



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

Consultation

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Section 1

A consultation on proposed amendments to Ofcom's statement on persistent misuse

Background to the consultation

- 1.1 On 1 March 2006 Ofcom published an updated *Statement of Policy on the persistent misuse of an electronic communications network or service* (the "Persistent Misuse Statement")¹. The Persistent Misuse Statement was published in accordance with section 131 of the Communications Act 2003 (the "Act"), and sets out Ofcom's approach to the use of its powers in section 128 of the Act to deal with persistent misuse of an electronic communications network or electronic communications services. In particular, the Persistent Misuse Statement set out Ofcom's new approach towards the treatment under section 128 of the Act of silent and abandoned calls, which had been identified as a major cause of annoyance, inconvenience or anxiety for telephone users. The sections of the Persistent Misuse Statement which dealt with silent and abandoned calls were specifically aimed at organisations using predictive diallers in call centres, the single biggest source of silent calls, although Ofcom's guidance in this area can and does have wider application.
- 1.2 The principal requirements of Ofcom's approach to silent and abandoned calls are:
- limiting abandoned calls to a rate not exceeding three per cent of all live calls made in any 24 hour period;
 - playing a brief information message giving details about any call answered before an agent is available;
 - Calling line identification (CLI) information to be provided on outbound calls, so that consumers may return the call;
 - a 72-hour period before a telephone number receiving an abandoned call may be called again without the guaranteed presence of an agent; and
 - unanswered calls must ring for a minimum of 15 seconds.
- 1.3 When the Persistent Misuse Statement was published Ofcom said it expected these requirements and the approach to enforcement that Ofcom intended to adopt would have a real impact on the nuisance of abandoned calls. However we also committed to review the effect of the new approach after twelve months in order to determine whether further changes to the Persistent Misuse Statement were required.
- 1.4 In accordance with section 131(4) of the Act, Ofcom may from time to time revise that statement published in accordance with section 131(1) as it sees fit. Given the potential impact on stakeholders, Ofcom has decided to consult on its proposed changes to the statement.

¹ http://www.ofcom.org.uk/consult/condocs/misuse/misuse_state.pdf

The impact of the new policy

- 1.5 The introduction of such a wide-ranging set of requirements has had a major impact on organisations using predictive diallers. We know, through a process of regular engagement with dialler users, that many of them have made very significant investments to improve their call centre procedures and practice in order to comply with the new rules. This has generally involved more staff training, upgrading equipment and instituting a tighter monitoring regime.
- 1.6 A recent study commissioned by Ofcom from CM Insight indicated that for a representative group of companies the average costs of achieving compliance were £289 per dialler seat or call station. For this particular group the overall costs of compliance averaged £138,175 per company. Moreover, reports in the trade press² suggested that 70 per cent of contact centres have changed their outbound operations over the last year to come into line with Ofcom requirements.
- 1.7 The impact on the public is less easy to quantify. There is no reliable way of measuring the aggregate of abandoned calls made over any given period. The best indicator is the volume of complaints made to communications providers about such calls, with the cautionary note that these can vary according to the degree of public awareness of silent calls at any one time. However the indicators we have are relatively promising.
- 1.8 BT has established a new way of capturing complaints about silent calls that indicates complaints were running at a broadly stable level of just under 30,000 a month over the period between June 2006 and April 2007. However there has recently been some evidence of a decline in the volume of complaints which have been averaging around 20,500 since April 2007 (albeit with quite sharp monthly fluctuations ranging from a high of nearly 25,000 and a low of around 18,500). This contrasts with a peak of 160,000 complaints a month to BT's Nuisance Calls Bureau in 2004 and the 80,000 complaints BT received about silent calls in January 2006, before the publication of the Persistent Misuse Statement.
- 1.9 The fluctuations in the number of complaints to the Ofcom Contact Centre about silent calls suggest that their volume represents too small a sample to be a reliable indicator of trends. In the period from January 2006 through to November 2007 the highest number of monthly complaints recorded was 776 in November 2006 (in the month when Ofcom published details of its investigation into four companies) and the lowest was 195 in April 2006, just after the publication of the Persistent Misuse Statement. More recently, since April 2007 the figures have stabilised around the 300 mark, with a high of 375 in May and a low of 263 in September.
- 1.10 Unpublished MORI research conducted in February 2007 on behalf of the Telephone Preference Service (TPS)³ included a section on silent calls. This revealed that out of a sample of 1,961 respondents the number of silent calls received within a typical month was⁴:

² *Contact Centre Link 22 June 2007; Customer Management 05 July 2007*

³ *Awareness of Telephone Preference Service, DMA, Marked-up questionnaire 2 March 2007*

⁴ The totals add up to 101 per cent because of the effects of rounding-up

none	47%
1 or 2	20%
3 or 4	8%
5 or 6	5%
7 or 8	2%
9 or 10	4%
more than 10	6%
don't know or can't remember	9%

- 1.11 The fact that nearly half the sample received no silent calls is almost certainly related to the approximately 14.5 million telephone numbers registered with the TPS by February 2007 and so these numbers are unlikely to be receiving any unsolicited marketing calls.
- 1.12 A further question asking how people felt about receiving silent calls highlights that even if the overall numbers are in decline this is still a problem to be taken seriously.

Which of these statements about silent calls do you agree with. Please tell me all that apply to you

Silent calls cause me unacceptable inconvenience	37%
I feel anxious when I receive a silent call	21%
I am not particularly inconvenienced by silent calls	15%
I have no problem with silent calls	15%
None of these or don't know	20%

- 1.13 Although some respondents agreed with more than one of the statements the figures suggest that one in three people regard a silent call as an unacceptable inconvenience and one in five feel anxious when they receive one.
- 1.14 The figures make an interesting comparison with those derived from the 2005 Brookmead Report commissioned by the Direct Marketing Association: *Silent Calls Research*⁵. The report found that 36 per cent of the sample received no silent calls, 20 per cent received two or less a month, 12 per cent received more than 10 a month and about 3 per cent said they were receiving over 30 a month. The emotional responses to silent calls revealed by the Brookmead report are strikingly similar to

⁵ http://www.contact.dma.org.uk/Downloads/Silent_Calls_Research.pdf

those of the MORI research mentioned above: 37 per cent of respondents experienced “unacceptable inconvenience”, 21 per cent felt “anxious”, 23 per cent said they were “not particularly inconvenienced” and 26% were either “none of these” or “don’t know”. Again some respondents agreed with more than one statement.

- 1.15 Ofcom’s own consumer research, carried out in September 2005 and reported on in the consultation on the Statement of Persistent Misuse published in October 2005⁶, reinforces these findings. Sixty three per cent of adults said they were concerned by silent calls and 35% were very concerned. Within this general reaction, two groups, people over 65 and women, were particularly disturbed by silent calls.
- 1.16 Since the publication of the Persistent Misuse Statement Ofcom has been involved in a rolling programme of monitoring, investigation and enforcement. The first wave of enforcement in relation to silent and abandoned calls culminated in four companies receiving financial penalties of between £32500 and £45000 in January 2007 for a failure to comply with the new requirements.
- 1.17 The end of those particular investigation did not signal the end of the process. Ofcom indicated the priority it attaches to bringing silent calls under control in an update note issued to its Competition Bulletin entry for the silent calls monitoring and enforcement programme issued on 20 June this year where it announced that it will extend its programme of monitoring and enforcement for a further six months to investigate whether companies using dialling equipment are complying with Ofcom requirements. In December 2007 Ofcom issued Notifications under section 128 of the Act against two additional companies. Details of the investigations are published at http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_9_05/
- 1.18 We recognise that the volume of silent calls has still not been reduced to an acceptable level, in which they subside to an infrequent and minor irritant. However we believe that the measures adopted have made significant inroads into the problem and that sustained pressure by Ofcom creates a climate in which there are continuing improvements in call centre practice. It is too early to assess the impact of the most recent penalties but we believe they will have a salutary effect.
- 1.19 Against this background Ofcom does not intend to propose any radical departures from the current approach. However in the course of explaining and publicising the new approach to the industry and in the process of investigation we believe there are areas where the existing recommendations need to be made more explicit. This consultation identifies those areas where there is a need for greater clarity and proposes revisions to the text of the Persistent Misuse Statement to forestall any misunderstandings.

Proposed revisions

- 1.20 This section analyses the recommendations set out in section 6.16 of the current statement, identifies where problems of interpretation have arisen and proposes revised text.
- 1.21 **Existing recommendation:** *the ‘abandoned call’ rate shall be no more than three per cent of ‘live calls’ on each individual campaign over any 24 hour period.*

⁶ <http://www.ofcom.org.uk/consult/condocs/misuse/misuse.pdf>

- 1.21.1 There is still a lack of clarity in some quarters about how to measure this target. An “abandoned” call is a connected call answered by a live individual and terminated by a dialler because no agent is available. For the purposes of calculating the three per cent limit a call is not “abandoned” if it is terminated by the connected individual or because it has not been answered within the minimum 15 second ringing time. The abandoned call rate is calculated by dividing the number of abandoned calls by the number of live calls over each 24 hour period. The number of live calls will include the number of abandoned calls which are, by definition, live calls. The applicable formula is:

Abandoned calls (x)/(abandoned call (x) + calls passed to live operator (y)) x 100/1

- 1.21.2 Where diallers are linked to Answering Machine Detection (AMD) devices the number of abandoned calls is likely to be increased by AMD false positives because the AMD will sometimes misinterpret the presence of a live individual as an answering machine and terminate the call, which is, in reality, a live call that has been abandoned. Companies that use AMD need to factor these false positives into their abandoned call rate by subtracting AMD calls from the number of calls categorised as being passed to a live operator. The accuracy of AMD may be tested by comparing the differing connection rates when it is on and off or by making test calls to a range of numbers where the actual presence of an answering machine is known in advance.
- 1.21.3 An alternative approach would be for Ofcom to assume a generic constant of false positives in percentage terms and apply that to its investigation of the proportion of silent calls. Given widely differing views within the industry about the accuracy of AMD it might be difficult to arrive at a consensually accepted figure. An assumption that one in five answer machine detections represents a false positive might be a reasonable starting point for discussion. Your opinions, especially if supported by evidence, would be welcome on this point.
- 1.21.4 The word “campaign” has also caused difficulties of interpretation. For the avoidance of doubt Ofcom understands an individual campaign to be identified by the use of a single call script to make a single proposition to a single target audience. It is possible to run an individual campaign from more than one call centre over a 24 hour period. It is also possible to run more than one campaign (sometimes for different clients) from the same call centre. This is the reason why Ofcom’s Persistent Misuse Statement recommended calculating abandoned call data per campaign.
- 1.21.5 However, Ofcom also recognises that where a call centre operates multiple campaigns on behalf of the same client it may be appropriate to aggregate calling data across campaigns so as to give a picture of the overall performance of the call centre. In any particular investigation, Ofcom may therefore analyse calling records on the basis of aggregated data (combining data from multiple call centres where they operate in respect of the same client or campaign) or on a disaggregated basis (call centre by call centre or by campaign, where a call centre operates different campaigns for different clients). Depending on circumstances, either aggregation or disaggregation may yield a more realistic and accurate picture.

1.21.6 There will be circumstances where an organisation's outbound calls do not easily fit into the definition of a campaign, for example in the fields of debt recovery or reminding for appointments. Where calls cannot be ascribed to a particular campaign, the abandoned call limit must be applied to all outbound calls made from any call centre over a 24 hour period.

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

1.22 **Existing recommendation:** *in the event of an 'abandoned call', a very brief recorded information message is played within two seconds of the call being answered, which contains at least the following information:*

- *the identity of the company on whose behalf the call was made (which will not necessarily be the same company that is making the calls);*
- *details of a no charge (0800) or Special services basic rate (0845) number the called person can contact so they have the possibility of declining to receive further calls from that company; and*
- *includes no marketing content and is not used as an opportunity to market to the called person.*

1.22.1 Questions have arisen as to when the two second period begins, with possible alternatives being (i) from the moment the connection is established by the phone being picked up; (ii) from the start of the receiver's salutation; or (iii) from the end of the receiver's salutation.

1.22.2 The intention is that the two seconds begins from the start of the receiver's salutation. The alternatives do not provide the necessary degree of precision. As diallers are programmed to abandon a call when it is answered by a live individual (when no agent is available) the playing of an information message would be premature if triggered solely by the fact of connection before any human response. The end of the receiver's salutation is an indeterminate event as some people, confronted by silence on the phone, may extend their salutation while waiting for an answer.

1.22.3 Another issue frequently raised has been whether it is acceptable for the information message to be interrupted by an agent who becomes available, thus converting the information message into a holding message. This is not acceptable, as already explained in section 2.38 of the March 2006 Persistent Misuse Statement, because the use of holding messages could enable diallers to be speeded up in the expectation that an agent might become available while the message is playing. Effectively, the interruption by an agent converts the information message into a holding message which is likely to lead to more, rather than fewer, silent calls.

1.22.4 The necessity to identify on whose behalf the call was made has been challenged by some financial services companies on the grounds that this may compromise a debtor's privacy in a debt recovery context. Licensed debt collectors are subject to Debt Collection Guidance⁷ issued by the

⁷ http://www.ofc.gov.uk/shared_ofc/business_leaflets/consumer_credit/ofc664.pdf

Office of Fair Trading which requires them not to act in a way likely to be publicly embarrassing to debtors. The possibility of embarrassment arises where the company's name in the information message clearly identifies it to be a debt collection company and the message is heard by other members of the debtor's household.

- 1.22.5 As already explained in the March 2006 Persistent Misuse Statement it would not be appropriate to allow two types of information message, one for marketing and one for recovery, as the absence of a company identification would in itself become an identifier of a debt recovery call, hence tending to compromise the debtor's privacy.
- 1.22.6 One approach that debt collectors might wish to consider is the adoption of a neutral trading name that does not indicate the nature of their business. It is noteworthy that financial services companies offering a range of services have been able to comply with this requirement as a call from an identified High Street bank or credit card provider does not necessarily indicate a debt problem.
- 1.22.7 Some financial services companies have reiterated the objections they made in the consultation preceding the March 2006 Persistent Misuse Statement that it is not reasonable to offer callers the apparent possibility of declining to receive further calls which are not marketing calls. However, the stumbling block remains that separate formats for marketing and recovery calls will tend, in the long run, to compromise the debtor's privacy. For this reason, it is not practicable to limit this possibility to marketing calls only. Ofcom is proposing a slightly amended wording of this requirement to clarify that it does not confer a right on individuals to decline to receive further debt recovery calls, even though they must be offered the possibility in the general interests of protecting privacy.
- 1.22.8 **Revised recommendation:** *in the event of an 'abandoned call', a very brief recorded information message is played within two seconds of an individual beginning to speak, which contains at least the following information:*
- *the identity of the company on whose behalf the call was made (which will not necessarily be the same company that is making the call);*
 - *details of a no charge (0800) or Special Services basic rate (0845) number the called person can contact so they have the possibility of declining to receive further marketing calls from that company;*
 - *includes no marketing content and is not used as an opportunity to market to the called person.*
- 1.23 **Existing recommendation:** *calls which are not answered must ring for a minimum of 15 seconds before being terminated;*
- 1.23.1 We have found a high level of understanding and compliance with this requirement and no changes are proposed.
- 1.24 **Existing recommendation:** *when an 'abandoned call' has been made to a particular number, any repeat calls to that number in the following 72 hours must be made by a live operator;*

- 1.24.1 Some confusion has arisen because the requirement could be read to mean that any repeat calls within the specified period must be set up manually. The underlying intention is that nobody receives two or more silent or abandoned calls from the same source within a 72 hour period. The requirement is that a live operator must be available if a repeat call is made within the period even if the call itself is set up using a dialler in progressive mode. A call may only be set up if an operator is free.
- 1.24.2 Revised recommendation: *when an 'abandoned call' has been made to a particular number, any repeat calls to that number in the following 72 hours may only be made with the guaranteed presence of a live operator.*
- 1.25 **Existing recommendation:** *for each outbound call a CLI number is presented to which a return call may be made which is not charged at a higher rate than the national call rate.*
- 1.25.1 When the March 2006 Persistent Misuse Statement was published there was a recognition that call centres located outside the United Kingdom might have difficulty in complying with this recommendation. Our experience has shown that it is technically feasible for overseas call centres to present a non-geographic CLI number and there will correspondingly be less tolerance for those companies that do not.
- 1.25.2 At the same time it is recognised that even where a CLI is attached to an outbound call whether or not it is presented to the called number depends on the behaviour of the terminating network in the UK. Some UK networks do not present CLI numbers received from overseas networks even where the number in question forms part of the UK National Numbering Plan. Investigations will take account of this factor.
- 1.25.3 The intention underlying the requirement that return calls should not be charged at a higher rate than the national rate was to prevent a return call connecting to an expensive Premium Rate Service number (i.e. an 09 number). This intention can be met by either using a geographic number or using a non-geographic presentation number that satisfies Ofcom's Guide to the use of Presentation Numbers. This Guide prohibits the use of 09 numbers as Presentation Numbers (see <http://www.ofcom.org.uk/telecoms/ioi/orp/cli/>).
- 1.25.4 Reference to the Guide to the use of Presentation Numbers would also remove the current inconsistency between those guidelines and the persistent misuse guidelines. The proposed change would have the effect of permitting providers using predictive diallers to use a wider range of non-geographic numbers than at present, including those charged at up to 10p per minute from a BT line such as 0871.
- 1.25.5 **Revised recommendation:** *for each outbound call a CLI number is presented to which a return call may be made which is either a geographic number or a non-geographic number adopted as a Presentation Number which satisfies the Ofcom Guide to the use of Presentation Numbers.*
- 1.26 **Existing recommendation:** *any call made by the called person to the contact number provided shall not be used as an opportunity to market to that person, without that person's consent.*

- 1.26.1 No changes are proposed.
- 1.27 **Existing recommendation:** *records are kept for a minimum of period of six months that demonstrates compliance with the above procedures.*
 - 1.27.1 Some organisations have interpreted this recommendation as requiring the maintenance of individual call records. However the maintenance of daily calling records is sufficient.
 - 1.27.2 No changes to the wording are proposed. However this is now presented as a general requirement rather than a call centre procedure.
- 1.28 In reviewing the Persistent Misuse Statement on the basis of investigations Ofcom has conducted we have concluded that the factors that carry most weight are the degree of compliance with the rules set out in sections 1.21 and 1.22 above. Accordingly the sections setting out the recommendations (see sections 5.15 and 5.17 below) have been restructured to reflect their priority. The other recommendations will primarily act as mitigating factors in establishing the seriousness of a particular act of misuse and the level of any potential penalty.
- 1.29 The proposed changes to the existing recommendations are summarised in the table overleaf.

Table 1: Summary of proposed changes to call centre procedures

Existing recommendations	Proposed recommendations
The 'abandoned call' rate shall be no more than three per cent of 'live calls' on each individual campaign over any 24 hour period;	The 'abandoned call' rate shall be no more than three per cent of 'live calls', calculated per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over any 24 hour period, and shall include a reasoned estimate of AMD false positives;
<p>In the event of an 'abandoned call', a very brief recorded information message is played within two seconds of the call being answered, which contains at least the following information:</p> <ul style="list-style-type: none"> • the identity of the company on whose behalf the call was made (which will not necessarily be the same company that is making the calls); • details of a no charge (0800) or Special services basic rate (0845) number the called person can contact so they have the possibility of declining to receive further calls from that company; and • includes no marketing content and is not used as an opportunity to market to the called person; 	<p>In the event of an 'abandoned call', a very brief recorded information message is played within two seconds of an individual beginning to speak, which contains at least the following information:</p> <ul style="list-style-type: none"> • the identity of the company on whose behalf the call was made (which will not necessarily be the same company that is making the call); • details of a no charge (0800) or Special Services basic rate (0845) number the called person can contact so they have the possibility of declining to receive further marketing calls from that company; • includes no marketing content and is not used as an opportunity to market to the called person;
Calls which are not answered must ring for a minimum of 15 seconds before being terminated;	Unchanged
When an 'abandoned call' has been made to a particular number, any repeat calls to that number in the following 72 hours must be made by a live operator;	When an 'abandoned call' has been made to a particular number, any repeat calls to that number in the following 72 hours may only be made with the guaranteed presence of a live operator;
For each outbound call a CLI number is presented to which a return call may be made which is not charged at a higher rate than the national call rate;	For each outbound call a CLI number is presented to which a return call may be made which is either a geographic number or a non-geographic number adopted as a Presentation Number which satisfies the Ofcom Guide to the use of Presentation Numbers;
Any call made by the called person to the contact number provided shall not be used as an opportunity to market to that person, without that person's consent;	Unchanged
Records are kept for a minimum period of six months that demonstrate compliance with the above procedures.	Unchanged, although this is now proposed as a general requirement rather than a call centre procedure.

Q1 Do you agree that the proposed changes make for a clearer set of rules that enable compliance to be achieved with a greater degree of certainty?

Other proposed amendments

Automated messages and outbound call steering

- 1.30 Over the last year there has been growing interest in a variant of the holding message based on outbound call steering. The original holding message was a recorded message that simply asked the customer to stay on the line pending the intervention of a live operator. As already indicated in section 1.22.3 of this document, holding messages have the potential to increase rather than reduce the volume of silent calls. They are also likely to cause annoyance with their presumption that the called party's time is less valuable than the caller's. For these reasons we concluded that they represent a form of misuse.
- 1.31 The past 12 months have seen a refinement of the simple recorded holding message with the development of a technology that can be described as outbound call steering. In this case the communication opens with a recorded message which then offers the called party a number of keypad options, including the opportunity to be connected to a live operator. Under the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the '2003 Regulations') all automated messages without live speech that include marketing content are prohibited. This prohibition captures holding messages and outbound call steering. Their most likely use in a non-marketing environment is therefore for credit management or debt recovery.
- 1.32 Ofcom's assessment of outbound call steering for non-marketing purposes is based on the principles that we have previously applied to any type of non-marketing automated message. The default position is that the persistent use of automated calling systems to transmit recorded messages that are not marketing messages within the meaning of the 2003 Regulations is persistent misuse.
- 1.33 However in previous versions of this Persistent Misuse Statement we also recognised that some uses of automated messages do benefit the public. An obvious example is an emergency authority sending a recorded hazard warning to subscribers within a defined geographical area; another is the kind of automated service offered by some communications providers that test a subscriber's line or obtain a subscriber's confirmation that a faulty line has been repaired. We concluded that where automated messages provide a clear public benefit their use will not be a form of persistent misuse.
- 1.34 Because of the availability of outbound call steering technology this relatively straightforward test is coming under pressure. As already stated, the most common use of outbound call steering is in managing customer finances, for example by reminding for a payment around the time it falls due and before it has become subject to debt recovery procedures. To judge from correspondence received by the Ofcom Advisory Team, consumers express differing reactions to receiving this type of message. Some are clearly inconvenienced and annoyed and regard such calls as a breach of their privacy. Others say they find a reminder for an unpaid bill useful and welcome the opportunity to be able to speak to an operator and make an immediate payment.
- 1.35 Although there is no consensus, the effect of outbound call steering is likely to cause at least some people to suffer unnecessary annoyance and inconvenience, which is the test set by the persistent misuse provisions. In consequence, Ofcom is minded to treat all outbound call steering as a form of misuse.

- 1.36 There are several reasons that support this conclusion. Firstly, there is a high risk that the technology lends itself to being exploited as an artificial device for massaging abandoned calls figures downwards. The reminder calls made by outbound call steering could just as easily be made from a conventional call centre using live operators and dialler technology, although we recognise this has cost implications.
- 1.37 Secondly, the use of any type of automated message in a credit or debt context runs the risk of jeopardising the debtor's privacy. Despite being protected by security questions there is a clear possibility that the message may be heard by another member of the household, rather than the person for whom it was intended.
- 1.38 Thirdly, the driver for the adoption of outbound call steering is cost as it does not offer anything extra that cannot already be done more conventionally. As it is unlikely to be subject to significant cost restraints and it relies on a technology that is intrinsically scaleable it is almost inevitable that it will be prone to abuse. What happens when a customer presses "1" to speak to an operator and no one is there?
- 1.39 Finally, the lack of consensus around what constitutes a public benefit leaves a permanent shadow of doubt over what is acceptable and what is not. Short of Ofcom offering guidance on a case-by-case basis for each application (e.g. automated reminders are OK for dental appointments but not for hospital appointments - because of the differing privacy sensitivities), which is impracticable, outbound callers will never know whether they are compliant with the requirements of the Persistent Misuse Statement or not.
- 1.40 Given these uncertainties it is right for Ofcom to err on the side of caution. However we welcome any suggestions that might lead to a simple and coherent regulatory framework within which restricted applications of this technology are deemed to be acceptable. One alternative might be an opt-in scheme where customers only receive automated messages and outbound call steering if they have given their prior consent. Another might be a set of objective criteria defining the public benefit.

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

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

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

- 1.41 The March 2006 Persistent Misuse Statement identified the exploitation of premium rate or revenue sharing numbers, generally by duping customers into making unexpectedly expensive calls, as a form of misuse. This remains the case but we propose to make it clear that the exploitation of revenue sharing numbers in the 08 range is also a form of misuse. A number of scams have been operated that typically invite people to phone an 0871 number in order to receive a prize, an "important message" or delivery instructions for a "valuable shipment". There is no worthwhile prize, message or shipment but people are kept on the line for an undue length of time.

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

- 1.42 In Section 2 we clarify that Ofcom's initiative to take action against a form of misuse is not stymied because that misuse happens to contravene other consumer protection legislation.
- 1.43 Finally, in Section 8 which deals with penalties for persistent misuse, Ofcom's Penalty Guidelines, (see <http://www.ofcom.org.uk/about/accoun/pg/>) are referenced.

The Consultation

- 1.44 The remaining sections of this document set out Ofcom's *Statement of Policy on the persistent misuse of an electronic communications network or service* with the proposed amendments incorporated.
- 1.45 Annex 1 of this document explains how to respond to this consultation, which closes on 1 February 2008. It is intended that the revised Statement on Persistent Misuse will be adopted on the same date as the post-consultation Statement is published, in March 2008.
- 1.46 In accordance with Ofcom's revised Consultation Guidelines (see http://www.ofcom.org.uk/consult/consult_method/ofcom_consult_guide) the duration of the consultation period is one month, extended by two weeks to take account of the Christmas/New Year period. The subject matter of this consultation falls within a Category 3 consultation because the proposed revisions to the Persistent Misuse Statement only represent limited amendments to Ofcom's existing policy.

Section 2

Statement of policy on the persistent misuse of an electronic communications network or service – Introduction and summary

Introduction

- 2.1 This statement is published in accordance with section 131 of the Communications Act 2003 (the “Act”) and sets out Ofcom’s general policy with regard to the exercise of its powers under sections 128 to 130 of the Act.
- 2.2 The purpose of this statement is to provide clarity about the operation of the ‘persistent misuse’ provisions in sections 128 to 130 of the Act. These sections enable Ofcom to issue notifications if it has reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services. These sections also set out enforcement procedures and factors relevant to the application of Ofcom’s Penalty Guidelines⁸ where there has been ‘persistent misuse’. Section 131(4) of the Act imposes a duty on Ofcom to have regard to the statement in exercising the powers conferred on it by the relevant sections. However, the statement cannot bind Ofcom absolutely in exercising those discretionary powers. Section 131(2) enables Ofcom to revise the statement from time to time as it thinks fit.
- 2.3 The statement addresses the following policy issues:
- i) a definition of what constitutes ‘misuse’ of a network or service;
 - ii) when does misuse become ‘persistent’;
 - iii) examples of persistent misuse;
 - iv) Ofcom’s policy on the issuing of section 128 notifications;
 - v) the consequences of a notification; and
 - vi) factors relevant to the application of Ofcom’s penalty guidelines.

Summary

- 2.4 A person misuses an electronic communications network or service when the effect or likely effect of their behaviour is to cause unnecessary annoyance, anxiety or inconvenience to another person. Misuse also occurs when a person uses the network or service to engage in conduct the effect or likely effect of which is to cause unnecessary annoyance, anxiety or inconvenience to another person. In this context a person means either a living individual or a legal entity.

⁸ Published by Ofcom in accordance with section 392 of the Act and available at <http://www.ofcom.org.uk/about/accoun/pg/>.

- 2.5 Misuse becomes persistent when the behaviour in question is repeated often enough to represent a pattern of behaviour or practice or it is clear that the misuse is reckless. Three examples of misuse may be sufficient to constitute persistent misuse.
- 2.6 There are many forms that misuse can take. The legislation is broad enough to capture new ways of misusing a network or service that have not yet been encountered. However the statement identifies six general areas where misuse can occur. These are:
- i) misuse of automated calling systems;
 - ii) misuse by making silent or abandoned calls;
 - iii) number-scanning;
 - iv) misuse of a calling line identification facility;
 - v) misuse for dishonest gain; and
 - vi) misuse of allocated telephone numbers.

These examples are not discrete and misuse may overlap more than one area.

- 2.7 Given the breadth of the legislation some forms of misuse, say those involving the misuse of automated calling systems or scams, may also represent contraventions of other consumer protection legislation. Where such legislative overlap exists and Ofcom is faced by a particular instance of misuse, it shall determine in consultation with the relevant competent authorities which set of legislative requirements is more appropriate and may be more effectively deployed.
- 2.8 Where Ofcom believes that misuse is occurring it may issue a section 128 notification to the misuser, determining that a person has persistently misused a network or service, specifying the nature of the misuse and the period within which the notified person may make representations. In issuing section 128 notifications Ofcom will be guided by a scale of priorities and take account of the severity of the harm that the misuse causes to individual members of the public, the volume of the misuse and the number of people affected by it, or the need to indicate that certain forms of misuse are unacceptable.
- 2.9 Once a section 128 notification has been issued and the period for making representations has expired, Ofcom may issue a section 129 enforcement notification if it is still satisfied that the misuse is persistent and that the misuser has not taken all steps Ofcom considers appropriate to bring the misuse to an end, avoid its repetition and remedy its consequences. The section 129 enforcement notification imposes an enforceable requirement on the misuser to take all the necessary steps to end the misuse, avoid its repetition and remedy its consequences. The required remedial action may involve the payment of compensation to persons who have suffered as a result of the misuse.
- 2.10 Where Ofcom has issued a notification under section 128 and/or section 129, Ofcom may also impose a financial penalty on a person responsible for acts of persistent misuse. The limit for such a penalty is £50,000 per contravention, increased from £5,000 on 6 April 2006 by what was then the Department for Trade and Industry (which is now referred to as the Department for Business Enterprise and Regulatory

Reform). Section 8 of this Statement sets out the factors relevant to the application of Ofcom's Penalty Guidelines in determining penalties for persistent misuse.

Section 3

Defining 'misuse' of a network or service

- 3.1 Section 128(5) sets out two definitions of what constitutes misuse of an electronic communications network or electronic communications service. A person misuses a network or service if:
- the effect or likely effect of his use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety; or
 - he uses the network or service to engage in conduct the effect or likely effect of which is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety.
- 3.2 In both cases the significance of the words "likely effect" is that the effect has to be probable, not necessarily proven. The two cases may be distinguished insofar as the former requires the direct use of a network or service whereas the latter captures a wider category of behaviour which involves conduct dependent on the use of a network or service. An example of the former is where a person uses a telephone to make an abandoned call (i.e. one which is terminated as soon as the called person tries to answer it); an example of the latter is conduct that results in a person being led unknowingly to dial a premium rate service.

Section 4

Identifying when misuse becomes 'persistent'

- 4.1 To fall within the provisions of sections 128 to 130 it is not sufficient to misuse an electronic communications network or service. The misuse must be persistent; in other words it must be "repeated on a sufficient number of occasions". Section 128(6) offers two ways of determining whether misuse has been repeated sufficiently so as to be classified as persistent. The misuse must either represent:
- a) pattern of behaviour or practice; or
 - b) recklessness as to whether persons suffer annoyance, inconvenience or anxiety
- 4.2 The first test in 4.1(a) is met by instances of repetitive misuse. It is difficult to define in advance what cycle of repetitive behaviour may reasonably be described as forming a pattern. This will need to be determined on a case by case basis. However any such pattern is likely to require a minimum of three instances of the conduct in question in order to be recognised as such. More generally, the episodes that compose a pattern are subject to three variables: those of number, frequency and regularity. 'x' instances of a silent or abandoned call on successive days is more likely to be considered to form a pattern than '2x' instances at random intervals over a twelve-month period.
- 4.3 The second test in 4.1(b) requires the misuse to represent 'recklessness' on the part of the misuser. This will need to be determined on a case by case basis. Evidence that points to recklessness could be:
- i) that the misuser was informed of the effect of his behaviour but continued with it;
 - ii) that the behaviour in question is so patently annoying (e.g. ringing someone repeatedly in the middle of the night) that no reasonable person could not have realised it would have that effect; or
 - iii) a failure to take reasonable steps to establish whether or not the behaviour would inconvenience other people.
- 4.4 In determining whether misuse is persistent or not, section 128(7) makes it clear that it is immaterial whether networks were used on some occasions and services on other occasions; that different networks or services were used on different occasions; or that the persons exposed to the misuse were different on different occasions.

Section 5

Examples of persistent misuse

- 5.1 Having analysed the reasonable grounds for believing that behaviour may be persistent misuse, this section identifies six general areas within which such forms of behaviour typically occur. There is a degree of overlap between these areas; several forms of misuse may fall into more than one category.
- 5.2 The examples are intended to be illustrative rather than inclusive and will not prevent Ofcom from issuing a notification in respect of behaviour which is not identified by this statement. That could occur if, for example, a new technology or new use of technology allowed for the operation of a form of misuse not previously known to Ofcom, which has the potential to cause unnecessary annoyance, inconvenience or anxiety to consumers. In these circumstances Ofcom would take the necessary measures to prevent further harm and also revise the statement to incorporate the new form of misuse.
- 5.3 The six areas are:
- i) misuse of automated calling systems;
 - ii) misuse by making silent or abandoned calls;
 - iii) number-scanning;
 - iv) misuse of a calling line identification facility;
 - v) misuse for dishonest gain (scams); and
 - vi) misuse of allocated telephone numbers.

Misuse of automated calling systems

- 5.4 Predictive diallers offer the possibility of initiating calls to a sequence of numbers in accordance with stored instructions without the need for each individual number to be dialled in turn. They are widely used in call centres. For the purpose of the 2003 Regulations predictive diallers are more commonly known as automated calling systems with the additional qualification that the calls are made without human intervention. In this context, this means that the contents of the call do not involve an operator or live speech.
- 5.5 Under the 2003 Regulations it is an offence to use automated calling systems to make direct marketing calls which do not consist of live speech unless the called person has previously notified the caller that for the time being they consent to such communications being sent. An example of such a call is a recorded message for marketing purposes where no operator is present.
- 5.6 The concept of direct marketing that the 2003 Regulations rely on is very broad and applies not just to the advertisement of goods and services but also to the promotion of an organisation's aims and ideals. It therefore applies to political and charitable, in addition to commercial, organisations. However there may be types of unsolicited recorded messages sent by automated calling systems that cause annoyance or inconvenience but which, for whatever reason, fall outside the 2003 Regulations.

- 5.7 Ofcom believes that the persistent use of automated calling systems to transmit recorded messages that are not marketing messages within the meaning of the 2003 Regulations or to make silent or abandoned calls (see the section on Misuse by making silent or abandoned calls below) or fax-scanning calls (see the section on Number-scanning below) is persistent misuse within the meaning of section 128.
- 5.8 We also recognise that some uses of automated calling systems offer benefits to the public. One example is the possibility of emergency authorities being able to send a recorded hazard warning to subscribers within a defined geographical area; a second is the kind of automated services offered by some communications providers that test a subscriber's line or obtain a subscriber's confirmation that a faulty line has been repaired. Where automated calling systems send a recorded message that provides a clear public benefit their use will not be a form of persistent misuse. However the use of such systems to send holding messages or outbound call steering messages are likely to constitute misuse unless a clear public interest can be demonstrated.

Misuse by making silent or abandoned calls

- 5.9 The term 'silent call' is a generic description for all those types of calls where the person called hears nothing on answering the phone and has no means of establishing whether anyone is at the other end. A specific type of silent call is the 'abandoned call' without a recorded information message, where a connection is established but terminated by its originator in circumstances where the call is answered by a live individual. Any type of silent call is almost certain to cause inconvenience and is very likely to cause annoyance to the called person. The level of distress will be exacerbated where lack of calling line identification ("CLI") information precludes the possibility of a return call. Anxiety may also be caused, in particular when individuals have received a number of such calls over a short period, and may conclude that they are being specifically targeted.
- 5.10 There are a number of circumstances which give rise to silent calls. The most serious are silent calls made with a malicious intent to deliberately frighten or annoy the person called. In such cases, where intention can be demonstrated, the caller may be guilty of a criminal offence under section 127(2). However, there are also less serious instances, where the behaviour may more fairly be judged as mischievous rather than malicious; an act of irresponsibility comparable to ringing a door bell and then running away. In such cases, where the behaviour is repeated, action under section 128 would be justified.
- 5.11 Most silent calls are not generated with malicious or mischievous intent but are caused by automated calling systems such as predictive or power diallers used by call centres (see the section Misuse of automatic calling systems above). The diallers are programmed to generate and attempt to connect calls. If there are not enough call centre agents available to handle a call it is abandoned if the call is answered by a live individual, that is, it is a 'live call'. The industry term for a live call terminated in this way is an 'abandoned call' and subsequent references to 'abandoned calls' in this Statement have this specific meaning. A call may also be terminated after a predetermined period, say 15 seconds, because it has not been answered, perhaps because no one is there to take it. Within industry terminology and for the purposes of this Statement such calls are not classified as 'abandoned calls'.
- 5.12 One research source suggests that phone owners receive an average of 5.7 abandoned calls a month, although this figure rises to 7.3 for people over 65, who may spend more time at home. However such calls are not evenly distributed and some unfortunate people will have received a similar number of calls over a single

day. Ofcom consumer research carried out in September 2005 and reported on in the consultation on the Statement of Persistent Misuse published in October 2005⁹, revealed the high level of public concern and distress caused by silent calls. Sixty three per cent of adults say they are concerned, of whom 35 per cent are very concerned. The degree of concern experienced varies for different groups of consumers: 63 per cent of people over 65 are very concerned whereas only 24 per cent of people in the 15-24 age group have a similar reaction. Women are more likely to be distressed (38 per cent) than men (33 per cent).

- 5.13 It is undeniable that even a single abandoned call may cause unnecessary annoyance, inconvenience or anxiety and properly managed call centres will strive to ensure that they do not generate more calls than their agents can handle. A persistent failure to do so will constitute an act of persistent misuse and may lead to the issue of a notification under section 128. However, in deciding whether to take enforcement action in a particular case Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment and will take account of the steps taken by call centre operators to reduce the degree of concern that silent or abandoned calls cause.
- 5.14 Ofcom's primary objective is to ensure that call centres take steps to place a limit on the number of abandoned calls they make. When, unavoidably, abandoned calls are made, Ofcom believes that the degree of consumer detriment is lessened if an abandoned call is not a silent call and the called person is empowered by knowing who made the call and how they can block further calls. For these reasons the key factors that will influence Ofcom's enforcement actions are the proportion of abandoned calls made and the degree to which the consumer is informed about the origin of the calls
- 5.15 These two objectives will be served if organisations using dialling equipment observe the following rules:
- 5.15.1 the 'abandoned call' rate shall be no more than three per cent of 'live calls'¹⁰ calculated per campaign or per call centre over any 24 hour period and shall include a reasoned estimate of Answer Machine Detection (AMD) false positives;
- 5.15.2 in the event of an 'abandoned call', a very brief recorded information message is played within two seconds of the call being answered, which contains at least the following information:
- the identity of the company on whose behalf the call was made (which will not necessarily be the same company that is making the call);
 - details of a no charge (0800) or Special Services basic rate (0845) number the called person can contact so they have the possibility of declining to receive further marketing calls from that company; and
 - includes no marketing content and is not used as an opportunity to market to the called person.

⁹ <http://www.ofcom.org.uk/consult/condocs/misuse/misuse.pdf>

¹⁰ The number of 'live calls' is the sum of abandoned calls, calls passed to a live operator and an appropriate proportion of calls apparently answered by an answer machine (AMD false positives)

- 5.16 In addition to these two rules there are a number of procedures that organisations using dialling equipment can adopt which, taken as a package, will act as mitigating factors in establishing the seriousness of a particular act of misuse and the extent of any potential penalty. These are:
- 5.16.1 calls which are not answered must ring for a minimum of 15 seconds before being terminated;
 - 5.16.2 when an 'abandoned call' has been made to a particular number, any repeat calls to that number in the following 72 hours may only be made with the guaranteed presence of a live operator;
 - 5.16.3 for each outbound call a CLI number is presented to which a return call may be made which is either a geographic number or a non-geographic number that satisfies the Ofcom Guide to the use of Presentation Numbers;
 - 5.16.4 any call made by the called person to the contact number provided shall not be used as an opportunity to market to that person, without that person's consent.
- 5.17 Additionally Ofcom expects that where organisations are subject to these rules records are kept for a minimum period of six months that demonstrate compliance with the above procedures.
- 5.18 Another source of silent calls, where the called person is not able to speak to a person on answering the phone arises from fax broadcasting. Obviously, fax broadcasters do not make abandoned calls in the conventional sense (where calls are terminated because no operator is available). The most common cause of nuisance calls generated by fax broadcasters is where they phone a number associated with a voice line rather than a fax receiver. If the called person answers such a call they are likely to hear the high-pitched tones of the fax 'handshake' protocol. Some callers will be able to identify this as an abortive fax call – others may not. Fax calls to non-fax numbers undoubtedly cause unnecessary annoyance, inconvenience or anxiety and making such calls repeatedly may constitute persistent misuse.
- 5.19 Although it would not be feasible for fax broadcasters to ensure that they only make calls to fax lines, there are procedures they can adopt which would lessen the degree of nuisance caused. These include ensuring that:
- i) unsolicited communications are not sent via fax to any telephone number unless that number has been 'cleaned' against the Fax Preference Service (FPS) file within the previous 28 days and the caller's in-house suppression list;
 - ii) calls which are not answered should ring for a minimum of 15 seconds before being terminated;
 - iii) for each outbound call a CLI number is presented to which a return call may be made which is not charged at a higher rate than the national call rate;
 - iv) either a recorded message or a live operator is available at the CLI number presented to inform called persons of the identity of the organisation that called them and that the called person's number will be deleted from the organisation's database and added to its in-house suppression list at the called person's request if they leave their name and telephone number; and

- v) any call made by a called person to the contact number provided should not be used as an opportunity to market to that person without that person's consent.
- 5.20 Again, records should be kept for a minimum period of six months to demonstrate compliance with the above procedures.
- 5.21 Fax broadcasters also need to develop ways of establishing why a fax call has failed – for example, distinguishing between an engaged tone and a voice line so that they can avoid repeat calls in the second case. Repeatedly making fax calls to the same voice line is unlikely to be justifiable.

Number-scanning

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

Misuse of a calling line identification facility

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

Misuse for dishonest gain - scams

- 5.26 There are a number of activities associated with the use of electronic communications networks or services motivated by a desire for unscrupulous or dishonest gain. Although this statement will not fully describe all those that have been discovered (so as not to encourage their perpetration) and cannot describe

schemes that have yet to be practised, these activities share certain common features.

- 5.27 The first feature they share is that they are primarily aimed at defrauding end-users, rather than communications providers.
- 5.28 The second feature they share is the exploitation of premium rate or revenue sharing services, or in some instances, where these services are not used, by directly billing the person who has been duped into making a call. In either case, the essence of the scam is that users are deceived into phoning a number without realising that it is a premium rate or revenue sharing service or may lead to a fraudulent bill and so costs more than they expect. Examples of this that have come to light in recent years include:
- i) faxing a premium rate or revenue sharing fax number where the terminating fax machine has been set to run deliberately slowly thus increasing the duration of a call;
 - ii) the apparently personal text message that invites a return call to a premium rate or revenue sharing number;
 - iii) making a silent call where any return call connects the caller to a premium rate or revenue sharing number (this latter example is also misuse through silent calls and misuse of CLI facilities);
 - iv) the use of recorded ringing tone to deceive the caller that charging has not yet started; or
 - v) inviting people to telephone a revenue sharing number on the suppositious pretext that they have won a prize or need to take delivery of an important message or parcel.
- 5.29 In some circumstances the deception that incites a caller to phone a premium rate or revenue sharing number will be a form of direct marketing and additionally subject to applicable legislation. For example, under Regulation 8 of The Electronic Commerce (EC Directive) Regulations 2002 any unsolicited commercial communication sent by electronic mail must be clearly and unambiguously identifiable as such as soon as it is received. Regulation 23 of the 2003 Regulations prohibits the practice of disguising or concealing the identity of the sender of electronic mail used for direct marketing purposes and additionally requires the provision of a valid address to enable the recipient to request the cessation of such communications. The definition of "electronic mail" in the 2003 Regulations applies to SMS or text messages as well as email.
- 5.30 PhoneyPayPlus (previously known as ICSTIS), is the regulatory body for all premium rate telecommunications services, and requires that providers of premium rate services must state clearly in all promotional material the likely charge for the calls, and must not seek to mislead consumers by inaccuracy, ambiguity, exaggeration, omission or otherwise. Ofcom considers that the deceptions identified in this section are also likely to be in breach of its Code of Practice, which is available at <http://www.phoneypayplus.org.uk/publications/cop/default.asp>
- 5.31 Ofcom will regard the practice of tricking callers into phoning a premium rate or revenue sharing number, including numbers in the 08xx range, or non-revenue

sharing service that leads to the presentation of a fraudulent bill as misuse and if repeated, persistent misuse.

Misuse of allocated telephone numbers

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

Section 6

Ofcom policy on the issuing of section 128 notifications

- 6.1 Section 128 authorises Ofcom to issue a notification to a person where it has reasonable grounds for believing that a person has engaged in persistent misuse of a network or service. In some cases this power may be limited insofar as section 128(8) enables the Secretary of State to make an order that behaviour of a specified description is not to be treated as a misuse of an electronic communications network or service where there is an appropriate alternative means of dealing with it. There is a general presumption that a notification will not be given where an alternative legal remedy is available, although it should be noted that section 130(8) allows for the imposition of a penalty under the 'persistent misuse' powers in respect of the same conduct for which a person is also liable for an offence under sections 125 to 127 of the Act.
- 6.2 Under section 128(2) the notification must include the following elements:
- i) a determination that a person has persistently misused an electronic communications network or electronic communications service;
 - ii) a specification of the use that Ofcom considers persistent misuse; and
 - iii) a specification of the period within which the notified person may make representations.

Ofcom's priorities on issuing notifications

- 6.3 Because persistent misuse is defined in very broad terms and the powers in section 128 may be potentially invoked whenever a person believes that they have suffered inconvenience through another person's use of a network or service, Ofcom needs to be guided in the exercise of its enforcement powers by a scale of priorities. We believe that the 'persistent misuse' powers are primarily about protecting consumers and that the more likely a particular form of misuse is to harm consumers by causing them annoyance, inconvenience or anxiety, the more incumbent it is on Ofcom to take enforcement action. In general terms, misuse and the harm it causes the public may be prioritised in three ways.
- 6.4 Firstly, there is the degree of harm caused to an individual consumer, on a scale where anxiety is more detrimental than annoyance or inconvenience. As an example, we believe that anonymous silent calls are more likely to give rise to anxiety than those associated with an information message and a CLI, hence the remedial measures proposed in section 5.15. This could be described as a qualitative test.
- 6.5 The second consideration is the scale or amount of the misuse. Other things being equal, the more people are affected by an act of misuse the more likely it is that Ofcom will take enforcement action. Causing annoyance to thousands of people is inherently more serious than causing annoyance to hundreds and is more likely to justify enforcement action. By the same token if a person on a single occasion accidentally and in good faith misdials a telephone number and thereby inconveniences the called person, the misuse they are responsible for is of a negligible scale. This could be described as the quantitative test.

- 6.6 The third priority factor is where a new serious form of misuse has come to light and Ofcom needs to act quickly in order to stop the misuse and deter others from engaging in the practice. An example might be where a person provides a commercial service offering to overlay outbound phone calls with an inauthentic CLI number, thus enabling callers to send misleading information about their identity and preserve their anonymity. Such services exist in the US but have not been offered in the UK to date. This could be described as the deterrence test.
- 6.7 Ofcom policy on issuing notifications will generally be consumer driven. It is expected that representations made by consumers will be one of the most likely ways in which instances of persistent misuse are brought to Ofcom's attention. In addition, the overview that communications providers have of network activity makes them particularly well placed to pick up on instances of high-volume misuse of which isolated consumers may only have a single experience. Ofcom welcomes such cases being brought to its attention by communications providers. Where Ofcom receives complaints, they will be assessed to ascertain whether there is sufficient evidence to provide reasonable grounds for believing that persistent misuse has occurred.

The determination and the specification

- 6.8 The determination will need to refer to the evidential basis that supports the occurrence of persistent misuse. As the notification is required to be given to the person who is responsible for the misuse it will also be necessary for Ofcom to establish the identity of the persistent misuser. As a point of clarification, it will not be possible to take action under this legislation against a communications provider over whose network or service the persistent misuse takes place, unless the communications provider itself is responsible for perpetrating the misuse. A provider over whose network silent or abandoned calls are made cannot be made responsible for those calls.
- 6.9 The specification will describe the actual behaviour that constitutes persistent misuse supported by the grounds for believing that this behaviour is likely to give rise to annoyance, inconvenience or anxiety.
- 6.10 The specification of the period during which the notified person may make representations must not normally be less than a month but may be as short as seven days, in urgent cases. An urgent case is defined by section 128(4) as one where the misuse is both continuing and causing a degree of harm that requires it to be stopped as soon as is practicable.
- 6.11 Whether or not the misuse is continuing is a matter of fact; the degree of harm that it is causing is necessarily a matter of judgement. The factors that would tend towards a shorter period for representations are the scale of the misuse, the number of consumers on whom the misuse is impacting and the degree of detriment caused. An example of an urgent case might be where automated calling systems are being exploited to send a high volume of recorded messages seeking to influence voting in a TV phone-in.

Section 7

The consequences of a notification

7.1 Once the period allowed for the making of representations has expired, Ofcom has three options:

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

7.2 An enforcement notification is appropriate where Ofcom is satisfied that:

- i) the person who has been notified under section 128 (“the notified user”) has persistently misused an electronic communications network or service;
- ii) the notified user has not, since the giving of the notification, taken all the steps that Ofcom considers appropriate to ensure that the misuse is ended and not repeated; and
- iii) the notified user has not, since the giving of the notification, remedied the consequences of the notified misuse in a manner that Ofcom considers appropriate.

7.3 The enforcement notification will impose a requirement on the misuser to take the necessary steps:

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

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

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

7.5 In order to remedy the consequences, a misuser may be required to pay the person who has suffered the effects of misuse an appropriate sum of money. In determining what is an appropriate amount in the circumstances of a particular case Ofcom may take account of how much is required to provide compensation for the loss and damage suffered, or for the annoyance, inconvenience or anxiety experienced.

7.6 A policy on quantifying compensation payments needs to recognise that in many cases of persistent misuse there will be no pecuniary loss or damage, say in the case of silent or abandoned calls or where there has been misuse of automated calling systems. However a degree of annoyance, inconvenience or anxiety will invariably

be present. A second consideration is that even where a quantifiable loss has been registered, the sums involved may be negligible, say, where someone has been tricked into making a £5.00 premium rate call. Even where loss or damage has been suffered it is arguable that the 'victim' feels that the irritation or inconvenience experienced was more traumatic than the actual loss sustained, and merits compensation at a higher level. Ofcom is likely to hear such claims sympathetically.

- 7.7 It is not appropriate for Ofcom to propose an ex ante tariff of compensatory payments in advance of applying this legislation. The intention is that over a period of time a scale will be developed that is internally consistent and will offer a degree of expectation. The reason for this is that the amount of compensation will have to be weighed according to the factors of a particular case and should be proportionate to the distress that has been experienced. Clearly, where misuse has given rise to anxiety the compensation would normally be greater than in cases that have only caused annoyance or irritation. Another factor is the individual susceptibility of the person experiencing the misuse. It might be reasonable to assume that silent or abandoned calls made to a rugby club bar would have a less distressing impact than similar calls made to an individual who is prone to anxiety as a result of their age or state of health.
- 7.8 Individual susceptibility will normally be a less significant factor when it comes to quantifying the compensation payable for misuse that has caused annoyance or inconvenience. A person does not deserve more compensation simply because they are irascible by nature. In these cases Ofcom will need to be guided by a normative concept of the average or reasonable individual. In assessing the level of compensation due, Ofcom would in general expect to follow ordinary principles of law relating to damages. Ofcom will also seek guidance, where applicable, from comparable compensation claims passing through the civil courts.

Section 8

Factors relevant to the application of Ofcom's Penalty Guidelines

- 8.1 Where Ofcom has issued a section 128 notification, or both a section 128 notification and a section 129 enforcement notification, Ofcom will be able to impose a penalty on a persistent misuser, once the period for making representations has elapsed. Ofcom may also impose a financial penalty where a notified misuser has contravened a requirement of a section 129 enforcement notification. Additionally, section 130(8) of the Act allows for the imposition of a penalty where a person is liable for an offence under sections 125 to 127 of the Act. (These sections relate to the offences of dishonestly obtaining electronic communication services, possession or supply of apparatus which may be used for dishonestly obtaining such services, or improper use of a public electronic communications network).
- 8.2 The upper limit for such a penalty is currently £50,000 although this amount may be changed by order of the Secretary of State.
- 8.3 Ofcom is required under section 130(4) to determine an amount, which is both appropriate and proportionate to the misuse. In making such a determination, section 130(5) requires Ofcom to have regard to:
- i) any representations made by the notified misuser;
 - ii) any steps taken by the misuser to bring the misuse to an end and not repeat it; and
 - iii) any steps taken by the misuser to remedy the consequences of the misuse.
- 8.4 Section 130 thus confers a discretion on Ofcom to impose a penalty that it considers to be appropriate and proportionate to the notified misuse. Furthermore, under section 392 of the Act Ofcom is required to publish a statement containing the guidelines it proposes to follow in determining the amount of penalties it imposes under the Act. By virtue of section 392(6) of the Act, Ofcom must also have regard to the statement for the time being in force when setting the amount of any penalty under this Act.
- 8.5 The statement on Ofcom's Penalty Guidelines is published at <http://www.ofcom.org.uk/about/accoun/pg/>. The general criteria it sets out are that the amount of any penalty must be appropriate and proportionate to the contravention in respect of which it is imposed. In addition Ofcom must have regard to any representations made to them by the regulated body in breach. Accordingly, Ofcom, in setting the level of penalty will consider all relevant circumstances.
- 8.6 The Penalty Guidelines establish a three-step procedure for determining the level of penalty. First, Ofcom determines a starting figure by reference to such general and specific criteria as it considers relevant in the circumstances of the notified misuse. Secondly, Ofcom considers whether there are any relevant aggravating factors according to which the starting figure should be increased. Thirdly, Ofcom considers whether there are any relevant mitigating factors according to which the starting figure should be decreased.

- 8.7 In accordance with the Penalty Guidelines, Ofcom is likely first to consider the following factors in determining the starting figure of any penalty:
- the seriousness of the contravention;
 - any precedents set by previous cases; and
 - the need to ensure that the threat of penalties will act as a sufficient incentive to comply.
- 8.8 The seriousness of persistent misuse will be a key factor in determining a section 130 penalty. However, the development of a calibrated scale of seriousness involves a degree of subjective judgement and Ofcom recognises that people will have differing perceptions of how various forms of behaviour should be ranked.
- 8.9 In the context of persistent misuse, Ofcom may consider the following in applying its Policy Guidelines and determining the seriousness of a contravention:
- i) the type of misuse (for example, a serious contravention could include conduct such as the making of a very high number of abandoned calls, or the making of silent calls, or misuse for dishonest gain);
 - ii) the degree of persistence and regularity of misuse;
 - iii) the number of people exposed to the misuse (for example, where an Automated Calling System targets a great number of people)¹¹; or
 - iv) the degree of harm caused by the misuse (for example, where does the misuse fall on the spectrum of distress that extends from inconvenience – e.g. *I have to stop what I'm doing to get up to answer a single silent call* - through to irritation – e.g. *I answer the phone several times to hear a caller chortling, who then rings off* - to anxiety – e.g. *I have recently emerged from an abusive relationship and receive several silent calls a day - I no longer feel safe in my new home?*)
- 8.10 As at December 2007 Ofcom has imposed penalties under section 130 for contraventions of section 128 in six cases. Ofcom's penalty determinations can be found at:
- http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_905/
- http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_880/
- http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_891/

¹¹ In this context, it is also worth drawing attention to the provisions of section 128(7) that make it immaterial whether the persons who are the victims of any misuse are different on different occasions. It would not be a defence to say that each person only received a single recorded message.

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 1 February 2008**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at http://www.ofcom.org.uk/consult/condocs/persistent_misuse/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 frank.phillips@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.
- Frank Phillips
Floor 6
Strategy and Market Developments
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.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Frank Phillips on 020 7981 3856.

Confidentiality

- A1.8 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, 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.

- A1.9 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.
- A1.10 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/about/accoun/disclaimer/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in March 2008.
- A1.12 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/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 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 . 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.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@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.
- 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 www.ofcom.org.uk/consult/.
- 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

Q1 Do you agree that the proposed changes make for a clearer set of rules that enable compliance to be achieved with a greater degree of certainty?

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

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

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

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