said they no longer used AMD with another four saying they had reduced their use of it. Of the 14 who said they had stopped using it, one said they had mitigated the cost impact through other efficiencies in call centre operations and one respondent said there had been no detrimental impact on efficiency of the dialler or productivity of their outbound activity.
- 4.59 In 2010, research by Ember suggested that the cost of banning AMD could lead to between a 13% and 36% reduction in productivity,<sup>79</sup> albeit this was based on a very small and non-statistically robust sample.<sup>80</sup> The definition of productivity varies by sector but generally referred to consumer contacts per hour. To the extent that this relates to agent utilisation, this can be in turn converted to a cost impact which may be greater than the impact on utilisation, depending on current levels of agent productivity. The productivity effects also varied depending on the ratio of connections to answering machines, which tended to vary by activity. We also note that Ember found that in some contexts banning AMD increased costs, but also increased sales per hour (which effectively reduced costs). Overall, we place limited weight on this evidence, due to its small sample size.
- 4.60 The previous 2009 study by Verint, meanwhile, found that, depending on the rate of answer machine pick-up, ceasing the use of AMD technology would result in a cost increase of between 2%–13%.<sup>81</sup>
- 4.61 What this means, in summary, is that we have seen little reliable evidence on the degree to which the ability to use AMD can generate efficiencies for calling organisations. As such, we consider that the question of efficiencies from this activity

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<sup>77</sup> Agent utilisation rates are likely to correspond to the proportion of time that agents are engaged in useful activity such as talking to a live call recipient. These changes are not directly equivalent to efficiencies/cost impacts since these take into account to cost of the change. For example, if agent utilisation is currently 75% (45mins in an hour) and falls to 50% (30mins in an hour) this is a reduction in utilisation of 33%. However, it is equivalent to a cost increase of 50% since now 1.5 agents would be required to achieve the same total utilisation as previously.

<sup>78</sup> Those who answered the relevant question.

<sup>79</sup> Productivity rates are likely to correspond to agent utilisation rates (as per footnote 75) and therefore are not directly comparable to the break-even efficiencies presented in Tables 4.1 and 4.2.

<sup>80</sup> Ember (2010), 'Use of AMD – Economic Impact', July. Prepared for Ofcom,

[http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/Ember\\_analysis.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/Ember_analysis.pdf)

<sup>81</sup> See, paragraph 3.25,

<http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/summary/condoc.pdf>

remains unclear. This appears to be different to the situation for making abandoned calls, where there is some evidence of material efficiencies, although with uncertainty around the range (see paragraphs 4.94- 4.105 below).

- 4.62 What we can, nonetheless, note is that there are a range of break-even thresholds that may apply. While we do not have certainty over the cost impact, it appears there is scope for the benefits of our proposal to outweigh the costs.
- 4.63 Moreover, if organisations decide to stop making silent calls caused by AMD false positives by converting these calls to abandoned calls (perhaps through IVM) we expect the relevant costs to be lower than ceasing to use AMD altogether. Under Scenarios 3 and 4 in Table 4.2, we find the break-even efficiency threshold is lower than in Table 4.1. But, for organisations using IVM, the costs seem likely to be small. For those without IVM, we note that that 36% of 111 respondents to the industry research used IVM, suggesting it is not a prohibitively expensive technology. These assessments would also suggest scope for the benefits of our proposal to exceed its costs.

#### *Provisional conclusion on impact of proposal*

- 4.64 Our provisional view is that this proposed change to the 2010 policy should help reduce the number of silent calls consumers receive. It would also enable Ofcom more easily to take enforcement action against the full extent of silent calls, since they would be liable to such action however caused and whatever their number or the rate at which they are made. Effective enforcement should also have a deterrent effect on those who are not complying with the law on persistent misuse.
- 4.65 We also provisionally assess that, overall and whilst subject to some uncertainty, the benefits of the proposed change (reducing consumer harm) may outweigh the potential costs (in efficiencies). Organisations that currently use AMD have options (such as using IVM and AMD in combination) that may allow them to continue to operate at current efficiency levels, albeit potentially with some transitional costs. If organisations respond to the change by ceasing to use AMD altogether, the efficiency impact is less clear cut given we have little reliable evidence on the degree to which its use can generate efficiencies. However, even in those circumstances, there are credible scenarios in which the benefits outweigh the efficiency impact.
- 4.66 Moreover, in arriving at our overall policy proposal, we are mindful of two further points. First, that made at the outset of this sub-section, that it may not be appropriate to reflect the full extent of the costs in any impact assessment given that, in light of the 2010 policy position on silent calls, organisations should already have taken steps to minimise the volume of such calls that they make.
- 4.67 The second is that our proposal is part of a provisional public policy judgment. As we have noted, Parliament has prohibited persistent misuse. There is evidence that silent calls are the most harmful type of such misuse commonly complained about to Ofcom, and the use of AMD technology may be a principal cause. Our provisional view is, therefore, that we should exercise our discretion under section 131 so as to focus our policy on reducing these sorts of calls notwithstanding uncertainties about the costs. It is always likely to be more expensive to comply with the law than break it, but Parliament has decided certain conduct is not allowed and calling organisations should, accordingly, bear the costs of avoiding it.

## Proposed policy on abandoned calls

- 4.68 We have similarly considered whether the 2010 policy makes clear enough Ofcom's position on the making of abandoned calls and examined whether, in light of the statutory prohibition, the policy takes the right approach to enforcement action against them.
- 4.69 Having carefully considered the evidence so far gathered, our provisional assessments are that we should:
- clarify and update the way the 2010 policy defines abandoned calls, to reflect their nature, causes and effects;
  - make explicit that we may take enforcement action in any cases where the caller makes more than three abandoned calls and that, where we have to prioritise cases, we would likely take into account the number of such calls and/or the rate at which they are made, and are most likely to take action where the ACR<sup>82</sup> is three per cent or more (and/or the caller also makes silent calls); and
  - make similarly clear that in any case where we do act, we would take into account all the abandoned calls an organisation makes in any period investigated, not just those on any days its ACR is three per cent or more.

### Defining abandoned calls

- 4.70 A first consideration is whether the 2010 policy properly captures all those calls that ought to be treated as abandoned calls liable to amount to persistent misuse. Such calls are defined in the 2010 policy as occurring, "... where a connection is established but which is terminated by the person making the call after the consumer answering picks up the receiver." We have considered whether there is a need to clarify and to update that definition.
- 4.71 A need for some clarification follows first of all from what we propose above about the definition of silent calls. If those calls are characterised by their silence, including the lack of any information message to their recipients, and the additional harm they cause, there is a need properly to distinguish them from calls in which the caller plays such a message and the harm caused is liable to be slightly less. We therefore propose to do so.
- 4.72 In addition, one respondent to our call for inputs noted that our current definition could include calls in which conversations take place and are then terminated by the agent when the conversation finishes. We provisionally consider that we should amend the definition to remove this sort of ambiguity as well.
- 4.73 As to updating the definition, we note the evidence in section 3 above that the use of ACS continues to be a likely cause of abandoned calls (where calls are automatically dialled, there are insufficient call centre agents to speak to all the recipients who answer and an information message is played). On that basis, we consider that our definition of abandoned calls should continue to capture these.
- 4.74 Our preliminary view is that the evidence in section 3 also suggests we should update the definition in two respects. The first relates to those cases in which the use

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<sup>82</sup> As set out in Annex 5, this would either be on a campaign or call centre basis.

of IVM may lead to abandoned calls (where the call recipient opts to speak to an agent but the caller plays a message and terminates the call).

- 4.75 Second, there may also be circumstances in which recipients answer calls and would have heard a recorded message (usually an information message), on account of no agents being available, but instead disconnected the call themselves before it was played (see paragraph 3.14 of Annex 5). This could occur in any case for example, where the technology used by the calling organisation is capable of identifying when a call recipient has terminated the call before it starts to play the message.
- 4.76 Each of these points considered, we are minded to adopt this revised definition of abandoned calls, to ensure it reflects the kinds of calls liable to cause consumers harm within the meaning of section 128 of the Act:

“Abandoned calls can occur, for example:

- in relation to live calls – where the calling party makes calls, whether using ACS or not, with a view to live agents speaking directly to call recipients. The call may be abandoned because, for example, an insufficient number of agents are available to take the call. In this case, the call can be, and usually is, abandoned immediately when the call recipient answers the phone and the recipient hears an automated message;
- in relation to automated calls involving interaction from the call recipient – for example, where Interactive Voice Messaging (“IVM”)<sup>83</sup> is used and the call recipient answers the phone and hears an automated message which asks them to press a button to speak to an agent or to answer a series of automated questions before being connected to an agent. Where the call recipient has indicated a preference to be put through to an agent, they may experience an abandoned call (for example, through a lack of agents to take the call) and instead hear an information message (which may or may not be after a period of being placed in a queue for an agent); and
- in relation to calls which would otherwise have been abandoned – where the call recipient answers and would have heard an automated message (usually an information message) instead of being connected to a live agent. However, the call recipient disconnects the call themselves before the message is played. This could occur, for example, where the technology used by the calling party is capable of identifying when a call recipient has terminated the call before it starts to play the message.”

- 4.77 We also propose some other, more minor definitional changes as set out in the draft revised policy in Annex 5.

### Approach to enforcement

- 4.78 Our second consideration is whether the 2010 policy prioritises enforcement action in respect of abandoned calls correctly and effectively, taking account of consumer harm, industry costs and possible innovations in using certain dialling technologies.
- 4.79 In our statement accompanying the 2010 policy, we said:

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<sup>83</sup> This type of technology may also be referred to as Interactive Voice Recognition (“IVR”).

- “2.14 The efficiency benefits of ACS may initially fall to industry, making it cheaper and easier for companies to contact consumers. But ultimately consumers may benefit from these efficiencies on the economic assumption that lower costs feed through into lower prices. ....”
- 3.68 .... This is reflected in setting the enforcement priority at a 3% abandoned call rate, rather than a zero tolerance approach. This allows industry to use ACS and AMD technology despite some degree of harm caused to consumers.....
- 3.79 .... we have sought to balance consumer protection with industry innovation, allowing the industry some margin of error instead of advocating a zero tolerance approach. This is reflected in our policy criteria, namely the three per cent abandoned call rate threshold ....”
- 4.80 One effect of the 2010 policy, given what it says about ACRs, is that we are more likely to take action where the rate of abandoned calls is three per cent or more of live calls in a 24-hour period. Another is that our action is likely to focus only on those days in which that rate is three per cent or more. In practice, we have tended only to take action in respect of abandoned calls made in excess of this rate.
- 4.81 This means calling organisations may make a certain number of abandoned calls in respect of which we are less likely to take enforcement action. First, they may consistently make abandoned calls, but at a lower rate than three per cent per 24 hours. Second, even if they exceed that rate on some days (and are more likely to face action in respect of those calls on those days), they are less likely to face action for any abandoned calls on other days.
- 4.82 Given our provisional assessment in section 3 above, that large numbers of abandoned calls continue to harm consumers (albeit at a lower rate than silent calls), we have considered whether these positions remain appropriate and looked at options for relevant changes to the 2010 policy. In the call for inputs, we sought views on:
- lowering the ACR; or
  - having an absolute number as a threshold for enforcement, rather than a rate.
- We have not, given the evidence of ongoing harm from abandoned calls, considered increasing the ACR.
- 4.83 We received a number of responses. We have considered these carefully along with other evidence and a number of other relevant considerations. These include the greater need to protect consumers in the cases in which they suffer most harm, and the corresponding need to target the prioritisation of Ofcom’s limited resources on those cases. These considerations take us to the provisional view that we should be explicit about the way we will prioritise abandoned calls cases for action, including treating cases where the ACR is three per cent or more as one of our higher priorities, and broadening the scope of enforcement action in other respects.

### Applying a lower rate than three per cent or a zero threshold for enforcing against abandoned calls

- 4.84 A report by StepChange in February 2015 noted that, of those countries who explicitly indicated dialler restrictions on abandoned calls, the UK's ACR is the lowest. The USA's is five per cent and Canada's three per cent a month.<sup>84</sup>
- 4.85 Twenty-seven respondents to our call for inputs disagreed with any change to our current approach. They said a change, especially to a zero or one per cent ACR, would risk making ACS, and in particular predictive dialling, difficult or impossible to use. It would mean more agents would have to be deployed (one respondent indicated as many as 50% more if the rate were reduced to zero or one per cent) to ensure they would be available to take answered calls, reducing overall productivity and efficiency. This, they said, would impose significant costs on the industry and increase prices (to call centre clients and consumers) and could lead to failed businesses.
- 4.86 Similar comments were made by respondents to the industry research. Although the analysis should be treated with caution due to low sample sizes, differing approaches in respondents' calculations of agent utilisation and other variables,<sup>85</sup> the responses suggest that agent utilisation rates are highest where calling organisations are able to use predictive dialling. These rates reduce where they use other forms of automated dialling and are lowest where agents dial calls manually. Twenty-one respondents said that reducing the ACR to two per cent, with a consequent effect on their ability to use ACS, would negatively affect their agent utilisation rates, with an average loss of 18%.
- 4.87 More fundamentally, one respondent to the call for inputs also contended that reducing the ACR would have no significant impact on the number of abandoned calls. Most are made by domestic and overseas call centres who simply disregard the law and our policy in any event. This respondent considered our current approach was proportionate, targeting consumer protection while allowing the call centre industry to make effective and efficient usage of diallers and resources. Others echoed this, suggesting a reduction in the ACR may just also increase the number of organisations deliberately ignoring the law and our policy.
- 4.88 On the other hand, five respondents to the call for inputs said a three per cent ACR risked distorting industry behaviour and causing consumer harm. Some put forward views consistent with the concerns we suggested in paragraph 4.81 above: an organisation whose ACR is 2.99% every day may cause more harm than one whose rate reaches 3.1% on one or two days and is much lower the rest of the time, but the 2010 policy suggests the latter will more likely face enforcement action. Some also suggested that a rate as high as three per cent may have perverse effects: organisations may make more live calls than they otherwise might, just to keep their ACR below that level.

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<sup>84</sup> StepChange report compared USA, Netherlands, Norway, Australia, Canada, India, UK and Germany.

[http://www.stepchange.org/Portals/0/documents/media/reports/additionalreports/Nuisance\\_Calls\\_Report\\_FINAL.pdf](http://www.stepchange.org/Portals/0/documents/media/reports/additionalreports/Nuisance_Calls_Report_FINAL.pdf)

<sup>85</sup> Which may affect utilisation rates, such as the quality of data and the number of attempts to contact a consumer.

- 4.89 We also note that in some respects call for inputs respondents provided only limited evidence in support of their opposition to any reduction in the ACR. In particular, a number contended that lowering the ACR would reduce the efficiency benefits of using ACS, and this may adversely affect consumers (for example, through higher costs). However, none provided quantitative evidence of explicit benefits to consumers resulting from call centres' operational efficiencies.
- 4.90 Taken together, these responses do not point strongly in any single direction as far as the ACR is concerned. They do raise a number of points about the costs that may result from reducing it. We have considered that aspect carefully, alongside a number of others, in making our proposal.

#### Moving away from a percentage threshold

- 4.91 Five respondents to our call for inputs questioned the use of an ACR based on a percentage of total live calls, with some saying it can be harder for call centres making lower volumes of calls to keep their rate below three per cent, not least because they do not have the ability to make sufficient numbers of live calls to absorb spikes in the numbers of abandoned ones. One respondent also noted that larger call centres could make many more abandoned calls in absolute terms than smaller ones, while remaining below a three per cent ACR. On that basis, a percentage rate may not address the largest sources of abandoned calls and consumer harm.
- 4.92 Some respondents suggested alternative approaches, including that:
- organisations should achieve an ACR below three per cent or make fewer than 1,000 abandoned calls in any 24 hour period, whichever is lower;
  - we should apply a sliding percentage scale, where larger calling campaigns should achieve a lower ACR, but smaller ones may make abandoned calls at a higher rate than three per cent; and
  - we should set down specific guidelines or limits on the number of times a calling organisation can attempt to contact a consumer, instead of reducing the ACR.
- 4.93 These responses again provide a number of points we have taken into careful account, without providing a compelling basis for a particular approach.

#### Proposal on prioritisation

- 4.94 Given all the circumstances, we have thought again about whether it is appropriate in setting our policy to take account of industry efficiencies and whether we should, on that account, adopt an approach to enforcement that suggests a degree of scope to make some abandoned calls.
- 4.95 In our provisional view, a number of points seem both clear and relevant to answering this question. There continue to be large number of abandoned calls. There is evidence these continue to harm large numbers of consumers. We should continue to regard these calls as examples of persistent misuse and should take enforcement action against them. We should prioritise that action towards cases in which the harm to consumers is likely to be greater, better to protect consumers using the limited resources available to us.



- 4.96 On those bases, enforcement action against abandoned calls may not attract the same priority as against silent ones. Such action should, however, retain a high degree of prioritisation and it is not appropriate to set any sort of prioritisation threshold that suggests calling organisations may make a certain number or rate of abandoned calls.
- 4.97 Our further provisional view, therefore, is that our policy should make explicit we may take may take enforcement action in any case where the calling organisation makes more than three abandoned calls. Taking that proposed approach, there may be cases where we have to make decisions about where to prioritise our (not unlimited) enforcement resources. Where we have to do so, we are likely:
- to take into account the number of abandoned calls made and the rate at which they are made (and the higher these are, the more likely action is to follow); and
  - to regard cases in which a caller's ACR is three per cent or more, or which also involve silent calls, as a higher priority for action and that calling organisations in such cases can expect us to act.
- 4.98 In proposing that position, we have taken careful account of the responses to both our call for inputs and our industry research. We have also sought to assess the impact on costs, in terms of efficiencies, and the benefits to consumers, in terms of reducing harm, as set out in more detail below.
- 4.99 We acknowledge that our proposal may result in additional costs for calling organisations which currently make abandoned calls at a three per cent rate, but change their behaviour so as to make them at a lower rate. As far as we can quantify them, these costs may exceed the benefits (see further below).
- 4.100 Our preliminary judgment, however, is that, on public policy grounds, this is an appropriate position given the statutory prohibition on persistent misuse such as abandoned calls. In all the present circumstances, the costs of complying with that prohibition, as opposed to the efficiency gains and harm to consumers that result from non-compliance, are legitimate.
- 4.101 Our proposed position also reflects that Ofcom may not adopt a policy that fetters its discretion and suggests that unlawful conduct, against which we are given powers to take action, will not be the subject of enforcement action. Any such policy would be contrary to the intention of Parliament.<sup>86</sup>
- 4.102 We also take account that our proposed position is not in any event a substantive change from the intended effect of the 2010 policy. That effect is that we prioritise for

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<sup>86</sup> We note in this regard the comments of the House of Lords in *R (Purdy) v Director of Public Prosecutions (Society for the Protection of Unborn Children intervening)*, [2009] UKHL 45, in which the court said:

“Such a policy could not lawfully identify any "category" of cases in which a prosecution would not be brought. Such a grant of de facto immunity to any category of offender would be contrary to the intention of Parliament and exceed the Director's powers: see paras 39, 40, 65, 70, 82, 107-108, 117, 118, 121 and 124 and *R (Mondelly) v Comr of Police of the Metropolis* [2006] EWHC 2370 (Admin) at [49]....”

These comments were made in the context of prosecuting authorities' approaches to prosecuting statutory criminal offences. They also seem to Ofcom relevant in relation to our policy towards statutory persistent misuse.

action those cases in which the ACR is above three per cent, but the current policy does not mean that we could or would not take action in cases where a calling organisation makes abandoned calls at a lower rate.

- 4.103 On the contrary, it follows from the 2010 policy that we may already take action in such cases. There are circumstances in which it may be particularly relevant to do so. These would include, but are by no means limited to, cases where the content of the recorded message played are unacceptable or where the absolute number of calls made means action to protect consumers is in any event appropriate.
- 4.104 Our provisional view is that we should make this position explicitly clear in the policy, so that organisations are absolutely aware that, if they want to avoid the risk of Ofcom taking action for their making abandoned calls, they should not make any at all. Since this does no more than confirm the status quo, it should not increase the legitimately reckoned costs to organisations of acting consistently with our policy.

#### Proposal on scope of enforcement action

- 4.105 We have also considered what the policy should say about the number of abandoned calls we are likely to take into account where we take enforcement action. For example, where we take action against calling organisations which have made more than three per cent abandoned calls, whether we should take into account only the calls on the days they exceed that rate.
- 4.106 We did not seek specific evidence on this in the call for inputs or our industry research. However, it appears to us that certain points flow out of other evidence.
- 4.107 In particular, the number of abandoned calls and the harm they continue to cause makes it appropriate for Ofcom to continue to take action against them. In any case which Ofcom has decided is serious enough to warrant enforcement action, it does not appear to us logical only to take into account some of the type of behaviour that is the subject of the action. Consumers will have been harmed by all the abandoned calls made.
- 4.108 Moreover, broadening the scope of enforcement action would have the effect of increasing an offending organisation's liability for any wrongdoing. It should also therefore increase the size and deterrent effect of the penalties we impose under section 130 of the Act and contribute to a reduction in the making of abandoned calls.
- 4.109 We therefore propose to amend the 2010 policy to make clear that, where we take action in respect of abandoned calls, we are likely to take into account all such calls an organisation made in any period under investigation (not just on certain days). Although it may result in an increase in the penalties we impose, this proposal should not have any impact on organisations' costs of complying with the law in the first place nor of acting consistently with our policy.

#### Impact of prioritisation proposals

- 4.110 In formulating our proposals, we have sought to quantify more specifically particular aspects of their impact. Most notably, that of calling organisations reducing the rate at which they make abandoned calls in practice.
- 4.111 We have noted above how, at a general level, our approach to the ACR maintains the status quo and, on that basis, our proposals should have limited impact. Our quantified assessment of the impact of organisations reducing the rate at which they

make abandoned calls in practice, and which we have taken into account in forming our provisional view of the right approach to take, is as follows.

- 4.112 Again, we note a certain amount of caution about the evidence we rely on, including the small sample sizes from our industry research. We also make certain assumptions about the way calling organisations would respond to reductions in the ACR. In particular, that they would react to limits on their efficiency by increasing costs (i.e. employing more staff) rather than altering behaviour in a different way (such as transferring business overseas, deliberately ignoring our policy or reducing total outbound calling).
- 4.113 Those points made, in order to calculate the relevant cost base that might be affected by a reduction in the ACR (the size of the agent-salary cost base<sup>87</sup> associated with out-bound dialling organisations that use ACS) we have drawn on evidence from the industry research. If we assume that salaries in UK contact centres amount to £17bn per annum<sup>88</sup>, that approximately 21.7% of activity is outbound,<sup>89</sup> and that that 83% of call centres use ACS,<sup>90</sup> we generate an estimate of relevant costs equivalent to £3,062m per year.
- 4.114 We can look at those figures in the context of the evidence from respondents to our industry research that a reduction in their ACR in practice, even from just three to two per cent, could lead to an 18% reduction in agent utilisation rates, or a 22% increase in costs.<sup>91</sup> That would imply costs of somewhere in the order £672 million.
- 4.115 Moreover, we can take the figures in paragraph 4.113 to calculate the break-even cost impact threshold by dividing the benefit (the harm saving) by the cost base in the same way as we did in respect of our silent calls proposals. For example, a (potential) benefit or harm saving of £3m / £3,062m = 0.1%. In this scenario, this implies that a cost increase of greater than 0.1% would outweigh the reduction in harm. The results of these calculations are shown in Table 4.3 below.

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<sup>87</sup> We focus on salary costs because we consider these are most likely to be affected by the change to the policy whereas other costs are likely to be relatively fixed.

<sup>88</sup> ContactBabel, 'UK Contact Centres in 2015: The State of the Industry & Technology Penetration', P23.

<sup>89</sup> ContactBabel, 'UK Contact Centres in 2015: The State of the Industry & Technology Penetration', P49.

<sup>90</sup> Figure 18 of the Ofcom commissioned industry research at Annex 6 shows 83% of call centres (based on 122 respondents) used ACS.

<sup>91</sup> According to the industry research (see Annex 6) the current average utilisation rate is 56%, so a fall of 18% (not 18 percentage points) would lead to utilisation rates of 46%. This change in the utilisation rate is equivalent to a cost increase of  $(56\% / 46\%) - 1 = 22\%$ .

**Table 4.3 Indicative quantified impact assessment**

	Scenario 1: Tightening ACR to zero per cent eliminates abandoned calls below three per cent ACR	Scenario 2: Tightening ACR to zero per cent eliminates all abandoned calls
Live calls (m per annum) <sup>1</sup>	1,715	1,715
Abandoned calls (m per annum) <sup>2</sup>	53	200
Reduction in harm (willingness to pay approach) (£m per annum) <sup>3</sup>	3 – 4	12 - 17
Relevant industry cost base (£m per annum)	3,062	3,062
Net impact	0.1% - 0.1%	0.4% - 0.5%

Notes: <sup>1</sup> See Table 3.1.

<sup>2</sup> Scenario 1 is calculated by applying the ACR to live calls  $3\% / (1-3\%) * 1,715m = 53m$ . For scenario 2 see Table 3.1. Both of these scenarios may give an underestimate if the volume of live calls was understated in our landline panel research since respondents were only asked to record unwanted live calls.

<sup>3</sup> The range for the reduction in harm corresponds to the two different approaches to the allocation of willingness to pay harm to each call type. See Table A7.5 of Annex 7. Scenario 1 harm is calculated by applying the harm per call to the relevant volume of calls. We recognise that this is likely to be an underestimate since calls to mobiles and businesses are not included.

Source: Ofcom calculations.

4.116 The assessment set out in Table 4.3 therefore indicates little scope to take steps that would increase costs before those costs would exceed the benefits. We acknowledge that this sits alongside the evidence from the industry research referred to in paragraph 4.114 above, that calling organisations reducing their ACR from three to two per cent may result in costs of £672 million (as against benefits of a maximum of a proportion of £17 million).

4.117 Even so, noting what the impact may be in some cases, for the reasons in paragraphs 4.98 – 4.104 above our provisional judgment is that our proposed approach is the appropriate one in the present circumstances, to give proper effect to the statutory prohibition on persistent misuse in the form of abandoned calls and to deter the harm such calls cause to consumers.

## Changes to other examples of misuse

4.118 Alongside our focus on silent and abandoned calls, as the main areas of concern, we have also looked at whether there is a need to amend the 2010 policy in other respects, so as better to address other circumstances in which persistent misuse may occur. Having done so, we propose to amend what we say about two forms of misuse described in the 2010 policy and include a new form of behaviour we are likely to treat as misuse going forwards.

## Misuse of Automated Calling Systems (ACS)

4.119 The 2010 policy states that persistent use of ACS to transmit recorded messages that are not marketing messages,<sup>92</sup> or to make silent or abandoned calls or carry out number scanning, may be persistent misuse (paragraph A1.65). The final statement we published alongside that version of the policy<sup>93</sup>, meanwhile, set out (in paragraphs 3.114 and 3.115) our expectations that call centres use of IVM for non-marketing calls should have a clear consumer benefit, and that they should ensure that recipients of calls using IVM are:

- always transferred to a call centre agent should they so choose;
- informed of the identity of the company making the call; and
- given no marketing information within the messages played to them.

4.120 We have considered whether there is a need to add to the 2010 policy to cover other forms of conduct involving ACS. Some of the evidence described in section 3 above suggested that automated technologies such as IVM could also give rise to other conduct which could be harmful. For example, around a third of 111 respondents to this question in the industry research said they used IVM. Misuse of this could lead to calls in which consumers are placed on hold for long periods or may be given limited information whilst placed on hold.

4.121 It appears to Ofcom self-evident that this kind of conduct would be liable to cause annoyance to consumers who, having been invited by the IVM to speak to an agent, have chosen to do so. Likewise if the consumer is given little or no information about the caller's identity or they are subjected to marketing information whilst held in a queue of calls (in cases where the relevant requirements of the PECRs have not been met).

4.122 On these bases, we have provisionally amended the 2010 policy to include examples of misuse resulting from the use of IVM. Namely, where:

- the person called elects to speak to a live agent, but experiences a long wait time; or
- during the time the person called waits to be connected to an agent:
  - no information is provided about the calling organisation or the organisation on whose behalf the call was made; and/or
  - marketing content is included, where relevant requirements have not been met (such as obtaining consent under the PECRs).

4.123 In assessing the impact of this change, we note that the types of technology we describe as susceptible to misuse remain the same as in the 2010 policy. However, our proposal would clarify the specific types of conduct we are most likely to be concerned with, particularly in relation to IVM. To the extent that organisations using

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<sup>92</sup> Paragraph A1.63 notes that under PECR, organisations can only make automated marketing calls to people who have specifically consented to receiving automated calls from them.

<sup>93</sup> <http://stakeholders.ofcom.org.uk/consultations/silent-calls/statement/>

IVM in their outbound calls need to adjust their operations to take account of the proposed revised policy, it is likely to be in one of the following ways:

- they may have to manage their dialling rates so that call recipients electing to speak to a live agent can do so without experiencing a long wait time, which may affect efficiencies or require greater cost to recruit more agents; or
- they may have to change the content of any automated messages.

4.124 The scale of these impacts is not clear-cut. However, three points are relevant. One is that any changes to automated messages used in IVM would appear to be fairly straightforward and therefore unlikely to be costly (if they involve a cost at all).

4.125 Second, calling organisations' operations are likely already to tend towards doing things that are consistent with our proposed policy, limiting their exposure to increased costs. For example, they have a commercial interest in ensuring recipients have relevant information about their identity and are connected to agents quickly and that the process is conducted lawfully.

4.126 Third, we are not prescribing the maximum time consumers may be kept on hold after electing to be connected to an agent. That gives calling organisations a degree of flexibility. A key consideration would be whether consumers make complaints, to Ofcom, the ICO, or the organisation itself, showing annoyance or distress at call waiting times. It should not, in our provisional judgment, be open to calling organisations to have these effects on consumers simply on the grounds that to avoid doing so would involve costs.

### **Misuse of a CLI facility**

4.127 The 2010 policy sets out (in A1.69 and A1.70) that Ofcom will treat the repeated forwarding or use of inauthentic or misleading CLIs as persistent misuse. This includes where it is not possible to identify the caller using the CLI, or the CLI does not enable the recipient to make a return call or it is a number allocated to a Premium Rate Service provider such that a returned call may lead to a higher charge than the return caller may reasonably expect.<sup>94</sup>

4.128 As set out in Section 3, CLI plays an important role in enabling consumers to protect their privacy. For example, by blocking or screening calls and by enabling them to make return calls (in order to ask to be taken off calling lists). It can also play a role in relation to nuisance calls because it:

- can be used by consumers to report calls to Ofcom and other regulators; and
- helps reduce consumer harm (complaints data indicates that consumers are more concerned where a CLI is not provided with a silent or abandoned call).

4.129 On those footings, and in light of the evidence in section 3, misuse of a CLI remains liable to give rise to persistent misuse. We have therefore considered whether the 2010 policy sets out clearly enough a position which addresses the ways this sort of misuse could harm consumers.

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<sup>94</sup> This is without prejudice to a caller's right (under the PECRs) to preserve their anonymity by withholding their number.

4.130 Our provisional view, following that consideration, is that we should amend the 2010 policy so as to:

- set out the circumstances which we consider a CLI facility displayed on outbound calls to have been misused; and
- include examples of misuse which may occur when consumers call the CLIs presented to them.

4.131 As to the former, we propose to make clear that we regard the following as misuse of a CLI facility:

- displaying a CLI which is not authentic or valid;
- displaying a CLI which is unreturnable such that when called (and although there is a dialling tone), the number does not connect to an agent or an automated message; and
- displaying a CLI which is a controlled premium rate service (as defined in the condition regulating premium rate services under section 120 of the Act).

This would be consistent with the idea that consumers should be able to use CLI facilities to protect their privacy in the ways described above and without undue cost.

4.132 As to the latter, we propose that the policy should make clear that we would regard it as misuse if any of the following happen to consumers who use CLIs to make return calls. That is, when they are connected to an agent or an automated message:

- no information is provided about the calling organisation (or that on whose behalf the call was made);
- an opportunity is not provided for the consumer to opt out of future calls or messages; or
- the call is used as an opportunity to market to the consumer in breach of the PECRs.

4.133 These proposals would go to particular concerns about what happens when consumers make return calls. Our industry research indicates that when a consumer returns a call to a CLI, not all organisations give consumers information about the organisation and purpose of the call (based on 24 responses) or how to opt-out of future calls (based on 20 responses). These deficiencies appear to us to undermine the purpose of CLI provision and, accordingly, to involve its misuse.

4.134 It does not appear to us that our proposals here would have a big impact on costs for call centres who already present CLIs. Most of them replicate the substance of what we already say in the 2010 policy. The main changes relate to the misuse which may occur when consumers make return calls. However, while some organisations may need to change the content of their automated messages or agents' call scripts, the information required is minimal and any changes would be limited.

### **Misuse of a network or service which is also a breach of the PECRs**

4.135 The 2010 policy identifies (in paragraph A1.63 and A1.64) that some behaviour that may fall within the definition of persistent misuse may also be unlawful under other

legislation (for example, the misuse of automated calling systems or marketing calls made to consumers which may fall within the PECRs). It says that, where such overlaps exist, we will consult with the other relevant enforcement authorities to determine who is best placed to act (see paragraph A1.61).

- 4.136 We considered in section 3 the possibility that unsolicited live calls and messages in breach of the PECRs might cause consumer harm and amount to persistent misuse. We took account of the evidence, including from our consumer research and complaint numbers from the TPS and the ICO. We estimated the volumes of nuisance calls received by UK consumers each year (of which some, we reasonably supposed, would be unlawful) and came to a provisional view that a proportion of this harm could be attributed to calls made in breach of the PECRs.
- 4.137 Given their liability to annoy consumers, we provisionally consider that we should regard these kinds of calls as a form of misuse, against which we may take action under section 128 of the Act. We therefore propose to amend the 2010 policy explicitly to reflect this position.<sup>95</sup>
- 4.138 We do not think this proposal would have any impact on calling organisation's costs as those making outbound calls for marketing purposes should already comply with the PECRs.

### Other forms of misuse

- 4.139 The examples of misuse in the 2010 policy are, and those in the proposed revised one would be, illustrative not exhaustive. There may be other types of behaviour which we have not identified specifically that we would regard as persistent misuse, and which we would not be precluded from investigating and taking enforcement action against. One particular example which has come to our attention, and which we propose to include in the revised policy, is where call centre agents behave improperly towards call recipients, such as by behaving in a rude or intimidating manner.

### Changes to the factors we will consider if misuse is identified

- 4.140 During our review, we have also considered whether the policy should continue to set out in the same way the steps ACS users can take to reduce the harm caused by silent and abandoned calls and the factors we are likely to take into account in deciding cases to prioritise for enforcement action. In particular, whether they too address the main causes and effects of various forms of misuse and lead us to prioritise the cases in which consumers suffer most harm.
- 4.141 Our highest priorities for action would, as set out above, be cases in which calling organisations make any silent calls, or abandoned calls at a rate higher than three per cent or in combination with silent calls. We are also, however, proposing to amend the 2010 policy to set out a list of factors we are likely to regard as aggravating misuse where it occurs, and which would be relevant to our assessment of our priorities.
- 4.142 Of the factors we propose to include, some were already in the 2010 policy (and some of which we are proposing to amend) and some are new. Our proposed

<sup>95</sup> In view of the legislative overlap, it would still be our intention that we would usually consult with the ICO, as the main enforcer of the PECRs, to determine who is best placed to act, before we did so.



approach would be to take account of them, where relevant, when assessing what action to take and, where we act, what the consequences should be. We would not intend to consider the factors in a mechanistic way, and it may not be appropriate or necessary to consider some or all of them in any particular case. These factors may also assist calling organisations, to mitigate the harm caused by any misuse and reduce the likelihood of enforcement action by Ofcom.

### **Misuse repeated in respect of the same number or recipient**

- 4.143 The 2010 policy sets out two positions concerned with ensuring that silent and abandoned calls to the same numbers are not repeated within 24 and 72 hours, respectively. We propose to amend the 2010 policy so as to set out a more general principle that cases of repeated misuse in respect of the same telephone number or, in some cases, call recipient are likely to involve greater harm and to be higher priorities for action.
- 4.144 We also propose to include examples of the ways in which we may assess the harm arising out of repeated calls. One is to consider those made within particular periods of time. In particular, whether repeat calls involving misuse (for example silent and abandoned calls) are made to the same number within 72 hours.
- 4.145 It again appears to us self-evident that, if calling organisations cause consumer harm by committing misuse, the more they do it the greater the harm. In any event, a number of pieces of evidence appear to us to support this proposal. Five respondents to our call for inputs, for instance, agreed that repeat silent or abandoned calls can cause harm.
- 4.146 Our industry research showed that organisations make multiple attempts to contact a recipient, with the number and frequency depending on the activity being carried out. Respondents in debt collection tend to make the highest number of attempts to contact the same recipient, for example, with those making sales calls calling fewer times. The period over which multiple calls are made varies. Half of the 36 respondents from the debt collection industry indicated that they make multiple calls, some as many as six, on the same day. Those making marketing calls to new and existing customers said they typically call the same person around three times a week over the course of a campaign. Each of these points demonstrates the capacity for repeated calls to cause harm to consumers.

### **Times of day that misuse occurs**

- 4.147 The 2010 policy envisages that we may take action if calls are repeatedly made at unsociable hours. It cites<sup>96</sup> ringing someone repeatedly in the middle of the night as an example of reckless behaviour which is so patently annoying that it amounts to misuse. We have considered whether we need to make the policy more specific. We do not, however, think the evidence indicates a need to do so.
- 4.148 The call for inputs discussed whether the policy should specify which hours might be considered to be unsociable and whether further consideration would need to be given to existing protections in this area. For example, provisions in industry codes of practice<sup>97</sup> and/or sector specific rules and guidance.<sup>98</sup> Five respondents did not

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<sup>96</sup> Paragraph A1.10.

<sup>97</sup> For example, Rule 39 of the Market Research Society code of conduct requires members to ensure marketing activities do not take place before 9am Monday to Saturday, before 10am on a Sunday or

consider extra guidance was needed, whilst six thought it would be useful to have clearer guidance or possibly a curfew.

- 4.149 Looking at this in more detail, our landline panel research identified that, over the four week fieldwork period, eighteen per cent of all participants said they had received a call that was at an unsuitable time, such as on a Sunday, late night or early morning.<sup>99</sup> Overall, however, few calls were received on weekends (six per cent Saturdays and three per cent Sundays).
- 4.150 Our Industry research, meanwhile, indicated that calls tended to be made between 8am – 9pm on weekdays (based on 89 responses). Thirty respondents said they called on Saturdays between 9am – 6pm with one third stopping after 1pm. By 6pm on Saturdays, almost all outbound calling had stopped. Only six respondents said they called on Sundays and tended to call between 10am – 6pm. Information from four respondents to the call for inputs had indicated similar calling times. Respondents generally felt that calls made during unsociable hours were made by those deliberately ignoring the 2010 policy or those based outside the UK.
- 4.151 The evidence therefore generally suggests that the organisations making outbound calls to consumers are making calls at reasonable times, either in compliance with industry codes of practice or because it is obvious when the timing is unsociable. On this basis, it does not appear to us necessary to specify in the policy which hours we consider unsociable. We also recognise that the right time to make calls may vary depending on the purpose of the call and the called party. We may, nonetheless, consider sectoral guidance on calling times, if we see a prevalence of activities constituting misuse at unsociable hours.

### Calling line identification

- 4.152 As set out in paragraph 4.127 above, the 2010 policy refers to certain CLI misuse as a form of persistent misuse falling within section 128 of the Act (see paragraphs A1.69 and A1.70). In paragraph 4.131, we have set out changes we propose to make in this regard. The 2010 policy also sets out steps ACS users can take in relation to CLIs to help reduce the harm caused by silent and abandoned calls (in particular, at paragraphs A1.56 and A1.57). These include whether a CLI was provided to which a return call can be made.<sup>100</sup> We have thought about whether there is more we need to say about the way CLIs are used which may aggravate the harm from various kinds of misuse.
- 4.153 On the bases set out in various places in this document that CLI facilities are an important means for consumers to protect themselves from various forms of misuse, we propose to make a number of changes. We propose to say that the harm is liable to be aggravated and enforcement action more likely in cases of persistent misuse where:
- no CLI is provided;

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after 9pm on any day of the week.

<https://www.mrs.org.uk/pdf/mrs%20code%20of%20conduct%202014.pdf>.

<sup>98</sup> For example, 3.8.2 and 3.8.3 of the Mortgages and Home Finance: Conduct of Business Sourcebook: <http://media.fshandbook.info/content/FCA/MCOB/3/8.pdf>.

<sup>99</sup> See footnote 3 for link to data tables.

<sup>100</sup> 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.

- the CLI provided requires the recipient to pay more than the minimum necessary to return the call; or
- the calling organisation, without good reason, used more than one CLI.

4.154 We also propose that the policy should say that deficiencies in the information consumers receive when they make return calls to CLIs would be likely to aggravate the harm from any misuse. For example, a consumer who has suffered the annoyance of a silent call would likely suffer further annoyance if, on returning a call to the relevant CLI, they are told nothing about the identity of the caller, not given a chance to opt-out of future calls and/or are subjected to marketing information in breach of the PECRs.

4.155 As to the first and second of those bullets, it appears to us to follow that, if a consumer suffers the annoyance of persistent misuse, such as from a silent or abandoned call, that annoyance may be greater where either they cannot use CLIs to take steps to mitigate that effect or they are required to pay unduly to do so. We therefore propose to take into account whether basic rate CLIs are provided. By “basic rate”, we mean a number which costs the same as a standard geographic call,<sup>101</sup> or a standard mobile rate or a number which is free to the caller.<sup>102</sup>

4.156 As to the third, we are aware that some calling organisations present localised CLIs<sup>103</sup> on their outbound calls, while others use a range of CLIs on a rotating basis. In our call for inputs we explored whether these sorts of practices could cause harm and represent a form of persistent misuse. We noted that using CLIs this way may mislead consumers into picking up calls they may not otherwise have answered, and that this may have the potential to cause them annoyance.

4.157 Four respondents agreed with this hypothesis, whilst 15 did not (provided the CLIs presented were valid and enabled return calls to be made). Some said that in some cases, such as debt recovery, it was important to reach the consumer and using different CLIs increased the chances of calls being picked up.

4.158 In our industry research, some respondents said they presented a local CLI that did not correspond to their location<sup>104</sup> for reasons including that doing so reassured recipients the call was genuine and from the UK, improved answer rates and provided a better return calling option. A greater proportion, however, said they provide a local CLI corresponding to their location<sup>105</sup> or a non-geographic number (such as 0843 or 080).<sup>106</sup>

4.159 As to using a range of CLIs, a third of 72 relevant respondents to the industry research said they used more than one CLI at individual contact centres. Of the 13 who provided more detailed figures, most used between two and ten CLIs and three,

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<sup>101</sup> Such as 01 or 02, and 03 numbers which are charged at ‘geographic rate’.

<sup>102</sup> Such as 080 numbers.

<sup>103</sup> For example, if the consumer the organisation is calling is based in Glasgow the presentation CLI is based on local area code ‘0141’ but if the same organisation is calling a consumer in Cardiff it would present a number based on ‘029’.

<sup>104</sup> 13% of 72 respondents provided a local CLI that did not correspond to the location from which the calls were being made. 8% of respondents provided a local CLI that corresponded to the business’s office locations, but not necessarily directly where the call was made from.

<sup>105</sup> 38% of 72 respondents provided a CLI that did correspond to the caller’s location.

<sup>106</sup> 29% of 72 respondents use a UK-based non-geographic number, such as 0843, and 11% of respondents provide a Freephone number.

involved in debt collection and cold calling, said they use 30, 500 and up to 1,000 CLIs, respectively. They, too, said this practice was designed to improve call answer rates.

- 4.160 There may be good reasons for organisations to use different CLI numbers, such as routing return calls to the right parts of their organisation. However, our provisional view is that, though mixed, this evidence shows the potential for misleading CLIs to aggravate the harm from misuse. If receiving an abandoned call, for example, is annoying, likely all the more so if the consumer is misled into picking it up by the CLI presented with it.
- 4.161 We acknowledge that our proposals may mean some organisations need to change the CLIs they present with calls. Some may decide, for example, to use numbers which are charged at geographic or mobile rates or are free, where they currently use 0845 numbers. This may result in a cost to them (a loss of revenue). We expect that cost to be limited, however, as less than a third of the 72 respondents to the relevant question in our industry research said they currently present non-geographic revenue-share CLI numbers.
- 4.162 In any event, our provisional judgment is that such cost is justified. If a consumer suffers a form of persistent misuse, like a silent call, in breach of the statutory prohibition, there is no justification for them having to pay more than the most basic charges to protect themselves, or for the misuser profiting from their misconduct.

### **Length of time a call should ring**

- 4.163 Paragraph A1.53 of the 2010 policy says, “Calls which are not answered must ring for a minimum of 15 seconds before being terminated”. This should be considered in the context of silent calls, where ringing for an insufficient period of time to enable the recipient to answer the phone may lead to a silent call (or an experience akin to one) which could have been avoided had the phone rung for longer.
- 4.164 As part of our review we considered whether there are changes we could make to the 2010 policy that have the potential to reduce the likelihood of silent and abandoned calls caused by timing issues (such as the consumer picking up at the same time as the call is disconnected by the ACS). One possibility we have looked at is lengthening the minimum ring time.
- 4.165 We sought relevant views in the call for inputs. Most of the 13 respondents who commented did not consider a change was needed, and the responses more generally did not suggest timing issues are a major cause of silent or abandoned calls.
- 4.166 We have also reviewed other evidence. Of respondents to the call for inputs and the industry research who commented on calling times, most said they allow unanswered calls to ring for longer than 15 seconds. The landline panel research, meanwhile, showed that most calls are answered quickly: 22% within one to two rings and 58% within three to five.
- 4.167 A number of respondents also suggested a change in policy, towards longer ringing times, may do more harm than good. Longer ringing times could cause additional frustration to those who do not want to answer. They could also add to costs and harm productivity, by requiring organisations to install more lines and to risk connecting to more answer machines (as network based machines tend to operate once a call has rung for more than 20 seconds). We agree that calls which are left

ringing for extended periods are likely to cause more harm, and propose to include this in the policy.

### **Time taken to connect the called person to a message**

4.168 We have also assessed the need to amend what the 2010 policy says in paragraph A1.51 about the time within which the recorded information message, played in the event of an abandoned call, should start. It currently says that we will take into account whether the message is played no later than two seconds after the telephone has been picked up or the recipient begins to speak.

4.169 An underlying rationale in this connection is that if a consumer is subjected to persistent misuse, in the form of an abandoned call for example, which is by definition annoying, they should not be exposed to the possibility of further annoyance by delays in the playing of automated messages. This may even cause them to hang up the call and to regard it as a silent one. It would undermine the purpose of the message, which is to mitigate the harm caused by the call.

4.170 We have considered a number of aspects of the policy:

- the time within which it indicates a message should begin playing;
- the types of automated messages to which it applies; and
- whether it should set out a similar position in relation to the time within which agents should begin speaking on live calls.

We do not propose to make any changes in the first respect, nor to add to the policy in the third. We do propose, however, to make clear that the policy also covers other kinds of automated messages that amount to persistent misuse. We would also be likely to regard delays in playing these messages as aggravating the harm involved and as a basis for treating relevant cases as a higher priority for enforcement action.

4.171 This position appears to us to be supported by the evidence. Our nuisance calls consumer behaviour research showed that around five per cent of people who indicated they had received a silent call in the previous four weeks hang up immediately if there is silence (with 41 - 45% waiting a few seconds). It is possible that in some of these calls the recipient hung up before an information message would have been played. The landline panel research, meanwhile, shows that among the most common reasons why calls were considered annoying or distressing were that there was silence or no response.<sup>107</sup>

4.172 This evidence would support the notion that delays in playing an information message may aggravate the harm involved in an abandoned call. It does not, however, indicate a need to change in any specific way the two-second period within which the policy says a message should begin.

4.173 There is, however, in our preliminary view, a basis to extend the policy position to other kinds of automated messages that involve misuse. It does not appear to us to make a material difference what kind of message was involved. A delay in hearing it is still liable to aggravate the harm a consumer suffers and to suggest that the case may be one Ofcom should prioritise for action.

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<sup>107</sup> See footnote 3 for link to data tables.

- 4.174 For example, as set out elsewhere in this document, we are minded to take the view that sending recorded marketing messages in breach of the PECRs is likely to annoy consumers and may amount to persistent misuse. That being so, it appears to us equally likely that a delay in playing the message would aggravate the annoyance consumers feel.
- 4.175 This proposal may have some impact on organisations that have to change their behaviour. Even so, it does not appear to us likely to impose undue costs on them. We know from our industry research that the majority of the 51 respondents who provided relevant information connect call recipients to an information message within two seconds. We can reasonably suppose that connection to other types of message will be similarly feasible.
- 4.176 We have also considered whether the policy should also be extended to cover the time taken for connecting live calls to call centre agents. We sought relevant views as part of the call for inputs.
- 4.177 We received sixteen responses, with seven respondents considering that specification of a connection time would be reasonable or sensible and eight disagreeing. One noted that call centres have a commercial interest to minimise connection time and maximise productivity of outbound calling operations in any event. Another said a policy would affect efficiency and increase operating costs.
- 4.178 Our industry research covered similar ground. Forty one respondents said they monitored connection times, with all aiming to connect to an agent within two seconds and the majority saying they achieve that (over two-thirds connecting in under a second).
- 4.179 As a general principle, it is important that organisations connect live calls to agents quickly, so as to avoid recipients suffering the annoyance of what appears to them a silent call. However, this evidence tends to suggest that call centres do generally make those connections quickly and that there is no need for us to intervene specifically via our policy (though we would not be precluded from taking action in any particular case were a calling organisation harming consumers by taking too long to connect live calls to agents).

### **Playing an information message**

- 4.180 As set out elsewhere in this document, the purpose of the information message played when a call is abandoned is to prevent the additional harm of a silent call and to inform the recipient who has called and how they can opt out of receiving future calls. To that end, the 2010 policy states that the message should include:
- the identity of the organisation on whose behalf the call was made; and
  - 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) that the called person can contact; but not
  - any marketing content.
- 4.181 The harm to consumers is likely to be greater, and we are more likely to take enforcement action, where information messages are deficient in one or more of these respects.

- 4.182 Our provisional view is that the reasons for playing this sort of information message remain relevant. We therefore propose to maintain what the 2010 policy says, with a small number of changes.
- 4.183 One proposed change is that the message should also explain that there was an attempted call but that the caller was unable to connect the recipient to an agent. Another is that the range of numbers that may be provided in the recorded message should be limited. In particular, to restrict them to a “basic rate” – a number which costs the same as a standard geographic call,<sup>108</sup> or a standard mobile rate or a number which is free to the caller,<sup>109</sup> but not numbers starting 0845.
- 4.184 Both of these proposals are consistent with the underlying rationale for playing such a message. The former would distinguish the information message from other types of automated communication (such as broadcast messages) and help consumers to take steps to protect their interests.
- 4.185 The latter, meanwhile, would reflect changes Ofcom made to the charges for non-geographic calls that came into effect in 2015. They would maintain the general proposition that, having suffered misuse, consumers should be able to take steps to protect themselves (to contact the calling organisation to say they do not wish to receive further calls) without additional inconvenience and harm. That includes not having to pay more than a minimum amount to make that call and not being deterred from doing so by the cost.<sup>110</sup> In cases where they cannot take such steps, the harm they suffer is liable to be aggravated and the priority for us to take action is likely to be greater.

### **Management, processes and practices**

- 4.186 In Section 3, we provisionally concluded that the large number of organisations making outbound calls to UK consumers were likely to be responsible for the volumes of silent and abandoned calls those consumers receive. Further, that the ways to prevent or reduce them, such as how they manage their ACS, are within their control. This corresponds with our experience in enforcement cases in which poor management processes have increased the harm caused to consumers.
- 4.187 The 2010 policy does not comment specifically on this matter. However, nine respondents to the call for inputs agreed it should be amended to make clear the importance of good procedures and to establish best practice. Respondents to both that call and our industry research also indicated that poor management processes, like inappropriate or poor management of an ACS resulting in ‘over-dialling’,<sup>111</sup> may contribute to cases of persistent misuse.
- 4.188 We therefore propose, based on our enforcement experience and the evidence we have looked at, to amend the 2010 policy to set out that, in assessing harm and prioritising cases for action, we are likely to take into account whether an organisation applied effective procedures to:

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<sup>108</sup> Such as 01 or 02, and 03 numbers which are charged at ‘geographic rate’.

<sup>109</sup> Such as 080 numbers.

<sup>110</sup> We made an assessment of the possible costs to call centres of this sort of measure in paragraph 4.135 above.

<sup>111</sup> Setting the dialling rate too high for the number of call centre agents available to deal with calls answered by consumers.

- prevent and identify any issues which may cause misuse (whether unintentional or deliberate);
- rectify misuse in a timely manner were it to occur; and
- prevent further misuse.

Examples of steps they may take would include carrying out testing when setting up or changing systems, monitoring agent performance and ensuring dialler management is carried out by competent persons.

- 4.189 We also propose that, where an organisation engages third parties to make calls on its behalf, we may consider whether that organisation took reasonable steps to monitor and assess compliance by the third party on an ongoing basis, beyond the acceptance of assurances or the imposition of contractual obligations.
- 4.190 These proposals are intended to ensure calling organisations put in place effective management procedures to help reduce instances of misuse and the harm they cause to consumers. For those which already have them in place, the proposals are unlikely to have any impact on their costs. Organisations which have to adopt or amend management procedures would likely incur some costs. In our provisional view, that is justified by their responsibility to ensure they adopt processes and practices in order not to fall foul of the statutory prohibition of persistent misuse.

### **Other changes to the 2010 policy**

- 4.191 We also propose to make some further changes to the 2010 policy. These are set out in Annex 5 and include:
- explaining to whom the policy applies and the persons against whom we will take enforcement action. For example, it will not usually be our intention to take action against a communications provider over whose network or service the persistent misuse takes place, but it may be appropriate to do in some cases, where for example the provider was responsible for, or complicit in, the misuse (see Sections 1 and 5 of Annex 5); and
  - proposed changes to our enforcement processes.
- 4.192 In general, we consider these sorts of changes clarify the meaning and intention of the policy, which should help calling organisations to understand and act consistently with it. More specifically, we have proposed ways in which we are minded to change the process we follow in taking enforcement action.
- 4.193 In particular, we propose that we may, in appropriate cases, effectively combine some of the procedural steps taken when we serve a notification under section 128 of the Act and for the imposition of a penalty under section 130. In such cases, we may, at the same time as we serve a section 128 notification setting out that we have reasonable grounds to believe the recipient has persistently misused an electronic communications network or service, also give notice of a penalty we are minded to impose under section 130.
- 4.194 We propose that in those cases the recipient would have the opportunity to make representations about both the section 128 notification and the proposed penalty at that stage. Our provisional view is that this approach would allow for more efficient



and effective enforcement action, while at the same time giving relevant parties fair rights of defence consistent with the relevant statutory provisions.

## Raising awareness

- 4.195 In addition to our preliminary views about how to change the 2010 policy, we have also considered compliance with the law, and the policy. In that regard, we are concerned that some organisations, particularly smaller ones, those operating from overseas and those contracting out services to call centres, may not be aware of or fully understand the law relating to persistent misuse nor the steps they can take to avoid engaging in it and to reduce the consumer harm it can cause. We are similarly concerned to note that 22 respondents to our call for inputs thought deliberate non-compliance was the main or a key cause of silent and abandoned calls. StepChange reports that many such calls are generated internationally and the proportion of those calls coming into the UK from non-compliant organisations overseas appears to be growing.<sup>112</sup>
- 4.196 Compliance with the law is the responsibility of the organisation using the network or service or engaging others to do so on its behalf. Even so, we called for inputs on whether and how we should raise awareness of the persistent misuse provisions in the Act, such as through a short summary to accompany the full policy.
- 4.197 We considered this could be a useful tool to aid and encourage compliance, by helping calling organisations understand the law and our policy. It could be used to engage with overseas call centres and regulators, and act as a useful reference for those contracting out call centre services.<sup>113</sup> Eleven respondents to the call for inputs supported this idea and we propose to adopt it in due course.
- 4.198 We acknowledge that some organisations have no intention of complying with the law or having regard to our policy. Over half (26) of relevant respondents to the call for inputs said our focus should be on tackling the behaviour of the non-compliant rogue calling organisations through enforcement action, rather than changing the 2010 policy. They said the latter would only have an impact on compliant organisations.
- 4.199 We take careful account of these comments and continue to work with industry and other regulators to identify and implement technical (and other) solutions, such as in relation to call tracing, to the problems caused by nuisance calls<sup>114</sup> Our proposed changes to the 2010 policy are aimed at both deliberate and unintentional persistent misuse. They seek to broaden the scope for enforcement action against the former and make clear what organisations should do to avoid the latter. Where we find evidence of organisations deliberately flouting the law, we would be likely to regard this as aggravating the level of harm caused by their behaviour. We would be likely to

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<sup>112</sup> See Stepchange Report, February 2015, Combatting nuisance calls and texts, a comparative policy study of practices in multiple countries, Claire Milne.  
[http://www.stepchange.org/Portals/0/documents/media/reports/additionalreports/Nuisance\\_Calls\\_Report\\_FINAL.pdf](http://www.stepchange.org/Portals/0/documents/media/reports/additionalreports/Nuisance_Calls_Report_FINAL.pdf)

<sup>113</sup> As it could help inform thinking about what it may be useful to consider when setting up service level agreements and in on-going performance monitoring.

<sup>114</sup> See the nuisance calls action plan. <http://stakeholders.ofcom.org.uk/consultations/silent-calls/joint-action-plan/> and [http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/JAP\\_update\\_Dec2014.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/JAP_update_Dec2014.pdf). The latest update to the action plan is published alongside this document.

take this into account when assessing what action to take and what the consequences should be.

## Provisional conclusions

- 4.200 Parliament has decided that certain behaviour which harms individuals should be prohibited and punishable by penalties of up to £2 million. Despite that prohibition, there is evidence of the enduring nature and scale of the problem of persistent misuse, and of silent and abandoned calls in particular. In those circumstances, our preliminary view is that we should make changes to our 2010 policy in order to enforce that prohibition more effectively.
- 4.201 Our provisional judgment, which takes into account important public policy considerations, is that the above proposed changes will enable us to target better the causes and effects of various types of persistent misuse. They make clear the examples of conduct that we are likely to regard as misuse and the factors that we are likely to take into account in assessing the harm involved in particular cases and prioritising our enforcement action.
- 4.202 We acknowledge that our proposals may require some calling organisations to change aspects of their behaviour. This may result in costs to them. We think there is some scope for the benefits of some of our proposals to outweigh these costs.
- 4.203 In any event, our proposals aim to ensure that our policy gives proper effect to a prohibition imposed by Parliament. It is always liable to be more expensive for organisations to comply with the law than to break it. If they can only achieve efficiency gains by not complying and causing harm to consumers, then that would not justify those efficiencies.
- 4.204 Our further provisional view is that our proposed changes to the 2010 policy would secure the performance of our general duties to further the interests of citizens and consumers under section 3 of the Act. They would, we propose, help to secure their additional protection from the harm caused by persistent misuse.
- 4.205 Accordingly, we make the proposals set out and invite views on them, along with any evidence respondents can provide to support those views.

## Consultation questions

*Q6: Do you agree with our provisional view that we need to make changes to the 2010 policy in order to address the causes and effects of persistent misuse in a more effective way?*

*Q7: Do our proposed changes target the right forms of persistent misuse and their causes and effects? If not, which forms, causes and effects should we target?*

*Q8: Do you agree with our proposed definitions of (i) silent calls and (ii) abandoned calls?*

*Q9: Do you agree with the proposed policy on silent calls – that these should be Ofcom's highest priority for enforcement action, however caused and in whatever number? Do you have any information that would help to quantify further the potential costs and benefits of the proposal?*

*Q10: Do you agree with the proposed policy on abandoned calls:  
a) that cases where a caller's abandoned call rate is three per cent in any 24 hour period or more should represent a higher priority for enforcement and;*

*b) where we take enforcement action, we should take into account all abandoned calls a caller makes in the period under investigation?*

*Q11: Do you have any information that would help to quantify further the potential costs and benefits of this proposal?*

*Q12: Do you have any comments on our proposed changes to the policy in relation to persistent misuse arising from:*

- a) misuse of ACS;*
- b) misuse of a CLI facility; and*
- c) breaches of the PECRs?*

*Q13: Do you agree with the way we propose to assess the harm from cases of persistent misuse and prioritise enforcement action? In particular, have we identified the right factors to take into account and do you agree with the way we propose to apply them?*

*Q14: Do you have any further comments or views on other aspects of this consultation or the proposed policy set out in Annex 5 which are not covered above?*

*In all your responses, please state your reasons and provide evidence to support your views.*

## Annex 1

# Responding to this consultation

## How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 24 February 2016**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <https://stakeholders.ofcom.org.uk/consultations/review-persistent-misuse-powers/howtorespond/form> as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email [kiera.bower@ofcom.org.uk](mailto:kiera.bower@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Kiera Bower  
Consumer Affairs  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA  
Fax: 020 7981 3333
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

## Confidentiality

- A1.7 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.8 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.

- A1.9 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/terms-of-use/>

## Next steps

- A1.10 Following the end of the consultation period, Ofcom intends to publish a statement in Q1 2016/17.
- A1.11 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: <http://www.ofcom.org.uk/email-updates/>

## Ofcom's consultation processes

- A1.12 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.13 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk) . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.14 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Graham Howell, Secretary to the Corporation, who is Ofcom's consultation champion:

Graham Howell  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

Tel: 020 7981 3601

Email [Graham.Howell@ofcom.org.uk](mailto:Graham.Howell@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

### During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

### After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 3

# Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at <http://stakeholders.ofcom.org.uk/consultations/consultation-response-coversheet/>.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

## Cover sheet for response to an Ofcom consultation

### BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

### CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

### DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)



## Annex 4

# Consultation questions

### Section 3

*Q1: Should Ofcom's policy on persistent misuse continue to have as its main focus the tackling of silent and abandoned calls?*

*Q2: Have we identified the main causes and effects of silent and abandoned calls, and are there any others we should take into account?*

*Q3: Do you agree with the other forms of misuse we propose to include in the policy?*

*Q4: Is there any other evidence we should take into account in relation to the causes and effects of the other types of misuse identified (misuse of ACS, misuse of a CLI facility and breaches of the PECRs)?*

*Q5: Do you have any comments on:*

- a) the evidence of consumer harm from the forms of persistent misuse we propose to include in the policy (and on silent and abandoned calls in particular); and*
- b) our approach to estimating the consumer harm from those forms of misuse?*

*In all your responses, please state your reasons and provide evidence to support your views.*

### Section 4

*Q6: Do you agree with our provisional view that we need to make changes to the 2010 policy in order to address the causes and effects of persistent misuse in a more effective way?*

*Q7: Do our proposed changes target the right forms of persistent misuse and their causes and effects? If not, which forms, causes and effects should we target?*

*Q8: Do you agree with our proposed definitions of (i) silent calls and (ii) abandoned calls?*

*Q9: Do you agree with the proposed policy on silent calls – that these should be Ofcom's highest priority for enforcement action, however caused and in whatever number? Do you have any information that would help to quantify further the potential costs and benefits of the proposal?*

*Q10: Do you agree with the proposed policy on abandoned calls:*

- a) that cases where a caller's abandoned call rate is three per cent in any 24 hour period or more should represent a higher priority for enforcement and;*
- b) where we take enforcement action, we should take into account all abandoned calls a caller makes?*

*Q11: Do you have any information that would help to quantify further the potential costs and benefits of this proposal?*

*Q12: Do you have any comments on our proposed changes to the policy in relation to persistent misuse arising from:*

- a) misuse of ACS;*
- b) misuse of a CLI facility; and*
- c) breaches of the PECRs?*

*Q13: Do you agree with the way we propose to assess the harm from cases of persistent misuse and prioritise enforcement action? In particular, have we identified the right factors to take into account and do you agree with the way we propose to apply them?*

*Q14: Do you have any further comments or views on other aspects of this consultation or the proposed policy set out in Annex 5 which are not covered above?*

*In all your responses, please state your reasons and provide evidence to support your views.*

## Annex 5

# Draft revised statement of policy

- A5.1 This annex is published separately to this document, available on the Ofcom website at the following link:  
[http://stakeholders.ofcom.org.uk/binaries/consultations/review-of-how-we-use-persistent-misuse-powers/annexes/Annex\\_5.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/review-of-how-we-use-persistent-misuse-powers/annexes/Annex_5.pdf)

## Annex 6

# Industry research

- A6.1 We commissioned Contact Babel to carry out a quantitative survey with the outbound call centre industry. The survey covered areas such as use of ACS and AMD, dialler use, CLI use, minimum ring times and connection times.
- A6.2 The independent report is published separately to this document, available on the Ofcom website at the following link:  
[http://stakeholders.ofcom.org.uk/binaries/consultations/review-of-how-we-use-persistent-misuse-powers/annexes/Annex\\_6.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/review-of-how-we-use-persistent-misuse-powers/annexes/Annex_6.pdf)

## Annex 7

# Estimating consumer harm

- A7.1 This annex is published separately to this document, available on the Ofcom website at the following link:  
[http://stakeholders.ofcom.org.uk/binaries/consultations/review-of-how-we-use-persistent-misuse-powers/annexes/Annexes\\_7-8.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/review-of-how-we-use-persistent-misuse-powers/annexes/Annexes_7-8.pdf)

## Annex 8

# Summary of responses to our call for inputs

- A8.1 This annex is published separately to this document, available on the Ofcom website at the following link:  
[http://stakeholders.ofcom.org.uk/binaries/consultations/review-of-how-we-use-persistent-misuse-powers/annexes/Annexes\\_7-8.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/review-of-how-we-use-persistent-misuse-powers/annexes/Annexes_7-8.pdf)

## Annex 9

# Glossary and defined terms

2010 policy	Revised statement of policy on the persistent misuse of an electronic communications network or service 2010, annexed to Ofcom's Statement of 1 October 2010 on "Tackling abandoned and silent calls".
Abandoned call	<p>Under the 2010 policy, we define an "abandoned call" as a call where a connection is established but which is terminated by the person making the call after the consumer answering picks up the receiver.</p> <p>We sometimes refer to 'an abandoned call with message' (that is, an abandoned call that plays an information message).</p> <p>To see how we propose to amend this definition, please see Annex 5.</p>
Answer machine detection (AMD)	Technology used to automatically detect answer machines.
Automated calling systems (ACS)	Technology which can automatically dial and connect calls. Automated calling systems can be used for outbound, inbound and a mixture of outbound and inbound calls. Outbound automated calling systems work by accepting a bulk input of telephone numbers, usually from a computer drive or database and then making calls and try to connect the called party to a live agent or play a pre-recorded message.
Calling Line Identification facility (CLI)	Facilities by which the telephone number of a calling party is presented to the called party prior to the call being established.
Communications Act	The Communications Act 2003, which came into force in July 2003.
Data Protection Act	The Data Protection Act 1998.
Digital Enhanced Cordless Telecommunications (DECT)	Technology primarily used for creating cordless phone systems which allow the use of multiple handsets to one base station and one phone line socket. This allows several cordless telephones to be placed around the house.
Electronic communications network	As defined in section 32 of the Communications Act, a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals (i) apparatus comprised in the system; (ii) apparatus used for the switching or routing of the signals; (iii) software and stored data and (iv) (except for the purposes of sections 125 to 127) other resources, including network elements which

	are not active.
Electronic communications service	As defined in section 32 the Communications Act, a service consisting in, or having as its principal feature, the conveyance by means of an Electronic Communications Network of signals, except in so far as it is a content service.
ICO	The Information Commissioners Office. This is the UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.
Interactive voice messaging (IVM)	Technology that automates telephone contact between humans and machines. Typically operated by computers and typically includes prompts for the consumer to either press a button or speak a response. Depending on the consumer's input, the automated phone system may play some information, route the caller to another prompt or connect the caller with a human operator.
Nuisance calls	The various different types of calls and messages people regard as a nuisance including silent calls, abandoned calls, unsolicited live marketing calls, recorded marketing calls and marketing text messages where the relevant requirements for making marketing contact have not been met and silent and abandoned calls.
Ofcom	The Office of Communications. The UK communications regulator.
Persistent misuse	<p>As defined in section 128 the Communications Act, a person misuses an Electronic Communications Network or Electronic Communications Service if—</p> <ul style="list-style-type: none"> <li>(a) the effect or likely effect of his use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety; or</li> <li>(b) he uses the network or service to engage in conduct the effect or likely effect of which is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety.</li> </ul> <p>The cases in which a person is to be treated as persistently misusing a network or service include any case in which his misuse is repeated on a sufficient number of occasions for it to be clear that the misuse represents—</p> <ul style="list-style-type: none"> <li>(a) a pattern of behaviour or practice;</li> <li>(b) recklessness as to whether persons suffer annoyance, inconvenience or anxiety.</li> </ul>
Predictive dialler	See the definition for Automated Calling Systems (ACS). Predictive dialling is one form of dialling telephone numbers automatically at a rate aiming to synchronise calls answered by recipients with call centre agent availability
Privacy and Electronic Communications Regulations (PECR)	The Privacy and Electronic Communications (EC Directive) Regulations 2003.
Privacy and Electronic	Directive 2002/58/EC of the European Parliament and of



Communications Directive	the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).
Silent call	<p>Under the 2010 policy, we define a “silent call” as a type of abandoned call where the consumer receives a call but can hear nothing on answering the phone and has no means of establishing whether anyone is at the other end of the line.</p> <p>To see how we propose to amend this definition, please see Annex 5.</p>
Voice over Internet Protocol (VoIP)	The methodology and group of technologies for the delivery of voice communications and multimedia sessions over Internet Protocol which is the data protocol used for routing and carriage of messages across the internet and similar networks.