



## Persistent Misuse

A statement of Ofcom's general policy on the exercise of its enforcement powers

Statement

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## About this document

Ofcom has powers to take action if a person persistently misuses an electronic communications network or service. We are required to set out a general policy on how we are likely to use these powers and to have regard to that policy when exercising them. This is a statement of our general policy. It applies from 1 March 2017.

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## Section 1

# Ofcom's statement of policy on its persistent misuse powers

## Overview

- 1.1 Ofcom has powers<sup>1</sup> to take enforcement action against those who persistently misuse electronic communications networks<sup>2</sup> and services.<sup>3</sup> Persistent misuse involves using a network or service in ways which cause or are likely to cause someone else, especially consumers, to suffer harm. Ofcom can take action to stop it and to remedy its consequences and can impose penalties of up to £2 million.
- 1.2 Ofcom is required to publish a statement of our general policy on the exercise of our enforcement powers against persistent misuse. We have a duty to have regard to that statement when we exercise those powers.<sup>4</sup> This is our statement, including the annexes, which will apply from 1 March 2017.
- 1.3 A person<sup>5</sup> may misuse a relevant network or service in two possible ways:
  - One is where the particular way the person uses the network or service itself causes or is likely to cause unnecessary annoyance, inconvenience or anxiety to someone else. An example, described more fully in Annex 1, is where a person makes silent or abandoned phone calls.
  - The other is where the person uses the network or service to do something else which causes someone unnecessary annoyance, inconvenience or anxiety. Some examples are described more fully in Annex 1, but one is where a person uses the phone in a way that misleads others into calling premium rate service numbers.
- 1.4 Misuse is persistent where it is repeated enough for it to be clear that it represents a pattern of behaviour or practice, or recklessness about whether others suffer the relevant kinds of harm.
- 1.5 Ofcom may take enforcement action against any persistent misuse falling within these parameters.
- 1.6 We set out in Annex 1 to this document examples of various forms of misuse. These are based on forms of misuse that Ofcom is currently aware of, for example, as a result of complaints that have been made to us. All of these forms of misuse may cause harm to consumers and Ofcom will take enforcement action in relation to them as appropriate.

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<sup>1</sup> Under sections 128-130 of the Communications Act 2003 (the Act).

<sup>2</sup> As defined in section 32(1) of the Act, as, '... a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and [ancillary apparatus and other resources] ...'

<sup>3</sup> As defined in section 32(2) of the Act, as '... a service consisting in, or having as its principal feature, the conveyance by means of an Electronic Communications Network of signals, except in so far as it is a content service.'

<sup>4</sup> Although it does not bind us in exercising our discretion in connection with them.

<sup>5</sup> Who may be an individual or an organisation like a company.

## Prioritising

- 1.7 Ofcom has to prioritise its enforcement activities and will do so by reference to those cases liable to cause the greatest consumer harm. Annex 2 to this document sets out Ofcom's prioritisation approach in more detail.
- 1.8 We monitor the numbers of unwanted phone calls consumers receive, and the numbers of complaints Ofcom receives from various sources, including consumers and communications providers, about different forms of misuse. We also gather evidence from consumers about the harm they suffer.
- 1.9 The evidence shows consumers receive very high numbers of silent calls. Ofcom receives more complaints about silent calls than other forms of misuse, and our research shows consumers find a higher proportion of them annoying than other types of call. They are also liable to have more serious harmful effects, such as causing anxiety. **Ofcom's current top priority is to tackle silent calls.**
- 1.10 The evidence also shows that consumers continue to receive large numbers of abandoned calls and they make significant numbers of complaints about them to Ofcom. Our research has also consistently shown that these sorts of calls annoy consumers. **Ofcom is also concerned to tackle abandoned calls.**
- 1.11 Ofcom may take action in relation to other forms of persistent misuse where there is significant harm. We are more likely to act, for example, the greater the extent of the misuse a person commits and the more complaints we receive about it, or if there are other circumstances or factors liable to exacerbate the harm involved.

## The way we investigate

- 1.12 The processes Ofcom will generally follow in conducting investigations and enforcement actions are set out in our Enforcement Guidelines.<sup>6</sup>
- 1.13 In relation to persistent misuse specifically, Ofcom may open investigations on its own initiative or on the basis of information it receives, such as complaints to our Consumer Contact Team, industry data and information from other enforcement agencies.
- 1.14 Our usual approach is to seek to establish the identity of the person responsible for the potential misuse, including where necessary through call tracing. We will then gather further evidence, which may include issuing formal information requests to the person or persons under investigation, and/or to third parties with relevant information, using our powers under section 135 of the Act.
- 1.15 In assessing the persistence of a person's misuse, we are likely to investigate cases by looking at their use of networks or services over a six to 12-week period.<sup>7</sup> We are more likely to regard misuse as persistent where there is evidence it occurred:
  - either throughout or at different points during the period investigated; and
  - at levels greater than could reasonably be attributed to factors such as accidental human error, isolated agent misbehaviour or one-off technical errors; or

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<sup>6</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0034/79846/enforcement\\_guidelines.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0034/79846/enforcement_guidelines.pdf)

<sup>7</sup> Although we may look at different periods where appropriate.

- where there is evidence the misuse was repeated in a way that shows disregard for the risk of harm to consumers.
- 1.16 On the basis of the information gathered, we will decide, on a case-by-case basis, whether to take action. We may decide either to:
- take no further action, on the basis that we do not have reasonable grounds for believing that a person has persistently misused a network or service, or on administrative priority grounds;
  - take enforcement action and issue a formal notification under section 128 of the Act (and in appropriate cases, notice of a penalty we are minded to impose under section 130) where we have reasonable grounds for believing that a person has persistently misused a network or service; or
  - take action to obtain assurances from the person that they will change their behaviour.
- 1.17 Where we issue a notification to any person under section 128, that person will have a chance to make representations. Subject to those representations, we may serve enforcement notifications requiring any person to stop and remedy any persistent misuse, and to pay a financial penalty.
- 1.18 Where we seek or obtain assurances from a person, it may also be appropriate to take formal enforcement action later on. For example, if engagement on this basis does not produce the desired outcomes or any assurances given are later breached.

## Persons against whom we will enforce

- 1.19 A person or organisation may be liable for persistent misuse where they are misusing networks or services themselves, or where they have engaged another person or organisation to use the network or service on their behalf. The latter may arise where an organisation engages representatives, such as third party call centres, to contact UK consumers on its behalf. The organisation engaging the third party to make the calls may be the subject of an investigation and action under the Act for persistent misuse by its representatives.
- 1.20 It will not usually be our intention to take action against a communications provider over whose network or service the persistent misuse takes place. In some cases, however, it may be appropriate to do so. For example, it may be appropriate to take action where the provider itself is responsible for, or involved in, perpetrating the misuse. This could occur where, for instance:
- the principal party – the person making the calls – has spoofed their CLI number and the communications provider was complicit in the spoofing; or
  - the provider participates in an arrangement it knows involves the artificial inflation of call traffic in order to cause consumers to incur inappropriate call charges by making calls to revenue-sharing numbers.

## Annex 1

# Forms of misuse

## Introduction

- A1.1 Examples of the kinds of behaviour which Ofcom is likely to regard as misuse are set out below.
- A1.2 These forms of misuse are commonly, but not necessarily, caused where organisations using call centres make outbound calls to consumers, often using dialling technology. They call, or attempt to call, consumers for various reasons, such as telemarketing, debt collection, charity fundraising and market research. However, as a result, some consumers receive calls which can cause unnecessary annoyance, inconvenience or anxiety.

## Silent calls

- A1.3 Silent calls are a prime example of misuse. When a call recipient experiences one of the following, we consider that they have received a 'silent call':<sup>8</sup>
- they hear nothing on answering the phone;<sup>9</sup>
  - they are disconnected by the calling party as soon as or shortly after they pick up the phone;
  - they hear background or distant noise, whether spoken or otherwise, such as chatter (but the conversation is not directed at the call recipient), breathing or electronic beeps;
  - they hear something else which falls short of a message (whether spoken or otherwise) directed at the call recipient; or
  - they experience a combination of the above, such as a short period of silence followed by disconnection by the calling party (known as a 'short duration call').
- A1.4 In a silent call the caller does not play any sort of information message informing the recipient about the attempted call (or any other sort of communication directed at that person). It is distinct from an 'abandoned call', which is described below.
- A1.5 Ofcom understands that silent calls are usually a result of organisations, or call centres calling on their behalf, using Automated Calling Systems (ACS).<sup>10</sup> Silent calls may occur when the ACS has 'over-dialled', so that all the call centre agents are busy when the call recipient answers the phone and/or the ACS disconnects the call.

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<sup>8</sup> Or a call equivalent to a silent call and which we are likely to treat as such.

<sup>9</sup> Except for calls as described in paragraph A1.10 where the caller would have played an automated message but the recipient hangs up before the message plays. We treat these as abandoned calls.

<sup>10</sup> ACS is technology which can automatically dial and connect calls. Outbound automated calling systems work by accepting a bulk input of telephone numbers, usually from a computer drive or database, and then making calls and trying to connect the called party to a live agent or playing a pre-recorded message.

- A1.6 Some organisations also use technology in conjunction with ACS to detect answer machines and disconnect calls picked up by them. However, this technology, referred to as Answer Machine Detection (AMD), may generate silent calls by mistaking a call recipient for an answer machine and disconnecting the call.
- A1.7 Silent calls can also be caused where no technologies are used at all. For example, where the agent making the call hangs up when the call recipient answers the phone.
- A1.8 Ofcom considers silent calls to be misuse wherever they are caused by something within the calling party's responsibility or control.<sup>11</sup> The numbers of consumer complaints to Ofcom and consumer research Ofcom has carried out consistently demonstrate that silent calls are liable to cause some recipients annoyance, inconvenience or anxiety.

## Abandoned calls

- A1.9 Abandoned calls, commonly referred to in the call centre industry as 'dropped calls,' are another example of misuse. They occur when a party makes a call with a view to the recipient speaking to a live agent but, instead of being connected to an agent or experiencing a silent call, the caller plays the recipient a message (usually an information message),<sup>12</sup> or would do but for the call recipient disconnecting the call themselves.<sup>13</sup>
- A1.10 Abandoned calls can occur, for example:
- In relation to live calls – where the calling party makes calls<sup>14</sup> with a view to live agents speaking directly to call recipients. The call may be abandoned because an insufficient number of agents are available to take the call and a recorded message is played instead.
  - In relation to automated calls involving interaction from the call recipient – where Interactive Voice Messaging (IVM)<sup>15</sup> is used and the call recipient answers the phone and hears an automated message which asks them to press a button to speak to an agent or to answer a series of automated questions before being connected to an agent. Where the call recipient has indicated a preference to be put through to an agent, they may experience an abandoned call and instead hear an information message.
  - In relation to calls which would otherwise have been abandoned – where the call recipient answers and would have heard an information message instead of being connected to a live agent. However, the call recipient disconnects the call themselves before the message is played.

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<sup>11</sup> Including but not necessarily by any calling technology it uses.

<sup>12</sup> In Annex 2 below, we set out our policy position on information messages and how we are likely to take the contents of those messages into account in deciding what action we may take.

<sup>13</sup> Abandoned calls only include those picked up by live individual recipients, and not calls picked up by answer machines.

<sup>14</sup> Whether using ACS or not.

<sup>15</sup> Sometimes also referred to as Interactive Voice Recognition (IVR). IVM is technology that automates telephone contact between humans and machines. It is typically operated by computers and includes prompts for the call recipient to either press a button or speak a response. Depending on the recipient's input, the automated system may play some information, route the recipient to another prompt or connect them with a human operator.



A1.11 As with silent calls, abandoned calls will be a misuse where they are caused by anything within the calling party's responsibility or control. As with those calls, complaints to Ofcom and our consumer research consistently demonstrate that abandoned calls are liable to cause some recipients annoyance, inconvenience or anxiety.

## **Distinctions between silent and abandoned calls**

A1.12 Calls may either be silent or abandoned, but not both. We treat them as mutually exclusive categories, distinguished by the lack of communications or messages directed to the recipient in the case of silent calls and the information message that is, or would be, played in an abandoned call.

A1.13 Calling parties should not make silent or abandoned calls. Ofcom considers both to be misuse, but that silent calls are likely to be an even more harmful type because less information about the call (such as the caller's identity) is provided to the recipient and because the nature of the call may mean the recipient considers it to be threatening or malicious.

A1.14 Ofcom therefore expects that, where parties make calls but there are insufficient live agents to handle them when answered by recipients, those parties should play an appropriate information message (see Annex 2 below). The call would still be an abandoned call and the making of such calls may amount to persistent misuse, but the message would prevent the additional harm associated with a silent call.

## **Misuse for dishonest gain – scams**

A1.15 Some activities associated with the use of electronic communications networks or services are motivated by a desire for unscrupulous or dishonest gain (scams).<sup>16</sup> This Annex does not describe them fully, so as not to encourage them. However, Ofcom is likely to regard conduct which shares common characteristics, like those set out below as examples of misuse.

A1.16 Characteristics common to scam calls may include:

- they are primarily aimed at defrauding the end consumer; and
- they exploit the use of premium rate or other revenue sharing services, or in some cases non-revenue sharing services, to generate calls where consumers are misled<sup>17</sup> about the service offered and/or the costs involved.

A1.17 Ofcom will regard the practice of misleading call recipients<sup>18</sup> into phoning a premium rate or revenue sharing number, including numbers in the 08xx range, or a non-revenue sharing service that leads to the presentation of a fraudulent or unexpectedly high bill, as misuse. We are also likely to regard as misuse cases where the principal purpose or effect of the caller's outbound calls is or was to generate return calls by consumers using revenue sharing numbers.

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<sup>16</sup> Although dishonesty is not an element of persistent misuse and taking action in respect of any such misuse does not require Ofcom to prove dishonesty or deception.

<sup>17</sup> Including by omission of material information.

<sup>18</sup> Including by omission.

## Misuse of a CLI facility

- A1.18 CLI is a facility by which the telephone number of a calling party is presented to the call recipient.<sup>19</sup> In some cases, the caller may legitimately alter the CLI number that is seen by the person receiving the call. For example, so that the number displayed<sup>20</sup> is the number for the relevant department in the calling organisation and to which the caller wishes to direct any return calls.
- A1.19 CLI numbers serve useful purposes as far as call recipients are concerned. They help them to identify callers and to decide whether to answer.<sup>21</sup> They also enable recipients to call the number back later, for reasons that may include finding out who made the call, expressing interest in services or to request that no further calls are made. CLI numbers also enable recipients to report calls to Ofcom and other regulators.
- A1.20 Misuses of a CLI facility include:
- the withholding of CLIs by those making marketing calls, in breach of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECRs, see further below);
  - displaying a CLI which is not authentic or valid;<sup>22</sup>
  - displaying a CLI which is unreturnable such that, when called,<sup>23</sup> the number does not connect to an agent or an automated message; or
  - displaying a CLI which is a controlled premium rate service number.<sup>24</sup>
- A1.21 Misuse may also arise where calling parties use a number of different CLIs. Those making calls for business or marketing purposes may use several, presenting different ones to recipients of different calls. There may be good reasons for this, like using different numbers for different customer groups<sup>25</sup> or so that any subsequent calls can be returned to the correct location.
- A1.22 The reasons for doing so may also, however, be illegitimate. For example, using large numbers of different CLIs so as to mislead recipients about the caller's identity or whereabouts and to answer or return a call when they otherwise would not, or to avoid detection and complaints to Ofcom or other regulators.
- A1.23 The use of a number of different CLIs therefore has the potential to involve misuse. Where there is evidence, such as complaints, that call recipients are being misled by the use of different CLIs and this is causing them unnecessary annoyance or other effects falling within section 128 of the Act, we may regard it as misuse.

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<sup>19</sup> For example, on a handset display screen prior to a call being established or where the recipient dials 1471 after receiving a call.

<sup>20</sup> Known as a 'Presentation Number.'

<sup>21</sup> Some handsets and services may rely on CLI information in order to block and filter calls.

<sup>22</sup> For example, it is a false, 'spoofed', or random number which does not dial or where a connection cannot be established or it does not connect to the person or organisation calling.

<sup>23</sup> And although there may be a dialling tone.

<sup>24</sup> As defined in the condition regulating premium rate services under section 120 of the Act.

<sup>25</sup> For example, by location or type of service.

- A1.24 Where a person calls the CLI provided and is connected to an agent or an automated message, we may also regard it as misuse if:
- no information is provided about the organisation which called, or the organisation on whose behalf the call was made;
  - an opportunity is not provided for the person called to opt out of future unsolicited marketing calls or messages; or
  - the call is used as an opportunity to market to that person, without their consent.

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

- A1.25 There are some circumstances in which an activity or conduct involving the use of a network or service may amount to misuse under section 128 of the Act and may breach the PECRs. For example, parties making unsolicited marketing communications:
- failing to identify themselves on calls;
  - withholding their CLIs;
  - making calls to people on the Telephone Preference Service's do not call register and/or those who have asked to be placed on the caller's own in-house do not call list; and/or
  - using ACS in ways that breach the PECRs, such as making recorded direct marketing calls without the recipients' consent.
- A1.26 When considering cases like these, Ofcom will usually consult with the Information Commissioner's Office,<sup>26</sup> to determine who is best placed to take the most appropriate course of action. We may take action on the basis the conduct amounts to persistent misuse.

### **Misuse resulting from use of technology**

- A1.27 As well as silent and abandoned calls, use of dialling technologies, like ACS, and other technology such as automated messages,<sup>27</sup> IVM and AMD, can cause other forms of misuse.
- A1.28 For example, Ofcom is likely to regard it as misuse if a caller uses IVM and the call recipient elects to speak to an agent but experiences an unfairly long wait-time to do so. We would assess this on a case-by-case basis.
- A1.29 Our concern would be that the calling party is unjustifiably wasting the recipient's time. We are therefore more likely to regard a call waiting time as unfairly long where, for example, the caller:

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<sup>26</sup> The Information Commissioner's Office is the UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals. It has primary responsibility for enforcing the PECRs.

<sup>27</sup> Including broadcast messages or 'robo-calls', where the sole purpose is to make a recorded announcement, rather than to connect a consumer to a live agent.

- makes far more calls than they have live agents to handle; and
  - keeps recipients holding on the line for unreasonable times without providing recipients with clear and accurate information, such as the caller's identity and the purpose of the call, the recipient's position in any call waiting queue and the likely waiting time.
- A1.30 In those circumstances, call recipients' time is being taken from them without them being given a fair and informed choice to use that time waiting on hold.
- A1.31 Misuse may also arise in other circumstances involving IVM. An unreasonably long holding time might, to take one example, involve misuse, even where call recipients are given the kind of information described in the previous paragraph. There is the potential for such misuse where calling organisations make essential calls to recipients using IVM<sup>28</sup> but, when those recipients elect to speak to an agent, they are kept on hold for a manifestly excessive time.
- A1.32 Another example of possible misuse involving IVM is where, during the time the call recipient waits to be connected to an agent, marketing content is included in any information provided but the relevant requirements for doing so<sup>29</sup> have not been met.

## Misuse of allocated telephone numbers

- A1.33 Where telephone numbers have been allocated, Ofcom will regard their use<sup>30</sup> in a way that is inconsistent with designations and/or restrictions in the National Telephone Numbering Plan (the Plan)<sup>31</sup> as a form of misuse. An example would be where Personal Numbers (070) are used for anything other than providing a 'Personal Numbering Service'<sup>32</sup> or 'Mobile Numbers'<sup>33</sup> are used for services other than those which fall within the definition of 'Mobile Service'.<sup>34</sup>
- A1.34 In these cases, any action would usually be taken against the person or organisation making the relevant calls. However, condition 17 of the General Condition of Entitlement imposes obligations on communications providers in relation to the use of telephone numbers. Such a party could also be liable for persistent misuse where, for example, they are involved in the misuse of the network or service (see Section 1 above).

## Number-scanning and fax-scanning

- A1.35 Number-scanning (also known as 'pinging') is another example of misuse. It involves making calls to find out which telephone or fax numbers, out of a range, are in service. As soon as a tone is received which establishes the status of a particular number, the call is terminated. This is usually done by the caller in order to develop lists of active telephone numbers.

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<sup>28</sup> For example, about fraud, debt-recovery or essential utilities.

<sup>29</sup> Such as obtaining consent under the PECRs.

<sup>30</sup> Whether by the end-user, relevant communications provider, intermediary or other party.

<sup>31</sup> Ofcom, The National Telephone Numbering Plan, <http://stakeholders.ofcom.org.uk/telecoms/numbering/>.

<sup>32</sup> As defined in the Plan.

<sup>33</sup> 071-075, 077, 078 and 079.

<sup>34</sup> As defined in the Plan.

- A1.36 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 communications providers. In a worst case scenario, high-volume number-scanning could overload either the originating or terminating local exchange, depriving users connected to that exchange of the ability to make or receive calls.

### **Other forms of misuse**

- A1.37 Ofcom may also regard other forms of behaviour as misuse. An example is where call centre agents making outbound calls behave improperly towards call recipients, such as using rude or intimidating behaviour. Where such behaviour is repeated, this may amount to persistent misuse.

## Annex 2

# Prioritisation

- A2.1 This Annex sets out how Ofcom is currently likely to prioritise cases for action based on the likely consumer harm involved.
- A2.2 Our assessment of harm will usually take account of:
- the type of misuse involved; and
  - the level of likely consumer harm.
- A2.3 Action against those making silent calls is likely to be our highest priority. Of the types of unwanted phone calls that fall within Ofcom's exclusive jurisdiction, silent calls are the most common. UK consumers receive very high numbers of them, complain to Ofcom more about them than other unwanted phone calls and find more of them annoying.
- A2.4 Action against persistent abandoned calls is also likely generally to be a priority. The evidence also shows that consumers continue to receive large numbers of abandoned calls and they make significant numbers of complaints about them to Ofcom. Our research has also consistently shown that these sorts of calls annoy consumers.
- A2.5 We may also make a priority of any case – whatever the form of misuse involved – where there is significant harm.
- A2.6 We are more likely to act in any individual case:
- the more silent, abandoned or other calls or misuses a party makes, or the higher the rate at which it makes those calls;<sup>35</sup>
  - the greater the number of consumer complaints the misuse attracts;
  - the more serious harm the form of misuse is liable to cause;
  - where there is any evidence of flagrant or deliberate non-compliance with the law and/or disregard of this policy; and/or
  - the greater the need we assess for deterrent action.
- A2.7 There are also particular factors, described below, which we are likely to take into account in assessing some cases. They may mitigate or aggravate the harm caused by the misuse and increase the priority we attach to the case.<sup>36</sup> We will not consider these factors in a mechanistic way. It may not be appropriate or necessary to consider some or all of them in any particular case. They are not all relevant to

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<sup>35</sup> In prioritising cases, one factor we may take into account is the abandoned call rate (or ACR). See Annex 3 for the way in which we are likely to calculate the rate at which abandoned calls in particular are made.

<sup>36</sup> As well as increasing the seriousness with which we would regard the matter when assessing a person's liability for persistent misuse.

every form of misuse. In other cases, it may be appropriate to consider other factors not set out here.

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

- A2.8 In appropriate cases, Ofcom will take account of the extent to which any misuse is repeated. Generally, we are likely to regard repeated misuse in respect of the same number, or recipient, as an aggravating factor indicating a higher degree of harm.
- A2.9 One of the ways we may assess this is whether any calls constituting misuse<sup>37</sup> are made within the 72 hours following the first instance of misuse. If they are, we would consider the circumstances in which the repeat calls were made<sup>38</sup> and whether the calling party guaranteed the availability of a live agent for the repeat call. If not, Ofcom is likely to regard the repeated call(s) as an aggravating factor.
- A2.10 In some cases, it may be appropriate to take account of misuse repeated in respect of the same recipient, rather than the same number. An example may be where the misuse consists of deception for dishonest gain.

## Time(s) of day misuse occurs

- A2.11 Ofcom may also take into account the time(s) of day at which misuse occurs. We are likely to regard misuse at unsociable hours as more harmful and liable to action. We do not prescribe those hours and will consider matters on a case-by-case basis. Nevertheless, we think there are some obvious examples, such as ringing someone repeatedly, or for marketing purposes, in the middle of the night.

## CLI

- A2.12 As described in Annex 1, the proper provision by calling parties of CLI numbers serves a number of useful purposes for recipients, some relating to the protection of privacy. Accordingly, we are likely to regard cases in which a calling party misuses CLI facilities as serious and they may be priorities for enforcement action.
- A2.13 Additionally, where a calling party chooses to withhold the CLI on calls we will usually regard its absence as aggravating the harm in any case of misuse. This is particularly so in relation to silent calls, where the call recipient will not have any information about the caller and may consider the call threatening or malicious.
- A2.14 In other cases of misuse<sup>39</sup> where a CLI number is provided, we may also take into account the following factors:
- whether the CLI provided<sup>40</sup> was a basic rate number;<sup>41</sup>
  - whether more than one CLI number was used and the circumstances in which they were used; and

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<sup>37</sup> Such as silent or abandoned calls.

<sup>38</sup> For example, whether there are good reasons for making repeat calls.

<sup>39</sup> Like silent or abandoned calls.

<sup>40</sup> Including in any messages played to or left with the call recipient.

<sup>41</sup> A number which costs the same as a standard 'geographic' call, such as 01 or 02, and 03 numbers which are charged at the 'geographic rate,' or a standard mobile rate or a number which is free to the caller, such as 080 numbers.

- when a person makes a return call to the CLI number and hears an information message, whether it contains the sort of information set out in A2.16 – A2.17 below.

## Length of time a call should ring

A2.15 Ofcom considers that the length of time a call rings can be an aggravating factor in some cases of misuse. For example, a short period of ringing may not allow sufficient time for a person to answer the phone, and may therefore cause more harm. Conversely, a long period of ringing may increase annoyance and/or anxiety if the person called does not wish to, or is unable to, answer the phone. Ofcom therefore considers that calls that are allowed to ring for less than 15 seconds before being terminated (unless answered before then) by the calling party, or are left ringing for extended periods, are likely to cause more harm and are likely to be subject to enforcement action.

## Information messages

A2.16 Calling parties can often avoid causing silent calls by playing an information message in the event of an abandoned call. Doing so does not mean the call causes no unnecessary harm and does not prevent persistent misuse occurring. An appropriate message can, however, at least reassure the recipient of the caller's identity and that the call is not a malicious silent one. It can also enable the recipient to protect their privacy by calling back and asking not to receive further calls.

A2.17 Another factor we may consider, therefore, in assessing the harm in cases involving abandoned calls is the content of the recorded message. It should:

- identify the party on whose behalf the call was made;<sup>42</sup>
- explain that the party attempted to contact the recipient;
- provide details of a basic rate number (see above) which the recipient can call so they decline further calls from the calling party; and
- not include any marketing content.<sup>43</sup>

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

A2.18 We also consider the length of time taken to connect the call recipient to a message<sup>44</sup> has the potential to aggravate some forms of misuse. An example would be a delay in the playing of an information message in the event of an abandoned call.

A2.19 We may therefore consider in such cases whether the recipient is connected to a message as quickly as possible, and no longer than two seconds, after:

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<sup>42</sup> Which may but will not necessarily be the same party making the call.

<sup>43</sup> In addition, any call made by the abandoned call recipient to the contact number provided in the information message should not be used as an opportunity to market to that person without the person's consent.

<sup>44</sup> Whether an information message, an automated message or an interactive message.



- where the message playing is dependent on the technology recognising a voice or sounds to classify the call, the person called begins to speak;<sup>45</sup> or
- in any other case, the phone has been picked up.

## Management, practices and processes

A2.20 Where effective practices and procedures are in place, adhered to, monitored, and regularly reviewed, they should help to minimise misuse. They should also help to address promptly any which does occur and minimise the risk of it recurring.

A2.21 These are matters within a calling party's responsibilities and control. Ofcom may, therefore, take into account in prioritising cases whether a calling party had procedures for example to:

- test dialling systems when they are set up or changed;
- ensure their dialling technology is managed by competent persons;
- set the dialling rate of any ACS at a rate appropriate to the number of call agents employed; and
- monitor performance of their agents.

A2.22 Where a calling organisation engages third parties to act for it,<sup>46</sup> it may also be relevant for Ofcom to consider the arrangements made to select that party and the compliance obligations imposed on it. In particular, whether an organisation took reasonable steps to monitor and assess on-going compliance by the third party, beyond accepting assurances or imposing contractual obligations.

## Record management

A2.23 Ofcom expects that, where organisations are subject to this policy, records that demonstrate that they have acted in accordance with it are kept for at least six months.

A2.24 Where organisations are using ACS and/or AMD Ofcom is likely to require relevant information to be made available in the event of an investigation. This will include information about the type of ACS/AMD in use, detailed records of calls<sup>47</sup> and evidence of the accuracy of AMD.

A2.25 Where an organisation does not retain or does not provide relevant information, but there are reasonable grounds for believing that there has been persistent misuse, Ofcom is highly likely to take action. We are also likely, in these circumstances, to take into account the lack of records or information when determining the level of any penalty. These points reflect the importance, in protecting call recipients from harm caused by persistent misuse, of appropriate records management.

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<sup>45</sup> Or 'start of salutation'.

<sup>46</sup> For example, to undertake the activity using the network or service on its behalf, or to secure compliance on its behalf.

<sup>47</sup> Including total numbers of abandoned calls and live calls for a specified period.

## Annex 3

# Calculating the Abandoned Call Rate

- A3.1 As set out in Annex 2, action against abandoned calls is an Ofcom priority and we may take action in any case where a calling organisation makes them. Where it is necessary to prioritise cases one factor we may take into account is the abandoned call rate (or ACR), calculated as set out below.<sup>48</sup>
- A3.2 The ACR is the proportion of abandoned calls a person makes as a proportion of all calls where a connection was established with a live individual call recipient.<sup>49</sup> A higher ACR would indicate that a greater proportion of a calling party's conduct is misconduct and that Ofcom may be more likely to take action.

## Definitions and interpretation

- A3.3 For the purposes of calculating the ACR:
- an abandoned call is as described in Annex 1 above;
  - a calendar day means between midnight and midnight on a calendar day;
  - a campaign is identified by the making of calls for a single proposition to a single target audience;<sup>50</sup>
  - a live call is where the call is answered by a live individual and the call is connected to a live agent;
  - a silent call is as defined in Annex 1 above; and
  - an unconnected call is a call in which a connection is not established between two parties.

## How to calculate the ACR

### The formula

- A3.4 The ACR formula for each calendar day is:

$$\frac{\text{Abandoned calls } (x)}{\text{Abandoned calls } (x) + \text{Live calls } (y)} * 100\%$$

<sup>48</sup> On either a per campaign or per call centre basis. Depending on the circumstances of the case, it may be appropriate to assess an organisation's ACR on a disaggregated basis or aggregated basis, or both. For example, where an organisation operates the same campaign simultaneously across more than one call centre, or multiple campaigns simultaneously from one or more call centres, it may be appropriate to calculate the ACR using aggregated data across all call centres and/or all campaigns run by and on behalf of the organisation. It may nonetheless be appropriate in certain cases for Ofcom to consider the ACR on an individual (that is, disaggregated) campaign or call centre basis. This will be determined on a case-by-case basis.

<sup>49</sup> Calls where a connection was established are the total of: live calls (i.e. calls which are answered by the person called and connected to a live agent) and abandoned calls (i.e. calls which are answered by the person called and a message, usually an information message, is played).

<sup>50</sup> A campaign can be run from more one call centre and/or for more than one calendar day. It may be based on a single call script, though we would not regard slight changes to a call script to constitute a new campaign. We will consider the facts of each case on its own merits.

A3.5 The following types of calls are excluded from the calculation:

- silent calls;
- unconnected calls;
- calls to answer machines which are:
  - picked up by an answer machine and disconnected by the AMD;
  - picked up by an answer machine, mistaken by the AMD for a live person and connected to a live agent (known in the industry as 'false negatives');
  - abandoned to answer machines.

A3.6 There may be cases where no data is available as to whether abandoned calls have been made to answer machines or live individuals. To estimate the number abandoned to live individuals, for calculating the ACR in those cases, we need to make an assumption about the number abandoned to answer machines. We will therefore assume that the following ratios are the same:

- the calls made to answer machines that are connected to live agents compared to total calls passed to live agents; and
- the calls abandoned to answer machines where no agent is available compared to total calls abandoned where no agent is available.

A3.7 This ratio may also be assumed in cases where an organisation uses AMD alongside ACS.

### **Example: Applying the formula for calculating the ACR**

A3.8 The example below illustrates how to calculate the ACR, on the basis that a call centre makes 1000 calls in a calendar day where:

- 392 calls are live calls, i.e. answered by a live individual and connected to a live agent (y)
- 8 calls are abandoned either to a live individual or an answer machine (the number (x) in the ACR formula will be derived from this)
- 200 calls are unconnected – these are excluded from the calculation
- 400 are connected to a live agent and classified as calls to answer machines (z) – these are excluded from the calculation

A3.9 The first step is to calculate the number of abandoned calls to answer machines and so those abandoned to live individuals ((x) in the ACR formula). Taking the ratio of calls made to answer machines that are connected to live agents compared to total calls passed to live agents, this can be expressed as  $z / (y + z)$ , or  $400 / (392 + 400) = 50.5$  per cent.

A3.10 The same ratio is applied to the 8 calls abandoned to live individuals or answer machines, in order to calculate the number abandoned to the former.

A3.11 Therefore, of the 8 such calls, 50.5% of them are assumed to have been made to answer machines. This produces a reasoned estimate of calls abandoned to answer machines of  $8 \times 50.5\%$ , or 4.04, meaning that the number of abandoned calls answered by live individuals in this case (x) is estimated to be 3.96.

A3.12 Accordingly, the ACR in this scenario is:

$$\frac{3.96 (x)}{3.96 (x)+392 (y)} * 100\% = 1.00\%$$

## Annex 4

# Decision to revise the statement of policy

A4.1 This document is annexed to the revised statement of policy Ofcom has decided to make under section 131 of the Act. It explains our decisions, as set out in that statement.

## Proposals

A4.2 As part of our review of our 2010 policy we sought views from stakeholders in a call for inputs in October 2014 and commissioned consumer and industry research. We considered whether, given the ongoing consumer harm from various forms of misuse, and silent and abandoned calls in particular, the policy gave appropriate effect to the relevant legislation. In December 2015, we consulted on proposed changes.

A4.3 On the basis of the evidence and our analysis, we proposed to adopt a revised policy that, in terms of the behaviour we are likely to treat as misuse:

- continued to focus on silent and abandoned calls as the main examples;
- made the definitions of these calls, and the behaviour we would regard as misuse, clearer; and
- updated other examples of behaviour we are likely to regard as misuse.

A4.4 We also proposed that, where a person engaged in behaviour amounting to misuse on three or more occasions, we may regard that as persistent.

A4.5 In terms of prioritising cases for action, we proposed an explicit policy position that consumers must not be subject to silent calls under any circumstances and that action against those who make them would be our highest priority. We also proposed making similarly explicit that consumers should not be subject to abandoned calls and that, where we had to prioritise cases, we would be likely to take into account the number of abandoned calls a person made and/or the rate at which they made them. We said we would regard cases in which a person's abandoned call rate met or exceeded three per cent<sup>51</sup> as a higher priority for action. We also proposed a number of other factors we would take into account in assessing the harm caused by misuse and in prioritising cases.

## Summary of responses

A4.6 We received 56 responses to the consultation from a range of respondents including those operating outbound call centres, industry representative bodies, communications providers, consumer representatives, other regulators and individual respondents. We have considered all these carefully and, having done so, have made some changes to the proposed policy, which are now set out in the published statement.

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<sup>51</sup> Of the total number of calls made and connected to live recipients.

- A4.7 Over half the consultation responses agreed with the proposed focus of the revised policy, particularly on silent and abandoned calls, and to make a priority of tackling silent ones. Some, however, questioned some of the evidence Ofcom relied upon and whether we placed insufficient focus on other forms of misuse. Concerns were also raised about the misuse we proposed to treat as persistent and about the effects on calling organisations of complying with the proposed policy. Some of the responses contended that Ofcom should treat different types of calls and callers differently where they make silent and abandoned calls.
- A4.8 A number of respondents opposed in particular the proposal to treat behaviour as persistent where it occurred at least three times. Their responses included that making three silent or abandoned calls could not amount to “persistent” misuse, and that the proposal would be impossible to comply with and would effectively ban the use of predictive dialling technology. Twenty-three respondents said Ofcom should allow calling organisations a greater “margin for error.” Respondents also sought clarity as to the time period and activity to which the threshold would apply.
- A4.9 Several also opposed aspects of Ofcom’s proposed approach to abandoned calls. They said these calls cause much less harm than silent ones. They also said the approach would mean calling organisations would have to reduce their abandoned call rate below three per cent, perhaps to zero, to avoid the risk of enforcement action. This, too, would effectively ban the use of predictive dialling and the costs of compliance with the policy in terms of lost efficiencies would greatly exceed the benefits to consumers, making the proposed approach disproportionate. Some respondents also criticised the research we used to estimate the likely costs to calling organisations of changing their abandoned call rate.
- A4.10 As with silent calls, some respondents said calling organisations need more margin for error when making abandoned calls and Ofcom should allow a degree of “tolerance” for them. Some considered certain calls could be “compliant” abandoned calls and others suggested we should not regard making abandoned calls as persistent misuse until the rate at which a person makes them exceeds three per cent in three separate 24-hour periods. Others sought an explicit statement that we would not take enforcement action until a caller’s abandoned call rate exceeded three per cent.
- A4.11 A number of respondents also made submissions in respect of other aspects of the proposed policy, including in relation to the factors we may take into account in prioritising cases for action and the period for implementation of the revised policy. On the latter, some said they needed longer than the proposed two months to make changes to their practices, systems and resources.

## Ofcom’s response

- A4.12 A common theme in many of the responses was that, on account of the costs of compliance and the lesser degree of harm caused by certain behaviour such as making abandoned calls, Ofcom should create a safe harbour permitting a certain amount of behaviour liable to amount to persistent misuse. Some also appeared to suggest that the 3% abandoned call rate described in our 2010 policy, which was intended to be a criterion for prioritising cases for enforcement action, had had a misleading effect. It appeared to have created a view that abandoned calls below that level were lawful or acceptable and would not face action.

- A4.13 We have had particular regard to these responses, together with the evidence set out in our consultation about the ongoing consumer harm from persistent misuse, especially silent and abandoned calls.
- A4.14 We have carefully considered the costs organisations may incur if they change their behaviour in response to our revised policy. We acknowledge that, as we set out in our consultation, our industry research into those costs has limitations. It nonetheless gives a broad indication of the direction and magnitude of the impact of changes to our policy.
- A4.15 On the basis of that research, we appreciate that if calling organisations change their behaviour they may incur costs. For example, if, based on their understanding of our 2010 policy, they currently operate at a three per cent abandoned call rate and take steps to reduce that, there are likely to be costs of doing so and these may be significant.
- A4.16 We have a general duty in section 3 of the Act to have regard to the principles that regulatory activities should be proportionate and targeted only at cases in which action is needed.
- A4.17 Our intention is to act reasonably and proportionately and to focus our policy, and the action we take under it, on those organisations likely to cause more harm to consumers. One factor our policy takes account of is whether there is any evidence of a calling organisation flagrantly or deliberately acting in a non-compliant way.
- A4.18 There are, however, a number of reasons why we have decided to adopt the policy set out in our statement and not to create the sort of safe harbours some respondents sought. These include:
- Parliament has imposed a statutory prohibition on persistent misuse;
  - Ofcom has statutory duties to protect consumers from harm;
  - we may not allow a certain amount of unlawful activity or fetter our discretion to take action against it;
  - the large numbers of silent and abandoned calls consumers continue to receive, the evidence of the harm they cause and the numbers of complaints we receive about them; and
  - the revised policy is not different in relevant ways to the one it replaces.
- A4.19 More specifically, Parliament has defined and prohibited persistent misuse – behaviour which has the prescribed harmful effects on consumers. The seriousness with which Parliament regards that misuse is reflected in the fact that it gave Ofcom broad powers to take enforcement action and made persistent misusers liable to penalties of up to £2m.
- A4.20 Where evidence shows behaviour is harmful and falls within the statutory definition, it is unlawful. We cannot create safe harbours allowing a certain amount of that conduct or unlawfully fetter our discretion to take action. The view held by respondents that the 3% abandoned call rate set out in the 2010 policy created a safe harbour is incorrect. Rather, it reflected a criterion for prioritising cases for action.

- A4.21 It is also important that Ofcom has a number of duties in section 3 of the Act relating to the protection of citizens and consumers. Reading the statutory provisions on persistent misuse in light of these duties, our policy on the exercise of our persistent misuse powers should seek to reduce the occurrence of the harmful behaviour that is prohibited.
- A4.22 With these points in mind, we have decided to make some changes to the policy we proposed. We agree with respondents that we should not regard misuse as persistent simply because it happens three times. Instead, we will apply the statutory definitions of both persistence and misuse on a case-by-case basis, taking account of the ordinary meaning of the words.
- A4.23 Our general policy will be that citizens and consumers should not be subject to any behaviour that has the harmful effects set out in the statutory definition of persistent misuse. We may take action in any case where behaviour falls within that definition, however, we will focus on cases liable to cause most harm to citizens and consumers and/or a deterrent effect is required.
- A4.24 We continue to take account of the evidence of the numbers of silent and abandoned calls consumers receive and of the harm they cause. Whilst our research does not give a precise calculation, it does provide a reasonable basis for our estimates of the large numbers of these calls. Consumer evidence has consistently shown that they find silent and abandoned calls annoying, and in some cases, distressing, and we still receive large numbers of complaints about them. That being so, in terms of the types of misuse we should focus on, our current priorities are likely to continue to be tackling persistent silent calls in particular, and also to focus on abandoned ones.
- A4.25 We do not agree that our policy should draw a broad distinction between silent and abandoned calls for what some respondents said are legitimate and illegitimate purposes. We agree that some consumers will want or benefit from being contacted by certain organisations for certain purposes. However, it seems to us they are likely to want and benefit from live calls, not silent or abandoned ones. The consumer evidence shows that they find silent and abandoned calls from a broad range of calling organisations<sup>52</sup> annoying or worse.
- A4.26 The current focus on silent and abandoned calls will not mean we are unconcerned about other forms of misuse. The revised policy sets out a number of examples against which we may take action. We are also likely to prioritise action against other forms of misuse which are likely to cause significant consumer harm and/or where a deterrent is required. These may include, for example, where parties make large numbers of very short calls in order artificially to generate return calls and cause consumers to incur inappropriate call charges. We will also be able to re-focus the policy if other forms of misuse become more prominent.
- A4.27 In terms of prioritising between particular cases, we will also generally focus on those where the harm is likely to be greater. We have considered the points made by respondents on the factors we may consider in assessing the harm and the priority we attach to particular cases. We will take into account factors such as the numbers of offending calls a caller makes and/or the rate at which they make them, and the numbers of complaints to Ofcom, all of which we think are reasonable indicators of consumer harm. We have not included as a prioritisation criterion in

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<sup>52</sup> Including those calling about Payment Protection Insurance, market research, accident claims and debt repayment and advice.



the revised policy a reference to a specific abandoned call rate.<sup>53</sup> However, as set out above, we will prioritise cases by reference to those which cause the greatest consumer harm.

## Conclusions

- A4.28 Our overall assessment, therefore, is that the policy we have decided to adopt gives proper effect to the statutory prohibition of persistent misuse. It is in line with our duties to protect citizens and consumers.
- A4.29 In terms of implementation, we have decided that the revised policy will come into force as proposed. We have considered the relevant consultation responses but, since the policy is not substantially different to the 2010 policy in significant respects, as set out above, we do not agree calling organisations need longer to take account of it. It will therefore come into force on 1 March 2017.

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<sup>53</sup> Whether three per cent or a different rate.