



Tackling abandoned and silent calls

Statement

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Section 1

Executive summary

Introduction

- 1.1 Ofcom has powers under the Communications Act 2003 (“the Act”) to take enforcement action where it has reasonable grounds for believing that a person has persistently misused an electronic communications network or service.
- 1.2 Ofcom is required under the Act to prepare and publish a statement of our general policy with respect to our powers to deal with persistent misuse and is required to have regard to this statement when taking enforcement action under the Act.
- 1.3 Ofcom’s Revised Statement of Policy, published on 10 September 2008 (the “2008 Revised Statement”) identifies making abandoned or silent calls as one example of persistent misuse. It describes steps call centres can take to avoid – insofar as possible – making abandoned calls; and that when abandoned calls are made, steps are taken to limit harm to consumers. Specifically it sets out Ofcom’s approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls.
- 1.4 In June 2010 we consulted on various changes to the 2008 Revised Statement aimed at making our policy more effective and further reducing consumer harm (the “2010 Consultation”).
- 1.5 Ofcom received 63 responses to the 2010 Consultation from a broad range of industry and consumer stakeholders. This document sets out Ofcom’s response to the comments we received and includes our final conclusions. These are reflected in Annex 1 to this document (“the Revised Statement”) which sets out Ofcom’s current approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls.

Consumer harm

- 1.6 Abandoned and silent calls will almost invariably result in consumer harm, which may range from inconvenience and annoyance through to genuine anxiety, particularly for people who live alone. This is especially the case for silent calls. Over 22% of the population have experienced silent calls on their landline in the last 6 months¹.
- 1.7 The type of complaints we receive indicates that older and some disabled consumers are more likely to be adversely affected by silent calls – partly due to the amount of time spent at home, as well as any physical difficulty in reaching the phone.
- 1.8 Consumer harm caused by abandoned and silent calls can be made worse when individuals receive a number of calls over a short period of time. In the case of silent calls, multiple calls of this nature over a short period may lead to a consumer believing they are being targeted or harassed.

¹ Ofcom Consumer Concerns Tracker, TNS Omnibus, March 2010.

Abandoned and silent calls

- 1.9 Most abandoned and silent calls are not generated with malicious or mischievous intent but by Automated Calling Systems (ACS) and Answer Machine Detection (AMD) technology, used by call centres to maximise the amount of time call centre agents spend speaking to consumers.
- 1.10 Companies using ACS and AMD technology can however generate abandoned and silent calls. For example, consumers might receive an abandoned call if there are not enough call centre agents to handle a call when the consumer picks up or a silent call if AMD technology mistakes them to be an answer machine and disconnects a call without playing an information message (known as an 'AMD false positive²').
- 1.11 Ofcom continues to address the problem of abandoned and silent calls by introducing an enforcement policy to tackle repeat silent calls and clarifies its existing policy.

Tackling repeat silent calls

- 1.12 We commissioned independent analysis of the silent call complaints we receive and found that – where consumers gave us information about the frequency of silent calls they received – over 70% had received two or more silent calls in a day, from the same company, often over a period of days or even weeks. Our data therefore suggests these 'repeat silent calls' are a major cause of consumer harm.
- 1.13 Although the majority of UK consumers do not suffer from repeat silent calls, the impact on those that do, is significant. Some consumers complaining to Ofcom have received 10 or more silent calls a day, from the same company. We estimate that 2 million people in the UK are affected by this problem.
- 1.14 We recognise that silent calls can be caused by various factors – for example, where a call centre agent mistakes a consumer for an answer machine and disconnects a live call or when a consumer picks up their phone just as a call centre hangs up. However we believe the majority of repeat silent calls are caused by the inaccuracies of AMD technology. This is because of the recurrent nature of AMD false positives.
- 1.15 The way AMD technology works means that if a consumer is mistaken to be an answer machine once, it is likely that this will happen again. This means that they receive repeat silent calls as a call centre continues in its attempts to speak to a consumer. This type of systematic, repeated mistake is unlikely to be down to human error.
- 1.16 As set out in the 2010 Consultation, we believe the consumer harm from repeat silent calls is likely to outweigh the benefits enjoyed by AMD users. This is because our policy did not effectively place a limit on the number of times an ACS user could call an answer machine. We are therefore adding to the policy criteria set out in the 2008 Revised Statement to limit call centres calling answer machines. When a call has been identified by AMD technology as an answer machine (including AMD false positives), any repeat calls to that number may only be made with the guaranteed presence of a call centre agent.
- 1.17 We hope that this addition will prevent those consumers currently worse affected receiving repeat silent calls from the same company over the course of a day.

² An AMD false positive is when an AMD device mistakenly identifies a call as being answered by an answer machine whereas, in reality, it has been answered by a live individual.

1.18 Call centres will be required to comply with this policy by 1 February 2011.

Clarifying our existing policy

- 1.19 We are also clarifying various parts of the 2008 Revised Statement, taking on board the views of stakeholders who responded to the 2010 Consultation. More detail is provided in the main body of this document, but in particular we are;
- clarifying how call centres should calculate the number of calls they abandon (the 'abandoned call rate');
 - finalising our policy on when an information message needs to start playing in the event of an abandoned call (the 'two second policy');
 - requiring call centres to include certain phone numbers in the information message played in the event of an abandoned call; and
 - clarifying what constitutes a 'campaign'.

Consumer Advice

- 1.20 Alongside this document and the Revised Statement, we have updated and reissued advice for consumers on what to do if they receive an abandoned or silent call (see <http://consumers.ofcom.org.uk/2009/08/silent-calls-2/>).
- 1.21 We are also encouraging companies that use call centres and call centre technology to make information available to consumers about how they can prevent silent calls.

Increase in maximum penalty available

- 1.22 Ofcom welcomes the Government's decision to increase the maximum penalty to £2 million for companies found to be persistently misusing a network or service. This decision is the culmination of a consultation undertaken by the Department for Business Innovation & Skills (BIS)³.
- 1.23 The increase reflects the potential seriousness of the harm caused to consumers by the unsolicited and intrusive nature of abandoned and silent calls and enables Ofcom to more effectively regulate these activities.

Other forms of persistent misuse

- 1.24 Abandoned and silent calls are just two examples of persistent misuse that call centres may be responsible for. As set out in the Revised Statement (see A1.60 to A1.77), other examples include using making unsolicited marketing calls which do not include live speech and a failure to present (valid or accurate) Calling Line Identification (CLI).
- 1.25 Ofcom recognises that use of pre-recorded messages (without consumers' prior consent) and failure to present (valid or accurate) CLI are areas of concern for many of our industry and consumer stakeholders. Ofcom shares these concerns and will be considering how to tackle some of the issues presented to us in these areas.

³ <http://www.bis.gov.uk/Consultations/maximum-penalty-for-misuse-of-an-electronic-comms-network>

Section 2

Introduction

This document

- 2.1 This document follows our consultation on tackling abandoned and silent calls, published on 1 June 2010 (the “2010 Consultation”)⁴. In it, we consulted on changes to Ofcom’s current statement of policy on the persistent misuse of an electronic communications network or service.
- 2.2 Specifically, the 2010 Consultation sought to:
- address the problem of repeat silent calls (two or more silent calls from the same company over a 24 hour period); and
 - clarify parts of our existing policy with regards to abandoned calls.
- 2.3 The 2010 Consultation closed on 27 July 2010 with a total of 63 responses received. It invited feedback from stakeholders to nine questions. This document summarises the points raised in those responses, our consideration of those points and our final conclusions.

Ofcom’s role

- 2.4 Ofcom is required, under section 131 of the Communications Act 2003 (the “Act”), to prepare and publish a statement of its general policy with respect to its powers to deal with the persistent misuse of an electronic communications network or electronic communications services.
- 2.5 It is Ofcom’s duty in exercising its enforcement powers under sections 128 to 130 of the Act to have regard to this statement.
- 2.6 On 1 March 2006, Ofcom published the *Statement of Policy on the persistent misuse of an electronic communications network or service* (the “2006 Statement”)⁵. It identified the making of silent or abandoned calls as an example of persistent misuse.
- 2.7 Ofcom may revise its statement on persistent misuse from time to time as it thinks fit and has done so on two occasions since 2006 as follows:
- i) On 10 September 2008, publishing the *Revised Statement of Policy on the persistent misuse of an electronic communications network or service* (the “2008 Revised Statement”)⁶ following a period of consultation⁷.
 - ii) On 30 October 2009, making an amendment to the 2008 Revised Statement (the “2009 Amendment”)⁸.

⁴ <http://stakeholders.ofcom.org.uk/consultations/silent-calls/>

⁵ http://www.ofcom.org.uk/consult/condocs/misuse/misuse_state.pdf

⁶ http://www.ofcom.org.uk/consult/condocs/persistent_misuse/statement/misuse_statement.pdf

⁷ http://stakeholders.ofcom.org.uk/binaries/consultations/persistent_misuse/summary/misuse.pdf

⁸ http://www.ofcom.org.uk/consult/condocs/persistent_misuse/amendment/

- 2.8 This document presents responses to the 2010 Consultation that detailed proposed further amendments to the 2008 Revised Statement. Annex 1 – *Revised Statement of Policy on the persistent misuse of an electronic communications network or service* (the “Revised Statement”) – will replace the 2008 Revised Statement as our current policy position.

Background

Abandoned and silent calls

- 2.9 An abandoned call is where a connection is established but terminated by its originator in circumstances where the call is answered by a live individual. Ofcom expects that such calls should include an information message.
- 2.10 A silent call is a type of abandoned call where the person called hears nothing on answering the phone and has no means of establishing whether anyone is at the other end. Any type of silent call is almost certain to cause inconvenience and is very likely to cause annoyance to the called person.
- 2.11 There are a number of circumstances which give rise to abandoned calls. The most serious are silent calls made with a malicious intent to deliberately frighten or annoy the person called.
- 2.12 Most abandoned calls however are not generated with malicious or mischievous intent but are caused by Automatic Calling Systems (ACS) such as predictive or power diallers used by call centres. These diallers are programmed to generate and attempt to connect calls. If there are not enough call centre agents available to handle a call it is terminated by the ACS.

Automated calling systems and answer machine detection technology

- 2.13 ACS are used by call centres to increase the amount of time that their agents spend speaking to existing or potential customers. This is achieved by automating the manual processes associated with physically making a call i.e. locating a valid record, dialling a relevant contact number and listening to the ring tone.
- 2.14 The efficiency benefits of ACS may initially fall to industry, making it cheaper and easier for companies to contact consumers. But ultimately consumers may benefit from these efficiencies on the economic assumption that lower costs feed through into lower prices. Consumers may also benefit from ACS when companies need to get in contact with a large group of customers in a limited time period to communicate important information, such as an online shopping company arranging delivery of purchases or a ticket sales company notifying customers of a schedule change to a purchased event.
- 2.15 Another source of efficiency for some call centres is the use of Answer Machine Detection (AMD) technology, which may be used in conjunction with ACS. AMD technology disconnects calls made to answer machines before they are put through to call centre agents. This is significant because a typical daily proportion of ACS users calls' made to answer machines lie between 30% and 50% of all outbound calls. AMD equipment is therefore popular within industry as it cuts out large elements of agent activity when they are not talking to consumers (for example, listening to and cutting off calls picked up by answer machines) and lowers the operational costs of running a call centre.

- 2.16 The use of AMD technology may accentuate the consumer benefits derived by ACS overall. This is because call centre agents spend less time being put through to answer machines and more time talking to live individuals. However, these benefits need to be weighed against the failure of AMD technology to attain total accuracy and the side-effects this creates for consumers.
- 2.17 AMD technology is not always accurate and can lead to the generation of AMD 'false positives'. These arise when an AMD device mistakenly identifies a call as being answered by an answer machine whereas, in reality, it has been answered by a live individual. An AMD device will terminate the call if it believes it has detected an answer machine, and so the call becomes an abandoned call.
- 2.18 Calls abandoned as a result of AMD false positives are unlikely to be accompanied by an information message. This is because ACS users who do leave a message on answer machine calls have received complaints from customers regarding the high number of messages left on a daily basis. There is also the potential for part messages to be left if ACS users leave messages on all answer machine calls (these occur if the salutation on an answer machine doesn't finish before the recorded information begins). These calls are therefore likely to be silent calls.
- 2.19 A further aggravating factor is that the detection of an answer machine may lead to repeat silent calls over a relatively brief period as the ACS user retries the number. As a result, in the event of a sequence of AMD false positives, the consumer may receive several silent calls in the same day. It is likely that these calls will cause a greater level of anxiety if the consumer concludes that they are being specifically targeted.

Our policy

- 2.20 Ofcom's approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls is to ensure that call centres take steps to avoid, in so far as is possible, making abandoned calls; and that when abandoned calls are 'unavoidably' made, steps have been taken to reduce the degree of harm caused.

The 2008 Revised Statement

- 2.21 Specifically, Ofcom has been guided by the following policy criteria as set out in the 2008 Revised Statement⁹.
- i) The 'abandoned call' rate shall be no more than three per cent of 'live calls', calculated per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over any 24 hour period, and shall include a reasoned estimate of Answer Machine Detection (AMD) false positives.
 - ii) In the event of an 'abandoned call', a very brief recorded information message must be played either no later than two seconds after the telephone has been picked up, or no later than two seconds after an individual begins to speak, which contains at least the following information:
 - the identity of the company on whose behalf the call was made (which will not necessarily be the same company that is making the call);

⁹ 2008 Revised Statement, 4.16.

- details of a no charge (0800) or Special Services basic rate (0845) number the called person can contact so they have the possibility of declining to receive further marketing calls from that company; and
 - includes no marketing content and is not used as an opportunity to market to the called person.
- iii) Calls which are not answered must ring for a minimum of 15 seconds before being terminated.
- iv) When an 'abandoned call' has been made to a particular number any repeat calls to that number in the following 72 hours may only be made with the guaranteed presence of a live operator (the '72 hour policy').
- v) For each outbound call a Caller Line Identification (CLI) number is presented to which a return call may be made which is either a geographic number or a non-geographic number adopted as a Presentation Number which satisfies the Ofcom Guide to the use of Presentation Numbers.
- vi) Any call made by the called person to the contact number provided shall not be used as an opportunity to market to that person, without that person's consent.
- vii) Records are kept for a minimum period of six months that demonstrate compliance with the above.
- 2.22 Ofcom's policy on persistent misuse has also had wider application to other types of misuse¹⁰. Other examples of persistent misuse, such as misuse of automatic calling systems and number-scanning, are outlined in A1.60 to A1.77 of this document.
- 2.23 Ofcom recognises that use of pre-recorded messages (without consumers' prior consent) and failure to present (valid or accurate) CLI are areas of concern for many of our industry and consumer stakeholders.

Proposed revisions in the 2010 Consultation

- 2.24 The 2010 Consultation considered a number of revisions to our policy. These revisions focused on two main points and are discussed in the following sections:
- i) Tackling repeat silent calls (Section 3).
- ii) Clarifying parts of the 2008 Revised Statement:
- Section 4 covers the abandoned call rate, providing a reasoned estimate of AMD false positives and applying the formula for calculating the abandoned call rate when and when not using AMD; and
 - Section 5 covers the two second policy, information messages to be played in the event of an abandoned call and what constitutes a campaign.

Consumer advice

- 2.25 During the 2010 Consultation process we discussed with consumer and industry stakeholders the current advice available to consumers about silent calls. A number

¹⁰ See Annex 1 – A1.60-77.

of consumer stakeholders believed that Ofcom could use this document to highlight to consumers what action they can take to mitigate the effects of abandoned and silent calls.

2.26 We have updated and reissued our advice for consumers on how to avoid silent and nuisance calls, and what consumers should do if they receive them (see <http://consumers.ofcom.org.uk/2009/08/silent-calls-2/>).

2.27 There are also a number of other resources available to consumers that address to some extent the issue of abandoned and silent calls:

- the Telephone Preference Service (TPS) is a free, central opt out register on which a consumer can record a preference not to receive unsolicited sales or marketing calls – <http://www.mpsonline.org.uk/tps/>;
- StayPrivate.org provides an easy way of opting out of receiving unwanted mail and sales calls by making it simpler to register with various marketing opt-out lists – <http://stayprivate.org/about>;
- trueCall (www.trueCall.co.uk) and CallBlocker (www.callblocker.co.uk) are two technological solutions that are capable of blocking the receipt of silent calls; and
- many communication providers offer services which allow customers to adjust their own privacy settings. For example, BT offers *Caller Display*, *Choose to Refuse*, *Anonymous Call Reject* and *BT Privacy at Home*.

2.28 Ofcom also believes that ACS users could provide information on what to do if a consumer receives abandoned and silent calls either on their website or through call centre agents. Coming into greater contact with consumers who suffer abandoned and silent calls may provide an ACS user with a useful gauge of the harm caused by their outbound dialling (where applicable).

Section 3

Repeat silent calls

Introduction

- 3.1 Ofcom noted in the 2010 Consultation that consumer harm caused by abandoned and silent calls can be made worse when individuals receive a number of calls over a short period of time, and may conclude that they are being specifically targeted – especially if they are silent.
- 3.2 Independent analysis of the silent calls complaints Ofcom receives¹¹ indicates that where frequency is mentioned, 72% of consumers are receiving two or more silent calls a day from the same company (referred to in this statement as ‘repeat silent calls’).
- 3.3 Our policy as set out in the 2008 Revised Statement in relation to abandoned calls was that companies should;
- play an information message in the event of an abandoned call; and
 - guarantee the presence of a live operator if they call back within a 72 hour period (the ‘72 hour policy’).
- 3.4 Repeat silent calls can arise through the use of AMD technology and specifically the generation of AMD false positives. This is because current technology means that an AMD false positive cannot be identified as a call picked up by a live individual. Rather it is wrongly identified as a call to an answer machine that has been disconnected. Because of this, AMD false positives cannot be recorded by AMD users as abandoned calls¹² and therefore are not considered against the above policy criteria.
- 3.5 Due to the recurrent nature of AMD false positives, Ofcom believes that AMD technology is responsible for the majority of repeat silent call complaints that Ofcom receives. However, we recognise the limitations – set out above in 3.4 – of AMD users when seeking to act in a way that is consistent with Ofcom’s policy criteria. The 2010 Consultation considered whether a more tailored approach would be more effective in limiting the extent of repeat silent calls.

Ofcom’s proposed position on repeat silent calls

- 3.6 In the 2010 Consultation we proposed that in the event that AMD technology indicates that an answer machine has been reached, subsequent calls to that number within a 24 hour period could only be made with the guaranteed presence of a live operator. This solution would prevent consumers from receiving two or more silent calls from the same company in a standard day.
- 3.7 We proposed amending the 2008 Revised Statement as follows:

“When a call has been identified by AMD equipment as an answer machine (including AMD false positives), any repeat calls to that number in the

¹¹ 2010 Consultation, Annex 6.

¹² A reasoned estimate of AMD false positives therefore needs to be factored in to the abandoned call rate (see A1.33).

following 24 hours may only be made with the guaranteed presence of a live operator.”

3.8 Introducing a ‘24-hour policy’ was Ofcom’s preferred solution on the grounds that it would limit the harm to consumers from repeat silent calls whilst allowing efficiency benefits from some use of AMD technology to be maximised. We also noted that a 24 hour policy for calls made to answer machines would reflect the standards that some ACS users are already operating to.

3.9 In the 2010 Consultation, Question 1 asked,

‘Do you agree that Ofcom should limit the number of times a company can call an answer machine without guaranteeing the presence of a live operator to once every 24 hours?’

Consultation responses

3.10 The interest in this question was significant.

Justification for adopting preferred option – introducing a new 24 hour policy

3.11 A large number of consultation responses agreed with this proposal. They agreed that AMD users were likely to produce a high number of repeat silent calls through the generation of AMD false positives and believed that some limit on the number of times they contacted consumers without the guaranteed presence of a live operator was appropriate. They did not believe that the other options provided for in the 2010 Consultation produced the same consumer benefit gains in comparison to the 24 hour policy.

3.12 One response specifically agreed with our proposal on the basis that ‘there is a statistically significant probability that the end to end communications process that causes a live individual to be wrongly classified as an answer machine may be repeated in subsequent calls to the same individual.’

‘Not enough evidence linking AMD technology with majority of repeat silent calls’

3.13 Other responses questioned whether Ofcom had the appropriate evidence to directly link the use of AMD technology with the majority of repeat silent calls in the UK. They argued that silent calls can be produced in a variety of different ways; by not playing an information message in the event of an abandoned call; call centre agents incorrectly classifying a live call as one reaching an answer machine and disconnecting the call; or AMD technology being used ‘in reverse’ to leave messages on answer machines.

3.14 One response stated that Ofcom may have created more silent calls through the clarification it made in the 2008 Revised Statement that a reasoned estimate of AMD false positives needed to be included in an ACS users abandoned call rate. The argument presented to Ofcom was that as a result of our clarification in the 2008 Revised Statement, ACS users decided to switch off AMD technology and pass all calls to call centre agents. They have also reduced the amount of time that they let calls ring (i.e. to the minimum period of 15 seconds) so as to avoid reaching many network based answer machines that answer after 18 to 20 seconds. This reduces the number of answer machines passed to call centre agents. The consequence for consumers is that if they answer in the 15-18 second period, they may potentially

answer a phone just as the ACS decides to hang up resulting in a silent call but recorded by the ACS as an unanswered call.

- 3.15 One stakeholder stated that Ofcom should examine its complaints and see if they are about companies using AMD technology. Others questioned why consumers raise complaints with Ofcom and not the company involved. It was also suggested that we investigate why a small number of consumers get large numbers of silent calls.

'Not enough consumer harm to justify policy'

- 3.16 Some stakeholders did not believe that Ofcom provided enough evidence of consumer harm to justify the introduction of a '24 hour policy'. They argued that the call centre industry makes hundreds of millions of calls per annum and there was insufficient justification to convince that the proposed solution was proportionate. They also noted that only 10% of complaints to the Telephone Preference Service (TPS¹³) were about silent calls.

'Increase the number of times we can reach answer machines using AMD'

- 3.17 Related responses wanted to increase the number of times that an answer machine could be reached using AMD technology over a 24 hour period. It was presented to Ofcom that many call centres will attempt to contact a consumer once in the morning, once in the afternoon and once in the evening.
- 3.18 Some stakeholders argued that they should be able to contact consumers at least twice a day for time-critical calls (such as debt collection and service related calls) or an unlimited number of times to contact high risk debt customers.
- 3.19 Other responses noted that the more times a call centre attempts a call using AMD technology during a day, the more likely it is that the company is going to get in contact with the consumer (one respondent noted that it contacted 30% of its consumers on the second attempt).
- 3.20 One response stated that ACS users should be limited to a maximum of six calls per day where business hours exceeded 10 hours and 3 calls per day where business hours were 8 hours or less.

'AMD technology should be banned'

- 3.21 A number of consumer stakeholders did not agree with the proposal on the grounds that AMD technology should be banned. They stated that this technology had little or no benefit to consumers and simply resulted in high levels of annoyance, inconvenience and anxiety. While other consumer stakeholders agreed with the proposal, they believed that a longer period (such as 48 or 72 hours) was more appropriate. They also disputed the consumer benefits of AMD technology and questioned the validity of the examples put forward by Ofcom in the 2010 Consultation to support its use.
- 3.22 Some industry stakeholders believed that AMD technology should be banned on the grounds that it damaged the industry as a whole. Their argument was that it is flawed technology which will always be prone to making identification errors. The receipt of

¹³ The TPS is a central opt out register on which a consumer can record a preference not to receive unsolicited sales or marketing calls on.

these calls by UK consumers impedes the overall ability of companies to sell or provide services via call centres.

Other issues

'Who would the policy apply to?'

- 3.23 A number of responses wanted Ofcom to clarify who the '24 hour policy' would apply to. Would it apply to an individual consumer, a phone number or an account? Other responses questioned how Ofcom would view one ACS user contacting a consumer multiple times on behalf of multiple clients.

'Define guaranteed presence of a live operator'

- 3.24 Other responses wanted Ofcom to clearly state that the policy only applied to the use of AMD technology. They also wanted Ofcom to define the 'guaranteed presence of a live operator'.

'Ofcom's proposal would push consumers into debt, reduce lending and not be in consumers' interests'

- 3.25 Some stakeholders argued that Ofcom's proposal would push consumers further into debt. The argument presented to Ofcom was that by limiting the number of times a debt recovery agency could contact consumers (using AMD technology), the greater the risk that consumers would default on outstanding debts. Other potential impacts put to Ofcom included reduced consumer credit and increased service disconnections.

'Should only apply to sales and marketing calls; debtors are in a position where they expect to be contacted in order to make a payment'

- 3.26 A number of responses agreed with the proposal, but stated a belief that it should only apply to sales and marketing calls. They argued that calls related to debt collection, fraud prevention, service disconnections and parcel deliveries were 'time critical' and the use of AMD technology ensured that they could most effectively contact a large number of consumers.

'Exclude call-backs requested by customers'

- 3.27 It was noted to Ofcom that the proposed policy may prevent a call-back to a consumer when they have explicitly asked for one. One response stated that they offer a service whereby if a customer calls and there is no agent available, this service offers the caller the option of a call back once an operator is available. It was noted that the return call may trigger a silent call. In such an instance, it was argued that a requirement not to make another return call within 24 hours is actually a hindrance to the customer experience. The response then went on to request that such systems where the caller has initiated the request for a call back are explicitly excluded from the proposed policy.

'Exclude business to business calls'

- 3.28 The issue of business to business calls was raised in a small number of consultation responses. The argument was made that due to the larger volume of calls that businesses receive, abandoned and silent calls are unlikely to be such a significant issue for them. Compared with more vulnerable consumers they are also less likely

to cause distress (in part because calling to businesses is conducted during normal business hours).

- 3.29 One industry stakeholder argued that switching off AMD technology for business to business calls had significantly reduced their productivity.
- 3.30 However one consumer stakeholder argued that businesses are affected by silent calls – particularly small businesses – and should be included in the proposed policy.

'How would the policy be applied?'

- 3.31 How the 24 hour policy would be applied was an issue on which some consultation respondents sought clarification from Ofcom.
- 3.32 There was concern that a rolling 24 hour policy would, in practice, limit contact with consumers to two times every three days. For example, if an answer machine was reached using AMD technology at 6 pm on a Monday, an ACS user would only be able to contact the consumer using AMD technology again at 9am on Wednesday morning (assuming call centre office hours of 9am-6pm).
- 3.33 Responses argued that Ofcom should change its proposal to a 'calendar day' or 'standard day' rather than a rolling 24 hour period.

'Text phone users'

- 3.34 A separate issue raised in the 2010 Consultation was that silent calls are particularly harmful for vulnerable telephone users such as deaf people who rely on text phones. A consultation respondent who represents the interests of deaf, deafened, hard-of-hearing, deafblind people and sign language users – TAG – noted that text phone users have no means of knowing whether the inability to connect to a particular call is because it is an abandoned or silent call or because it is a valid call made by a hearing person without using the prefix that will automatically bring in Text Relay. In the event of an abandoned call, text relay users will not hear any information messages that might be played during such calls as these do not have a text equivalent. In short, TAG felt that there is inadequate protection for text phone users in the current arrangements.
- 3.35 TAG also questioned whether any research has been carried out on what will happen if AMD technology is used during a call to a text phone.

'Ofcom must monitor the impact of its proposal'

- 3.36 One response stated that if the 24 hour policy was finalised, Ofcom should assess its effectiveness by monitoring complaints – and that if complaints did not decrease, then Ofcom should increase the time limit from 24 to 72 hours.

'Interactive Voice Messaging (IVM)'

- 3.37 A number of responses advocated the use of Interactive Voice Messaging (IVM) technology to counter the harm caused by AMD false positives. One response in particular described how IVM technology could be used to counter silence:
- i) In the event of a call being identified as reaching an answer machine, a short IVM message (i.e. 'This is X, press 1 to be put through to a call centre agent') would be played immediately.

- ii) If an answer machine was reached (i.e. the AMD technology was accurate in its assessment), the call would be disconnected before the IVM message was recorded.
 - iii) In the event that a live person was reached (i.e. the AMD technology was inaccurate and a false positive occurred), the called party would not hear silence and have the option of speaking to the company making the call.
- 3.38 The Confederation of British Industry (CBI) provided a diagrammatic explanation of IVM in their consultation response and this is provided in Annex 2.
- 3.39 Responses in favour of an IVM solution suggested that Ofcom should explicitly support this technology. They argued that ACS users employing IVM should not be subject to the 24 hour policy as these calls would never be abandoned and a consumer would never receive a silent call. They said this would incentivise companies to take extra steps to eliminate silence.
- 3.40 These responses accepted that IVM would need to be used responsibly and comply with the wider persistent misuse regulatory framework.

'Network based solutions to answer machine identification'

- 3.41 The 2010 Consultation noted that since the publication of the 2008 Revised Statement, stakeholders have demonstrated a number of advances in AMD technology. A particular initiative put forward involves answer machine detection at the network level rather than at the point of connection. One response believed that network providers should be required to facilitate the development of this initiative on the grounds that this requirement would remove the need for the 24 hour policy.

Ofcom's consideration and response

Justification for adopting preferred option – introducing a new 24 hour policy

- 3.42 We continue to believe that a 24 hour policy would be likely to bring the most net benefit to society as it allows some of the efficiency benefits of AMD technology to be retained while eliminating repeat silent calls and the harm they cause consumers.
- 3.43 Not taking action would ignore the current levels of consumer harm generated by repeat silent calls (see 3.61-67 below). Banning AMD technology would ignore the consumer benefits AMD may produce (both direct and indirect) and curtail industry innovation (see 3.77-83 below). Extending the 72 hour policy which exists for abandoned calls has its merits, but we continue to be conscious of the costs to industry and consumers this may impose (see 3.82-83 below).
- 3.44 It is our belief that a 24 hour policy could significantly reduce silent calls (and certainly tackle repeat silent calls) while preserving the efficiency benefits of AMD technology. We regard this as a better outcome for society than an outright ban of AMD technology.
- 3.45 However, as set out in the 2010 Consultation, if we do not see a continued reduction in this harm – evidenced by fewer complaints and moves by industry towards more accurate and reliable use of AMD technology, we may need to revisit our approach. This may involve consulting on whether tighter regulation of AMD technology is required; this could lead Ofcom considering a policy of avoidance of AMD technology or a policy that AMD is 100% accurate.

'Not enough evidence linking AMD technology with majority of repeat silent calls'

- 3.46 A number of responses questioned whether Ofcom had collected enough evidence to demonstrate that the use of AMD technology was the primary cause of silent calls. In the 2010 Consultation we noted that silent calls can be caused by a variety of different factors¹⁴, namely, by not including an information message in the event of an abandoned call or through call centre agent error.
- 3.47 Our concern with regards to AMD technology and its propensity to lead to repeat silent calls is based on a number of different factors.
- 3.48 One consultation response noted that a limit on the number of times ACS users could contact an answer machine without the guaranteed presence of a live operator was appropriate because 'there is a statistically significant probability that the end to end communications process that causes a live individual to be wrongly classified as an answer machine may be repeated in subsequent calls to the same individual.'
- 3.49 This statement has been repeated in conversations we have had with industry stakeholders and is also supported by the 'TPS Report on unwelcome calls 2008'¹⁵ which indicates that AMD false positives are not evenly distributed and as a result they may have a disproportionate effect on a limited number of people (i.e. they are not dispersed randomly and infrequently throughout the population).
- 3.50 On this basis, it is more likely that a consumer will receive repeat silent calls as a result of systematic AMD errors than a consumer receiving repeat silent calls as result of, for example, a call centre operator continually disconnecting a live call or a consumer picking up a call just as a call centre disconnects a call.
- 3.51 The policy criterion to include an information message in the event of an abandoned call was introduced with 'general agreement'¹⁶ by stakeholders in the original statement of policy in 2006. This requirement has since become well-known and well-practised. Having investigated a significant number of silent calls complaints received by Ofcom few, if any, complaints about silent calls have emerged as being caused by an ACS user not playing an information message in the event of an abandoned call. This suggests that silent calls are not generated by ACS users not playing an information message in the event of an abandoned call.
- 3.52 We also receive very few complaints about ACS users subjecting consumers to multiple abandoned calls within a continuous 72 hour period indicating that ACS users would not knowingly call back consumers who have received an abandoned call within that time period. If repeat silent calls are the result of AMD technology, then the ACS in question may not even realise that they are leaving repeat silent calls because AMD false positives are recorded by the ACS as calls disconnected to answer machines.
- 3.53 Finally, Ofcom has an open monitoring and enforcement programme that addresses the consumer harm caused by abandoned and silent calls. During the administration of this programme we have come into continual contact with AMD users who – whilst having some understanding of AMD false positives – are unaware about how accurate their technology is and how many repeat silent calls they may be generating.

¹⁴ 2010 Consultation, 3.18-20.

¹⁵ http://www.dma.org.uk/attachments/resources/4957_S4.pdf

¹⁶ 2006 Statement, 2.17.

- 3.54 For the reasons set out in paragraphs 3.48-53, we continue to believe that AMD technology is responsible for a significant majority of repeat silent calls.
- 3.55 Other responses stated that the 2008 Revised Statement may have inadvertently led to more silent calls as ACS users switch off AMD technology and pass on all calls to call centre agents. In this scenario, ACS users may choose to allow calls to ring for the minimum 15 seconds as set out in our policy to avoid network based answer machines (that are programmed to answer a call between 18 to 20 seconds). As a result, this may lead to silent calls where consumers have picked up a call just as an ACS user has disconnected the call. An industry stakeholder undertook its own preliminary testing which indicated that this may occur in 0.8% of all live calls encountered. We note that for a large operation making many calls this could represent a significant number of silent calls.
- 3.56 Ofcom acknowledges that, on efficiency grounds, this may be the position adopted by AMD users. However, we think that any extra silent calls that arise from this practice would be eliminated if ACS users allowed calls to ring for longer. ACS users may want to consider the effect of only allowing a call to ring for 15 seconds, and risking consumers picking up a call just as it is disconnected, particularly if the calls they are making are to an existing or potential customer base. ACS users may also examine whether disconnecting a call too early actually turns out to be less efficient, particularly if they are required to call a consumer again as a result.

‘Not enough consumer harm to justify policy’

‘Companies do not receive complaints about silent calls’

- 3.57 One stakeholder questioned whether the issue of repeat silent calls was a significant one because companies receive few complaints themselves.
- 3.58 Ofcom has conducted desk research into the information available on ACS users’ websites about silent calls and found no, to very little, information available to consumers regarding the abandoned and silent calls caused by call centre operations. To this end, consumers may be deterred from complaining directly to the company who has generated the silent call.
- 3.59 The Mott MacDonald analysis provided in the 2010 Consultation¹⁷ also found that consumers often find it difficult to opt out of future calls from the company generating the silent calls or effectively notify them of the silent calls they are receiving. Ofcom has established itself as the primary body to receive communication based complaints and it is natural for consumers to complain directly to Ofcom about silent calls.

‘Ofcom’s proposal is a disproportionate response to the level of consumer harm’

- 3.60 A further argument presented to Ofcom was that the policy proposal was a disproportionate response to the level of consumer harm caused by silent calls.
- 3.61 As set out in the 2010 Consultation, Ofcom consumer research indicated over 1 in 5 (22%) of the population had experienced silent calls on their landline in the last 6 months¹⁸. Of these 24% had received more than two silent calls in a 24 hour period

¹⁷ 2010 Consultation, Annex 6.

¹⁸ Ofcom Consumer Concerns tracker, TNS Omnibus, March 2010

from the same number – although nearly half – 46% – had never checked¹⁹. We estimated there could be as many as 4.8 million consumers affected by silent calls, and 2 million affected by repeat silent calls.

- 3.62 Although the majority of consumers do not suffer from repeat silent calls, the impact on those who do, is significant. 70% of consumers complaining to Ofcom about silent calls, and who mention the frequency of calls they experience, have received two or more calls a day from the same company. Around two thirds of these are receiving more than three silent calls a day, and in the most extreme cases, 10 or more²⁰.
- 3.63 As noted in the 2010 Consultation, AMD false positives are not evenly distributed and as a result may have a disproportionate effect on a limited number of people. When Ofcom initiated action on persistent misuse in 2005, figures at the time suggested the worst affected 5% of the population receive 35% of all silent calls, the worst affected 10% receive 60% and the worst affected 15% receive 70%²¹.
- 3.64 Ofcom received over 6,500 silent call complaints in 2009 and has already received over 6,800 during 2010. Whilst these complaints numbers are by themselves significant, recent research commissioned by the TPS²² indicates that the number of complaints Ofcom receives may only be a fraction of the total number of silent calls experienced by UK consumers; 89% of consumers who had received silent calls did not complain to anyone about their receipt.
- 3.65 In addition the consumer harm represented by the number of silent call complaints we receive, the receipt of silent calls will have a particularly damaging effect on specific groups of consumers.
- 3.66 Consumers complaining to Ofcom often mention that they (or family members) are more adversely affected by silent calls because of their age or disability. In the 2010 Consultation we noted the particular harm on older and disabled consumers, likely to be due to the amount of time spent at home and in certain cases, difficulties with mobility that make it more difficult to reach the phone when it rings. We included cases studies collected by Ofcom that illustrated the harm on this group from silent calls.
- 3.67 Older and disabled people are also more likely to suffer the higher cost of silent calls due to poor awareness of or investment in a technological solution (like 'BT Privacy at Home' or 'trueCall'), as well as any physical difficulty in reaching the phone.
- 3.68 Our approach to silent calls (set out in the 2006 Statement and 2008 Statement) has been to balance consumer protection with innovation by industry. This is reflected in setting the enforcement priority at a 3% abandoned call rate, rather than a zero tolerance approach. This allows industry to use ACS and AMD technology despite some degree of harm caused to consumers.
- 3.69 However, based on our analysis set out in the 2010 Consultation, the consumer harm from repeat silent calls is likely to outweigh the efficiency benefits enjoyed by AMD users. This is because the existing policy did not effectively place a limit on the number of times an ACS user could call a consumer's answer machine. Where AMD

¹⁹ Ofcom Consumer Concerns tracker, TNS Omnibus, March 2010.

²⁰ Mott MacDonald, Analysis of Silent Calls (Annex 6, 2010 Consultation).

²¹ TPS Report on unwelcome calls, 2008 p.11.

²² TPS Annual Mori Survey 2010 (unpublished).

mistakes a consumers to be an answer machine (a 'false positive') this can result in repeat silent calls and consumers feeling targeted.

- 3.70 Not taking action would ignore the current level of consumer harm generated by repeat silent calls. However, we also recognise that banning AMD could ignore the consumer benefits (both direct and indirect) that AMD may produce and curtail industry innovation (see 3.80 – 81).
- 3.71 We conclude that introducing a 24 hour policy should reduce the incidence of repeat silent calls while preserving some of the industry and consumer benefits derived from the use of AMD technology.

'Increase the number of times [an ACS user] can reach answer machines using AMD'

- 3.72 A few respondents urged Ofcom to increase the number of times that an answer machine could be reached using AMD technology over a 24 hour period.
- 3.73 Ofcom believes that one attempted call to an answer machine without the guaranteed presence of a live operator over a 24 hour period remains appropriate. Any more attempts than this (for example, two or three times a day) and consumers could continue to receive repeat silent calls.
- 3.74 As set out in the 2010 Consultation, we believe that the majority of consumer harm is generated by repeat silent calls. Independent analysis of the silent calls complaints Ofcom receives indicates that where frequency is mentioned, 72% of consumers are receiving two or more silent calls a day from the same company. A large number of these are receiving more than three silent calls a day, and in the most extreme cases, 10 or more²³.
- 3.75 We note that this may contrast with the 'optimal calling cycle' described to us (i.e. one call in the morning, one call in the afternoon and one call in the early evening). However, as stated, a major objective of our policy proposal is to put in place measures to reduce consumer harm from receiving repeat silent calls from the same company on a daily basis (see 3.73 above). By allowing more than one attempted call to an answer machine without the guaranteed presence of a live operator per day we would diverge from this objective.
- 3.76 We also note in paragraph 3.86 that ACS users are not restricted in their ability to contact different numbers provided by consumers on a daily basis.

'AMD technology should be banned'

- 3.77 We have considered the arguments for banning the use of AMD technology but do not consider this an appropriate course of action.
- 3.78 We continue to believe that if properly managed, the use of AMD technology can benefit consumers by reducing the time taken by a company to contact a large number of customers. There is a wide range of activities where this may be required and Ofcom has been presented with a number of valid examples. One such example is the use of AMD technology by an insurance company; according to this company they use AMD to contact thousands of customers who have submitted claims each month.

²³ Mott MacDonald, Analysis of Silent Calls (Annex 6, 2010 Consultation).

- 3.79 As we noted in the 2010 Consultation, we also think that preventing ACS users from using AMD technology would be a departure from previous policy as set out in the 2006 Statement and the 2008 Statement. In these documents we have sought to balance consumer protection with industry innovation, allowing the industry some margin of error instead of advocating a zero tolerance approach. This is reflected in our policy criteria, namely the three per cent abandoned call rate threshold and the 72 hour limit on contacting consumers without the guaranteed presence of a live operator who have received an abandoned call.
- 3.80 Since the publication of the 2008 Statement, and in response to the 2010 Consultation, stakeholders have demonstrated a number of advances in AMD technology. These advances have focused on improving accuracy rates and developing solutions where customers who may receive AMD false positives are given the opportunity to be transferred to a dedicated call centre agent.
- 3.81 As set out in the 2010 Consultation, banning AMD technology would remove any incentive for any innovation in AMD technologies that could lead to an increase in these efficiency benefits while lowering consumer harm caused by its use.
- 3.82 We believe that consumers are to some extent already protected from AMD false positives by the clarification in the 2008 Statement. This stated that AMD false positives are abandoned calls and therefore need to be included in an ACS users abandoned call rate. Feedback from industry stakeholders since the 2008 Statement was published has indicated that using AMD technology in accordance with this established policy is potentially very difficult unless very high levels of AMD accuracy are reached. This means that AMD technology should already be generating fewer silent calls and therefore the harmful effects of AMD technology should already be reduced. We are now further reducing the remaining potential harmful effects of AMD technology by tackling repeat silent calls with the 24 hour policy.
- 3.83 We do not think that extending the time period – i.e. to 48 or 72 hours – is appropriate. It is our intention to limit the consumer harm of repeat silent calls over a calendar day. To this end, any restriction above this would be a departure from our stated objective.
- 3.84 We concluded in 2010 Consultation that extending the existing 72 hour policy would significantly increase operational inefficiency above and beyond a 24 hour policy. This is because call centre campaigns would be shortened resulting in a drop in sales, while a 5 – 10% loss in overall productivity would result from less agent ‘talk time’ per hour²⁴. We continue to believe the potential further reduction in consumer nuisance achieved by an extended 72 hour policy would not outweigh this increased cost.

Other issues

‘Who would the policy apply to?’

- 3.85 A number of responses wanted Ofcom to clarify who the ‘24 hour policy’ would apply to (an individual consumer, a phone number or an account) and how Ofcom would view one ACS user contacting a consumer multiple times on behalf of multiple clients.

²⁴ 2010 Consultation, 3.88-95

- 3.86 The proposed policy applies to a specific contact number. That is, an ACS user can contact a consumer multiple times if they use multiple contact details (i.e. home, work or mobile). We have clarified this in the Revised Statement which now reads “to that **specific** number” (addition in bold).
- 3.87 Some stakeholders wanted Ofcom to clearly state that the policy only applied to the use of AMD technology.
- 3.88 Paragraph 1.55 of Annex 1 of the 2010 Consultation clearly states under the heading 24 hour policy that this policy applies “When a call has been identified by AMD equipment as an answer machine”. Therefore the intention is that the 24 hour policy only applies to the use of AMD technology for the reasons set out in paragraph 3.4.

‘Define guaranteed presence of a live operator’

- 3.89 Respondents also wanted Ofcom to define the ‘guaranteed presence of a live operator’.
- 3.90 The purpose of this requirement is to ensure that a live operator is available if a repeat call is made during the specified period. That is, when an ACS user makes a call, they can guarantee a consumer who picks up the call will be connected to a call centre agent.
- 3.91 We will insert wording to this effect in the Revised Statement.

‘Ofcom’s proposal would push consumers into debt, reduce lending and not be in consumers’ interests’

- 3.92 Another point raised by respondents was that our proposed 24 hour policy would negatively impact debt collectors’ ability to contact debtors. As a result, debtors would be placed at greater risk of defaulting.
- 3.93 A number of responses foresaw the opposition that would be presented by debt collection agencies to our proposed policy. They noted that debt collection agencies should not be calling debtors one day before their case is escalated to the next collection level. They also questioned whether AMD technology was necessary to meet their legal obligations²⁵ by questioning how they fulfilled their legal obligations before the technology was available.
- 3.94 We agree with both the points made by respondents in 3.93. From the information presented to us we do not think a high enough risk exists for us to reconsider our proposal.

‘Should only apply to sales and marketing calls; debtors are in a position where they expect to be contacted in order to make a payment’

- 3.95 We stated in the 2010 Consultation that our proposed policy would not distinguish between ‘marketing’ and ‘service’ calls. However several respondents argued that calls related to debt, parcel delivery and other ‘time critical’ activity should be exempt.
- 3.96 Analysis of our complaints data indicates that silent call complaints are generated from a variety of different calling intentions. This includes complaints related to ‘time critical’ activity.

²⁵ For example, legal obligations under the Office of Fair Trading *Debt Collection Guidance* http://www.offt.gov.uk/shared_offt/business_leaflets/consumer_credit/oft664.pdf

- 3.97 As set out in Ofcom's 2008 Revised Statement, the harm caused by a silent call is not mitigated by the reason for which that call is being made as by its nature the consumer is unable to identify the caller and therefore the purpose of the call. Therefore, in the case of silent calls, the level of annoyance, anxiety and concern is not lessened by the intention of the caller.
- 3.98 Moreover, our proposed policy would not prevent a company making contact for a second time where an agent could be guaranteed. Companies would also be free to try reaching the customer via other means, for example SMS or email – or trying a different number (e.g. mobile or work).
- 3.99 We note that ensuring the guaranteed presence of a live call centre agent may increase costs of ACS users. However, we think that a variety of different options exist for contacting consumers and application of these options can mitigate this difficulty. That is, if an AMD user has reached an answer machine when calling a landline earlier in the day, they are still able to use AMD technology to attempt to contact a mobile or a work number later that day.
- 3.100 For these reasons we do not accept the argument presented that 'service' calls including debt calls should be exempt from the proposed policy.
- 3.101 It was further argued that silent calls are less of an issue than cold calling on the basis that 10% of the complaints to TPS relate to silent calls compared to 59% of complaints for cold calls. The TPS is a service designed to allow consumers to opt-out of marketing calls from companies with which they have no association. It is therefore expected that the majority of the complaints that it receives are about instances where this does not occur.

'Exclude call-backs requested by customers'

- 3.102 Two responses argued that systems which enabled customers to request a call back from their provider should be explicitly excluded from the proposed 24 hour policy.
- 3.103 As previously stated, we do not believe the harm caused by a silent call is necessarily mitigated by the reason for which the call is being made. A customer requesting a call back has asked specifically to speak to an agent. Receiving a silent call in these circumstances is unlikely to be any less concerning or annoying than in other circumstances. On this basis these types of calls will be subject to the same 24 hour policy as all other calls. We believe that this will act as a further stimulus to improving AMD accuracy rates. As stated above, our proposed policy would not prevent a company making contact for a second time where an agent could be guaranteed.

'Exclude business to business calls'

- 3.104 A small number of stakeholders argued that business to business contacts should be exempt from the proposed 24 hour policy. They argued that in a work environment, abandoned and silent calls are unlikely to cause much distress.
- 3.105 We do not think it would be appropriate to exempt 'business to business' calls. There is no way to conclusively demonstrate that an individual will feel less anxiety, concern or annoyance by receiving an abandoned or silent call at work rather than receiving one at home. As set out in one consumer stakeholder's response, small businesses face many of the same problems as individual consumers.

'How would the policy be applied?'

- 3.106 A number of stakeholders argued that Ofcom should change its proposal to a 'calendar day' or 'standard day' rather than a rolling 24 hour period as suggested by "in the following 24 hours". In practice, the wording of the '24-hour policy' may preclude return calls using AMD for a period longer than intended.
- 3.107 Our intention for this policy was to prevent consumers receiving repeat silent calls over the course of a day. On this basis, we are clarifying our original proposal to "any repeat calls to that number **within the same 24 hour period**" where a 24 hour period means 'between midnight and midnight on a calendar day'. This will enable an AMD user who reaches an answer machine at 3pm to call that number again at the start of the following day. This more accurately reflects the underlying policy intention, which is to avoid consumers receiving multiple abandoned or silent calls each day. This change does not however have any implications for the treatment of the 72 hour policy which remains as "in the following 72 hours" from receipt of the abandoned call.

'Text phone users'

- 3.108 Ofcom is concerned that text phone users may be inadequately protected by the existing policy. To date, we have not received any complaints from text phone users about the receipt of silent calls. We are however willing to work with stakeholder groups who represent text phone users to understand more about the problem and possible solutions and will continue to monitor the nature of silent call complaints we receive.

'Ofcom must monitor the impact of its proposal'

- 3.109 Our open monitoring and enforcement programme addresses this point. We will assess whether a longer period (i.e. 48 or 72 hours) is appropriate after this policy has been implemented.
- 3.110 As noted above (see 3.45), if we do not see a continued reduction in harm – evidenced by fewer complaints and moves by industry towards more accurate and reliable use of AMD technology, we may need to revisit our approach.

'Interactive Voice Messaging (IVM)'

- 3.111 Some stakeholders have argued that where IVM is used, companies should be exempt from the proposed 24 hour policy because no consumer will receive a silent call using IVM.
- 3.112 Whilst we conditionally support an IVM solution²⁶ for non marketing calls²⁷, we do not believe the companies using it should be exempt from this policy. This is because a consumer who has indicated a preference to be put through to a call centre agent may experience an abandoned call (i.e. through a lack of call centre agents to take the call or by being disconnected by the call centre). If ACS users who use IVM can guarantee the presence of a live operator then they will be in compliance with the new 24 hour policy.

²⁶ 2010 Consultation, 5.15.

²⁷ As noted in A1.63, it is an offence to use automated calling systems to make direct marketing calls which do not consist of live speech.

- 3.113 Ofcom may also need to consider what action is required if consumers who experience a high number of AMD false positives, but do not express a preference to talk to a call centre agent (i.e. 'Press 1'), continue to receive a high amount of these calls.
- 3.114 Our overall position on the use of IVM for non marketing calls is therefore unchanged from the 2010 Consultation. We will expect that any call centre employing IVM for non marketing calls to ensure that recipients of these messages (as a result of AMD false positives) are;
- always transferred to a call centre agent should they choose;
 - informed of the identity of the company making the call; and
 - given no marketing information within the short message.
- 3.115 As noted in A1.66 of the Revised Statement, we would expect that where IVM is deployed for non marketing calls, it has a clear public benefit.

'Network based solution to answer machine detection'

- 3.116 A number of responses supported a network-based solution to answer machine detection. As described in the Verint Report²⁸, 'Early Detection' works by analysing communications made between the dialling parties and between a dialling party and the network both before and after connection. In theory, a call may be identified as an answer machine and disconnected before a phone starts ringing.
- 3.117 We do not think it is appropriate to compel networks to implement any such solution at this stage, despite the perceived merits. We have had limited sight of any solution based on 'early detection' principles and as such have not been able to test its technical, financial and regulatory feasibility.
- 3.118 We do however hope that a network based solution to answer machine detection is developed. This would provide a clear benefit in the form of improved AMD accuracy. We would encourage AMD users to pursue the development of this solution with the networks and are willing to provide our support where appropriate.

Conclusion

- 3.119 After considering the consultation responses, Ofcom has decided that a policy for enforcement which limits the number of times a company can call an answer machine where AMD technology is used without guaranteeing the presence of a live operator to once within the same 24 hour period is appropriate. We believe that this policy will significantly reduce the number of silent calls that UK consumers receive on an annual basis.
- 3.120 We are changing the wording of our original proposal from 'in the following 24 hours' to 'within the same 24 hour period' in response to stakeholders' concerns. We have also inserted a definition of "24 hour period".
- 3.121 The policy will apply to all calls (marketing and service calls) and is purpose blind. It refers to a specific telephone number (rather than an individual consumer). This has

²⁸ Verint Report, 5.1.1.3.

been clarified in the revised wording which now reads “to that **specific** number” (addition in bold). This policy applies to AMD users only.

3.122 The Revised Statement will therefore read as follows (see A1.55):

“When a call has been identified by AMD equipment as being picked up by an answer machine (including AMD false positives), any repeat calls to that specific number within the same 24 hour period may only be made with the guaranteed presence of a live operator.”

3.123 The following terms have been inserted in the definitions section (see A1.16 and A1.22):

“24 hour period means between midnight and midnight on a calendar day”.

“Guaranteed presence of a live operator means to ensure that a live operator is available if a repeat call is made during the specified period. That is, when an ACS user makes a call, they can guarantee a consumer who picks up the call will be connected to a call centre agent.

Ofcom’s proposed position on implementation period

3.124 Linked to the previous proposal was Ofcom’s intention that a 24 hour policy was adopted by industry stakeholders within two months of the statement being published.

3.125 In the 2010 Consultation, Question 2 asked,

‘Do you agree with Ofcom that a two month implementation period (from publication of Ofcom’s revised statement) would be an appropriate length of time for industry stakeholders to adopt any changes to comply with the proposed 24 hour policy?’

Consultation responses

3.126 A number of responses stated that no implementation period was necessary and the policy should come into immediate effect from the publication of this document.

3.127 Other responses stated that two months was a reasonable period while others noted that any implementation period would be contingent on dialler manufacturers having the ability to provide AMD users with the necessary software upgrade. Similar responses proposed that AMD users could agree to implement the 24-hour policy once these upgrades had been secured. One response stated that any dialler manufacturer based exemptions should be capped at six months.

3.128 For those responses that argued a longer implementation period was required, the appropriate implementation period length varied between three and twelve months, with most favouring four-six months.

3.129 Reasons put forward for a lengthier implementation period included the need to make system changes, minimum periods to adjust staff terms and conditions and the time required to administer a procurement process if operations were subsequently moved off-shore.

- 3.130 Other responses noted that if our regulatory statement was published in September, then the proposed implementation period would end at the beginning of one of the busiest periods in the debt recovery calendar.

Ofcom's consideration and response

- 3.131 The information presented collectively in the responses has demonstrated to us that increasing the proposed implementation period – from two months to four months – would be appropriate.
- 3.132 Ofcom has noted the impact that the end of year / festive period generally has on all UK companies and is increasing the implementation period to four months from the date of publication to avoid our policy coming into effect during this period.
- 3.133 Based on our conversations with dialler manufactures, we believe that an implementation period of four months will allow them the time to develop and implement any required system changes. As noted in the 2010 Consultation, we understand that some ACS users already have the ability to time restrict calls to answer machines within a 24 hour period.
- 3.134 An implementation period of four months is – as we understand it from the consultation responses – also more amenable to adjusting employees' employment terms and conditions, should that be required.

Conclusion

- 3.135 Ofcom will require adherence to the 24 hour policy by 1 February 2011.

Section 4

Clarifying the abandoned call rate

Introduction

- 4.1 Ofcom's approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls has been and continues to be to ensure that users of automated calling systems (ACS) take steps to avoid making abandoned and silent calls; and that when abandoned calls are made, steps are taken to reduce the degree of harm caused.
- 4.2 A long standing policy for enforcement has been as follows (section 4.16.1 of the 2008 Revised Statement:
- 'the abandoned call rate' shall be no more than three per cent of 'live calls', calculated per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over any 24 hour period, and shall include a reasoned estimate of Answer Machine Detection (AMD) false positives.*
- 4.3 This section seeks to clarify:
- The abandoned call rate;
 - How to provide a reasoned estimate of AMD false positives; and
 - How to apply the abandoned call rate formula when using AMD technology and when not using AMD technology

Ofcom's proposed position on the abandoned call rate

- 4.4 We noted in the 2010 Consultation that a formula for calculating the abandoned call rate provided in a footnote to the 2008 Revised Statement²⁹ may not have fully reflected our policy above. For this reason we suggested amended wording as reflected below:

$$\frac{\text{Abandoned calls } (x)}{\text{Abandoned calls } (x) + \text{Live calls to a live operator } (y)} * \frac{100}{1}$$

- 4.5 The 2010 Consultation argued that this formula more clearly reflected our policy to present the number of abandoned calls as a proportion of live calls.
- 4.6 The 2010 Consultation proposed definitions to the following terms relevant to calculating the abandoned call rate:
- A *live call* is where a connection is established and the call is answered by a *live individual*. This includes *live calls to a live operator* and *abandoned calls*.
 - A *live individual* refers to a person who is called by an ACS and/or AMD user.

²⁹ 2008 Revised Statement, footnote 15.

- A *live call to a live operator* is a call where a live operator is put through to a live individual. A *live call to a live operator* does not include calls made by ACS and/or AMD users that are answered by answer machines.
- An *abandoned call* is where a connection is established but terminated by its originator in circumstances where the call is answered by a live individual. An abandoned call rate includes a reasoned estimate of *AMD false positives* and excludes a *reasoned estimate of calls abandoned to answer machines*.
- An *AMD false positive* is when an AMD device mistakenly identifies a call as being answered by an answer machine whereas, in reality, it has been answered by a live individual.
- A *reasoned estimate of AMD false positives* is an estimate of the number of AMD false positives as a proportion of total answer machine calls.
- A *reasoned estimate of calls abandoned to answer machines* is an estimate of the number of ACS identified abandoned calls that have actually been answered by an answer machine.
- An *unconnected call* may also be terminated after a predetermined period (i.e. greater than 15 seconds) because it has not been answered, perhaps because no one is there to take it. Within industry terminology and for the purposes of the 2010 Consultation such calls are not classified as 'abandoned calls'. This is because an abandoned call is one which has been picked up by a live individual.

4.7 In the 2010 Consultation, Question 3 asked,

'Has Ofcom provided sufficient clarity on how the abandoned call rate is to be calculated?'

Consultation responses

- 4.8 Responses to the 2010 Consultation generally agreed that the theory behind Ofcom's proposed formula was correct.
- 4.9 A difficulty for ACS users arises however when attempting to apply the formula in a practical sense. For instance, ACS users responding to the 2010 Consultation stated that the proposed formula did not address the problem of removing the number of false negatives³⁰ from calling statistics nor did it include practical guidance on how to incorporate a reasoned estimate of AMD false positives into their abandoned call rate calculation.
- 4.10 A number of responses also noted an error with the example we provided in the 2010 Consultation to provide an illustrative display of how the abandoned call rate could be calculated using ACS statistics. This error and its implications are discussed below in paragraphs 4.56-58.
- 4.11 Other responses argued that AMD users should be given the opportunity to include a reasoned estimate of calls abandoned to answer machines in their abandoned call rate.

³⁰ False negatives occur when AMD technology incorrectly identifies an answer machine as a live consumer.

Ofcom's consideration and response

- 4.12 The consultation responses agreed that the proposed formula presented in the 2010 Consultation provided clarity on how a theoretical abandoned call rate should be calculated and dispelled any confusion that may have arisen following the 2008 Revised Statement.
- 4.13 We recognise issues raised by some stakeholders around the problem of removing the number of false negatives from calling statistics. Our response to this and guidance on how to incorporate a reasoned estimate of AMD false positives into an abandoned call rate calculation is discussed below (see Question 5).
- 4.14 We also accept that AMD users should be given the opportunity to include a reasoned estimate of calls abandoned to answer machines in their abandoned call rate in addition to non AMD users. Further discussion of this point is covered in 4.64-66.
- 4.15 To clarify further what is meant by an abandoned call rate, we have inserted the following definition in addition to amending the definition of abandoned calls (see A1.17 and A1.18):

The abandoned call rate is the number of abandoned calls as a proportion of total live calls. It must include a reasoned estimate of AMD false positives where AMD is used and may exclude a reasoned estimate of calls abandoned to answer machines

Conclusion

- 4.16 As noted in 4.15, we have included a definition of the abandoned call rate in the Revised Statement (see A1.18). This definition includes a provision for AMD users to include a reasoned estimate of calls abandoned to answer machines in their abandoned call rate.
- 4.17 The abandoned call rate formula is presented in A1.35-36.
- 4.18 We have also added a definition of AMD false negatives as set out in footnote 30 (see A1.19).

Ofcom's proposed position on providing a reasoned estimate of AMD false positives

- 4.19 Current technology means that an AMD false positive cannot be recorded in dialler statistics as a call picked up by a live individual. Rather it is wrongly identified as a call to an answer machine that has been disconnected. Because of this, AMD false positives are not recorded by AMD users as abandoned calls. Therefore these are not included in the abandoned calls figure produced by the AMD user.
- 4.20 Moreover it is not possible to give an exact figure of the number of AMD false positives AMD users generate. Therefore Ofcom clarified in the 2008 Revised Statement that AMD users must produce a reasoned estimate of AMD false positives.
- 4.21 The 2010 Consultation outlined a variety of methods for AMD users to calculate a reasoned estimate of AMD false positives. The three methodologies detailed in the 2010 Consultation were:

- i) 100% analysis – every call that has been identified as an answer machine being checked to identify whether it was a true detection.
 - ii) Staged analysis – test calling known outcomes.
 - iii) Live sampling – sampling real answer machine detected calls to determine a reasoned estimate of AMD false positives.
- 4.22 Ofcom stated that it was not inclined to prescribe a particular testing methodology to be used by all ACS users when producing a reasoned estimate of AMD false positives. Rather we proposed to include an examination of the methodologies above in the Revised Statement and also include an outline of what we would look for when assessing the methodology used when testing AMD accuracy.
- 4.23 In the 2010 Consultation, Question 4 asked,

‘Do you agree with the factors set out by Ofcom for determining a reasoned estimate of AMD false positives in an ACS users abandoned call rate?’

Consultation responses

- 4.24 Responses were generally supportive of the factors set out by Ofcom to determine a reasoned estimate of AMD false positives in an ACS user’s abandoned call rate. They welcomed Ofcom providing more detail on testing methodology and most were encouraged by the fact that we had resisted being overly prescriptive on the testing choices available to ACS users.

‘Further detail on testing processes’

- 4.25 A small number of responses wanted further detail on particular testing processes. This included an indication from Ofcom about what were expected sampling levels; the appropriate frequency between testing; and what constituted a ‘material change’.

‘The same reasoned estimate for multiple campaigns’

- 4.26 Some stakeholders questioned whether a reasoned estimate for one campaign could be used in similar campaigns.

‘Still a place for manufacturers’ claims’

- 4.27 A number of stakeholders believed that dialler manufacturers’ claims with regards to AMD accuracy would be a sufficient enough basis for providing a reasoned estimate of AMD false positives.

‘Interactive Voice Messaging (IVM) based testing’

- 4.28 Industry stakeholders have flagged the possibility that Interactive Voice Messaging (IVM) technology could be used to ensure that recipients of AMD false positives are given the opportunity to speak with a call centre agent. As such, they believe that an alternative testing method, referred to as the ‘call-back’ method should be recognised in the revised statement.
- 4.29 The call-back method would involve live monitoring of AMD detections and passing a random selection of AMD detects, including the phone number called, to a tester. The tester would then manually call back the number to see if they are also put

through to an answering machine again or if they are put through to a person. If put through to an answering machine, the AMD detect would be shown to be correct. If, on the other hand, the tester was put through to a person the ACS user would be able to have a direct conversation with the consumer and ask them whether they answered the previous call or not; hence revealing whether the call was correctly identified as being picked up by an answering machine.

'List of accredited independent auditors'

4.30 In the 2010 Consultation we noted that a further option for AMD users would be to seek the services of an independent auditor to assess AMD accuracy³¹. One stakeholder asked whether Ofcom had a list of accredited independent auditors.

Ofcom's consideration and response

'Further detail about testing processes'

4.31 A small number of responses wanted further detail on particular testing processes.

4.32 With regards to stakeholders' specific questions about testing processes, the following applies:

- i) **Frequency.** We think that the frequency of testing is linked closely to data relevance. That is, testing should be undertaken whenever campaign data is changed. To the extent that it could materially change AMD accuracy rates, the testing should reflect this.
- ii) **Sampling.** A sample size needs to be large enough to derive a high confidence level. It should also cover different times of the day and different days of the week. We consider that confidence levels of 95%, or two standard deviations from the mean, and above are high enough across the population.
- iii) **Material change.** A material change could be considered changing the setting on a dialler (e.g. making the AMD more or less aggressive, a dialler upgrade or a reconfiguration of dialling patterns).

4.33 The testing options we provided were not intended to be considered as the only testing methodology available to ACS users. We have merely used the information available to us to identify various testing methodology we think ACS users could apply to determine a reasoned estimate of AMD false positives. What we consider most important is outlining to ACS users how we will assess the robustness of the testing used to fulfil this requirement.

'The same reasoned estimate for multiple campaigns'

4.34 Ofcom was asked whether the same reasoned estimate of AMD false positives could be used across similar campaigns.

4.35 If ACS users are sufficiently confident that individual campaigns are similar enough to apply the same reasoned estimate of AMD false positives, then they could do so.

4.36 Ultimately however, the appropriateness of this approach – and the original reasoned estimate used – will be examined in the event of an investigation when Ofcom

³¹ 2010 Consultation, 4.50.

assesses the robustness of testing used to determine a reasoned estimate of AMD false positives.

‘Still a place for manufacturers’ claims’

- 4.37 A number of consultation responses argued that there was still a place for dialler manufacturers’ claims regarding AMD accuracy. We do not dispute the technical knowledge and expertise of a dialler manufacturer to provide an assessment of its own product’s accuracy and reliability. What we stated in the 2010 Consultation however, was that from evidence we have received to date, external factors relevant to an individual ACS user³² are not taken into account in a manufacturer’s claims regarding AMD accuracy.
- 4.38 One of Ofcom’s aims in this area is to encourage individual ACS users to proactively test the accuracy and reliability of the AMD technology they use, taking into account external factors relevant to them. This will provide ACS users with an awareness of how – improperly managed – AMD technology can negatively impact consumers.
- 4.39 An ACS user undertaking its own testing is also important because we will not accept manufacturers’ claims regarding AMD accuracy as the sole basis of a reasoned estimate of AMD false positives.

‘IVM based testing’

- 4.40 We welcome the thought put into devising the call-back option and agree it could be used to determine the accuracy of AMD technology. As noted by the industry stakeholder who raised this, an important feature of this testing is the length of time between calls; the call-back must be within a very short period of time and certainly no more than a few minutes. This testing methodology is subject to the same ‘robustness’ standards outlined in the 2010 Consultation for the testing methodologies we originally identified.
- 4.41 The IVM solution is based on allowing consumers who receive a false positive the opportunity to be connected to a call centre agent. AMD accuracy could therefore be tested by seeing how many consumers take up this option. It may, however, not be a comprehensive assessment of AMD accuracy if consumers choose to hang up rather than be put through to a call centre agent.

‘List of accredited independent auditors’

- 4.42 Ofcom does not have a list of accredited independent auditors. We are however aware of call centre consultants who specialise in helping organisations optimise their outbound calling campaigns (some of whom responded to our 2010 Consultation).
- 4.43 As we noted in the 2010 Consultation, Ofcom would take into account the use of an independent auditor when assessing AMD accuracy. However AMD users are ultimately responsible for the quality of this audit and producing an accurate reasoned estimate of AMD false positives.

³² External factors such as the telephone type called (fixed, mobile or VoIP), consumer location (where the consumer is likely to be at the time of the call and associated background noise), how a call is answered and the type of consumer called (demographic factors such as the age group being called) will contribute to what sounds are on the line when an AMD device makes its assessment and therefore how accurate the detection is.

Conclusions

- 4.44 We have added information on ‘Frequency’ (A1.41), ‘Sampling (A1.42)’ and ‘Material change (A1.43)’ in the Revised Statement.
- 4.45 The factors set out by Ofcom for determining a reasoned estimate of AMD false positives in an ACS user’s abandoned call rate are set out in A1.37-43.

Ofcom’s proposed position on applying the abandoned call rate formula when using AMD technology

- 4.46 For the purposes of calculating the abandoned call rate when AMD technology is used, Ofcom proposed in the 2010 Consultation that the following definitions would apply to the formula for calculating the abandoned call rate presented in 4.4:

Abandoned calls	The number of calls where a connection is established but terminated by its originator in circumstances where the call is answered by a live individual. An abandoned call includes a reasoned estimate of AMD false positives.
Reasoned estimate of AMD False Positives	A reasoned estimate of AMD false positives is an estimate of the number of AMD false positives as a proportion of total answer machine calls.

- 4.47 Ofcom also provided an example to demonstrate how these definitions could be applied to a practical calculation of an ACS user’s abandoned call rate.
- 4.48 In the 2010 Consultation, Question 5 asked,

‘Has Ofcom provided sufficient clarity on how AMD users should calculate an abandoned call rate that includes a reasoned estimate of AMD false positives?’

Consultation Responses

‘Error in example used’

- 4.49 A number of responses identified an error in the definition and example Ofcom used to demonstrate how an abandoned call rate for an AMD user could be calculated.
- 4.50 The example we proposed, based upon the definition of a reasoned estimate of AMD false positives, measured AMD false positives as a proportion of total answer machine calls. Stakeholders noted that answer machines do not generate AMD false positives. Instead, the higher the incidence of calls answered by live individuals in a campaign, the higher the potential for AMD false positives. This is because each live individual represents an opportunity for an ACS to identify a live call as an answer machine and therefore generate an AMD false positive.

‘Endorse Direct Marketing Association (DMA) paper instead’

- 4.51 A number of responses referred to a paper put together by the Telemarketing Council of the Direct Marketing Association (DMA) that sets out what steps ACS and AMD users should take to calculate their abandoned call rate correctly. These stakeholders suggested that Ofcom should officially endorse this approach. The DMA itself asked Ofcom to adopt this paper.

‘Lacking explanation on how to subtract false negatives from abandoned call rate calculation’

- 4.52 A false negative is a call that has been answered by an answer machine but incorrectly transferred to a call centre agent as a call picked up by a live individual. Ofcom noted in the 2010 Consultation that the abandoned call rate should only include abandoned and live calls, for which false negatives are neither³³.
- 4.53 A number of responses also noted that the example Ofcom provided did not include a provision to subtract false negatives from the abandoned call rate calculation.
- 4.54 Those stakeholders who supported Ofcom endorsing the DMA paper as an appropriate means to calculate an ACS users abandoned call rate, also noted another benefit of this paper in that it allows ACS users to factor in the incidence of false negatives.

‘No provision for calls abandoned to answer machines for AMD users’

- 4.55 One response asked why the provision to exclude calls abandoned to answer machines was made for non-AMD users but not for AMD users.

Ofcom’s consideration and response*‘Error in example used’*

- 4.56 We accept that the definition and example provided in the 2010 Consultation to demonstrate how an abandoned call rate could be calculated was incorrect. The basic premise of this argument is that fewer live calls should result in fewer AMD false positives. The error in our proposed example can be demonstrated by assuming a 100% AMD false positive rate, that is, every live call is incorrectly detected as an answer machine. In this situation the maximum number of AMD false positives will be equal to the number of live calls, regardless of how many answer machines there are. However many extra answer machines are added they cannot, by definition, result in extra false positives. However, applying a reasoned estimate of AMD false positives to the number of answer machines detected would result in more false positives than actual live calls. This clearly does not make sense.
- 4.57 Whilst it is mathematically possible to calculate the number of AMD false positives based on the number of answer machines reached, the resulting figure will only be valid if the relative proportion of live calls and answer machines remains constant. We accept this is unlikely to occur in a live calling environment.
- 4.58 We are therefore amending the definition of a reasoned estimate of AMD false positives and removing the example proposed in the 2010 Consultation. A reasoned estimate of AMD false positives is an estimate of the number of AMD false positives as a proportion of total live calls.

‘Endorse Direct Marketing Association (DMA) paper instead’

- 4.59 We appreciate the logistical challenge faced by ACS and AMD users in calculating their abandoned call rates and arriving at a reasoned estimate of false positives. This is a highly complex area and it is vital that stakeholders have the right tools and aids available to understand how the calculations should be made and presented.

³³ 2010 Consultation, 4.19.

- 4.60 The DMA's paper, and others we have seen like it, provides a mathematical explanation of how to calculate an abandoned call rate when ACS users use, and do not use, AMD technology. It expands on our calculation in 4.4 to provide a practical explanation of the abandoned call rate.
- 4.61 We recognise this is potentially a very useful aid which stakeholders may consider using when undertaking their own (abandoned call rate) calculations. The DMA's paper can be found at [http://www.dma.org.uk/ attachments/resources/5812_S4.pdf](http://www.dma.org.uk/attachments/resources/5812_S4.pdf).
- 4.62 In addition there may be other formulas which ACS operators choose to rely upon; in each case, where Ofcom was to undertake an investigation we would look at the methodology used and assess the robustness of the calculations.

'Lacking explanation on how to subtract false negatives from abandoned call rate calculation'

- 4.63 With regards to the issue of factoring in AMD false negatives into an ACS user's abandoned call rate, we think that the DMA approach is valid. We are likely to accept calculations based on, or expressly similar to, the workings provided by the DMA where the results they produce are robust.

'No provision for calls abandoned to answer machines for AMD users'

- 4.64 One response asked why the provision to exclude calls abandoned to answer machines (from their abandoned call rate) was made for non-AMD users but not for AMD users.
- 4.65 We agree it is appropriate that AMD users have the option to remove a reasoned estimate of calls abandoned to answer machines. However we think the number of calls that are actually abandoned to answer machines is likely to be minimal (on the premise that most answer machine calls would have already been filtered out by AMD technology prior to a call being abandoned).
- 4.66 If AMD users choose to do so, they may exclude a reasoned estimate of calls abandoned to answer machines. In the event of an investigation we will assess the robustness of any calculation presented to us.

Conclusion

- 4.67 We have amended the definition of a reasoned estimate of AMD false positives and removed the example. We have also included the definition of the abandoned call rate which includes a provision allowing AMD users the ability to include a reasoned estimate of calls abandoned to answer machines in their abandoned call rate (see A1.18).
- 4.68 Finally, we have included a reference in the Revised Statement to the DMA paper. As the reference notes, we regard the DMA paper, and others that may be similar to it, as a very useful aid which stakeholders may consider using when undertaking their own (abandoned call rate) calculations (see A1.45-6).
- 4.69 Applying the formula for calculating the abandoned call rate when using AMD technology is set out in A1.35-43.

Ofcom’s proposed position on applying the abandoned call rate formula when not using AMD technology

- 4.70 In the period between the publication of the 2008 Revised Statement and the 2010 Consultation, ACS users who did not employ AMD technology discussed with Ofcom difficulties they experienced with the formula for the abandoned call rate. It was noted to Ofcom that without AMD technology, an ACS will – in the event of abandoning a call – abandon it before it has determined whether the call was received by a live recipient or by an answer machine.
- 4.71 We noted in the 2010 Consultation that the calculation of the abandoned call rate only applies to live calls. Therefore calls abandoned to answer machines should not be included in the calculation of an abandoned call rate. On these grounds, we proposed that a reasoned estimate of calls abandoned to answer machines should be deducted from the number of abandoned calls when not using AMD technology.
- 4.72 A reasoned estimate of calls abandoned to answer machines is an estimation of the number of abandoned calls assumed to have been picked up by answer machines and should be calculated based on live call data. Specifically, it should be based on the number of answer machine calls put through to live operators as a proportion of connected calls made.
- 4.73 For the purposes of calculating the abandoned call rate when AMD technology is not used, we proposed in the 2010 Consultation that the following definitions apply:

Abandoned calls	The number of calls where a connection is established but terminated by its originator in circumstances where the call is answered by a live individual. An abandoned call excludes a reasoned estimate of calls abandoned to answer machines.
Reasoned estimate of calls abandoned to answer machines	A reasoned estimate of calls abandoned to answer machines is an estimate of the number of ACS identified abandoned calls that have actually been answered by an answer machine.

- 4.74 In the 2010 Consultation, Question 6 asked,

‘Has Ofcom provided sufficient clarity on how non-AMD users should calculate an abandoned call rate that includes an estimate of abandoned calls picked up by answer machines?’

Consultation responses

‘Error in example used’

- 4.74 Responses generally agreed with our proposal to allow non-AMD users the ability to calculate an abandoned call rate that included an estimate of abandoned calls picked up by answer machines. We noted in the 2010 Consultation that this reasoned estimate should be based on the assumption that the proportion of calls that are passed to an agent and answered by answer machines in a real-time environment, is equal to the proportion of calls that are abandoned by the ACS and answered by an answer machine.

- 4.75 Some stakeholders did however identify an error in the example we used to demonstrate how an abandoned call rate could be calculated.
- 4.76 The error relates to how the reasoned estimate of calls abandoned to answer machines was calculated in paragraph 4.66 of the 2010 Consultation. The example calculated the reasoned estimate as a proportion of all calls made. This incorrectly included calls that are disconnected when in fact calls that are not connected are never abandoned. Thus the correct proportion of answer machines to be used would be the proportion of answer machines in all connected calls.
- 4.77 An example was provided in the responses to the 2010 Consultation to demonstrate this based on some of the figures used in the 2010 Consultation:

- 392 calls are live calls connected to a live operator (y)
- 8 calls are abandoned (dropped by the ACS – and includes calls answered by answer machines) (x)
- 400 are connected to a live operator and classified as answer machines
- 200 calls are unconnected.

The number of answer machines as a percentage of all connected calls is $400 / (392 + 400) = 50.5$ per cent.

Therefore, of the 8 calls that are dropped by the ACS, 50.5% of them will have been answer machines. Thus the reasoned estimate of calls abandoned to answer machines is 4.040404, meaning that the number of abandoned calls answered by live individuals is 3.9595.

The abandoned call rate in this scenario is:

$$\frac{(8 - 4.040404)(x)}{(8 - 4.040404)(x) + 392(y)} * \frac{100}{1} = 1.00\%$$

The abandoned call rate will therefore be 1.00%.

A full algebraic treatment of the above can be found in the DMA paper referenced in A1.45). We have included this example in the Revised Statement.

‘Is it mandatory to include an estimate of calls abandoned to answer machines?’

- 4.78 A number of responses questioned whether providing a reasoned estimate of calls abandoned to answer machines was a mandatory requirement. They believed that estimating and monitoring the number of calls abandoned to answer machines would be costly.

‘This will lead to more abandoned calls’

- 4.79 Another response noted whether allowing a reasoned estimate of calls abandoned to answer machines should be encouraged. This was on the basis that it allows non-AMD users to generate more abandoned calls (by including connected calls abandoned to answer machines, a non-AMD user actually over-estimates the number of abandoned calls they generate).

Ofcom's consideration and response

'Error in example used'

- 4.80 We accept that the example provided in the 2010 Consultation to demonstrate how an abandoned call rate could be calculated for an ACS user not using AMD technology was incorrect because it included in the calculation calls that were disconnected. This rightly had the effect of producing a higher than actual abandoned call rate. We agree that the example provided above – and by the DMA in its paper – offers a more accurate determination of the abandoned call rate when AMD technology is not used.
- 4.81 Overall, Ofcom will need to be satisfied that the calculations used by non-AMD users are well evidenced, theoretically sound and based on data produced in a real time environment. We will assess the methodology used to factor in the number of calls abandoned to answer machines into an abandoned call rate on a case by case basis.

'Is it mandatory to include an estimate of calls abandoned to answer machines?'

- 4.82 In response to the issue about whether deducting a reasoned estimate of calls abandoned to answer machines is mandatory, we refer to our position in the 2010 Consultation. In 4.61 we stated:

'We suggest that a reasoned estimate of calls abandoned to answer machines is deducted from the number of abandoned calls.'

- 4.83 ACS users are under no obligation to take up this suggestion. We included it in recognition that not including a reasoned estimate of calls abandoned to answer machines may give a higher than actual abandoned call rate.

'This will lead to more abandoned calls'

- 4.84 Ofcom recognises that allowing ACS users to factor in a reasoned estimate of calls abandoned to answer machines could lead to more abandoned calls, particularly for non-AMD users. This is because a non-AMD user currently has to factor in calls abandoned to answer machines within their three percent abandoned call rate. By removing this proportion of calls, non-AMD users can replace this proportion with 'true' abandoned calls. However, as noted previously, the abandoned call rate is the number of abandoned calls as a proportion of total live calls – calls abandoned to answer machines are not abandoned calls and therefore some provision should be in place to account for this.

Conclusion

- 4.85 We have replaced the example provided in the 2010 Consultation with the example provided in 4.77 to demonstrate how non-AMD users can remove unconnected calls from the calculation of a reasoned estimate of calls abandoned to answer machines.
- 4.86 Calculating the abandoned call rate when AMD technology is not used is set out in A1.47-50.

Section 5

Additional clarifications

Introduction

- 5.1 In the 2010 Consultation, Ofcom also proposed additional clarifications in the following areas:
- i) what the information message played in the event of an abandoned call may and may not contain;
 - ii) the 'two second policy'; and
 - iii) what constitutes a campaign.
- 5.2 Ofcom's reasoning for proposing these clarifications and the responses they elicited are outlined below.
- 5.3 We also suggested additional amendments to the 2008 Revised Statement to include policy set out in previous consultation and statements but not expressly included in the Revised Statement, by reformatting certain sections to provide greater clarity and to set out a possible increase to our maximum fine. We are adopting those amendments.
- 5.4 In addition, we have removed the section relating to "Factors relevant to the application of Ofcom's Penalty Guidelines" in Annex 1 paragraphs 1.107 to 1.112 of the 2010 Consultation, provided an update on the recently implemented increase to our maximum fine and made some other minor amendments.

Ofcom's proposed position on Information messages

- 5.5 The approach to enforcement in Ofcom's 2008 Revised Statement was that ACS users, in the event of an abandoned call, play an information message which identifies the company making the call and provides a contact phone number for individuals to call to decline to receive further marketing calls. The message must not contain marketing content or be used as an opportunity to market to consumers. The aim of an information message is to remove silence when over-dialling occurs and there are not enough call centre agents available to handle a call which has been answered (i.e. when a call is abandoned). Information messages reduce consumer harm by informing the called party about who has called them and how they can return the call to decline to receive further marketing calls.
- 5.6 The 2008 Revised Statement requires companies – in the event of an abandoned call – to play an information which contains:
- *details of a no charge (0800) or Special Services basic rate (0845) number the called person can contact so they have the possibility of declining to receive further marketing calls from the company.*
- 5.7 Ofcom noted in the 2010 Consultation that this policy may disadvantage mobile customers. This may occur if mobile users who receive an abandoned call;
- pay more for a return call to an 080 or 0845 number;

- need to return a call from a fixed-line phone in order to avoid higher call charges; or
- are deterred from returning an abandoned call from the contact information provided for the reasons above.

5.8 It is important that consumers receiving abandoned calls on their mobile phones have the same opportunities as fixed line consumers to contact these companies and are not put off from doing so by higher costs. We therefore proposed in the 2010 Consultation to amend the 2008 Revised Statement as follows:

- *details of a freephone (080) and geographic (01/02 numbers) and/or a 03 number the called person can contact so they have the possibility of declining to receive further marketing calls from the company.*

5.9 In the 2010 Consultation, Question 8 asked,

'Do you agree with Ofcom's policy proposal that companies provide a geographic contact number (01,02 or 03) in addition to a freephone (080) number in the information message provided in the event of an abandoned call?'

Consultation responses

- 5.10 Responses to this proposal were mixed. A number of responses supported moves to present mobile users with a low cost contact option, while others believed including two phone numbers would lead to consumer confusion.
- 5.11 Those who supported moves to present mobile users with a low cost option believed that purchasing additional numbers should not be expensive for ACS users and mobile users would benefit from the proposed policy.
- 5.12 Some responses, while generally supporting the proposal, believed that the regulation of abandoned and silent calls was not the place to tackle the charging policies of mobile network operators.
- 5.13 Responses against the proposal stated that including two numbers would lead to confusion amongst consumers. They premised their argument on the belief that recipients of abandoned calls would be unsure which number to use. They also noted that lengthening the information message would annoy called parties. Others stated that in their experience, there was a low call back rate for abandoned calls. A number of responses – in opposition to the proposal – stated that it was unlikely that the cost of calling a 0800 number from a mobile would deter consumers from contacting the company making the abandoned call.
- 5.14 Other responses were opposed to the removal of the 0845 option. Responses stated that only including a 01/02/03 and 080 number would lead to an increase in consumers contacting an ACS user for no other reason than to subject employees to personal abuse. Examples were provided of internet forum campaigns encouraging readers to contact ACS users in this manner.
- 5.15 One response noted that the inclusion of two numbers in an information message may result in consumers subsequently being routed to the wrong call centre when returning a call.

Ofcom's consideration and response

- 5.16 We recognise that requiring companies to present two numbers to consumers within their information message may be confusing for consumers.
- 5.17 We do, however, continue to believe that the current policy is disadvantageous to mobile customers. We noted in the 2010 Consultation that whilst presently the lack of a low cost option for mobile users to return an abandoned call is not a significant cause of consumer detriment, this could increase with higher volumes of (silent) calls to mobile users. Higher volumes could be the result of increasing 'mobile only households' or more ACS users attempting to call mobile numbers after an attempt to call a fixed-line number is unsuccessful.
- 5.18 For this reason, we are allowing ACS users who want to include a geographic number in the information message to do so.

Conclusion

- 5.19 In the event of an abandoned call an ACS user will be required to include details of a *Special Services* (080 – no charge) or a *Special Services* basic rate (0845 only) or a *Geographic Number* (01/02) or a *UK wide Number at a geographic rate* (03 number)³⁴ which the called person can contact so they have the possibility of declining to receive further marketing calls from that company.
- 5.20 The required information that must be contained within an information message in the event of an abandoned call is set out in A1.52.

Ofcom's proposed position on the two second policy

- 5.21 The 2008 Revised Statement as amended in October 2009³⁵ (the '2009 Amendment') contained an enforcement criteria that companies, in the event of an abandoned call, play an information message within two seconds of either a telephone being picked up or a live individual starting to speak ('beginning of salutation').
- 5.22 Whilst it provides a minimum period of time that a consumer has to wait for an information message in the event of abandoned call, it also sets a minimum period for AMD technology to classify a call (as either a live individual or an answer machine). When a call is made, AMD technology currently has two seconds from the beginning of salutation to determine whether a live individual has picked up the call (and to consequently pass the call to an available agent or play an information message if none are available), or whether the call has gone through to an answer machine (upon which the ACS will disconnect the call).
- 5.23 The original policy, published in the 2006 Statement, was that a recorded message must be played within two seconds after a telephone has been answered. This was changed in the 2008 Revised Statement to 'two seconds after a telephone has been picked up'. Following research carried out by Ofcom and representations received

³⁴ As defined in the National Telephone Numbering Plan
<http://stakeholders.ofcom.org.uk/binaries/telecoms/numbering/numplan280710.pdf>

³⁵ http://www.ofcom.org.uk/consult/condocs/persistent_misuse/amendment/

from industry, we found some evidence that this policy diminished the effectiveness of AMD technology³⁶ and changed this requirement (the ‘2009 Amendment’).

- 5.24 The 2009 Amendment addressed the impact on AMD technology effectiveness by allowing call centres to choose from two options on when an information message needs to start playing³⁷ in the event of an abandoned call, either;
- no later than two seconds after the telephone has been picked up; or
 - no later than two seconds after an individual begins to speak (or ‘start of salutation’).
- 5.25 Following the 2009 Amendment, feedback from stakeholders was generally positive. Stakeholders indicated that allowing AMD devices slightly more time to make a determination about the presence of an answer machine has improved the accuracy of this technology and subsequently reduced the number of AMD false positives generated.
- 5.26 Ofcom did, however, receive a request to change the two second policy so that the information message could start playing no later than two seconds after the individual finishes speaking (i.e. ‘end of salutation’). In the 2010 Consultation we outlined our reasons for opposing this change, namely that,
- ‘end of salutation’ is potentially an indeterminate event;
 - extending the time period allowed for classification also means extending the time period that consumers who pick up an abandoned call need to wait for an information message to be played; and
 - any change may act as a disincentive for ASC manufacturers to continue to minimise the time an AMD device needs to make an accurate assessment or develop solutions that address AMD false positives.
- 5.27 However we were keen to open this issue up for discussion as part of the 2010 Consultation and Question 7 asked,

‘Do you agree that Ofcom should not amend the existing two second policy as set out in the 2009 Amendment from ‘start of salutation’ to ‘end of salutation’?’

Consultation Responses

- 5.28 Responses were largely divided between those that supported our proposal to maintain the 2009 Amendment and those who preferred that an ‘end of salutation’ policy be adopted by Ofcom.

‘Ofcom should not amend its existing policy’

- 5.29 Those responses that supported our proposal noted that changing to ‘end of salutation’ would create further delay and could lead to increased consumer annoyance. Other responses stated that they believed the right balance had already

³⁶Based on the assumption that increasing the time allowed for AMD assessment, even marginally, improves accuracy rates.

³⁷We have changed the wording from “played” to “start playing”. This is to more accurately reflect our general policy approach to when the information message needs to be played.

been reached, but acknowledged that the extra time afforded to an 'end of salutation' requirement would allow more accurate AMD. Other responses stated strong opposition to any perceived concession to AMD technology (by allowing 'end of salutation' instead of 'beginning of salutation').

'Extend the time period beyond two seconds'

5.30 Some stakeholders suggested that 'start of salutation' be maintained but the time period in which to play an information message in the event of an abandoned call be extended to between 2.5 and 3 seconds. They also questioned how Ofcom had come to choosing two seconds as an appropriate length of time, believing two seconds was an arbitrary number chosen without any scientific background.

'End of salutation'

5.31 A significant number of responses were opposed to maintaining the policy established in the 2009 Amendment. This opposition was based on the belief that requiring an information message to be played two seconds from when the called person started speaking has the effect of making AMD technology less effective.

5.32 These responses described how one of the main factors in determining whether AMD technology has reached a live individual or an answer machine is the length of the salutation. Therefore, in order to know the length of the salutation, AMD technology has to wait until it has finished.

5.33 Most answer machine greetings are significantly longer than two seconds. Therefore with the two second limit from start of salutation, any system has to make a determination at that point based on whatever information it has collated. In practice this often means that an answer machine is put through to a call centre agent by default as the least risky option (i.e. to avoid a silent call through an AMD false positive). It was argued that the effectiveness of AMD technology is therefore reduced because of our existing policy.

5.34 Responses also addressed the difficulties Ofcom outlined in the 2010 Consultation about potentially implementing an 'end of salutation' policy:

- i) The first difficulty was how the 'end of salutation' can be accurately defined. The end of an individual's salutation (rather than the start, as is the current policy) could be considered an indeterminate event as some people, confronted by silence on the phone, may extend their salutation while waiting for an answer.
 - Responses did not think this would be a problem. They noted that it is not in the interests of an AMD user to try to and exploit this – if there is too much of a delay people will hang up resulting in lower contact rates. The objective of an AMD user is to get in contact with consumers. One response noted that 'end of salutation' was applied in the US³⁸ so this would demonstrate that it should not be an issue if applied in the UK.
- ii) The 2010 Consultation noted that allowing information messages to be played two seconds from when someone finishes speaking would extend the period that consumers have to wait for an information message in the event of an abandoned call.

³⁸ <http://www.ftc.gov/os/2008/08/R411001tsrfrn.pdf>

- A number of stakeholders did not think this was an issue. One noted that in their experience, 80% of greetings were short (e.g. *Hello?*) so the difference between the start of salutation and the end of salutation was marginal.
- iii) Finally, the 2010 Consultation stated that allowing information messages to be played from end of salutation may act as a disincentive on dialler manufacturers to continue to minimise the time an AMD device needs to make an accurate assessment.
- Some stakeholders have argued that the efficiency impact on AMD technology from this policy is greater than any disincentive that may exist for dialler manufacturers to continue to improve AMD technology. Industry stakeholders have also told Ofcom that AMD proficiency is a key factor when choosing which dialler solution to purchase. Stakeholders argued that this will always drive dialler manufacturers to improve AMD reliability rates.

'Outbound call queue'

- 5.35 An outbound call queue was proposed as an alternative to playing an information message in the event of an abandoned call. Outbound call queues are in use in the US and transfer consumers to a holding position when there are not enough agents available. When an agent becomes available, consumers will be transferred to them (provided they have not hung up).

Ofcom's consideration and response

'Ofcom should not amend its existing policy'

- 5.36 We believe that the improvements in accuracy that allowing a limited 'end of salutation' solution could lead to a fewer number of AMD false positives being generated by individual ACS users. We also believe that allowing this provision would enable AMD technology to be used in its most reliable capacity for the majority of calls. ACS users will then be able to most effectively determine whether it can be used while adhering to the policy of including a reasoned estimate of AMD false positives within a three percent abandoned call rate.
- 5.37 Ofcom has decided to maintain the existing policy as to when an information message needs start playing in the event of an abandoned. However, AMD users can choose to play an information message in the event of an abandoned call from when an individual finishes speaking (or 'end of salutation'). This must be achieved on the condition that the total time taken to start playing an information message is no more than two seconds from start of salutation.

'Extend the time period beyond two seconds'

- 5.38 The choice of two seconds has evolved over time. In the 2010 Consultation preceding the 2006 Statement, it was originally proposed that an information message be played within one second of the call being answered. The one second period was extended to two in the 2006 Statement to allow for AMD technology. Our choice of the time period is based upon the length of time that a called party should reasonably be expected to wait for an information message in the event of an abandoned call or for a call centre agent to start speaking in the event of a live call.

'End of salutation'

- 5.39 Our decision to allow AMD users an end of salutation option is also in light of consultation responses addressing the concerns that we previously had about allowing this to occur.
- 5.40 We have noted the consultation responses that argued that AMD users do ultimately want to connect consumers with call centre agents and exploiting any uncertainty about how 'end of salutation' is determined goes against this desire.
- 5.41 Secondly, we expressed doubts about how end of salutation could be applied if it extended the time period for which a consumer had to wait for an information message in the event of an abandoned call. By limiting 'end of salutation' to two seconds from the start of salutation, there is no extension to the time period for which a consumer has to wait for an information message in the event of an abandoned call.
- 5.42 Finally, we have accepted that competition amongst AMD manufacturers to produce the most reliable technical solution will not be lessened as a result of this change. The requirement to include a reasoned estimate of AMD false positives within an ACS users abandoned call rate should ensure that this occurs.

'Outbound call queue'

- 5.43 Ofcom does not support the inclusion of an outbound call queue. Whilst improving an ACS user's productivity we believe that this would have little or no benefit for consumers. Industry experience indicates that UK consumers would be very unlikely to wait in a call queue. Consumers refusing to wait, and disconnecting a call, would also present a diluted indication of an ACS user's abandoned call rate.

Conclusion

- 5.44 Ofcom has decided to maintain the existing policy as to when an information message needs start playing in the event of an abandoned call, either;
- no later than two seconds after the telephone has been picked up; or
 - no later than two seconds after an individual begins to speak (or 'start of salutation').
- 5.45 AMD users can choose to play an information message in the event of an abandoned call from when an individual finishes speaking (or 'end of salutation'). This must be achieved on the condition that the total time taken to start playing an information message is no more than two seconds from start of salutation.
- 5.46 The timing of when a message is to be played is set out in A1.51:

What constitutes a 'campaign'?

- 5.47 For the purposes of calculating the abandoned call rate, an individual campaign is identified by the use of a single call script to make a single proposition to a single target audience. A campaign can be run from more than one call centre over a 24 hour period (for example a mobile phone company calling existing subscribers to offer them an upgrade from two different sites).
- 5.48 We proposed in the 2010 Consultation to include the following guidance regarding the definition of a campaign within the Revised Statement:

“For the purposes of calculating the abandoned call rate, an individual ‘campaign’ is identified by the use of a single call script to make a single proposition to a single target audience. A campaign can be run from more than one call centre over a 24 hour period. If calls are made for identifiable purposes with a single script to a single target audience, then Ofcom will continue to regard this as a ‘campaign’. In the event of an investigation, Ofcom will consider the facts of each case on its own particular merits.”

5.49 In the 2010 Consultation, Question 9 asked,

‘Has Ofcom provided sufficient clarity on what constitutes a ‘campaign’?’

Consultation Responses

- 5.50 Many responses agreed that Ofcom had provided sufficient clarity on what constitutes a ‘campaign’. One response stated that the Ofcom definition was ‘workable, and is a good a definition as it is possible to get.’ Other responses, while agreeing that we had provided clarity, felt that the definition provided was heavily based upon the direct marketing industry and did not take into consideration of other industries.
- 5.51 Some stakeholders felt that the definition provided was too restrictive, particularly in relation to the ‘single proposition’ element. It was noted that a campaign can often involve cross-selling different products, depending on the requirements of the customer.
- 5.52 A suggested change to the proposed definition was ‘a single call script used to contact a single target audience for a defined purpose/ proposition’. Another suggestion was to define a campaign as ‘a single call script to make a proposition to a single target audience’. There was a concern that consumers may be exposed to multiple phone calls when one phone call, discussing a range of propositions, was more efficient.

Ofcom’s consideration and response

- 5.53 Ofcom continues to believe that the definition provided in the 2010 Consultation is sufficiently clear to provide the required element of precision for compliance with the Revised Statement.
- 5.54 Ofcom notes that in some cases calls cannot always be ascribed to a single proposition so as to fit neatly into the definition of a campaign. However, as long as calls are made for identifiable purposes with a single script to a single target audience, then Ofcom will regard this as a campaign. We will however consider the facts of each case on their own particular merits.
- 5.55 It is not our intention to encourage multiple calls to consumers when one call involving several propositions would suffice. A campaign may involve the scenario where multiple services or products are promoted, sold or discussed using a single script. Again, in the event of an investigation, we would consider the facts of each case on their own particular merits.
- 5.56 We wish to note that slight changes to a call script do not constitute a new campaign. A campaign is where a single proposition is made to a single target audience.

- 5.57 Ofcom considers that where a company is operating multiple campaigns simultaneously from one or more call centres, it may be appropriate to calculate the abandoned call rate using an aggregation of data across all call centres and/or all campaigns run by and on behalf of the company. This will provide Ofcom with an overall picture of the performance of a company's outbound dialling activity operations (whether run internally or outsourced).
- 5.58 Where Ofcom has aggregated a company's call data and proposes to rely on those figures for the purpose of a notification issued under section 128 of the Act, Ofcom may also set out the underlying information on a disaggregated basis (that is by call centre and/ or campaign). The aim of setting out information in this way is to enable a company to understand the basis of aggregated figures; assess the individual performance of each campaign and/or call centre; identify good practice where possible where applicable; and target any remedial action that may be appropriate.

Conclusion

- 5.59 For the purposes of calculating an abandoned call rate, what constitutes a 'campaign' is set out in A1.21.

Other points of clarification

- 5.60 We are adopting the amendments set out in the 2010 Consultation with regards to including policy set out in previous consultations and statements but not expressly included in the statement of policy and by reformatting certain sections to provide greater clarity.
- 5.61 We have also removed the section relating to "Factors relevant to the application of Ofcom's Penalty Guidelines" in Annex 1 paragraphs 1.107 to 1.112 of the 2010 Consultation to simply refer to the Ofcom's Penalty Guidelines. This is to recognise that it is the Penalty Guidelines which set out the policy for considering the appropriate level of fines.
- 5.62 In addition, the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010 recently came into force³⁹. This increases the maximum amount of the penalty for persistent misuse to £2 million. We have amended the Revised Statement to reflect this.
- 5.63 Finally, it seems we overlooked inserting that "the abandoned call rate shall be no more than three per cent of live calls per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over a 24 hour period" in the Draft Revised Statement. This was in the 2008 Revised Statement and is established policy. We have rectified this oversight and reinserted the provision in the Revised Statement at A1.30.

³⁹ <http://www.publications.parliament.uk/pa/cm201011/cmgeneral/deleg2/100913/100913s01.htm>

Annex 1

Revised statement of policy on the persistent misuse of an electronic communications network or service 2010

Introduction

- A1.1 This statement is published in accordance with section 131 of the Communications Act 2003 (“the Act”) and sets out Ofcom’s general policy with regards to the exercise of its powers under sections 128 to 130 of the Act.
- A1.2 The purpose of this statement is to provide clarity about the operation of the ‘persistent misuse’ provisions in sections 128 to 130 of the Act. These sections enable Ofcom to issue notifications if it has reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services.
- A1.3 Sections 128 to 130 also set out enforcement procedures and factors relevant to the application of Ofcom’s Penalty Guidelines⁴⁰ where there has been ‘persistent misuse’. Section 131(4) of the Act imposes a duty on Ofcom to have regard to the statement in exercising the powers conferred on it by the relevant sections. However, the statement cannot bind Ofcom absolutely in exercising those discretionary powers. Section 131(2) also enables Ofcom to revise the statement from time to time as it thinks fit.
- A1.4 The statement addresses the following areas:
1. Defining ‘misuse’ of a network or service.
 2. Identifying when misuse becomes ‘persistent’.
 3. Guidance on persistent misuse by making silent or abandoned calls.
 4. Other examples of persistent misuse
 5. Ofcom’s policy on the issuing of section 128 notifications.
 6. The consequences of a notification.

1. Defining ‘misuse’ of a network or service

- A1.5 Section 128(5) sets out two definitions of what constitutes misuse of an electronic communications network or electronic communications service. A person misuses a network or service if:
- ‘the effect or likely effect of his use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety’. This

⁴⁰ Published by Ofcom in accordance with section 392 of the Act and available at: <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

requires the use of a network or service for example where a person uses a telephone to make an abandoned call (i.e. one which is terminated by an Automated Calling System – ACS as soon as the called person tries to answer it); 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’. This captures a wider category of behaviour which involves conduct dependent on the use of a network or service for example conduct that results in a person being led unknowingly to dial a premium rate service.

A1.6 In both cases the significance of the words "likely effect" is that the effect has to be probable, not necessarily proven.

A1.7 Section 128 of the Communications Act 2003 applies where “a person has persistently misused an electronic communications network or electronic communications services”. In Ofcom’s view, such misuse may be either direct or indirect. This means a person may be caught by section 128 either where they are misusing a network or services themselves, or where they have engaged another person to use the network or service on their behalf.

A1.8 An example of this may arise in the context of network or service misuse by a call centre. Where a person engages representatives, such as third party call centres to contact UK consumers on its behalf, that person may be the target of an investigation and ultimately action under the Act for persistent misuse by its representatives. This includes where the representative is an offshore centre.

A1.9 To be clear, there may be circumstances where the representatives are also persons who are misusing a network or service in their own right. In those circumstances, Ofcom may also consider investigating these individuals or companies. This decision would be taken on a case by case basis.

2. Identifying when misuse becomes ‘persistent’

A1.10 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’. This is met by instances of repetitive misuse. It is difficult to define in advance what cycle of repetitive behaviour may reasonably be described as forming a pattern. This will need to be determined on a case by case basis. However any such pattern is likely to require a minimum of three instances of the conduct in question in order to be recognised as such; or
- ‘recklessness as to whether persons suffer annoyance, inconvenience or anxiety’. This requires the misuse to represent 'recklessness' on the part of the misuser. This will need to be determined on a case by case basis. Evidence that points to recklessness could be:
 - i) that the misuser was informed of the effect of his behaviour but continued with it;

- ii) that the behaviour in question is so patently annoying that it amounts to misuse (e.g. ringing someone repeatedly in the middle of the night) that a reasonable person would realise it would have that effect; or
- iii) that the misuse has failed to take reasonable steps to establish whether or not the behaviour could cause annoyance, inconvenience or anxiety to other people.

A1.11 In determining whether misuse is persistent or not, section 128(7) states that it is immaterial whether networks were used on some occasions and services on other occasions; that different networks or services were used on different occasions; or that the persons exposed to the misuse were different on different occasions.

3. Guidance on persistent misuse by making abandoned and silent calls

A1.12 This section sets out Ofcom's approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls.

A1.13 In deciding whether to take enforcement action in a particular case Ofcom will be guided by a sense of administrative priority determined by the level of consumer detriment and will take account of the steps that have been taken by ACS users to reduce the degree of concern that silent or abandoned calls cause including those set out below.

Abandoned call rate

A1.14 This section sets out:

- i) Terms defined.
- ii) The abandoned call rate formula.
- iii) Calculating the abandoned call rate when AMD is used.
- iv) Calculating the abandoned call rate when AMD is not used.

(i) Terms defined

A1.15 We have defined the terms below which are relevant to calculating the abandoned call rate.

A1.16 24 hour period means between midnight and midnight on a calendar day.

A1.17 An *abandoned call* is where a connection is established but terminated by its originator in circumstances where the call is answered by a *live individual*.

A1.18 The abandoned call rate is the number of *abandoned calls* as a proportion of total *live calls*. It must include a *reasoned estimate of AMD false positives* where AMD is used and may exclude a *reasoned estimate of calls abandoned to answer machines*.

A1.19 An AMD false negative is a call answered by an answer machine but mistakenly categorised as a live call. For the purposes of calculating an abandoned call rate, these should be removed to ensure *the reasoned estimate of AMD false positives* is

not applied to a much bigger total of answer machine calls (i.e. they are not recorded as *live calls*).

- A1.20 An AMD false positive is when an AMD device mistakenly identifies a call as being answered by an answer machine whereas, in reality, it has been answered by a live individual.
- A1.21 A campaign is identified by the use of a single call script to make a single proposition to a single target audience. A campaign can be run from more than one call centre over a 24 hour period. If calls are made for identifiable purposes with a single script to a single target audience, then Ofcom will continue to regard this as a campaign. In the event of an investigation, Ofcom will consider the facts of each case on its own particular merits.
- A1.22 Guaranteed presence of a live operator means to ensure that a live operator is available if a repeat call is made during the specific period. That is, when an ACS user makes a call, they can guarantee a consumer who picks up the call will be connected to a call centre agent.
- A1.23 A *live call* is where a connection is established and the call is answered by a *live individual*. This includes *live calls to a live operator* and *abandoned calls*.
- A1.24 A *live individual* refers to a person who is called by an ACS and/or AMD user.
- A1.25 A *live call to a live operator* is a call where a live operator is put through to a live individual. A *live call to a live operator* does not include calls made by ACS and/or AMD users that are answered by answer machines.
- A1.26 A *reasoned estimate of AMD false positives* is an estimate of the number of AMD false positives as a proportion of total live calls.
- A1.27 A *reasoned estimate of calls abandoned to answer machines* is an estimate of the number of ACS identified abandoned calls that have actually been answered by an answer machine. We will assess the methodology used to factor in the number of calls abandoned to answer machines into an abandoned call rate on a case by case basis.
- A1.28 A silent call is a type of abandoned call where the person called hears nothing on answering the phone and has no means of establishing whether anyone is at the other end.
- A1.29 An *unconnected call* may also be terminated after a predetermined period (i.e. greater than 15 seconds) because it has not been answered, perhaps because no one is there to take it. Within industry terminology and for the purposes of the Revised Statement such calls are not classified as abandoned calls. This is because an abandoned call is one which has been picked up by a live individual.

(ii) The abandoned call rate formula

- A1.30 The abandoned call rate shall be no more than three per cent of live calls per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over a 24 hour period.
- A1.31 The abandoned call rate formula is therefore as follows:

$$\frac{\textit{Abandoned calls (x)}}{\textit{Abandoned calls (x) + Live calls to a live operator (y)}} * \frac{100}{1}$$

- A1.32 How the number of abandoned calls is calculated will depend on whether or not AMD is used.
- A1.33 AMD users must include a reasoned estimate of AMD false positives when calculating an abandoned call rate. This is on the premise that AMD false positives are abandoned calls and should be recorded as such.
- A1.34 All ACS users including AMD users may exclude a reasoned estimate of calls abandoned to answer machines from the abandoned call rate.

(iii) Calculating the abandoned call rate when AMD is used

- A1.35 The formula for calculating the abandoned call rate is as follows:

$$\frac{\textit{Abandoned calls (x)}}{\textit{Abandoned calls (x) + Live calls to a live operator (y)}} * \frac{100}{1}$$

- A1.36 The abandoned call rate must include a *reasoned estimate of AMD false positives* and may exclude a *reasoned estimate of calls abandoned to answer machines*.

Providing a reasoned estimate of AMD false positives

- A1.37 Current technology means that an AMD false positive cannot be recorded as a call picked up by a live individual. Rather it is wrongly identified as a call to an answer machine that has been disconnected. Because of this, AMD false positives are not recorded by AMD users as abandoned calls. Therefore these are not included in the abandoned calls figure produced by the AMD user.
- A1.38 Ofcom's general policy is that live sampling is likely to be the most practical and comprehensive testing available for AMD users to adopt when producing a reasoned estimate of AMD false positives. This testing methodology is based on sampling real answer machine detected calls to determine a reasoned estimate of AMD false positives. There are a number of different types of live sampling:
- i) **Trunk side recording**⁴¹. Where an answer machine has been identified by the AMD device this should be recorded by the AMD device. These dials can then be retrieved and sample tested by re-playing to identify the rate of AMD false positives.
 - ii) **Agent validation**. A random sample of calls that are identified by the AMD device are passed on to call centre agents rather than being disconnected. The agent can then verify if the answer machine detected call is correct or was in fact an AMD false positive.
 - iii) **Side-by-side comparison**. This testing methodology relies on a comparison of two scenarios: one where an AMD device is switched on and one where it is switched off. From the 'AMD on' scenario, the answer machine rate is recorded and compared to the answer machine rate recorded in the 'AMD off' scenario i.e.

⁴¹ **Trunk side** recording captures the call from the point the call starts ringing until the call is terminated. By comparison **agent side** recording would start recording from the point when the call is started by the agent. Trunk side recording allows reporting on all the calls made by the dialler.

the rate defined by agents listening to all calls. If false negatives are accounted for, the difference will be the reasoned estimate of AMD false positives.

A1.39 Where available and not ruled out by cost, trunk side recorded answer machine calls is generally the most preferable type of live sampling. Side by side comparison testing removes observer interference and is preferred to agent validation testing so long as a robust sampling methodology is followed. Generally these two forms of live sampling are preferred to agent validation due to the risk of observer interference in the testing.

A1.40 Ofcom is not, however, inclined to prescribe testing methodology to be used by all AMD users when producing a reasoned estimate of AMD false positives. Rather, we outline below the types of factors we will look for when assessing the methodology used when testing AMD accuracy. In the event of an investigation, Ofcom would expect that testing be based on this outline. We would also expect to have sight of relevant details of testing such as the date and times of testing, the procedure used and the number of calls made. Furthermore, we expect that any reasoned estimate to be based on high quality data.

A1.41 The following table sets out how we will assess the robustness of testing used to determine a reasoned estimate of AMD false positives:

Data authenticity	Testing based on past/actual call records is always preferred to scenario testing because of the high number of external factors that can influence AMD accuracy rates.
Data relevance	The reasoned estimate of AMD false positives should be based on relevant campaign data. Whenever campaign data is changed, to an extent that it could materially change AMD accuracy rates, the testing should reflect this.
Operational environment	The reasoned estimate should be calculated in an environment the same or materially the same as that in which regular calling occurs. This means that all operational variables (AMD sensitivity, calling windows and other operational metrics) should remain unchanged for the length of the test and should be equivalent to the ongoing non-test environments.
Frequency	The frequency of testing is linked closely to data relevance. That is, testing should be undertaken whenever campaign data is changed. To the extent that it could materially change AMD accuracy rates, the testing should reflect this.

A1.42 The following should also be followed if live sampling is undertaken:

Actual event analysis	Where possible, actual answer machine classifications should be analysed rather than side by side comparisons.
Observer interference	The test should not be allowed to interfere with the process being tested.
Sampling	A sample size needs to be large enough to derive a high confidence level. It should cover different times of the day and different days of the week. Confidence levels of 95% or two standard deviations from the mean, and above are high enough across the population.
Testing periods	Testing should be undertaken during representative times of the day and days of the week.

- A1.43 Following the above, AMD users should undertake testing on a per campaign basis or when material changes are made to an AMD. A material change could be considered to be changing the settings on a dialler (e.g. making the AMD more or less aggressive, a dialler upgrade or a reconfiguration of dialling patterns).
- A1.44 A further option for AMD users would be to seek the services of an independent auditor to assess AMD accuracy. On the condition that this is done on a regular basis and whenever significant changes are made to their use of AMD, Ofcom would take this into account when considering the accuracy of the reasoned estimate of false positives. However it should be noted that AMD users are ultimately responsible for the quality of this auditing in producing an accurate reasoned estimate of AMD false positives.
- A1.45 The Direct Marketing Authority (DMA)'s paper, and others we have seen like it, provides a mathematical explanation of how to calculate an abandoned call rate when ACS users use, and do not use, AMD technology. It expands on our calculation in A1.35 to provide a practical explanation of the abandoned call rate.
- A1.46 We recognise this is potentially a very useful aid which stakeholders may consider using when undertaking their own (abandoned call rate) calculations. The DMA's paper can be found at http://www.dma.org.uk/attachments/resources/5812_S4.pdf.

(iv) Calculating the abandoned call rate when AMD is not used

- A1.47 Calls to answer machines are not live calls and should not be included in calculating the abandoned call rate. Therefore a reasoned estimate of calls abandoned to answer machines may be deducted from the number of abandoned calls.

Applying the formula for calculating the abandoned call rate when not using AMD

- A1.48 The formula for calculating the abandoned call rate is as follows:

$$\frac{\text{Abandoned calls (x)}}{\text{Abandoned calls (x) + Live calls to a live operator (y)}} * \frac{100}{1}$$

- A1.49 The *abandoned call rate* can exclude a *reasoned estimate of calls abandoned to answer machines*

- A1.50 An illustrative example using broadly typical industry experience not involving the use of AMD might assume that of 1000 calls made in a 24 hour period:

- 392 calls are live calls connected to a live operator (y)
- 8 calls are abandoned (dropped by the ACS – and includes calls answered by answer machines) (x)
- 400 are connected to a live operator and classified as answer machines
- 200 calls are unconnected.

The number of answer machines as a percentage of all connected calls is $400 / (392 + 400) = 50.5$ per cent.

Therefore, of the 8 calls that are dropped by the ACS, 50.5% of them will have been answer machines. Thus the reasoned estimate of calls abandoned to answer machines is 4.040404, meaning that the number of abandoned calls answered by live individuals is 3.9595.

The abandoned call rate in this scenario is:

$$\frac{(8 - 4.040404)(x)}{(8 - 4.040404)(x) + 392(y)} * \frac{100}{1} = 1.00\%$$

The abandoned call rate will therefore be 1.00%.

Information messages – timing and content

A1.51 In the event of an abandoned call (other than an AMD false positive), a very brief recorded information message must start playing no later than two seconds after the telephone has been picked up or within two seconds of the call being answered. Within two seconds of the call being answered' means either:

- i) no later than two seconds after the telephone has been picked up; or
- ii) no later than two seconds after an individual begins to speak (or 'start of salutation'); or

whichever is more applicable to the technology deployed.

AMD users can choose to play an information message in the event of an abandoned call from when an individual finishes speaking (or 'end of salutation'). This must be achieved on the condition that the total time taken to start playing an information message is no more than two seconds from start of salutation.

A1.52 The information message must contain at least the following information:

- the identity of the company on whose behalf the call was made (which will not necessarily be the same company that is making the call);
- details of a *Special Services* (080 – no charge) or a *Special Services* basic rate (0845 only) or a *Geographic Number* (01/02) or a *UK wide Number at a geographic rate* (03) number⁴² the called person can contact so they have the possibility of declining to receive further marketing calls from the company; and
- includes no marketing content and is not used as an opportunity to market to the called person.

Unanswered calls

A1.53 Calls which are not answered must ring for a minimum of 15 seconds before being terminated.

⁴² As defined in the National Telephone Numbering Plan
<http://stakeholders.ofcom.org.uk/binaries/telecoms/numbering/numplan280710.pdf>

72 hour policy

- A1.54 When an abandoned call (other than an AMD false positive), has been made to a particular number, any repeat calls to that number in the following 72 hours may only be made with the guaranteed presence of a live operator.

24 hour policy

- A1.55 When a call has been identified by AMD equipment as being picked up by an answer machine (including AMD false positives), any repeat calls to that specific number within the same 24 hour period may only be made with the guaranteed presence of a live operator.

Caller Line Identification

- A1.56 For each outbound call a Caller Line Identification (CLI) number is presented to which a return call may be made which is either a geographic number or a non-geographic number adopted as a Presentation Number which satisfies the Ofcom Guide to the use of Presentation numbers.
- A1.57 Ofcom reluctantly accepts that the technological limits of international networking may result in some dialler calls being delivered to the UK without CLI identification but flagged 'international'. In these circumstances it is even more vital that such centres use the information message and a UK based number so that they may be contacted by called parties after an abandoned call.

Marketing

- A1.58 Any call made by the called person to the contact number provided shall not be used as an opportunity to market to that person, without the person's consent.

Record management

- A1.59 Ofcom expects that where organisations are subject to this statement, records are kept for a minimum of six months that demonstrate compliance with the above policy and procedures.

4. Other examples of Persistent Misuse

- A1.60 This section identifies five further general areas where persistent misuse may occur. There is a degree of overlap between these areas; several forms of misuse may fall into more than one category.
- A1.61 Given the breadth of the legislation, some forms of misuse, say those involving the misuse of automated calling systems or scams, may also represent contraventions of other consumer protection legislation. Where such legislative overlap exists and Ofcom is faced by a particular instance of misuse, it shall determine in consultation with the relevant competent authorities which set of legislative requirement is more appropriate and may be more effectively deployed.
- A1.62 The examples given are intended to be illustrative rather than inclusive and will not prevent Ofcom from investigating and issuing a notification in respect of behaviour which is not identified by this statement. That could occur if, for example, a new technology or new use of technology allowed for the operation of a form of misuse not previously known to Ofcom, which has the potential to cause unnecessary

annoyance, inconvenience or anxiety to consumers. In these circumstances Ofcom would take the necessary measures to prevent further harm and also revise the statement to incorporate the new form of misuse.

Misuse of automated calling systems

- A1.63 Under the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the “2003 Regulations”), it is an offence to use automated calling systems to make direct marketing calls which do not consist of live speech unless the called person has previously notified the caller that for the time being they consent to such communications being sent. An example of such a call is a recorded message for marketing purposes where no operator is present.
- A1.64 The concept of direct marketing that the 2003 Regulations rely on is very broad and applies not just to the advertisement of goods and services but also to the promotion of an organisation's aims and ideals. It therefore applies to political and charitable, in addition to commercial, organisations. However there may be types of unsolicited recorded messages sent by automated calling systems that cause annoyance or inconvenience but which, for whatever reason, fall outside the 2003 Regulations.
- A1.65 Ofcom believes that the persistent use of automated calling systems to transmit recorded messages that are not marketing messages within the meaning of the 2003 Regulations or to make silent or abandoned calls (see the section on misuse by making silent or abandoned calls below) or fax-scanning calls may be persistent misuse within the meaning of section 128.
- A1.66 However some uses of automated calling systems are beneficial, either to the general public or to the individual recipient. An obvious example of a public benefit would be where emergency authorities transmit a recorded hazard warning to subscribers within a defined geographical area. More limited cases, where the benefit is restricted to the individual, are the application of Interactive Voice Messaging (‘IVM’) technology to activate credit cards, check abnormal credit card use, arrange deliveries or remind for payments and appointments. Ofcom will consider each case on its own merits in terms of assessing whether misuse has occurred in the context of section 128(5) of the Act.

Number-scanning

- A1.67 Another type of silent call arises from the practice of number-scanning (also known as ‘pinging’) where calls are made to find out which telephone numbers, out of a range of numbers, are in service or not. As soon as a tone is received which establishes the status of a particular number the call is terminated. This activity is carried out in order to develop lists of active telephone numbers. As well as the inconvenience that may be caused to the recipient of an abruptly terminated call such behaviour is detrimental to consumers in general by adding to network congestion without generating any revenue for providers. In a worst-case scenario high-volume number-scanning could overload either the originating or terminating local exchange thus depriving subscribers connected to that exchange of the ability to make or receive any calls at all
- A1.68 A common variant of number scanning is fax scanning where a call is made to determine the presence of a fax receiver at the terminating end. This activity is motivated by the commercial value of a directory of validated fax numbers. Persistent number-scanning or fax-scanning both clearly fall within section 128.

Misuse of a CLI facility

- A1.69 CLI (as defined earlier) is a technology that identifies the number from which a call is made or enables a return call to be made. Ofcom will regard the repeated forwarding of inauthentic or misleading CLI information as persistent misuse. Where users have the ability to choose the CLI number that is forwarded (this is known as a Presentation Number), the deliberate sending of an inauthentic or misleading number from which it is not possible to identify the caller and which does not enable the recipient of a call to return a message is a form of misuse. This is without prejudice to a caller's right to preserve their anonymity by withholding their number.
- A1.70 It will also be regarded as a form of misuse to forward a CLI number that has been allocated to a Premium Rate Service provider. A return caller may suffer annoyance or inconvenience by unwittingly making a return call for which they are charged more than they may reasonably expect.

Misuse for dishonest gain - scams

- A1.71 There are a number of activities associated with the use of electronic communications networks or services motivated by a desire for unscrupulous or dishonest gain. Although this statement will not fully describe all those that have been discovered (so as not to encourage their perpetration) and cannot describe schemes that have yet to be practised, these activities share certain common features.
- A1.72 The first feature they share is that they are primarily aimed at defrauding end-users, rather than communications providers.
- A1.73 The second feature they share is the exploitation of premium rate or revenue sharing services, or in some instances, where these services are not used, by directly billing the person who has been duped into making a call. In either case, the essence of the scam is that users are deceived into phoning a number without realising that it is a premium rate or revenue sharing service or may lead to a fraudulent bill and so costs more than they expect. Examples of this that have come to light in recent years include:
- i) faxing a premium rate or revenue sharing fax number where the terminating fax machine has been set to run deliberately slowly thus increasing the duration of a call;
 - ii) the apparently personal text message that invites a return call to a premium rate or revenue sharing number;
 - iii) making a silent call where any return call connects the caller to a premium rate or revenue sharing number (this latter example is also misuse through silent calls and misuse of CLI facilities);
 - iv) the use of recorded ringing tone to deceive the caller that charging has not yet started; or
 - v) inviting people to telephone a revenue sharing number on the pretext that they have won a prize or need to take delivery of an important message or parcel.
- A1.74 In some circumstances the deception that incites a caller to phone a premium rate or revenue sharing number will be a form of direct marketing and additionally

subject to applicable legislation. For example, under Regulation 8 of The Electronic Commerce (EC Directive) Regulations 2002 any unsolicited commercial communication sent by electronic mail must be clearly and unambiguously identifiable as such as soon as it is received. Regulation 23 of the 2003 Regulations prohibits the practice of disguising or concealing the identity of the sender of electronic mail used for direct marketing purposes and additionally requires the provision of a valid address to enable the recipient to request the cessation of such communications. The definition of "electronic mail" in the 2003 Regulations applies to SMS or text messages as well as email.

- A1.75 PhonepayPlus is the regulatory body for all premium rate telecommunications services. PhonepayPlus prohibits misleading behaviour and requires providers of premium rate services to ensure that consumers are fully informed of the terms of the service (including pricing). Ofcom considers that the deceptions identified in this section are also likely to be in breach of its Code of Practice, which is available at <http://www.phonepayplus.org.uk>
- A1.76 Ofcom will regard the practice of tricking callers into phoning a premium rate or revenue sharing number, including numbers in the 08xx range, or non-revenue sharing service that leads to the presentation of a fraudulent bill as misuse and if repeated, persistent misuse.

Misuse of allocated telephone numbers

- A1.77 Where end-users have been allocated telephone numbers, Ofcom will regard their use in a way that is inconsistent with designations and/or restrictions in the National Telephone Numbering Plan ("the Plan")⁴³ as a form of persistent misuse by either the end-user or a relevant communications provider. An example would be where Personal Numbers (070) are used for anything other than "Personal Numbering" (as defined in the Plan) or Mobile Numbers (077, 078 and 079) are used for services other than those which fall within the definition of "Mobile Service" (as defined in the Plan). Condition 17 of the General Condition of Entitlement requires the range holder and any other communications provider using the number to take all reasonably practicable steps to secure compliance by their customers.

5. Ofcom's policy on the issuing of section 128 notifications

- A1.78 Section 128 authorises Ofcom to issue a notification to a person where it has reasonable grounds for believing that a person has engaged in persistent misuse of a network or service.
- A1.79 In some cases this power may be limited insofar as section 128(8) enables the Secretary of State to make an order that behaviour of a specified description is not to be treated as a misuse of an electronic communications network or service where there is an appropriate alternative means of dealing with it.
- A1.80 There is a general presumption that a notification will not be given where an alternative legal remedy is available, although it should be noted that section 130(8) allows for the imposition of a penalty under the 'persistent misuse' powers in respect of the same conduct for which a person is also liable for an offence under sections 125 to 127 of the Act.

⁴³ The National Telephone Numbering Plan
<http://stakeholders.ofcom.org.uk/binaries/telecoms/numbering/numplan280710.pdf>

A1.81 Under section 128(2) the notification must include the following elements:

- i) a determination that a person has persistently misused an electronic communications network or electronic communications service;
- ii) a specification of the use that Ofcom considers persistent misuse; and
- iii) a specification of the period within which the notified person may make representations.

Ofcom's priorities on issuing notifications

A1.82 Because persistent misuse is defined in very broad terms and the powers in section 128 may be potentially invoked whenever a person believes that they have suffered inconvenience through another person's use of a network or service, Ofcom needs to be guided in the exercise of its enforcement powers by a scale of priorities. We believe that the 'persistent misuse' powers are primarily about protecting consumers and that the more likely a particular form of misuse is to harm consumers by causing them annoyance, inconvenience or anxiety, the more incumbent it is on Ofcom to take enforcement action. In general terms, misuse and the harm it causes the public may be prioritised in three ways.

A1.83 First, there is the degree of harm caused to an individual consumer, on a scale where anxiety is more detrimental than annoyance or inconvenience. As an example, we believe that anonymous silent calls are more likely to give rise to anxiety than those associated with an information message and a CLI. This could be described as a qualitative test.

A1.84 Second, there is the scale or amount of the misuse. Other things being equal, the more people are affected by an act of misuse the more likely it is that Ofcom will take enforcement action. Causing annoyance to a significant number of people is inherently more serious than causing annoyance to a small number and is more likely to justify enforcement action. This could be described as the quantitative test.

A1.85 Third, is where a new serious form of misuse has come to light and Ofcom needs to act quickly in order to stop the misuse and deter others from engaging in the practice. An example might be where a person provides a commercial service offering to overlay outbound phone calls with an inauthentic CLI number, thus enabling callers to send misleading information about their identity and preserve their anonymity. This could be described as the deterrence test.

A1.86 Ofcom policy on taking action under its section 128 powers will be driven by the three factors set out above. In addition, where persistent misuse may have been caused by abandoned and silent calls, Ofcom will consider observance with the policy criteria set out in A1.12 to 58

A1.87 Ofcom will monitor consumer complaints in this area, and will look at other ways to identify priority cases of persistent misuse. In addition, the overview that communications providers have of network activity makes them particularly well placed to pick up on instances of high-volume misuse of which isolated consumers may only have a single experience. Ofcom welcomes such cases being brought to its attention by communications providers.

A1.88 Where Ofcom receives complaints, they will be assessed to ascertain whether there is sufficient evidence to provide reasonable grounds for believing that persistent misuse has occurred, and whether taking action would be a priority for Ofcom.

The determination and the specification

A1.89 The determination will need to refer to the evidential basis that supports the occurrence of persistent misuse. As the notification is required to be given to the person who is responsible for the misuse it will also be necessary for Ofcom to establish the identity of the persistent misuser. As a point of clarification, it will not be possible to take action under this legislation against a communications provider over whose network or service the persistent misuse takes place, unless the communications provider itself is responsible for perpetrating the misuse. A provider over whose network silent or abandoned calls are made cannot be made responsible for those calls.

A1.90 The specification will describe the actual behaviour that constitutes persistent misuse supported by the grounds for believing that this behaviour is likely to give rise to annoyance, inconvenience or anxiety.

A1.91 The specification of the period during which the notified person may make representations must not normally be less than a month but may be as short as seven days, in urgent cases. An urgent case is defined by section 128(4) as one where the misuse is both continuing and causing a degree of harm that requires it to be stopped as soon as is practicable.

A1.92 Whether or not the misuse is continuing is a matter of fact; the degree of harm that it is causing is necessarily a matter of judgement. The factors that would tend towards a shorter period for representations are the scale of the misuse, the number of consumers on whom the misuse is impacting and the degree of detriment caused. An example of an urgent case might be where automated calling systems are being exploited to send a high volume of recorded messages seeking to influence voting in a TV phone-in.

6. The consequences of a notification

A1.93 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

A1.94 An enforcement notification under section 129 is appropriate where Ofcom is satisfied that:

- i) the person who has been notified under section 128 (“the notified user”) has persistently misused an electronic communications network or service;

- ii) the notified user has not, since the giving of the notification, taken all the steps that Ofcom considers appropriate to ensure that the misuse is ended and not repeated; and
- iii) the notified user has not, since the giving of the notification, remedied the consequences of the notified misuse in a manner that Ofcom considers appropriate.

A1.95 The enforcement notification will impose a requirement on the misuser to take the necessary steps:

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

A1.96 It will impose clear and enforceable obligations on a misuser and allow a reasonable period for compliance with them.

A1.97 In many cases of persistent misuse, there may be no pecuniary loss or damage, say in the case of silent or abandoned calls. However a degree of annoyance, inconvenience or anxiety will invariably be present.

A1.98 When considering whether a misuser has remedied the consequences of a breach, Ofcom will consider the factors of the particular case and whether the remedy is proportionate to the harm caused.

A1.99 Section 129(5) of the Act makes compliance with an enforcement notification a duty of the notified user, and enables Ofcom to enforce that duty through civil proceedings which, as set out in section 129(6), may lead to an injunction, a requirement for specific performance of a statutory duty or any other appropriate remedy or relief. The appeal procedures available against notifications and penalties are set out in sections 192 to 196 of the Act.

Issuing a penalty under section 130

A1.100 Where Ofcom has issued a section 128 notification, or both a section 128 notification and a section 129 enforcement notification, Ofcom will be able to impose a penalty on a persistent misuser, once the period for making representations has elapsed.

A1.101 Ofcom may also impose a financial penalty where a notified misuser has contravened a requirement of a section 129 enforcement notification. The upper limit for such a penalty is currently £2 million following the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010⁴⁴.

A1.102 Ofcom is required under section 130(4) to determine an amount, which is both appropriate and proportionate to the misuse. In making such a determination, section 130(5) requires Ofcom to have regard to:

- i) any representations made by the notified misuser;
- ii) any steps taken by the misuser to bring the misuse to an end and not repeat it; and

⁴⁴ <http://www.publications.parliament.uk/pa/cm201011/cmgeneral/deleg2/100913/100913s01.htm>

iii) any steps taken by the misuser to remedy the consequences of the misuse.

A1.103 Section 130 thus confers discretion on Ofcom to impose a penalty that it considers to be appropriate and proportionate to the notified misuse.

A1.104 Furthermore, under section 392 of the Act Ofcom is required to publish a statement containing the guidelines it proposes to follow in determining the amount of penalties it imposes under the Act. By virtue of section 392(6) of the Act, Ofcom must also have regard to the statement for the time being in force when setting the amount of any penalty under this Act. These are Ofcom's Penalty Guidelines which Ofcom will apply when setting the level of penalty on a persistent misuser⁴⁵.

⁴⁵ The current Penalty Guidelines are: <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

Annex 2

Diagrammatic explanation of IVM solution

Provided by the Confederation of British Industry (CBI)

