

# Ofcom's Consumer Policy - a consultation - Response

## Introduction

### Responding to the consultation

Probably in common with most respondents, I feel that I only have a sufficient understanding of the relevant issues to respond with authority to a tiny portion of this extensive document. I comment at length on issues with which I am familiar, offer casual comments on other issues and pass over some altogether.

As I prepare these comments 2 working days before the end of the consultation period, no other responses have been published. I am therefore unable to gain the benefit of any informed comment in assessing aspects on which I am not myself fully informed.

This latter point is of particular concern, as Ofcom appears to rely on knowledgeable respondents to correct errors and misrepresentations in the consultation document.

I acknowledge the possibility that no responses authorised for publication during the consultation have been received.

### My key point

The persistent misuse powers under sections 128-130 of the Communications Act are proper to Ofcom's principal duty to "citizens", not that to "consumers".

This consultation document misrepresents both Ofcom's statutory duties and these provisions in any attempt to justify Ofcom's longstanding and continuing failure to fulfil its duty to parliament in respect of the issue of Silent Calls, which was recently expressed in the following terms:

**"We expect you to use your powers to eradicate the nuisance of silent calls".**

I address this specific issue in an appendix to this response. This covers the issue as addressed throughout the Consumer Policy consultation document in a structure suited to the points being made. The main response addresses the questions as presented.

### Misrepresentations

I address specific misrepresentations where they are relevant to my response to the consultation questions.

I highlight all such instances **in red**.

Some of the related issues are covered at length in the appendix.

Many of these have already been pointed out to representatives of Ofcom. I have been asked to raise them in this response.

David Hickson

16 April 2006

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# Ofcom's Consumer Policy - a consultation - Response

## Answers to the consultation questions

### **Question 1: Do you agree with the proposed distinction between citizen and consumer interests?**

No, it is totally wrong. I believe that Ofcom deliberately misstates and misinterprets its statutory duty to serve its desire to function only as a regulator of markets.

All responses to this question must be qualified by the fact that they are based on a distorted statement of Ofcom's first principal duty presented at paragraph 3.1.

Ofcom's duty to further the interests of citizens is in relation to "communications matters", **not "communications markets"**, as Ofcom clearly wishes that it were.

Misstating a statutory provision in the form that one would clearly wish it to have leaves one open to a charge of serious misconduct. The relevant provision is presented accurately at two other points in the document, where it is less likely to be referred to when considering the relevant issues. This suggests that a proper source of the text of the Act was used in the preparation of the document. Identical layout and punctuation at all three points provides further evidence to suggest that the word "matters" was deliberately changed to "markets" at this point.

All further comment here is based on the true definition of Ofcom's principal duties.

### Multiple consumer / citizen interests

The interests of each individual, as either a consumer or as a citizen, are far more complex than is outlined. We may be consumers of different products and services from competing companies whereby our interests in respect of one are in direct conflict with those in respect of another. We also have conflicting interests as citizens. An example of this is actually given in the consultation, where reference is made to wishing to have the right to drive a car whilst also being concerned about global warming. This is a conflict in citizens' interests; it has nothing to do with any consumer interest - except perhaps where there are competing toll roads!

It is not possible to properly address these interests whilst they are intertwined. No matter how difficult it may be to disentangle them, the various consumer interests and citizen interests each have to be properly separated so that only those that are strictly relevant may be considered with proper weighting. Ofcom cannot just give up on this task because it is difficult, choosing the course of action that best suits its own interests, picking whatever strand of interest it finds most convenient as justification.

### Conflict between the principal duties

The need to distinguish between consumer interests and citizens interests has nothing to do with any perception on the part of those whom Ofcom exists to serve.

The duty under sections 3(8)-3(9), **not 3(6)-3(8) as stated**, is to publish a statement clearly setting out the nature of the conflict and the manner in which it has been resolved. **It is not simply to "identify cases in which consumer and citizen interests conflict with each other"**.

Ofcom cannot just "flag-up" such a situation and then use whatever element it chooses to justify the action it finds most convenient. It must perform the necessary disentangling properly and indicate how this was done. Furthermore, this approach must be applied in each case, not dismissed once and for all within a policy statement.

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### Citizen interests "beyond the market"

If any action in furtherance of the interests of consumers in a market is also seen to have a significant impact on the interests of "citizens" then a conflict between the principal duties has occurred and must be addressed as defined in the Act.

By the odd manner in which "citizens interests" are defined, everything may have some impact on the interests of the citizen and so the concept is diluted into meaninglessness.

In laying out its policy Ofcom should be defining how it distinguishes its separate duties, not attempting a philosophical distinction between concepts.

The Act defines two exclusive principal duties. To suggest that "citizen interests" are mostly the fluffy stuff that is found in the sky above the hard business of market regulation is to misrepresent Ofcom's first principal duty.

### Citizen interests "outside the market"

Any responsibility of Ofcom that does not relate to the furtherance of the interests of consumers in a market must fall within its first principal duty to citizens.

There may be many of these, there is however one which has been the subject of extensive representations by myself. The persistent misuse powers under sections 128 to 130 of the Communications Act do not relate to any specific consumer interest in a market.

HM Customs and Excise and the National Blood Service are perhaps good examples of organisations subject to the provisions of these sections of the Act which could not be seen as operating as suppliers of services in a competitive market for which Ofcom has regulatory responsibility.

I do not believe that Ofcom would see itself as having a duty to further the interests of "consumers" of HM Customs and Excise and the National Blood Service in respect of "choice, price, quality of service and value for money".

Ofcom itself may fall subject to these provisions, as calls on its behalf are made by a market research company against which I have presented evidence that could lead to use of these powers. If viewed as a consumer issue, Ofcom would find its duty lying in the furtherance of its own interests in respect of "choice, price, quality of service and value for money". By the definition given in the Consumer Policy consultation document, Ofcom would be consumer if that company practised persistent misuse when calling on behalf of Ofcom.

I have presented complaints to Ofcom in respect of 23 organisations providing basic evidence and requesting use of these powers. I am a consumer of only one of these companies, and that complaint has no relevance whatsoever to that consumer relationship.

Under Section 131 of the Act Ofcom is required to publish and have regard to a Statement of Policy covering its use of the powers. The latest version of this Statement, put in force and implemented on 31 October 2005, but subject to minor revisions on 1 March 2006, makes no attempt to explain how the policy could be relevant to Ofcom's second principal duty, rather than the first. It does however use the word "consumer" where the word "citizen" should be used.

## **Ofcom's Consumer Policy - a consultation - Response**

The relevant sections of the Act itself are even broader in scope as they indicate that the powers are to be used for the protection of "persons" which presumably extends to "corporate citizens" as well as individuals.

The most bizarre aspect of this Statement of Policy, if seen as relevant to consumer policy, is that it focuses undue attention on the activities of outsourced call centres performing outbound work. The market for the services of the call centres has the client organisations on whose behalf marketing, research and service calls are made as the consumers. By aiming to constrain the use of aids to productivity, the policy is targeted on damaging the interests of the actual consumers covered by it.

### ***Question 2: Do you agree with Ofcom's position on vulnerable consumers?***

I am not qualified to comment on what is simply said to be the performance of a statutory duty.

It must be noted that this position distorts the operation of a competitive market. Best value for consumers in a market is achieved by the fullest exploitation of all vulnerabilities and weaknesses, whether specifically identified or not.

Any intervention to further the interests of less powerful consumers in a market that is operating properly must damage those of the more powerful.

### ***Question 3: Do you agree with the high level objectives for consumer policy proposed above?***

It must be noted that any intervention in a market, to further the interests of certain consumers, inevitably damages the interests of other consumers by distorting the market to some degree.

#### **The limits of Ofcom's capabilities**

It is absurd and foolish to suggest that Ofcom can "ensure that consumers benefit from increasingly competitive communications markets". Ofcom may "attempt" to secure the best possible effect for consumers, it cannot "ensure" that there is never any loss of benefit or competition, as this would require powers and resources well beyond those that it holds.

It should also be noted that where Ofcom sets standards of conduct in relation to consumers that stretch all providers to their limits, so none will exceed them, this action diminishes competitiveness.

#### **"Unreasonable annoyance and anxiety"**

The reference to "unreasonable annoyance and anxiety" could be seen as fair in this context, although it is seen that no requirement to avoid persistent misuse was included in the "Codes of Practice for Sales and Marketing – Providers of fixed-line telecommunication services". (There will be other examples of appropriate regulatory documents from which this was also omitted.)

It must however be noted that Ofcom also has responsibilities in this respect which do not relate to its duty to consumer interests in markets proper to its functions and cannot be fulfilled by "working together with other organisations and industry". Ofcom does not work with the fitted kitchens, tax collection or public health "industries".

## Ofcom's Consumer Policy - a consultation - Response

### Attainable objectives / unattainable objectives

Whilst some specific objectives are stated in qualified terms that make them attainable, others are not e.g. "Consumers are equipped with the information, skills and confidence needed to obtain a good deal". It would have been better to express all of the objectives in either one form or the other, so that the potential for achievement of the overall objective may be fairly assessed.

#### ***Question 4: Do you agree that the proposed indicators provide an appropriate basis for monitoring consumer interests? Are there any other indicators which should be used?***

Ofcom must use what information it can. It may well be that what is proposed is the best statistical data available. One must however be careful not to confuse the best information available with anything that could be regarded as the truth. One must also avoid the assumption that progress towards the objectives can be honestly shown by movement in these indicators.

Even the best available may not be good enough!

#### ***Question 5: Do you agree that Ofcom should publish an annual report on the Consumer Interest?***

If Ofcom seriously believes that it can have an adequate understanding of the "Consumer Interest" to make the effort involved in producing an Annual Report a justifiable use of public resources then it should do so.

One hopes that it will show due humility in any claims made.

#### ***Question 6: Do you agree with the characteristics identified of effective consumer protection?***

NO.

### The role of service providers in relation to harm caused by others

Harm that is caused by the use of communications networks and services, other than perhaps some of that caused by the providers of those networks and services themselves, has nothing whatsoever to do with Ofcom's duty to further the interests of consumers in markets.

It is also not the responsibility of the providers. It is likely that the remedies offered by the providers in respect of nuisance for which they are not responsible will be inappropriate and contrary to the public interest and possibly the interests of the consumers.

Dealing with misuse of communications networks and services is the responsibility of the "misusers" themselves, or otherwise Ofcom, acting in the public interest. Providers should not be enabled to exploit this to serve their own ends.

The history of what has happened with the issue of Silent Calls provides a classic example of what can go wrong.

## Ofcom's Consumer Policy - a consultation - Response

BT and the other providers have supported methods intended to avoid cases of persistent misuse coming to the attention of Ofcom. They have deliberately aimed to protect only those who have reported receiving Silent Calls when it is clearly understood that this will simply re-direct the same activity onto other citizens, who are likely to be more vulnerable to its effects.

The providers have also sought direct and indirect revenue from this nuisance.

Four examples of inappropriate provider action are given below.

- 1- Silent CallGard

All telephone service providers promote a service called Silent CallGard.

A recently issued marketing release by its operator advertised its true purpose in very clear terms, It was said that this was to prevent habitual Silent Callers from suffering the "cost in terms of time and resources of an Ofcom investigation".

It is interesting to note that Silent Callers are not seen as being likely to suffer in another other way. It is clear that the "gard"ing is of Silent Callers against Ofcom, not of citizens against Silent Callers.

This service exists specifically to prevent those who have made an initial complaint to their provider from gathering further evidence so as to be able to demonstrate persistence if their complaint is escalated to Ofcom.

Registration may prevent the complainant from receiving Silent Calls from the, relatively few, subscribers to this service. They do not use the service to reduce the number of Silent Calls they make - perhaps the opposite! The Silent Calls are, in effect, re-directed to other victims, who may be more "vulnerable".

It is a feature of the Silent Calls issue that those who are caused the greatest concern are those who would never make a complaint. They do not know what it is that they should complain about!

- 2 - Anonymous Caller Rejection

Some providers offer this service, named as if it will prevent calls from those who will make anonymous voice calls (i.e. calls where the caller does not say who they are). It has no such purpose; it simply screens out calls where the caller is unwilling or unable to offer the opportunity to make a return call. It does nothing to prevent anonymous calls from unknown callers who provide CLI and may not identify themselves when the return call is answered. There is no guarantee that CLI will even enable a return call to reach an answering service.

BT is an example of a company that makes anonymous calls that are not rejected by Anonymous Caller Rejection.

There is no way of discovering the identity of a caller directly from the CLI, unless they have called previously, or call again. The cost and effort of making a return call, following an anonymous call provides one option for trying to discover the identity of the caller. One must however question the motive of someone who fails to say who they are when their call is answered and thereby question the advisability of calling them back!

Anonymous Caller Rejection is offered for a fee, but fails to deliver what its name implies.



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- 3 - Caller Display

This feature is offered as a means of identifying callers. This is likely to be of only minimal benefit in identifying anonymous callers as it can only display the identity of callers that have been previously identified from their CLI. It is not normally intended that one should record the name of every caller just in case they happen to make a subsequent anonymous call. There is no list of known anonymous callers published so that one could pre-load a Caller Display device.

Except where they are recognised from their CLI, every caller is unidentified up to the point where they give their name, whether or not CLI is withheld.

- 4 - The Telephone Preference Service

Many who have suffered the nuisance of Silent Calls are encouraged to register with the Telephone Preference Service as a remedy for this nuisance. This has damaged competition in the market for telecommunications and other services. It has also damaged other areas where properly conducted unsolicited telephone contact serves the public interest (e.g. opinion research, charity fundraising).

BT has a specific objective of having all of its customers registered with the TPS, which provides some explanation for its policy of actually promoting the making of Silent Calls. It also sponsors efforts to prevent other forms of direct marketing,

Whilst this is perhaps primarily a tactic to impede competition in the market that it dominates, it is also seen to be part of a wider strategy by BT in which it attempts to secure the near-exclusive opportunity to conduct legitimate telemarketing to its customers. The development of BT-branded third party services has already begun.

### Misrepresentations at 4.27

Paragraph 4.27 of the consultation document includes the following serious deliberate misrepresentations of the terms of sections 128-130 of the Communications Act:

- **It refers to an "obligation"** - there is no obligation
- **It refers to "suppliers"** - there is no reference to suppliers
- **It refers to those who "supply or promote a product"** - there is no such reference
- **It refers to an ability for Ofcom to "launch an investigation"** - there is no such requirement imposed or power granted
- **It refers to a Notification "requiring the offending supplier to comply with the provisions of the Act"** - neither a Notification nor the Act impose or specify requirements, A separate mechanism exists for Ofcom to impose requirements.

### Misrepresentations at 4.28

Paragraph 4.28 goes on to misrepresent "recent" events as follows:

- It is suggested that Ofcom has **"made use of the persistent misuse provisions of the Act to tackle the problem of silent calls"** - Ofcom has repeatedly made determinations that have clearly failed to have this effect since early in 2004. The term "shadow-tackle" is apposite.

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- It is stated that Ofcom "concluded that **a direct marketing company** had engaged in persistent misuse of a network or electronic communications service **by making silent calls**" - Ofcom has never made any such determination. The case that is referred to occurred in May 2005 and involved a home improvements company. The required specification of persistent misuse was totally missing from the formal action taken. It may be inferred that Ofcom did not find "making silent calls" to be persistent misuse in this case.

In this case, and in all others, Ofcom has invariably and explicitly authorised the continued making of Silent Calls after considering use of the persistent misuse provisions of the Act.

- It is stated that "Ofcom issued **a notification requiring the firm to** provide Ofcom with evidence of **compliance** for a three-month period." - this requirement was not enforceable, because Ofcom did not use the provisions of the Act that allow for an enforceable requirement to be imposed. The required compliance was with the DMA Code of Practice, in direct contravention of provisions of the formal Ofcom Statement of Policy. (The company involved is not a member of the DMA).

### ***Question 7: Do you agree with the assessment and priorities for rights and regulations?***

#### Ofcom's error

In the one area with which I am familiar, Ofcom has made a major error. It has disregarded the proper nature of the persistent misuse powers under sections 128-130 of the Act and **assumed that these powers can be included within the scope of its general regulatory responsibilities** in respect of suppliers of telecommunications services, on behalf of consumers of those services.

If Ofcom wishes to have powers to enable it to act as a regulator of the call centre industry, including both specialist and in-house outbound calling operations, it must approach parliament to request those powers. In the summer of 2005, it approached the DTI to ask for an increase in the maximum penalty that could be imposed on use of the persistent misuse powers. It did not ask for any change in the nature of the powers. Subsequent discussions with the DTI and the DMA intended to produce the "solution" to the problem of Silent Calls did not lead to a request for a change in the powers.

In direct correspondence with myself Ofcom has indicated that it does not seek such powers.

#### Ofcom's false claims

Ofcom has nonetheless gone ahead and issued **a news release implying that it has regulatory powers over all users of automated dialling equipment** and has announced supposed **regulations that it says are enforceable**. Both of these claims are false.

It has also misrepresented the position throughout this consultation document.

This represents an attempt to excuse Ofcom's past and continuing failure to do its duty as recently expressed in parliament:

## Ofcom's Consumer Policy - a consultation - Response

### Ofcom's duty

"We expect you to use your powers to eradicate the nuisance of silent calls".

#### ***Question 8: Do you agree with the assessment and priorities regarding consumers' awareness?***

No. Only a body that is seen to have an exclusive and unbalanced focus on consumer interests can undertake this duty. Ofcom has a duty to protect its own resources and could not be seen to be soliciting complaints. Ofcom also has a duty to protect and regulate competitive markets and has to maintain a balanced position in respect of these markets. (Outside of its duties in market regulation the issue of balance does not apply)

#### ***Question 9: Do you agree with the assessment and proposed priorities regarding complaints handling and redress?***

It is interesting to note that the reporting of cases of persistent misuse is excluded from the list of examples of complaints handling.

Reference is made to the "Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives, July 2004". These do not cover use of the provisions of the Communications Act relating to persistent misuse.

It is noted that Ofcom finds it "appropriate" that there is no proper means for dealing with complaints about persistent misuse. In the context of Consumer Policy this is fair enough, because this issue has nothing to do with the relationship between consumers and suppliers, as defined for the purposes of that policy.

It is noted that "Ofcom has not identified any significant shortcomings in the current arrangements" covering a situation where there is "neither a direct nor an indirect relationship between the consumer and the supplier". Where there is no basis for identifying parties as consumers or suppliers, it is unsurprising that shortcomings cannot be identified!

This clearly shows that Ofcom cannot fit some of its duties into the models that are properly appropriate to its Consumer Policy - these duties to citizens therefore sit outside that policy - they do not disappear - nor can they sit in abeyance until citizen policy development work takes place towards the end of the year!

#### ***Question 10: Do you agree with the assessment and priorities regarding monitoring and enforcement?***

No.

Whilst the attempt to create a standard and consistent approach to investigation and enforcement suits Ofcom, it does not ensure that the most effective and appropriate approach is used to address each of the wide variety of responsibilities held by Ofcom. This can lead to "the tail of process wagging the dog of duty". The total disregard of the respective legislative provisions, which is seen in the case of the persistent misuse powers, is an example of what may also be seen in other areas.

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### ***Question 11: Do you agree with Ofcom's approach to the provision of consumer information?***

**Paragraph 5.1 begins with a yet another misrepresentation of Ofcom's two distinct, and potentially conflicting, principal duties, as if they were one.** This casual misrepresentation is not intended to support consideration of significant issues reliant on a proper definition, and so is not as serious as that at 3.1.

If a misrepresentation of its own principal duties may be taken as a fair example of Ofcom's approach to the provision of information to the public, then it should perhaps be seen as fortunate that "Only in exceptional cases will Ofcom itself provide information".

On the other hand one could suggest that if Ofcom adopted a more open approach, providing more information, then it would feel less reluctant to be honest.

### ***Question 12: Do you agree with Ofcom's conclusion on consumer awareness of suppliers and services?***

I repeat the previous point. Only a body that is seen to have an exclusive and unbalanced focus on consumer interests can undertake this duty.

### ***Question 13: Which of the options on comparative price information, if any, do you favour? Are there other options Ofcom should consider?***

Price comparison services will emerge from the market anyway. Accreditation provides little additional benefit, indeed it may imply an inappropriate degree of significance. Any calculation can only be illustrative.

Accreditation of price comparison services is an issue that covers more than just the telecommunications market. It should be handed over to the DTI, which may wish to take advice from Ofcom.

### ***Question 14: What is your opinion about these ideas for generating awareness of price comparison information?***

They are a waste of public money.

### ***Question 15: Do you agree with our proposed approach regarding the Quality of Service initiatives?***

A statutory regulator should only be involved with truly objective measures. Most of those referred to seem to have a strong subjective component and therefore belong to the market.

### ***Question 16: Do you agree with our proposed approach regarding switching processes?***

I note that this is the subject of a separate consultation.

I am pleased that switching is not seen as a key feature of Ofcom's Consumer Policy.

# **The Ofcom Silent Calls Policy**

## **Appendix - The Ofcom Silent Calls Policy**

The following sections address the Ofcom Silent Calls policy as covered by the Consumer Policy consultation document.

# The Ofcom Silent Calls Policy

## Introduction

### ***The purpose of these comments***

These comments are presented as part of my response to the consultation on Consumer Policy. As well as being published by Ofcom in this context, they will also be published and circulated more broadly.

I aim to explain and demonstrate how Ofcom's policy in relation to Silent Calls, as expressed in words and seen in practice, is in disregard of its statutory duties, and is likely to continue to fail.

In addition to Ofcom's duties in this regard being clearly expressed in statute, they were very clearly expressed on behalf of parliament on 28 March 2006 in the following terms:

**"We expect you to use your powers to eradicate the nuisance of silent calls"**

This is neither what Ofcom has been doing, nor what it intends to do.

David Hickson

16 April 2006

### ***Background***

Sections 128 - 131 of the Communications Act 2003 enable and oblige Ofcom to deal with Persistent Misuse of an Electronic Communications Network or Service.

These sections:

- require Ofcom to publish a statement of its general policy covering use of the powers (the Statement of Policy)
- refer to "persistence" as being "a pattern of behaviour or practice"
- refer to "misuse" as being "conduct the effect or likely effect of which is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety"

On 1 March 2006 Ofcom published a revised version of its Statement of Policy. Although there is no such indication within that document, that policy is seen to fall entirely within Ofcom's Consumer Policy, as presented in a document for consultation on 8 February 2006.

In terms of current Ofcom policy, the primary purpose of the persistent misuse powers is seen to be addressing the issue of what are known as Silent Calls.

### ***Silent Calls***

Making Silent Calls was defined as an example of persistent misuse in the original Statement of Policy that was published by Oftel in August 2003 and adopted by Ofcom in December 2003.

It is important to note that when adopting this initial version of the Statement, when revising it later and when applying its policy, Ofcom failed to take account of the terms of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the PECR). These regulations came into force after the drafting of the original Statement, but prior to its adoption by Ofcom. The following definition therefore stands, beyond dispute, from the day that Ofcom was vested with its powers.

## The Ofcom Silent Calls Policy

**Silent Calls, as an example of persistent misuse, may be defined as follows:**

- In addition to the Silent Call, as defined below, calls where the caller does not identify himself or herself may be made with the deliberate intention of causing nuisance. Although they may have exactly the same effect on the person called, these are covered by the provisions of Section 127 of the Communications Act - Improper use of public electronic communications network. This prosecutable offence is quite separate from persistent misuse, which is not an "offence".
- Many organisations, of all types, use automated dialling equipment as a pattern of behaviour or practice for a wide variety of purposes.
- "Predictive diallers" generate more calls than there are representatives available to speak to those who may answer. This reflects the fact that many dialled calls are not answered and represents a most valuable aid to the productivity of the staff involved.
- When no agent is available to speak to someone who answers a call, unnecessary annoyance, inconvenience and anxiety (persistent misuse) may be avoided by the immediate transmission of a recorded message identifying the caller and the intended purpose of the call (the Informative Message).
- To avoid breaching regulation 19 of the PECR, an Informative Message must not have a direct marketing purpose, unless the recipient has given consent. Where a call was intended to have a direct marketing purpose, this purpose must therefore be explained only in general terms. Where there is no direct marketing purpose involved, this regulation does not constrain the content of the message.
- **If no message is transmitted, causing the person answering the call to hear only silence when they answer, this is a "Silent Call".**
- Whilst any telephone call that results in no benefit for either party may cause inconvenience and perhaps annoyance, the Silent Call is likely to cause additional, significant and unnecessary annoyance and anxiety.
  - Annoyance is likely to result from the failure of the caller to identify themselves and the essential rudeness of a silent response to the salutation given on answering.
  - Anxiety is likely to arise from the assumption of a possibly sinister motive by someone who deliberately makes a voice telephone call and then fails to speak.
- The unnecessary annoyance and anxiety is not relieved by the provision of CLI, unless the person called is using caller display equipment, the number given is recognised and the purpose of the call may be readily inferred. Except for this particular situation, all telephone callers are anonymous until they speak.
- If provision of CLI is seen as relevant in the context of a Silent Call, this unquestionably increases the degree of inconvenience. Unless the number is recognised, CLI does not identify the caller, only their "line". Data protection regulations are used to disallow public access to records held by the providers giving the identity of owners or users of "lines" or "presentation numbers".

Providing a number implies that it is the responsibility of the person called to incur the cost in money and effort of making a return call to discover the identity and purpose of the original caller. This may also increase the degree of annoyance,

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The degree of annoyance would be likely to be increased further where a return call does not yield the necessary information, as this cannot be guaranteed.

Making a return call can also be a cause of further anxiety if it is suspected that the caller may have had a sinister motive, it is also ill advised.

- The number and nature of calls to other numbers made by the caller on the same day makes no difference whatsoever to the degree of nuisance caused to each person who receives a Silent Call, nor to the aggregated amount of nuisance caused by all those made.

### ***"Abandoned calls" and misdirected fax calls***

In addition to the Silent Call, there are other examples of telephone calls made as a pattern of behaviour or practice where nobody speaks in response to the call being answered.

- "Number-scanning" calls, not intended to ring or be answered.
- Calls made on the false assumption that a fax machine will answer the call.
- Calls made by automated diallers where there is no agent available to speak and a recorded message is used to announce the name of the caller and the intended purpose of the call.

### **THESE ARE NOT "SILENT CALLS".**

There may be cases where making such calls could represent persistent misuse. As the degree of annoyance, inconvenience and anxiety likely to be caused in each single instance is far less than that of a Silent Call, it is right to treat these separate issues as being of significantly less importance.

Rather than simply "a pattern of behaviour or practice", a second type of persistence suggested by the Act is perhaps more appropriate for establishing whether persistent misuse has occurred in these situations - "recklessness as to whether persons suffer annoyance, inconvenience or anxiety".

- Throughout these comments, the term "Silent Call" is used as defined above.
- Ofcom is seen to use the distinct terms "silent call" and "abandoned call" inappropriately when seeking to conceal (or perhaps when demonstrating) its failure to grasp the issue properly.

### ***The Consumer Policy consultation document***

The Ofcom approach to Consumer Policy presented for consultation makes reference to relevant issues in a number of places.

- It wrongly suggests that the persistent misuse powers relate to Ofcom's second principal duty, misstating and dismissing the first [3.1, 3.9, 3.14]. It attempts to justify this by misstating the nature of the powers themselves.
- It repeats misrepresentation of the Statement of Policy found in news releases.
- It provides an incomplete and inaccurate outline of Ofcom's handling of the issue of "Silent or Abandoned Calls" (see above) in an appended "Case Study".

Annotations as numbers in square brackets here identify the relevant paragraph in the Consumer Policy consultation document.



# The Ofcom Silent Calls Policy

## **Ofcom's second principal duty - to further consumer interests in relevant markets**

The persistent misuse powers relate to Ofcom's first principal duty - "to further the interests of citizens in relation to communications matters", not to its separate second principal duty - "to further the interests of consumers in relevant markets".

### ***Consumer-Supplier relationship***

The persistent misuse powers are not restricted, or specifically related, to cases arising from a supplier-consumer relationship [4.11: bullet 3, sub-bullet 4].

The primary features of the nuisance caused by a Silent Call are the anonymity of the caller and the ineffectiveness of the call in relation to its unknown intended purpose. It cannot therefore be recognised as being in execution of any relationship [4.11: bullet 3] between the caller and the called.

Where action is to be taken, it must be noted that the caller is unknown to the person called. Evidence of a pattern of behaviour that includes making Silent Calls is unlikely to reveal the identity of all those who were called. The precise nature of the relationships between the sets of parties is therefore unlikely to be established.

Consideration of these relationships is not required in determining whether the powers should be applied and how they are used.

### ***Providers in relevant markets***

The persistent misuse powers are not restricted to cover only providers of products and services in markets relevant to Ofcom's regulatory responsibilities [3.1].

The persistent misuse powers give Ofcom a duty to act against persistent misuse by any user of telecommunications networks and services. This does not mean that Ofcom may thereby regard any market in which a user of telecommunications networks and services may operate as a provider as being potentially subject to regulatory intervention to further the consumer interest in that market [3.1].

- Some Silent Callers, e.g. government departments, do not operate in a market.
- Some Silent Callers operate in markets where Ofcom would not acknowledge a duty to further the interests of consumers, e.g. home improvements.

In the case of Silent Calls for which outsourced call centres are deemed to be responsible, the only consumers involved are those who purchase their services in the competitive market for the provision of call centre services. As it is they who are ultimately responsible for the Silent Calls, use of the persistent misuse powers should, in such cases, be applied directly against the interests of the "consumers".

### ***Consumer interest in the market***

Ofcom's statutory duty to further consumer interests only applies to their interests in the relevant market, not to the interests of those consumers in general [4.1].

Where a person's general interests in relation to communications matters, rather than their specific interests as a consumer in a relevant market, are involved, these are their interests as a citizen. It is therefore Ofcom's first principal duty that applies.

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Considering the terms of the second principal duty, the interests of consumers in the market are furthered by enabling providers to keep their marketing and service costs as low as possible. If measures necessary to avoid persistent misuse add to their costs in making contact by telephone, this could be said to act against the interests of consumers in the relevant market.

This interpretation of Ofcom's duty may provide the justification for its longstanding and continuing tolerance of Silent Calls. It does not however justify its claim to be seeking to act against them [1.19].

This could be said to create a conflict between Ofcom's two principal duties, requiring it to publish a statement detailing how this conflict was resolved on each occasion that use of the powers against Silent Callers is considered [3.2].

Ofcom seeks to avoid being required to address this conflict by wrongly claiming that use of the persistent powers are in performance of its second principal duty.

### ***Consumer interest in general***

Although this is not strictly required by its second principal duty, Ofcom may wish to further the general interests of consumers by seeking to protect them from harm by providers in relevant markets [4.1]. Silent Calls made by, or on behalf of, these providers could be an example of such harm.

Ofcom has received evidence of many Silent Calls being made by, or on behalf, of a number of providers of telecommunications services. It is claimed by some that the largest provider of telecommunications services in the UK is also responsible for the largest number of Silent Calls.

The promotion of CPS services by telephone is another major cause of Silent Calls. At least two of the companies investigated by Ofcom in 2005 were making Silent Calls in the course of this activity. Ofcom somehow reached a determination that the Silent Calls made by a CPS provider from its own offshore call centres did not represent persistent misuse, whereas some of those made by a UK agent did [A8.5].

The persistent misuse powers apply to all telephone users and do not provide the most effective means for Ofcom to prevent harm being caused to consumers by providers on whom it may impose regulatory requirements. Contrary to what is said in the Consumer Policy consultation document [4.33], the powers to create and enforce General Conditions are very different to those available to address persistent misuse.

An ideal opportunity for Ofcom to introduce such a means of consumer protection was provided by the introduction of the "Guidelines for sales and marketing codes of practice for Fixed-line Telecommunications Services" in 2005 [4.30: bullet 3].

Ofcom chooses not to use this opportunity to implement an effective consumer protection measure. Other similar opportunities may also be neglected.

These Guidelines refer to provisions relating to contact by telephone, but make no reference whatsoever to Silent Calls, or any aspect of the use of automated diallers. An extensive schedule of "Legislation of particular relevance to sales and marketing of particular telephony products" even fails to mention the persistent misuse powers.

Ofcom's duty to stop Silent Calls is much broader than its measures to protect consumers in relevant markets. Given Ofcom's claim to the contrary, it may be seen as odd that it is totally omitted from Ofcom's proper action in this area.

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## The nature of the persistent misuse powers - as defined

Sections 128-131 of the Communications Act bear only on Ofcom, providing it with powers and obligations.

They do not define an offence [4.15] against which Ofcom may prosecute [3.52], nor do they impose enforceable obligations [4.27]. They do not empower [1.19: bullet 2], or require [4.27], Ofcom to conduct an investigation.

- Section 128 provides Ofcom with the opportunity to determine that a specified activity, practised by a particular "person", represented persistent misuse.

Such a determination requires only "reasonable grounds for believing", must conform to the general description of persistent misuse that is provided, and must also be made having regard to the published Statement of Policy.

- A Notification issued under section 128 may be followed by an Enforcement Notification under section 129, if the misuse continues.

**It is only the Enforcement Notification that imposes an enforceable requirement.** The duty to comply with an Enforcement Notification is enforceable through civil action in the courts.

- The issuing of a Section 128 Notification may be followed by imposition of Penalty under Section 130.

If considering a penalty, Ofcom is required to have regard to steps taken for securing that the misuse is brought to an end and is not repeated. It would therefore not be expected that a penalty would ever be imposed simply on account of a past activity that had been brought to an end following the s128 Notification.

The Statement of Policy currently in force indicates that this option will never be used in relation to Silent Calls.

- A breach of a requirement imposed by a section 129 Enforcement Notification may lead to the imposition of Penalty under Section 130. This is in addition to the opportunity for compliance with the specific requirements detailed in a particular Enforcement Notification to be enforced by the courts.

- Section 131 imposes two requirements on Ofcom.
  - To publish and revise a Statement of its general policy with respect to the exercise of the powers.
  - To have regard to the statement for the time being in force when exercising the powers.

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## Representation of the Ofcom Silent Calls policy

In addition to the points referred to above and those made within the Case Study, which is covered below, there are a number of other significant aspects of the relevant policy which are referred to elsewhere in the Consumer Policy consultation document.

### *Definition of policy*

Ofcom clearly applies an interpretation of its duties and the provisions of the persistent misuse powers that are at difference with the terms of the Act. As shown above, these are not clearly stated at a single point in any document.

The Consumer Policy is seen to encompass use of the persistent misuse powers and thereby to set relevant objectives and principles that bear on their use. There is however, no reference whatsoever to the Consumer Policy contained in the Statement of Policy (on persistent misuse).

Some differences of interpretation are found both between the two policy documents and between sections within each of these documents.

Yet further differences are found with expressions of policy in news releases and publications on the Ofcom website (e.g. FAQ).

The differences have to be picked out from various references.

### *Market regulator*

Notwithstanding its first principal duty, Ofcom is seen to wish to achieve all its objectives by acting only as a regulator of markets.

It supports this position by actually misstating its first principal duty as being:

"... to further the interests of citizens in relation to communications **markets**" [3.1]

Section 3(1) (a) of the Communications Act 2003 states this as being:

"To further the interests of citizens in relation to communications **matters**"

Away from the section [3.1 - 3.14] of the consultation document which addresses the distinction between citizen and consumer interests and invites agreement on the basis of an inaccurate statement of the statutory position, the duties under the Act are presented accurately [1.1, 2.1].

There is an attempt to present the first principal duty as though this related only to some general effect of market regulation - "Citizen-related policy is concerned with changing the outcome delivered by the market in order to meet a broader social, cultural or economic objective or interest." [3.14].

Ofcom therefore attempts to complicate its clear and simple responsibility "to eradicate the nuisance of silent calls" initially by introducing spurious issues of markets and consumers. Further complications then flow from this.

### *Media coverage*

It is said that media coverage has a part in Ofcom's delivery of its policy [4.49].

News releases on Silent Calls have been used to present a misleading impression of the content of Ofcom's Statement of Policy and the nature of its powers. The news releases of 31 October 2005 and 1 March 2006 provide examples of this.

## The Ofcom Silent Calls Policy

A deliberate attempt to convey a misleading impression of Ofcom's powers and policy appears to be part of its Consumer Policy. Ofcom appears to seek compliance with requirements that it has neither the proper authority to impose, nor any powers or intent to enforce, through news releases announcing "new measures" that have neither been requested nor provided.

The Consumer Policy consultation document fails to indicate that the agreement sought for its approach to "Consumer Protection" invites public consent to this activity. Ofcom cannot claim approval for the deliberate practise of deceit from those who are no less likely to be deceived than those whom it intends to deceive.

In particular:

- Ofcom cannot achieve the effect of a general s128 Notification to all users of automated diallers by means of a news release.
- Ofcom cannot achieve the effect of a general s129 Enforcement Notification to all users of automated diallers by means of a news release, so as to impose "enforceable requirements".

Given an understanding of the nature of the powers, the news releases of 31 October 2005 and 1 March 2006 were intended to have this effect. These releases failed to provide a true representation of the revisions to the Statement of Policy that were put in force on the respective dates. This was however probably not their purpose,

### ***Presentation of the extent and nature of the powers***

As stated above, Ofcom is seen to attempt to mislead others as to the nature of the powers that it holds to address persistent misuse.

- Ofcom seeks to pretend that by the Act [4.27], or through its Statement of Policy [A8.6], there is an enforceable obligation on users of automated diallers not to make Silent Calls.

This is untrue. Such an obligation would only arise if Ofcom were to issue an Enforcement Notification under Section 129 to this effect. Ofcom has never issued a s129 Enforcement Notification, nor has it ever required, or even publicly requested, anyone to stop making Silent Calls [4.28, A8.5].

- The Communications Act also covers matters that are more serious in their nature than persistent misuse. "Improper use of public electronic communications network" is defined at section 127 as an offence for which a person may be prosecuted.

Ofcom seeks to pretend that those making Silent Calls are liable to prosecution [3.52]. Ofcom is also probably responsible for the mistaken assumption by the Department of Trade and Industry that the penalty associated with the persistent misuse powers was originally set in respect of activities defined as "Improper Use".

Even if the interests of citizens are furthered as a result of this misrepresentation, this is not a proper way for a public body to perform its duties.

It will lead to a distortion of markets in favour of operators who are smart enough to recognise the truth. It is likely that this will be those who invariably operate on the edges of what is permitted - either major successful companies who would make many Silent Calls, or "cowboys" who would damage the reputation of the industry.

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## ***The Complaint and Dispute Guidelines***

It is said that the "Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives, July 2004" are appropriate for dealing with use of the persistent misuse powers [4.78].

This is untrue. These guidelines make no reference to the relevant provisions of the Act, nor do they even allow for them to be applied.

Ofcom chooses to follow these procedures for its administrative convenience. This has contributed to the failure of the Silent Calls policy in the following ways:

- Adequate evidence of persistent misuse provided to Ofcom is not used because it does not meet the standards of evidence set in these Guidelines.
- A spurious requirement taken only from these Guidelines leads to Ofcom conducting investigations of up to six months before considering use of the powers.

This introduces a delay before commencing action, that is quite unnecessary, because of the different standards of evidence,

Because the unnecessary investigation consumes a considerable amount of Ofcom resource, Ofcom's, otherwise proper, application of priority in use of resource means that very few cases are pursued.

- The "enforcement action" set out in these Guidelines is intended to address situations where an obligation to comply with enforceable requirements exists in law prior to action being taken.

The persistent misuse powers require a specific obligation to be created by use of the Enforcement Notification before it may be enforced.

- The Act requires a specification of the past misuse to be given in the original s128 Notification.

The guidelines do not include such a provision.

- The Act does not provide for any specific enforceable requirement to be imposed through the initial (s128) Notification.

The guidelines state that such requirements are specified at this point.

This leads to Ofcom being weak and ineffective in the action that it takes, because it is aware that by following its procedures it is acting without the support of the law.

These Guidelines make no provision for the action necessary to create an enforceable requirement under the Act, and so none may be created.

# The Ofcom Silent Calls Policy

## The Case study

The Consumer Policy statement includes a Case Study presenting a history of Ofcom's policy development and application in respect of Silent Calls.

Some omissions, points made and references given in this Case Study demand correction.

### ***Ofcom's error with the Informative Message***

Although it acknowledges "Lessons Learned", this Case Study does not make any reference to the major error by Ofcom, which is a primary cause of its past, and continuing, failure to address the issue of Silent Calls effectively in fulfilment of its duty,

### The Informative Message

The definition of a Silent Call given above makes reference to the need for an Informative Message to be used when a user of an automated dialler is unable to provide a representative to speak when a call is answered. Transmission of a message prevents the specific unnecessary inconvenience, annoyance and anxiety likely to be caused by a Silent Call, thereby avoiding this example of persistent misuse.

This is the key point to the whole issue of Silent Calls. Ofcom has totally failed to appreciate this in the past and now either grossly underplays its significance, or continues to disregard it.

### The mistake

Prior to 10 June 2005, Ofcom was labouring under the mistaken belief that use of the Informative Message was prohibited by regulation 19 of the PECR. This regulation prohibits transmission of messages that have a direct marketing purpose.

Where a call is made with the intention of fulfilling a direct marketing purpose, this purpose must simply be abandoned when no representative is available to fulfil it. Where predictive diallers are used for calls that have no direct marketing purpose this regulation could not possibly have ever applied, and there is no essential reason why the message could not be used to fulfil perhaps some of the intended purpose.

### The correction

The correction of Ofcom's ignorance of the terms of this regulation did not arise from its re-interpretation or any change in policy by the Office of the Information Commissioner (the ICO), which is responsible for enforcement of the PECR.

A simple reading of the relevant regulation by a member of the public led to an enquiry of the ICO. The ICO reply, forwarded to Ofcom and others on 10 June 2005, confirmed that this regulation is interpreted exactly as it is drafted in English.

Related points were raised by the ICO, including the vital need to adhere to other regulations and the wide interpretation of the term "direct marketing". All of this was however well known and well understood. There was no qualification whatsoever of the simple interpretation of the regulation to be as drafted.

This could have been resolved by anyone at any time.

**Ofcom has failed to explain or acknowledge its error.**

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## The blame

Blame cannot be placed on Oftel. The drafting of the original version of the Statement of Policy, which preceded introduction of the PECR, highlights the fact that the relevant provision of the, then forthcoming, PECR were unknown at that time.

Ofcom confirmed its misreading of the PECR in revising the Statement of Policy in May 2004. Without adding the specific reference, this revision made a general reference to the provisions of the PECR that was simply incorrect.

## The consequences

Ofcom has made no public statement on this issue following the 10 June 2005 revelation. It is seen to have actively discouraged adoption of the Informative Message, at least up to its announcement on 1 March 2006.

It could be assumed that Ofcom is trying to conceal its responsibility for this error.

In the revisions to the Statement of Policy on 31 October 2005 use of the message is accepted as permissible, although subject to inappropriate constraints.

In the 31 October 2005 Statement of Policy revisions and elsewhere, Ofcom now seeks to create confusion between any call where no live agent is available ("Abandoned Calls") and the Silent Call, which is the case that invariably represents misuse because of the likelihood of anxiety being caused.

Rather than focussing on the specific nuisance of Silent Calls, all of Ofcom's current policy in this area is actually addressed to "Abandoned Calls". Despite having introduced this term itself and carefully drawn the distinction, Ofcom is frequently seen to be deliberately seeking to mislead when using these terms in an inappropriate manner that disregards the important distinction:

- Silent Calls are a clear example of misuse (invariably made persistently)
- Abandoned Calls (other than Silent Calls) are, in general, no more likely to cause unnecessary annoyance, inconvenience or anxiety than any other telephone call that results in no benefit for either party.

The recent revisions to the Statement of Policy introduce a series of supposed general regulatory requirements alongside that of not making Silent Calls. These are presented in the context of all Abandoned Calls being said to represent persistent misuse.

Rather than the Informative Message, as described, Ofcom suggests use of an "Information Message". The difference is seen in that this "Information Message":

- may not state or fulfil (in the case of non-marketing calls) the purpose of the call
- must give a telephone number, thereby adding likely unnecessary annoyance, inconvenience and anxiety to the modest nuisance of an abandoned call.

Because these comments address the issue of Silent Calls, it would be inappropriate to discuss the spurious reasons given, and the true reasons held, by Ofcom for introducing a new type of nuisance call, when it should be focussed only on the elimination of Silent Calls.

This improper, inappropriate and unnecessary complication of the policy was perhaps undertaken deliberately, so as to make the actual powers unusable.



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## The significance

In early 2004 Ofcom disregarded the significance of the Informative Message. Its failure to act against Silent Calls at that time was said to result only from a reluctance to prevent the use of predictive diallers.

The Informative Message is therefore highly significant, as it enables use of predictive diallers without making any Silent Calls. Ofcom failed to recognise this.

Ofcom's position is seen not to have changed.

At paragraph 2.7 of the current Ofcom Statement of policy, published on 1 March 2006, there is reference to consideration of the responses to the consultation on the previous Statement of Policy, implemented on 31 October 2005.

Referring to policy decisions made in January / February 2006, this paragraph begins as follows:

**"A complete ban on silent calls was considered as a policy option but would effectively prohibit the use of predictive diallers in the UK. We believe that this would be a step too far"**

This statement confirms Ofcom's current and continuing support for the practice of making Silent Calls, and rejection of the Informative Message.

## Shared blame?

It is perhaps fair to point out that some responsibility for this error may be carried by the Direct Marketing Association, which made exactly the same mistake, even going back to the previous equivalent regulations in place prior to the PECR.

Being concerned only with Direct Marketing, it is possible that this organisation was unable to conceive of any action by its members that did not have a Direct Marketing purpose. Such an approach would have denied consideration of the use of the Informative Message.

One cannot be sure how far the relationship between Ofcom and the DMA involved Ofcom taking advice from the DMA on matters of statutory regulation involving the use of recorded messages without a Direct Marketing purpose.

Ofcom's selection of the DMA as the sole representative of those who use predictive diallers may be seen to have led to an undue influence on its thinking on this specific issue. There are indications of such an effect in relation to other aspects of the Silent Calls issue also.

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## ***Points from the Case Study***

### Liaison with the DMA

It is suggested that "During 2004 and early 2005 Ofcom liased with the Direct Marketing Association (DMA) and its members to reduce the number of silent calls" [A8.4].

- At this time the DMA had in place a Code of Practice which explicitly disallowed use of the Informative Message. (The relevant provision remains in the recently published March 2006 version of this code.)

This code allowed its members to make Silent Calls so long as the number did not exceed 5% of the number of calls answered. It was claimed that this specific provision was enforced by Ofcom. (That claim was removed in June 2005).

- At this same time the Ofcom Statement of Policy in force declared a pattern of behaviour or practice that included making any Silent Calls to be an example of persistent misuse. With specific reference to the DMA 5% policy, which had been in place since 2002, it also declared "because the 'persistent misuse' powers are framed with a view to the protection of individual consumers, it would be inappropriate to apply a 'percentage' approach".
- The substance of this liaison with the DMA is therefore seen to have been in direct contravention of Ofcom's stated policy.

This conduct also failed to reflect the interests of citizens, which demands that Silent Calls be stopped, rather than approved under some constraint, wherever Ofcom has the opportunity to use its powers.

The interests of citizens are also damaged by placing responsible members of the call centre industry under operational constraints and thereby at a competitive disadvantage in relation to less reputable operators.

### Other investigations

During 2004 and 2005, Ofcom conducted two investigations into a particular company, not a direct marketing company, not a member of the DMA, which was found to be making Silent Calls. This action arose from evidence given in a complaint by a member of the public in December 2003.

(This "landmark" case is not referred to at all in the Case Study; it is said to have been "less visible" [A8.5]. It is however covered in part in the main Consumer Policy consultation document [4.28].)

When concluding these investigations, in April 2004 and May 2005, Ofcom used non-enforceable means which were said to be effective in requiring this company to adhere to the DMA Code of Practice. This company has been making Ofcom-approved Silent Calls, applying the 5% rule, since 1 May 2004.

- It is said that "The absolute volume of silent calls is very hard to quantify" [A8.3].  
Ofcom knows (assuming that the reports provided are accurate) exactly how many Silent Calls this company has made, with its explicit approval. Using figures released by Ofcom covering the total level of calling activity prior to April 2004, it is possible to estimate that by 1 May 2006 over 4 million Ofcom-approved Silent Calls will have been made by this one company.

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## Growing public concern

It is said that "over the last two years there has been growing public concern about the distress caused by silent calls" [A8.3].

It is important to note that this distress was not necessarily any less previously, indeed it may have been greater when there were fewer complaints. Growing media coverage of this issue has helped many, who were deeply concerned by calls where the caller remained silent, to recognise the likely cause and therefore focus their concern and register complaints.

It is also important to note that the recent reduction in the number of complaints reported by BT may not provide a valid indication that public concern has halved.

Nothing of significance has ever been done to reduce the total number of Silent Calls being made. It is only very recently that the call centre industry has started to promote use of the Informative Message. This action has been unnecessarily delayed by Ofcom and is now complicated by the addition of other supposed requirements.

BT's promotion of its Privacy at Home service will have diverted many potential complainants into registration with the TPS. This simply serves to redirect Silent Calls away from those who may complain, it has no effect on the number being made. It may even increase the degree of concern felt if there is an increased concentration of Silent Calls onto those more vulnerable citizens who may also be less likely to complain.

A fall in the number of new complaints does not indicate a reduction in the level of concern, It only indicates a reduction in the rate of growth of the number of people who have expressed concern through a complaint to BT. After being told by BT that it can do nothing to stop Silent Calls being made, a complainant is unlikely to renew their complaint each month simply so that their unresolved concern may continue to be registered by Ofcom.

## The investigation completed on 31 October 2005

- It is said that an "investigation was completed on 31 October 2005 with notifications being issued to four companies and written undertakings provided by one company" [A8.5].
  - Two of these Notifications did not relate to Silent Calls, but to misdirected fax calls.
  - The Notifications issued were not Enforcement Notifications that could impose an enforceable requirement. Although said to be Notification under Section 128 they did not include the required specification of the activity that was determined to be persistent misuse. As the steps said to be necessary to bring the misuse to an end did not include ceasing the making of Silent Calls, the making of Silent Calls cannot have been the misuse covered by the Notifications
  - At the same time, a further written undertaking was obtained from the company covered by the investigations in 2004 and 2005.

The case study fails to indicate that the effect of this action against four companies found to be making Silent Calls, was to allow them to continue making Silent Calls up to a defined percentage of the total number of calls answered.

## The Ofcom Silent Calls Policy

The case study fails to indicate that this action was taken with regard to a revised Statement of Policy, put in force on 31 October 2005. The clearly stated prohibition of a percentage approach, which had been disregarded previously, was removed as part of these revisions.

The Statement of Policy in force and regarded when taking this action is essentially that put in force on 1 March 2006. The provisions in respect of use of the Informative Message in the current version of the Statement are exactly the same now as when this action was taken, and its use was not even suggested.

- It is said that "The absolute volume of silent calls is very hard to quantify" [A8.3].

Ofcom knows (assuming that the reports provided are accurate) exactly how many Silent Calls are being made by these three other companies, with its explicit approval. Unlike for the company subject to action previously, Ofcom has not published any figures from which to make an estimate.

### The "requirements" / "procedures" / "mitigating factors"

It is said that the Ofcom Statement of Policy "sets out a series of requirements for organisations using automated calling systems" [A8.6].

The actual Statement of Policy shows a closer regard for the limits of Ofcom's powers than its other publications. The Statement rightly does not refer to these as "requirements", but as:

"procedures that call centres can adopt which, taken as a package, will act as mitigating factors in establishing the seriousness of a particular act of misuse".

### The increase to the maximum penalty

Reference is made to the request for an increase to the maximum penalty available under s130 [A8.7].

This has now been granted and came into effect on 6 April 2006.

Although the granting of the request was expected, it was not anticipated by any (perhaps qualified) revision of the terms of policy for use of penalties. This remains unchanged from that in force in 2003.

If this significant increase is to have a significant effect on Ofcom's ability to use the powers, an announcement of the change in policy is awaited. One understands that this will follow the planned review of the policy, which is now expected to occur early in 2007/8.

Time will be taken by the review, consultation and consideration of responses, followed by an investigation under the terms of the revised policy. Adding 4, 3, 2 and 5 months respectively and assuming an immediate breach of the terms of an Enforcement Notification, the earliest time when a higher penalty would be imposed is August 2008!

No Enforcement Notification has ever been issued and no penalty ever imposed. The policy on use of the Enforcement Notification is now weaker as a result of the revisions put in force on 31 October 2005 and retained in the 1 March 2006 version.

The probability of use of a penalty, which would only follow after an Enforcement Notification, is therefore now reduced, even though the limit has been increased.

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### Two years to obfuscate the policy

It is said that "The time it took between the problem emerging and clarifying the policy and taking enforcement action was about two years" [A8.8: bullet 1].

The policy to address Silent Calls effectively, developed by Oftel, was in place, and perfectly clear, within a few weeks of the powers being provided in the summer of 2003. The actual problem was well known and recognised prior to this time. In December 2003, Ofcom inherited a perfectly effective policy with which to address a known problem. That policy has never been implemented, no enforcement action has ever been taken.

It has taken two years for Ofcom to complete its obfuscation of that policy, as covered in detail here. In the clearest form the policy is now presented as consisting of specific enforceable requirements imposed on providers in markets relevant to Ofcom's functions, in furtherance of the consumer interest in those markets.

This is ineffective unlawful nonsense, a most unworthy product of two years work.

### Self-regulatory approach - then

It is said that a "self-regulatory approach" was tried initially to solve the problem, and this failed [A8.8: bullet 2].

Ofcom has a statutory duty to publish a Statement describing its policy and to have regard to this when using its powers. That Statement has never made any reference whatsoever to a "self-regulatory approach".

There is no "self-" involved when the terms of a Code of Practice for members of the specialist Direct Marketing industry are applied to a member of the Home Improvements industry by a body with general regulatory responsibilities only for the Communications industry.

The "self-" was also missing when the body that applied the "regulation" disregarded the explicit prohibition of a "percentage approach" in its own formal policy, in defiance of a statutory provision.

This was the approach seen in effect on two occasions prior to 31 October 2005. From this date onwards, the terms of the DMA Code of Practice were adopted as formal Ofcom policy.

### Self-regulatory approach - now

The approach currently in force and in effect is far closer to self-regulation than that presented by the Statement of Policy in force prior to 31 October 2005.

It could be said that the current approach of attempting to impose requirements by news releases is precisely that of "self-regulation", because Ofcom cannot enforce requirements imposed in this way. Any compliance is, in terms of the law, voluntary.

The persistent misuse powers cover only those "persons" who are Notified of a specific action that is determined to represent persistent misuse. Each case has to be assessed on its merits, applying general principles and considering factors in mitigation, before determining what, if any, specific requirements need to be imposed in order to cause the misuse to cease. This is recognised in the terms of the Statement of Policy.

This is however not the approach that Ofcom says that it is following.

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This approach is said to be based on ensuring compliance with a series of requirements [A8.6]. This mirrors the way in which a self-regulatory body sets standards for its members, and maintains adherence to them.

There are however two significant advantages that any self-regulatory body has over Ofcom's position in respect of persistent misuse, when following this approach:

- It knows who its members are, and can therefore readily collect evidence of activity and compliance from them all,
- It can offer the "carrot" of certification as a valued means of winning business from standards-conscious clients, thereby encouraging compliance, against a recognisable commercial risk.

The current Ofcom policy that is said to be in effect, modelled on self-regulation in approach as well as specific content, lacks these benefits, and is therefore likely to continue to fail.

### Incentives to "bend the rules"

It is said that a self-regulatory approach did not have the desired impact because industry faced strong incentives to bend the rules [A8.8: bullet 2].

Rather than choosing a simple approach, well suited to its powers and resources, Ofcom has now chosen to follow a complex approach introducing a number of specific supposed "rules". Only one of these, that which disallows Silent Calls, is of true significance. This is however the only one that has been ignored in every case where Ofcom has taken action applying the Statement of Policy including the "rules".

Rather than following the simple procedure for use of the powers as outlined in the Act, Ofcom chooses to follow an unnecessarily laboured procedure, involving a significant level of resource and a long delay between the instigation of action and any possible outcome.

Considering the above, it is difficult to see what has changed, in terms of "incentives to bend the rules".

- Anyone responsible for making an abandoned call could be said to have an incentive not to damage their reputation by acknowledging responsibility for the inevitable inconvenience caused.
- Some in "the industry" may recognise that Ofcom does not have the powers to enforce the requirements in the manner in which they have been announced. They may be said to have a natural incentive not to incur any cost to their business that is not strictly necessary.
- The fact that Ofcom itself disregards the most significant "rule" provides an incentive for those who recognise the pick-and-choose approach to the "package of rules", that has been followed in practice, to do exactly the same as Ofcom.
- The addition of less significant "rules", which could be difficult to follow, provides an incentive for those who believe that it is the whole "package of rules" that has to be followed, as is stated, to adopt an all-or-nothing approach. (e.g. many overseas callers are totally unable to comply with the CLI requirement, some agencies find business harder to win working on a 3% drop rate)

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- The primary "incentive to bend the rules" that was in place previously remains in place.

The industry expects Ofcom to provide a level playing field. Any measure that damages competitiveness is unlikely to be adopted if it is known or suspected that competitors have not adopted, or are not required to adopt, the same measure.

- Ofcom's bias against intervention, reluctance to distort markets and other duties in areas of greater public concern will continue to cause very few cases to be investigated.
- The Statement of Policy confirms that the only certain consequence of a lengthy investigation would be a requirement to comply in future. History suggests that this would be through an unenforceable requirement applying for a period of six months.
- There is no basis in history, or in declared policy, to determine what other action would be likely to be taken.

Considering the above, those with a strong business drive, including a bias against compliance with regulations, may decide that non-compliance represents a sound business decision.

When this is recognised by others, those with a natural inclination to comply will feel morally justified in "bending the rules" where doing so could be seen as necessary to protect their competitive position - and UK jobs.

- The 3% drop rate limit was rejected by the DMA, when proposed by Ofcom as a limit on the number of Silent Calls being made, because of the difficulties this would cause to members. Where the Information Message is being used, two important considerations apply:
  - The degree of nuisance being caused is substantially diminished as abandoned calls are no longer anonymous and menacingly silent.
  - The caller now carries the risk that those who are caused annoyance by unsolicited abandoned marketing calls will be removed from their lists forever.

There could be a case where a caller would be prepared to accept the risk of losing twice as many potential future customers for the sake of the higher level of contact per agent hour, and the consequent reduction in costs, achieved by a 6% drop rate.

Assuming that the total daily call volume would be half that of Kitchens Direct, this would be causing far less nuisance than Ofcom is known to tolerate. This proposed campaign would produce no greater number of abandoned calls and none of them would result in silence.

A call centre could be faced with this proposition from a major prospective client. Perhaps a fitted kitchens company! Perhaps a company considering placing their outbound calling to the UK overseas, where there is no fear of Ofcom!

This call centre would have a very strong incentive to bend the rules.

Nothing has changed.

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### Uncertainty

Ofcom is said to have learned that "A lack of enforcement action by Ofcom and the assumption by industry that the DMA Code of Practice provided a 'safe harbour' led to considerable uncertainty" [A8.8: bullet 3].

Ofcom now provides the "safe harbor" as the DMA used to say that it did, in exactly the same way as it is provided in the US.

It would appear that Ofcom has learned to avoid uncertainty by always doing whatever the DMA says it does.

Adopting a policy that is based on the announcement of unenforceable requirements may, once this has recognised for what it is, provide the desired certainty about a lack of enforcement action.

### Ofcom vs. the ICO

It is said that "It was not always clear to consumers whom to address their complaint to, Ofcom or the Office of the Information Commissioner."

Ofcom has clearly learned that this is very effective way of managing its workload.

The recent revisions to the Statement of Policy now have matters enforced by the ICO even more closely embedded within that policy than previously.

The new "requirements", for example, include at least two issues that relate to regulations enforced by the ICO.

In addition to this, the new "requirements" also aim to assist the ICO in managing its workload by seeking to cause "opt-out" requests to be made only by telephone. Such requests, which are unlikely to be made to the right company anyway, cannot be enforced by the ICO. This will allow it to dismiss any complaints about breaches of such requests.

This could create an interesting situation if someone complains that a request not to receive further marketing calls from a particular company, allegedly made using the method specifically required by Ofcom, has been dishonoured.

Additional confusion could arise if the opt-out request was made to one telemarketing agent and another telemarketing agent made the further call. Still more confusion would arise if the two telemarketing agencies were engaged by different sales agencies of the company. In the mobile phone market, this situation is not uncommon.

One thing is certain, neither Ofcom nor the ICO would take action, against any one of the five companies involved, in response to the complaint.