



How we use our persistent misuse powers

Draft revised statement of policy

Draft 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 by law to set out a general policy on how we are likely to use these powers and to have regard to the policy when exercising our powers.

This document sets out our proposed revised policy following a review in 2014-15. It sets out examples of those activities we provisionally consider to represent misuse and what we consider to be persistent. It also explains how we intend to prioritise our enforcement actions and the process we propose to follow in issuing notifications.

We invite views on the proposed revised policy and the matters set out in our consultation document. The consultation closes on 24 February 2016. Subject to the responses, Ofcom plans to issue a final statement and publish a revised policy in Q1 2016-17. The revised policy would come into force after a two-month implementation period starting on the date of publication.

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Section 1

Introduction

Statutory background

- 1.1 This statement is published in accordance with section 131 of the Communications Act 2003 (“the Act”). It sets out Ofcom’s general policy with regard to the exercise of its powers under sections 128 to 130 of the Act.
- 1.2 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 respectively 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, and to issue enforcement and penalty notifications where such misuse has occurred.
- 1.3 Sections 128 to 130 also set out enforcement procedures and factors relevant to the application of Ofcom’s penalty guidelines¹ where there has been ‘persistent misuse’.
- 1.4 Section 131(1) of the Act requires Ofcom to prepare and publish a statement of its general policy on exercising its powers under section 128 to 130. Section 131(2) also enables Ofcom to revise the statement from time to time as it thinks fit. Section 131(4) imposes a duty on Ofcom to have regard to the statement in exercising the relevant powers (although it does not bind Ofcom in exercising its discretion in connection with them).
- 1.5 Ofcom can, therefore, take action against any activities or conduct that meets the statutory requirements for ‘persistent misuse’ in the Act (section 128 in particular). Although it is not exhaustive, this statement sets out activity or conduct Ofcom is most likely to treat as meeting those requirements and circumstances in which we are most likely to take action. The statement accordingly provides guidance to those responsible for the use of electronic communications networks and services, such as call centres or those engaging call centres to use networks and services on their behalf, as to steps they can take to avoid committing persistent misuse and to reduce the possibility of facing Ofcom enforcement action.

General application of the policy

- 1.6 This policy statement applies to any person who uses an electronic communications network or service, and who could therefore potentially fall within the scope of Ofcom’s powers under sections 128 to 130 of the Act. In particular, we would note that:
 - the location of the person is irrelevant, provided that they are using a network or service in the UK. For example, a person may be located in the UK and making calls within the UK, or located overseas and making calls into the UK;

¹ Published by Ofcom in accordance with section 392 of the Act. Ofcom has recently consulted on amending its penalty guidelines. See <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>.

- we would not generally regard the purpose of the use of the network or service as relevant to our assessment as to whether there has been misuse (for example, a person could be misusing a network or service regardless of whether the calls they make are for marketing purposes or non-marketing purposes); and
- we will interpret “use”, and therefore “misuse”, of a network or service broadly. We commonly take action where the use of a network or service involves making outbound calls, though there is no reason why, for example, a person who receives inbound calls would not be considered as “using” the network or service.

1.7 The statement addresses the following areas:

- the definition of ‘misuse’ of a network or service;
- identifying the circumstances in which Ofcom is likely to regard misuse as ‘persistent’;
- providing examples of use of a network or service that Ofcom considers to be misuse (and may be persistent misuse); and
- setting out Ofcom’s policy on the issuing of section 128 notifications and the consequences of a notification (section 129 enforcement notifications and section 130 penalties), including a non-exhaustive list of factors that Ofcom may take into account when deciding whether to take enforcement action and in assessing any persistent misuse we find a party to have committed.

1.8 This statement contains some changes from Ofcom’s previous policy statement. To enable those affected to make any necessary changes to the way they use electronic communications networks and services, Ofcom is allowing for a period of implementation. The policy statement will therefore apply to the use of networks and services from [2 months from publication] and to the exercise of our powers in respect of such misuse.

1.9 For misuse prior to this date, Ofcom’s previous policy statement, dated 1 October 2010, will apply.

Scope of the legislation on persistent misuse

1.10 Given the breadth of the definition of persistent misuse, some forms, such as the misuse of automated calling systems or scams, may also involve contraventions of other legislation in relation to which other bodies also have powers.² For example, marketing calls made to consumers may also fall within relevant legislation on data protection and privacy, including the Privacy and Electronic Communications (EC Directive) Regulations 2003 (“PECR”) in respect of which the Information Commissioner’s Office also has powers.

1.11 Ofcom may take action against persistent misuse that also involves contravention of other legislation. When considering potential cases of misuse, and where such legislative overlap exists, Ofcom will usually consult with the relevant enforcement

² For example, the following is a list of some of the bodies with relevant powers in relation to activities or conduct we have come across, and which sometimes occur in association with nuisance calls: the Information Commissioner’s Office, PhonepayPlus, the Advertising Standards Authority, the Financial Conduct Authority, the Ministry of Justice, the Action Fraud and the National Crime Agency.

authorities to determine who is best placed to take the most appropriate course of action. Possible courses include: determining the most appropriate single regulator to act in a particular instance; Ofcom and other regulators taking joint action; or for Ofcom to exercise powers even where the misuse would also fall within the scope of another set of legislative requirements.³ These decisions will be taken on the basis of securing the best outcome for consumers. That is, reducing consumer harm in the most effective and efficient way, which will usually include an assessment of the regulatory tools available in each case.

- 1.12 In addition, the examples of misuse given in this statement are intended to be illustrative rather than exhaustive and will not prevent Ofcom from investigating and, where appropriate, issuing a notification in respect of behaviour which is not specifically referred to in this statement. That could occur if, for example, a new technology or new use of technology allowed for conduct amounting to a form of misuse not previously known to Ofcom. In these circumstances, Ofcom would take the necessary measures to prevent the harm without delay and may also revise the statement to incorporate the new form of misuse if it considers it necessary and appropriate to do so. It could also, however, include any activities and conduct meeting the statutory requirements for persistent misuse that Ofcom has not expressly foreseen in making this statement, even if they are not novel.

³ Ofcom and the Information Commissioner's Office have agreed a Letter of Understanding, which serves to signal, on a non-binding basis, the actions we and the Information Commissioner's Office intend to take to improve cooperation between us, including by setting principles for deciding which organisation is best placed to take action: <http://www.ofcom.org.uk/about/policies-and-guidelines/data-protection/letter-of-understanding-between-ofcom-and-ico/>.

Section 2

Defining persistent misuse

Background

- 2.1 Ofcom has powers to take action against activities and conduct that amount to 'persistent misuse' of electronic communications networks and services. Section 128 of the Act sets out requirements that must be met for a person's activities or conduct to amount to persistent misuse. Relevant parts of section 128 are described below.
- 2.2 Ofcom can only take action against activities and conduct that meet these requirements. Whether the requirements are met is therefore a key question in every case. One principal purpose of this statement is to identify activity or conduct Ofcom is likely to regard as meeting them and to be persistent misuse. Another is to identify circumstances in which action against such activity or conduct is likely.

'Misuse' of a network or service

- 2.3 In order for there to be 'persistent misuse' of an electronic communications network or service there must be 'misuse'. Section 128(5) of the Act sets out two requirements, one or other of which must be met for there to be such misuse. 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'.
- 2.4 The first of these requires the use of a network or service. It covers, for example, where a person uses a telephone to make silent or abandoned calls, as described below. The second captures a wider category of behaviour which involves conduct dependent on the use of a network or service. For example, conduct resulting in a person being led unknowingly to dial a premium rate service.
- 2.5 In both cases the significance of the words "likely effect" is that the effect has to be probable, not necessarily proven.

Identifying when misuse becomes 'persistent'

- 2.6 The misuse also must be persistent. Section 128(6) states that this is where the misuse is repeated on a sufficient number of occasions for it to be clear that the misuse represents:
- 'a pattern of behaviour or practice;' or
 - 'recklessness as to whether persons suffer annoyance, inconvenience or anxiety'.
- 2.7 The requirement for a pattern of behaviour or practice would be 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. So, where a person engages in activities or conduct that amount to misuse on three or more occasions, Ofcom may regard that as 'persistent misuse'.

2.8 Alternatively, there may be persistent misuse where the repetition of the misuse shows 'recklessness' on the part of the misuser. Again, this will need to be determined on a case-by-case basis. Evidence that points to recklessness could be:

- that the misuser was aware of or informed of the effect of his behaviour but continued with it and/or failed to rectify it;
- that the behaviour in question is so patently annoying or likely to cause inconvenience or anxiety that a reasonable person would realise that repeating it would have that effect (for example, ringing someone repeatedly in the middle of the night); or
- that the misuser has failed to take reasonable steps to establish whether or not the behaviour could cause annoyance, inconvenience or anxiety to other people and has nonetheless continued with it.

2.9 In determining whether misuse is persistent or not, section 128(7) reflects that it is immaterial whether:

- the misuse was in relation to networks on some occasions and in relation to services on other occasions;
- that different networks or services were involved on different occasions; and
- that the persons who suffered or were likely to suffer annoyance, inconvenience or anxiety were different on different occasions.

Section 3

Examples of persistent misuse

- 3.1 This section identifies some general areas where persistent misuse may occur. Where activities or conduct of the kinds identified is repeated, Ofcom is likely to regard it as persistent misuse.
- 3.2 There is a degree of overlap between these areas and some forms of misuse may fall into more than one category. As noted in Section 1, the examples given are intended to be illustrative rather than exhaustive and Ofcom may also regard other types of behaviour which are not identified by this statement as persistent misuse.
- 3.3 Persistent misuse in these areas is commonly caused where organisations using call centres make outbound calls to consumers. Organisations 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 (including, in some cases, distress).
- 3.4 Ofcom may investigate and issue notifications in respect of behaviour in any of the areas identified (as well as any other behaviour amounting to persistent misuse). Factors that we may consider when ascertaining the harm caused by the misuse, and deciding whether to take enforcement action, are set out in Section 5 below. These factors may mitigate or aggravate the harm caused by the persistent misuse (though such misuse can nonetheless occur, and Ofcom may still take action, in the absence or presence of any of these factors).

Silent calls

- 3.5 Silent calls, however caused, are an example of misuse which, where repeated, may be persistent misuse.
- 3.6 When the call recipient experiences one of the following, we consider that they have received a “silent call”, or a call equivalent to a silent call and which we are likely to treat as such:
- they hear nothing on answering the phone (silence);⁴
 - 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

⁴ Except for calls as described in Section 3.14, where the caller would have played an automated message but the recipient hangs up before the message plays. We treat these as abandoned calls.

- 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).
- 3.7 A silent call does not play an 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.
- 3.8 We understand that silent calls are usually a result of organisations, or call centres calling on their behalf, using Automated Calling Systems (“ACS”). For example, silent calls can 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.
- 3.9 Some organisations also use technology in conjunction with ACS to detect answer machines and disconnect the call. 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.
- 3.10 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.
- 3.11 Ofcom considers silent calls to be misuse, which may be persistent misuse, however they are caused. The numbers of consumer complaints to Ofcom and consumer research Ofcom has carried out consistently demonstrates that silent calls are liable to cause some recipients annoyance, inconvenience or anxiety.

Abandoned calls

- 3.12 Abandoned calls are another example of misuse, which may be persistent misuse. They are commonly referred to in the call centre industry as “dropped calls”. An abandoned call occurs 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 recipient hears a message (usually an information message),⁵ or would do but for the call recipient disconnecting the call themselves.⁶
- 3.13 There are a number of scenarios which we understand can lead to abandoned calls. We have set out several examples below, though there may be other ways in which abandoned calls can occur and which we are likely to treat as misuse, which may be persistent.
- 3.14 Abandoned calls can occur, for example:
- in relation to live calls – where the calling party makes calls, whether using ACS or not, with a view to live agents speaking directly to call recipients. The call may be abandoned because, for example, an insufficient number of agents are available to take the call. In this case, the call can be, and usually is, abandoned immediately when the call recipient answers the phone and the recipient hears an automated message;

⁵ In Section 5 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.

⁶ Such calls only include those picked up by live individual recipients, and not calls picked up by answer machines.

- in relation to automated calls involving interaction from the call recipient – for example, where Interactive Voice Messaging (“IVM”)⁷ is used and the call recipient answers the phone and hears an automated message which asks them to press a button to speak to an agent or to answer a series of automated questions before being connected to an agent. Where the call recipient has indicated a preference to be put through to an agent, they may experience an abandoned call (for example, through a lack of agents to take the call) and instead hear an information message (which may or may not be after a period of being placed in a queue for an agent); and
- in relation to calls which would otherwise have been abandoned – where the call recipient answers and would have heard an automated message (usually an information message) instead of being connected to a live agent. However, the call recipient disconnects the call themselves before the message is played. This could occur, for example, where the technology used by the calling party is capable of identifying when a call recipient has terminated the call before it starts to play the message.

3.15 As with silent calls, abandoned calls will be a misuse, however they are caused. As with those calls, the numbers of complaints to Ofcom and consumer research carried out by Ofcom consistently demonstrates that abandoned calls are liable to cause some recipients annoyance, inconvenience or anxiety.

Distinctions between silent and abandoned calls, and information messages

- 3.16 Calls may either be silent or abandoned, within the definitions above, 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.
- 3.17 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. 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 Section 5 below). The call would still be an abandoned call and may amount to persistent misuse, but the message would prevent the additional harm associated with a silent call.

Misuse resulting from use of technology

- 3.18 The use of technologies for both inbound and outbound dialling can result in persistent misuse. Such misuse can occur as a result of using ACS on its own or in conjunction with other technology such as automated messages,⁸ IVM and AMD. We have already set out above, for example, that silent and abandoned calls can be caused by these technologies.

⁷ This type of technology may also be referred to as Interactive Voice Recognition (“IVR”).

⁸ 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.

- 3.19 In addition, there may be cases when the use of these technologies to transmit automated (whether interactive or not) messages leads to other forms of misuse, which may be persistent where repeated.
- 3.20 For example, Ofcom is likely to regard it as misuse if IVM is used and the call recipient elects to speak to an agent but experiences a long wait-time for an agent (we would consider the wait-time in its context). The same applies where during the time when the person waits to be connected to an agent:
- i) no information is provided as to the organisation which called, or the organisation on whose behalf they called; and/or
 - ii) marketing content is included, where relevant requirements (such as obtaining consent under PECR) have not been met.
- 3.21 These are specific examples where misuse results from technology used to make outbound calls. There may be others. Ofcom will consider each case on its own merits in terms of assessing whether persistent misuse has occurred.
- 3.22 In doing so, we recognise that, in some circumstances, the use of these technologies can be beneficial, either to the general public or to the individual recipient. An obvious example of a public benefit would be where emergency authorities use ACS to transmit a recorded hazard warning to subscribers within a defined geographical area. Examples of potential benefits to individuals include activating and monitoring credit card use, arranging deliveries, and sending reminders for payments and appointments.

Number-scanning and fax-scanning

- 3.23 The practice of number-scanning (also known as ‘pinging’) is another example of misuse. It involves the making of calls to find out which telephone or fax numbers, out of a range of numbers, are in service. 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.
- 3.24 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. Ofcom therefore considers repeated number-scanning or fax-scanning to be persistent misuse.

Misuse of a CLI facility

- 3.25 Calling Line Identification (“CLI”) is a technology that identifies the number from which a call is made. 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 (known as a Presentation Number) is the number for the relevant team or department in the organisation and to which the caller wishes to direct any return calls.
- 3.26 CLI numbers serve a number of useful purposes as far as call recipients are concerned. They help those receiving calls to identify the caller and to decide whether to answer the call (some handsets and services may rely on CLI information

in order to block and filter certain calls). They also enable the recipient 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 call recipients to report calls to Ofcom and other regulators.

3.27 We regard the following to be misuse of a CLI facility, and which may amount to persistent misuse where repeated:

- displaying a CLI which is not authentic or valid (for example, it is a false or random number which does not dial or where a connection cannot be established, or does not connect to the person or organisation calling or on whose behalf the call is made);
- displaying a CLI which is unreturnable such that, when called (and although there is a dialling tone), the number does not connect to an agent or an automated message; or
- displaying a CLI which is a controlled premium rate service (as defined in the condition regulating premium rate services under section 120 of the Act).

3.28 Where a person calls the provided CLI and is connected to an agent or an automated message, we will also regard it as misuse, which may be persistent misuse, if:

- no information is provided as to the organisation which called, or the organisation on whose behalf they called;
- an opportunity is not provided for the person called to opt out of future calls or messages; or
- the call is used as an opportunity to market to that person, without the person's consent.

Misuse for dishonest gain – scams

3.29 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 (“scams”).⁹ Although this statement does not fully describe known scams (so as not to encourage their perpetration), activities which share certain common characteristics, as set out below, and any future similar activities, will be considered examples of misuse and may be persistent misuse.

3.30 Characteristics common to scam calls may include:

- they are primarily aimed at defrauding the end consumer, usually an individual;
- they exploit the use of premium rate or other revenue sharing services, or in some cases, non-revenue sharing services, to generate calls which lead to charging circumstances where the individual is misled (including by omission of material information) as to the nature of the service being offered, and/or the costs involved, when returning the call for which they will then be billed.

⁹ 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.

- 3.31 Ofcom will regard the practice of misleading call recipients (including by omission) 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 or unexpectedly high bill, as misuse and if repeated, persistent misuse. We are also likely to regard as misuse cases where the only purpose of the caller's outbound calls was to generate return calls using revenue sharing numbers.
- 3.32 In some circumstances the leading of a call recipient to phone a premium rate or revenue sharing number will be a form of direct marketing and additionally subject to other applicable legislation. Again, where legislative overlap exists, Ofcom will usually consult with the relevant enforcement authorities as to the appropriate course of action.

Misuse of allocated telephone numbers

- 3.33 Where telephone numbers have been allocated, Ofcom will regard their use (whether by the end-user, relevant communications provider, intermediary or other party) in a way that is inconsistent with designations and/or restrictions in the National Telephone Numbering Plan ("the Plan")¹⁰ as a form of persistent misuse. An example would be where Personal Numbers (070) are used for anything other than providing a "Personal Numbering Service" (as defined in the Plan) or Mobile Numbers (071-075, 077, 078 and 079) are used for services other than those which fall within the definition of "Mobile Service" (as defined in the Plan).
- 3.34 In these cases, it is likely that any action would usually be taken against the person or organisation making the relevant calls. However, condition 17 of the General Condition of Entitlement requires the number range holder and any other communications provider using the number to take all reasonably practicable steps to secure compliance by their customers. Such a party could also be liable for persistent misuse where, for example, they are complicit in the misuse of the network or service (see Section 4).

Misuse of a network or service which is also a breach of PECR

- 3.35 Ofcom recognises that there may be some circumstances in which an activity or conduct which uses a network or service may amount to misuse in accordance with section 128 of the Act and be a potential breach of PECR.
- 3.36 For example, a calling party may make an unsolicited live call to a call recipient for marketing purposes when that recipient has notified the calling party that they do not wish to receive such calls. In this instance, this is likely to be in breach of PECR and may also represent misuse (which, if repeated, is persistent misuse) because the organisation used a network or service to engage in conduct (an unsolicited marketing call which the recipient asked not to receive) which the effect or likely effect of which is to cause the call recipient unnecessarily to suffer annoyance, inconvenience or anxiety.
- 3.37 When considering cases like this, Ofcom will usually consult with the Information Commissioner's Office, to determine who is best placed to take the most appropriate

¹⁰ The National Telephone Numbering Plan (1 July 2015): <http://stakeholders.ofcom.org.uk/telecoms/numbering/>.

course of action. We may decide to take action on the basis the conduct amounts to persistent misuse.

Other forms of misuse

- 3.38 As already noted, the examples given in this Section are intended to be illustrative rather than exhaustive and Ofcom may also regard other types of behaviour as persistent misuse. A further example where a network or service could be misused is where call centre agents making outbound calls behave improperly towards call recipients, such as rudeness or intimidating behaviour. Where such behaviour is repeated, this may amount to persistent misuse.

Section 4

Our approach to enforcement

Introduction

- 4.1 In this section, we set out the approach we are likely in most cases to take in enforcement action against persistent misuse, including:
- providing an overview of the process for investigating complaints and taking action;
 - explaining how we will decide which persons to enforce against;
 - setting out our priorities for taking enforcement action; and
 - providing a more detailed explanation of the procedures when we issue a section 128 notification, a section 129 enforcement notification and/or a section 130 penalty.
- 4.2 On the third of those matters, we set out in this section the sorts of principles we will usually take into account in assessing our priorities. For example, the level of harm caused by the relevant misuse. In the following section, we describe in more detail specific factors we are likely to consider in the assessment of that harm and other relevant principles.
- 4.3 We may also take different approaches to those described here, where that is appropriate in particular cases. Where we do so, we will consider appropriate and fair ways to do that, taking account of the needs to protect recipients of telephone calls and fair dealing businesses and the need for fairness to those who may be investigated.

Overview of enforcement process

- 4.4 Ofcom may open investigations into potential cases of persistent misuse 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.
- 4.5 Using the information available, our usual approach is to establish the identity of the person responsible for the potential misuse, including where necessary through call tracing. We will then gather further evidence, including where appropriate, by 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.
- 4.6 On the basis of the information gathered, we will decide, on a case-by-case basis whether taking action would fit within Ofcom's administrative priorities. We would usually take account of Ofcom's Enforcement Guidelines¹¹ and the assessment is

¹¹ Ofcom's guidelines for the handling of competition complaints and complaints concerning regulatory rules (25 July 2012): http://stakeholders.ofcom.org.uk/binaries/consultations/draft-enforcement-guidelines/annexes/Enforcement_guidelines.pdf

likely to include one or more of the factors described in principle below and in more detail in Section 5.

- 4.7 Having analysed all the available evidence, 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 an electronic communications 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 an electronic communications network or service; or
 - take action to obtain assurances from the organisation that they will change their behaviour.
- 4.8 In some cases where we seek or obtain assurances from an organisation, it may also be appropriate to take subsequent formal enforcement action. For example, if engagement on this basis does not produce the desired outcomes or any assurances given are later breached.
- 4.9 If we take formal enforcement action and issue a section 128 notification to the person or organisation under investigation, setting out our determination (and, in appropriate cases, notice of a penalty we may impose), they have the opportunity to make representations. The period for representations is not normally less than a month, although in urgent cases it can be seven days.
- 4.10 We will consider the representations and decide what further action, if any, should be taken. This may involve issuing an enforcement notification under section 129 requiring steps to be taken, and/or a penalty under section 130 of up to £2,000,000.
- 4.11 Our usual approach will be to publish information about enforcement actions. This is described in more detail at the end of this section.

Persons against whom we will enforce

- 4.12 Section 128 of the Act applies where “a person has persistently misused an electronic communications network or electronic communications services”. Such misuse may be either direct or indirect.
- 4.13 This means a person or organisation may be caught by section 128 either where they are misusing a network or services themselves, or where they have engaged another person or organisation to use the network or service on their behalf. An example of this may arise where an organisation engages representatives, such as third party call centres, to contact UK consumers on their behalf. In those circumstances, the organisation engaging the third party to make the calls may be the subject of an investigation and ultimately action under the Act for persistent misuse by their representatives. This includes where the representative is an offshore call centre.
- 4.14 The decision as to the most appropriate person or organisation to enforce against will be taken on a case-by-case basis. We may enforce against the principal party which has engaged representatives to act on its behalf, because we consider that the responsibility for the misuse lies with them. Nonetheless, there may be other

circumstances where the representatives are also persons who are misusing a network or service in their own right. An example is where a marketing organisation operates on its own account to generate information or services which it sells to another party. In some cases, we may consider it appropriate to take action against more than one person.

- 4.15 It will not usually be our intention to take action under sections 128 to 130 of the Act 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, where the provider itself is responsible for, or complicit in, perpetrating the misuse.
- 4.16 One instance where a communications provider over whose network or service the misuse is occurring may be responsible for perpetrating the misuse is as follows. The principal party – the organisation making calls – may have spoofed numbers, which would represent a misuse of a CLI facility. If a communications provider was complicit in the spoofing, it would also be committing misuse (which may be persistent misuse). Responsibility for such misuse will be assessed on a case-by-case basis.

Third party rights

- 4.17 Depending on the person or organisation against whom we decide to enforce, there may be third parties who are directly affected by the outcome of our investigation and/or who may have a direct interest in the investigation. We may consider whether any third party rights are relevant, and the fair and appropriate involvement of any third party in the enforcement process, on a case-by-case basis.

Ofcom's priorities on opening an investigation and taking enforcement action

- 4.18 Ofcom may take enforcement action in any case in which persistent misuse occurs. However, it is more likely to take action in some cases than others.
- 4.19 In determining whether and how to take action, Ofcom will usually take account of the administrative priority framework in our published enforcement guidelines. In relation to persistent misuse cases more specifically, we are likely to prioritise cases for action taking account of the following principles:
- i) the seriousness of the harm caused by the misuse; and
 - ii) the need for deterrent action.
- 4.20 These principles are also likely to be relevant in most cases in considering the nature and extent of the action we take.
- 4.21 Our assessment of the seriousness of the harm is likely in most cases to involve two main considerations. First, the type of harm caused, where anxiety is more detrimental than annoyance or inconvenience. Second, the scale and amount of harm, where, other things being equal, the more people affected by the misuse or the greater frequency with which it occurs, the greater the harm is likely to be.
- 4.22 In terms of the need for deterrent action, in some cases we may prioritise enforcement action because of the type of misuse involved (such as that referred to in the subsection below). In other cases, such as where a new form of misuse arises,

Ofcom may need to act quickly in order to stop it and deter others from engaging in the practice.

- 4.23 Specific factors Ofcom will usually take into account in assessing these principles relating to harm and deterrence are in Section 5 below. Some of those factors are likely to be particularly relevant to assessing the seriousness of the harm in particular cases.

An enforcement priority

- 4.24 Whilst there are many forms of misuse, the main focus of our enforcement action is, and will continue to be, tackling silent and abandoned calls. As noted elsewhere in this policy statement, the numbers of complaints to Ofcom and consumer research Ofcom has carried out consistently demonstrates that both silent and abandoned calls are liable to cause some recipients annoyance, inconvenience or anxiety. Accordingly, such calls are forms of misuse which we consider should be tackled most urgently.
- 4.25 Ofcom's assessment of that evidence is that silent calls are more likely to cause more harm than abandoned calls. On that basis, our general approach is that persons who are called must not be subjected to silent calls in any circumstances. Enforcement action against those making silent calls will, therefore, be our highest priority of all.

Enforcement outcomes

Section 128

- 4.26 One outcome of enforcement action is the issue by Ofcom of notification under section 128 of the Act. Section 128 authorises Ofcom to issue a notification to a person or organisation where it has reasonable grounds for believing that they have engaged in persistent misuse of a network or service.
- 4.27 Under section 128(2) the notification must include the following elements:
- i) a determination that Ofcom has reasonable grounds for believing 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.

The determination and the specification of a section 128 notification

- 4.28 The section 128 notification will refer to the evidential basis that supports Ofcom's determination about the occurrence of persistent misuse.
- 4.29 The specification of the use that Ofcom considers persistent misuse will describe the actual behaviour of the relevant person or organisation. It will be supported by the grounds on which Ofcom believes that this behaviour is likely to give rise to annoyance, inconvenience or anxiety.

- 4.30 The specified period during which the notified person may make representations must not normally be less than a month, but it 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.
- 4.31 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 judgment. The factors that are likely to lead towards Ofcom allowing a shorter period for representations are the scale of the relevant misuse, the number of consumers on whom the misuse is having an impact and the degree of detriment caused.

Additional matters

- 4.32 At the same time as issuing a section 128 notification, we may also in appropriate cases notify the relevant person or organisation of any further action we are minded to take if, following the period for making representations, we are satisfied that they have persistently misused an electronic communications network or service. This may include, for example, giving notice of a penalty which, subject to representations, we are minded to impose under section 130 of the Act.

The consequences of a section 128 notification

- 4.33 Once the period allowed for the making of representations has expired, Ofcom has three options:
- i) it can decide whether or not to issue an enforcement notification to the misuser under section 129 of the Act;
 - ii) it can impose a penalty under section 130 of the Act; or
 - iii) it can issue an enforcement notification and impose a penalty.

Enforcement notification under section 129

- 4.34 An enforcement notification under section 129 may be issued 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 section 128 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.
- 4.35 An enforcement notification will impose a requirement on the misuser to take the specified steps:
- i) to end the misuse and not repeat it; and
 - ii) to remedy the consequences of the misuse.

- 4.36 Where Ofcom issues an enforcement notification, it will impose clear and enforceable obligations on a misuser and allow a reasonable period for compliance with them. A requirement to remedy the consequences of misuse could include, according to section 129(7), paying an amount to a person by way of compensation for loss or damage suffered by that person, or an amount in respect of annoyance, inconvenience or anxiety to which they have been put.
- 4.37 When considering whether a misuser has remedied the consequences of a breach, Ofcom will consider any steps the misuser has so far taken. We will take account of the facts of the particular case and, in assessing the remedial steps to be taken, will consider whether the remedy is proportionate to the harm caused.
- 4.38 Section 129(5) of the Act makes compliance with an enforcement notification a duty of the notified user. It enables Ofcom to enforce that duty through civil proceedings. As set out in section 129(6), such proceedings may lead to an injunction, a requirement for specific performance of a statutory duty or any other appropriate remedy or relief.

Issuing a penalty under section 130

- 4.39 Where Ofcom has issued a section 128 notification, or both a section 128 notification and a section 129 enforcement notification, Ofcom has powers to impose a penalty on a persistent misuser for the matters notified. As noted above, Ofcom may in appropriate cases give notice of a penalty we are minded to impose at the same time as we issue a section 128 notification.
- 4.40 Ofcom can impose a final penalty once the period for making representations under a section 128 notification has elapsed, where the person or organisation notified has committed a persistent misuse in one or more of the ways notified. Ofcom may also impose a financial penalty where a notified misuser has contravened a requirement of a section 129 enforcement notification.
- 4.41 Under section 130(4) the penalty Ofcom may set is the amount which it determines is both appropriate and proportionate to the misuse for which it is imposed. This is subject to a maximum of £2,000,000.
- 4.42 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.
- 4.43 Ofcom will also take account of its penalty guidelines.¹² 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 (including for persistent misuse). Section 392(6) says Ofcom must also have regard to the statement for the time being in force when setting the amount of any penalty.

¹² Published by Ofcom in accordance with section 392 of the Act. Ofcom has recently consulted on amending its penalty guidelines. See <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>.

- 4.44 Section 130 thus confers discretion on Ofcom to impose a penalty that it considers to be appropriate and proportionate to the notified misuse. We generally give the notified misuser a month to provide representations on the proposed penalty, although the period may be shorter in appropriate cases. Where notice of the proposed penalty is given with the section 128 notification, the recipient will usually be given its opportunity to make representations on that notification and the proposed penalty at that stage.

Publication

- 4.45 Publishing information serves a number of important purposes. For example, it makes clear to consumers what kinds of conduct Ofcom is liable to investigate and the identity of organisations subject to such action. This helps them report relevant matters to Ofcom enhancing our ability to regulate effectively. It also helps make clear to those making calls what they should do to comply with the law and that they are liable to enforcement action if they do not, which should discipline their behaviour. Our usual approach will therefore be to publish information about enforcement actions.
- 4.46 In particular, Ofcom will usually announce the opening of persistent misuse investigations and the issuing of notifications under sections 128 and 129, and penalties under section 130 in its Competition and Consumer Enforcement Bulletin.¹³ Ofcom will also generally publish on its website versions of notifications it issues under these sections, subject to the requirements of section 393 of the Act.¹⁴
- 4.47 Ofcom will consider on a case-by-case basis whether to publish information about other milestones in our investigative process. We are likely to do so in cases where we think that doing so would facilitate the exercise of our functions, such as in the ways described in paragraph 4.43 above.
- 4.48 A particular example is where Ofcom obtains assurances from an organisation about its future conduct. In such cases, publishing the assurances raises awareness of them, enabling consumers to report cases of non-compliance, and shows calling parties the kinds of behaviour likely to be legitimate. These things help discipline the behaviour of the organisation giving the undertakings and others. In these sorts of ways, publication seeks to help reduce instances of persistent misuse.

¹³ <http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/?a=0>.

¹⁴ Which places statutory restrictions on the information Ofcom may publish.

Section 5

Factors relevant to the assessment of Ofcom's priorities

5.1 As set out in Section 4 above, Ofcom may take action in any case in which persistent misuse occurs. However, it is more likely to take enforcement action in some cases than others and, when deciding whether to take action, Ofcom will usually be guided by a sense of administrative priority determined by the level of consumer harm and the need to take enforcement action to act as a deterrent.

An enforcement priority

5.2 Enforcement action against those making silent and abandoned calls will usually be Ofcom's highest priorities. We have already referred in Section 4 above to the evidence demonstrating that both types of calls are liable to cause some recipients annoyance, inconvenience or anxiety. Accordingly, such calls are forms of misuse which we consider should be tackled most urgently.

5.3 Ofcom's assessment of that evidence is that silent calls are more likely to cause greater harm than abandoned calls, for example, on the basis that consumers make more complaints about silent calls than abandoned calls and research indicates a higher proportion of silent calls are considered annoying than any other type of call. The greater harm is liable to arise because the recipient is given less information about the call (such as the caller's identity).

5.4 On that basis, Ofcom's general approach is that enforcement action against those making silent calls will be our highest priority of all. We are likely to take action against any party making such calls, whatever the number it makes¹⁵ and whatever the rate (as a proportion of total calls made) at which it makes them, and to regard the harm involved as serious.

Relevant factors

5.5 Ofcom will also consider other factors in assessing particular cases. The factors described below may mitigate or aggravate the harm caused by the misuse. They are factors we are likely to take into account when assessing what action to take and, where we take action, what the consequences should be. Some of these factors are more general and could apply to any of the examples of misuse identified in Section 3. Others are more relevant when the use of the network or service relates to the making of outbound calls, particularly silent and abandoned calls, whether caused by the ACS or not.

5.6 We do not intend to consider those factors in a mechanistic way. It may not be appropriate or necessary to consider some or all of them in any particular case. For example, because the factors are not relevant to the type of misuse identified; or the misuse itself or the harm related to one or more factors is sufficient for us to decide that we need to take enforcement action. In other cases, it may be appropriate to consider other factors which are relevant to the assessment, but are not set out in this section.

¹⁵ Where there are at least three.

- 5.7 To assist organisations, we have provided in this section examples of steps they can take in respect of a number of the factors which may mitigate the harm caused and Ofcom may, therefore, be less likely to take action where such steps have been followed.
- 5.8 Misuse can nonetheless occur even if organisations take some or all of the steps identified. We will consider each instance of misuse on a case-by-case basis and we may take action in any case where we have reasonable grounds for believing the misuse is persistent.
- 5.9 To illustrate these points, making abandoned calls may amount to persistent misuse if, for example, they represent a pattern of behaviour or practice (for example, there are at least three instances). As set out below, Ofcom is most likely to take enforcement action where the calling party's abandoned call rate meets or exceeds the threshold described (and/or it makes silent as well as abandoned calls). However, we may take action in any case where an organisation makes abandoned calls, even where the rate is below the threshold. Ofcom's decision in such instances would be guided by an overall assessment of all the circumstances of the case, including the level of harm caused.

Overview of factors relevant to the assessment of Ofcom's priorities

- 5.10 The factors we consider are likely to be relevant to any assessment of Ofcom's priorities, and of the consequences of any persistent misuse Ofcom finds to have been committed, include:
- whether the misuse was repeated in respect of the same number (or recipient);
 - the time(s) of day when misuse occurred;
 - whether a CLI number was provided;
 - the length of time the caller let the phone ring before terminating the call;
 - the length of time it took for the person called to be connected to a live agent (either immediately on answering a call or after electing to speak to an agent via an interactive message) or information message;
 - for abandoned calls specifically, the number of abandoned calls made and the ratio of such calls to total calls in which a connection is established;
 - whether an information message was played and the content of the information message; and
 - whether effective management practices and processes were in place and followed.

We will take these factors, where appropriate, into account when assessing the seriousness of the harm caused by the misuse and the action we should take in each case.

- 5.11 We set out below more detail in respect of each of these factors.

Misuse repeated in respect of the same number or recipient

- 5.12 In appropriate cases, Ofcom will take account of the extent to which any misuse is repeated. Generally, where there is persistent misuse, Ofcom is likely to regard repeated misuse in respect of the same number, or recipient, as an aggravating factor. The greater the repetition the more likely Ofcom is take enforcement action and the more punitive that action is likely to be.
- 5.13 An example is repeated silent or abandoned calls to the same number. In these sorts of cases we will consider the number of repeat calls made to the same number, and the time period over which the calls occur. A higher frequency of repeated misuse generally indicates a higher degree of harm.
- 5.14 One of the ways in which we may do this is to assess whether a call constituting misuse is made within the following 72 hours after the first instance of misuse (to that number) has occurred. If they are, we would consider the circumstances in which the repeat calls were made (for example, there may be good reasons for making repeat calls) and whether the calling party guaranteed the availability of a live agent for the repeat call.
- 5.15 For example, if an abandoned call occurs, and the calling party makes a second call to the same number in the next 72 hours, Ofcom would consider whether the calling party can guarantee that a live agent will be available if the phone is answered by the call recipient. If not, Ofcom is likely to regard the repeated call(s) as an aggravating factor and the case is more likely to be one in which Ofcom takes action.
- 5.16 In some cases, it may be appropriate to regard misuse repeated in respect of the same recipient, rather than the same number. An example of this may be where the misuse consists of a deception for dishonest gain.

Time(s) of day misuse occurs

- 5.17 Ofcom may also take into account the time(s) of day at which the misuse occurs (whether calling an individual repeatedly or many consumers once). It is likely to regard misuse (such as silent and abandoned calls) which occurs at unsociable hours to involve an aggravating factor and the case is more likely to be one in which Ofcom takes action.
- 5.18 This statement does not prescribe the hours within which activities using a network or service should take place. Ofcom, however, considers there are some obvious examples of when such activities would be deemed unsociable such as ringing someone repeatedly, or for marketing purposes, in the middle of the night. We will consider these matters on a case-by-case basis and may also consider existing sectoral guidance on calling times if we see prevalence of such activities at unsociable hours.

Calling Line Identification

- 5.19 As described in Section 3 above, the proper provision by calling parties of CLI numbers serves a number of useful purposes for recipients. Some of these relate to the protection of privacy. CLI numbers help those receiving calls to identify the caller and to decide whether to answer. They also enable the recipient to call the number back, for reasons that may include finding out who made the call, expressing interest in services or to request that no further calls are made.

- 5.20 Accordingly, we are likely to regard cases in which a calling party misuses CLI facilities in the sorts of ways described in Section 3 as causing harm. Such cases are likely to be a priority for enforcement action and in which we may regard the misuse of the CLI as an aggravating factor.
- 5.21 Additionally, where calling parties choose to withhold CLIs in cases where they commit misuse (for example, by making silent or abandoned calls), Ofcom will usually regard the absence of a CLI number as a factor aggravating the harm and making enforcement action more likely. 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.
- 5.22 In other cases of misuse (like silent or abandoned calls) where a CLI number is provided, we may also take into account the following factors:
- whether the CLI number provided (including in any messages played to or left with the call recipient) was a basic rate number (that is, a number which costs the same as a standard 'geographic' call,¹⁶ or a standard mobile rate or a number which is free to the caller);¹⁷
 - whether more than one CLI number was used and the circumstances in which they were used; and
 - when a person makes a return call to the CLI number and hears an information message, whether it accords with the practices set out in '*Playing an information message*' below.
- 5.23 A particular concern arises in the circumstances in the second of these bullet points. A party making calls for business or marketing purposes may use a large number of CLIs, presenting different CLI numbers on different calls. There may be good reasons for doing so. For example, a business may use different numbers for different customer groups (by location or by type of service) or so that any subsequent calls can be returned to the correct team or department.
- 5.24 The reasons for this kind of behaviour may also, however, be bad. For example, using large numbers of different CLIs in a single campaign so as to mislead recipients into picking up a call or to avoid detection and complaints to Ofcom. In those circumstances, Ofcom would likely regard the behaviour as aggravating the harm arising from any misuse.

Length of time a call should ring

- 5.25 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.

¹⁶ Such as 01 or 02, and 03 numbers which are charged at 'geographic rate'.

¹⁷ Such as 080 numbers.

For abandoned calls specifically, the number of abandoned calls and the ratio of such calls to total calls in which a connection is established

- 5.26 Ofcom regards the making of abandoned calls as a serious matter, liable to cause harm to consumers, and a priority for enforcement action generally. We may accordingly take action in any case where a calling organisation makes such calls.
- 5.27 It will, nonetheless, sometimes be necessary or appropriate to prioritise some cases involving abandoned calls over others, or over other cases involving other types of misuse. We are likely in most cases to assess the level of harm and the priority for action by considering the number of abandoned calls an organisation makes and the abandoned call rate (“ACR”), calculated in accordance with the guidance in Annex 1.
- 5.28 The purpose of the ACR is to find out the proportion of abandoned calls being made as a proportion of all calls where a connection was established with a live individual call recipient.¹⁸ All other things being equal, a higher ACR rate would indicate a greater proportion of abandoned calls, and greater misuse and harm, for a given number of live calls in which a connection was established.
- 5.29 The ACR is not, however, the only or determinative consideration. A calling party which generates larger volumes of calls may have a low ACR, but may be causing as much or more harm than a party which generates smaller volumes of calls but has a higher ACR. Other considerations may also be relevant in an assessment of harm. These include the total number of abandoned calls made and the numbers and frequency of repeated calls to recipients.
- 5.30 Accordingly, the higher the number of abandoned calls an organisation makes and/or the higher its ACR, the more likely we are to treat a case as a priority for action. We are most likely to take action – and organisations can expect us to do so – where:
- the ACR, on any given calendar day, is three per cent or more of the total calls made that day in which a connection with a live individual is established, either on a per campaign basis or per call centre basis;¹⁹ and/or
 - the organisation makes both silent and abandoned calls.

We will also usually regard the harm in such cases as aggravated.

- 5.31 Wherever it decides to take action, Ofcom will take into account, and assess any liability on the basis of, all the abandoned calls the party was responsible for in the period investigated, not just those abandoned calls made in excess of that rate or only on those days in which the ACR was exceeded.

¹⁸ 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).

¹⁹ “Campaign” is defined in Annex 1. 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 centre, 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 at an individual (that is, disaggregated) campaign or call centre basis. This will be determined on a case-by-case basis.

Playing an information message

- 5.32 As noted in Section 3 above, calling parties can often avoid causing silent calls by playing an information message.
- 5.33 Playing such a message does not mean that an abandoned call causes no unnecessary harm and prevents persistent misuse occurring. Playing an appropriate message can, however, at least provide some reassurance to the recipient as to the caller's identity and that the call is not a malicious silent call. It can also enable the recipient to protect their privacy by calling back and asking not to receive further calls.
- 5.34 Another factor we may consider, therefore, in assessing the harm in cases involving abandoned calls is the content of the recorded message. It should:
- contain the identity of the party on whose behalf the call was made (which will not necessarily be the same party that is making the call);
 - include an explanation that the party attempted to contact the recipient but was unable to connect them to an agent;
 - provide details of a basic rate number (see 5.22 above) which the call recipient can contact so they have the possibility of declining to receive further calls from the calling party; and
 - not include any marketing content nor be used as an opportunity to market to the called person.²⁰
- 5.35 Where the information message is deficient in one or more of these respects, this is another factor Ofcom is likely to consider as aggravating the harm. Ofcom is more likely to regard such cases as priorities for enforcement action, whatever the ACR.

Time taken to connect the called person to a message

- 5.36 We also consider the length of time taken to connect the call recipient to a message (whether an information message, an automated message or an interactive message) has the potential to be an aggravating factor in some cases of misuse. An example would be a delay in the playing of an information message in the event of an abandoned call.
- 5.37 We may therefore consider in such cases whether the recipient is connected to a message (whether an information message, automated message or interactive message) as quickly as possible, and no longer than two seconds, after:
- i) where the playing of a message is dependent on the technology recognising a voice or sounds to classify the call, the person called begins to speak (or 'start of salutation'); or
 - ii) in any other case, the phone has been picked up.

²⁰ 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.

Management, practices and processes

- 5.38 Where effective practices and processes (“procedures”) are in place, adhered to, monitored, and regularly reviewed, they should help to minimise occurrences of misuse. They should also help to address promptly any misuse which does occur and minimise the risk of it recurring. These are matters within a calling party’s responsibilities and control. Ofcom may, therefore, take them into account in prioritising a case for enforcement action and in assessing a calling party’s liability.
- 5.39 Poor procedures can be aggravating factors in cases of persistent misuse.²¹ We may take into account in particular, therefore, whether an organisation applied effective procedures to prevent and identify any issues which may cause misuse (whether unintentional or deliberate). Likewise, whether an organisation had procedures to rectify misuse in a timely manner were it to occur and to prevent further misuse. For example, we expect organisations to: carry out testing when setting up or changing systems; monitor agent performance; and ensure dialler management is carried out by competent persons. We are likely to consider a failure to carry out such procedures as an aggravating factor in the event of an investigation.
- 5.40 Ofcom also considers that inappropriate or poor management of an ACS may result in ‘over-dialling’ (setting the dialling rate of the ACS too high for the number of call centre agents available). We may therefore consider, in appropriate cases, the ratio at which calls are dialled compared to the availability of agents.
- 5.41 In addition, where an organisation engages third parties (for example, to undertake the activity using the network or service on its behalf, or to secure compliance on its behalf) it may be relevant for Ofcom to consider the arrangements made by the organisation in selecting that third party and the compliance obligations imposed on it. In particular, whether an organisation took reasonable steps to monitor and assess compliance by a third party on an ongoing basis, beyond the acceptance of assurances or the imposition of contractual obligations.

Record management

- 5.42 Ofcom expects that where organisations are subject to this statement, records that demonstrate that they have acted in accordance with it are kept for a minimum of six months.
- 5.43 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 (including total numbers of abandoned calls and live calls for a specified period), and evidence supporting AMD accuracy.
- 5.44 Where an organisation does not retain and/or does not provide relevant information, but there are reasonable grounds for believing that there has been persistent misuse, Ofcom is more likely to take enforcement 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.

²¹ They may also indicate recklessness as to whether persons suffer annoyance, inconvenience or anxiety, and therefore establish whether misuse is “persistent” and Ofcom may take them into account in that regard.

Annex 1

Guidance on how to calculate the ACR

A1.1 Section 5 of the policy statement sets out that we regard the making of abandoned calls as a serious matter, liable to cause harm to consumers, and a priority for enforcement action generally. We may accordingly take action in any case where a calling organisation makes such calls. One of the cases where we are most likely to take action – and organisations can expect us to do so – is where:

the ACR, on any given calendar day, is three per cent or more of the total calls made that day in which a connection with a live individual is established, either on a per campaign basis or per call centre basis.

This Annex provides guidance on how to calculate the ACR.

Definitions and interpretation

A1.2 For the purposes of calculating the ACR:

- an *abandoned call* is as set out in Sections 3.12 to 3.15 of this policy statement;
- 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. (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.);
- 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 Sections 3.5 to 3.11 of this Policy Statement; and
- an *unconnected call* is a call in which a connection is not established between the two parties.

How to calculate the ACR

The formula

A1.3 The ACR formula for each calendar day is as follows:

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

A1.4 For the avoidance of doubt, the following types of calls must be excluded from the calculation:

- silent calls;
- unconnected calls;

- calls to answer machines where calls are:
 - picked up by an answer machine and are 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.

A1.5 There may be cases where no data is available as to whether abandoned calls have been made to answer machines or to live individuals. In order to estimate the number of abandoned calls to live individuals, for the purpose of calculating the ACR in those cases, we need to make an assumption about the number of abandoned calls 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.

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

Example: Applying the formula for calculating the ACR

A1.6 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

A1.7 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.

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.

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.

Accordingly, the ACR in this scenario is:

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