

# Response to Consultation on extension to the maximum financial penalty available to Ofcom in respect of Silent Calls

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## Introduction

I present my comments as a renowned campaigner on this issue. I was pulled out of semi-retirement from this campaign to comment on the consultation and am happy to do so.

I have repeatedly commented in Public, to Ofcom, in representations to Parliament (to which Ofcom is accountable) and to the Department (in its various forms) that Ofcom has never properly come to terms with the duty which it has in this respect and the particular powers that it holds.

I lay out below, once again, the outline for how I have always believed Ofcom should use its powers. I would be delighted to be invited to go through this in detail with officials from the Department and Ofcom and anyone else.

## My response in summary

Use of Ofcom’s powers to deal with Silent Calls, and the effectiveness of this activity, has little to do with the maximum penalty available.

When parliament granted the previous increase, it was delivered with the following clear message:

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

This comment reflected the view which I have always held and remains true today - the threat of a considerable penalty cannot be considered as an alternative to actually using the powers granted by parliament.

I urge the Department and Parliament to grant whatever increase may be deemed appropriate, but ONLY for effective use of the powers that Ofcom holds. I do not believe that a simple gesture (which is largely what is proposed in the Consultation) is likely to be effective, nor is it what citizens have the right to expect from Ofcom.

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## Ofcom's powers and duties

In the Telecoms field Ofcom is primarily a regulator of registered providers of telecoms services, using powers laid out in the Communications Act.

These powers are exceptionally and explicitly extended to providers of "Premium Rate Services", who fall within the scope of its regulatory powers, although these are exercised on Ofcom's behalf by PhonePay Plus. Ofcom's powers are not extended to users of "revenue sharing" telephone numbers, e.g. all those beginning 084, which is why Ofcom is unable to prevent misuse of these numbers as a way of obtaining subsidy in the provision of public services.

Ofcom's powers of regulation are not extended to cover call centres, debt collectors, nor any other users of Automated Calling Systems.

Ofcom's duty to use these regulatory powers over the market for telecoms services is expressed in the second of its principle duties - to consumers of telecoms services.

The persistent misuse powers apply to users, not providers, of telecoms services and therefore Ofcom has no powers of general regulation covering their activities.

Furthermore, as this has nothing to do with the market for telecoms services, this use of Ofcom's powers is in fulfilment of its first principle duty - to citizens.

This important distinction is commonly blurred by Ofcom itself and therefore misunderstood by others, sadly including the Department.

## Ofcom's approach to Silent Calls

When initially recognising the problem of Silent Telephone Calls, Ofcom initially worked very closely with the only relevant trade organisation that had shown any interest in the topic - the Direct Marketing Association. It suited the DMA for Ofcom to appear in the role of a regulator and Ofcom was very comfortable with that role.

The DMA had long held the view that moderating the percentage of calls that resulted in silence was a perfectly acceptable approach to the problem and persuaded Ofcom to adopt this principle. In October 2005 the following statement was **removed** from the Ofcom statement of policy - **a most significant, and unacceptable, change**.

*"because the 'persistent misuse' powers are framed with a view to the protection of individual consumers, it would be inappropriate to apply a 'percentage' approach.*

*Where a large call centre generates, say, 200 [abandoned] calls a day, it will not be a mitigating factor that these calls represent only 3 per cent of the call centre's output. From the standpoint of an individual who has received such a call, there is little comfort to be drawn from the knowledge that 97 other people did not."*

**THIS IS THE POLICY WHICH OFCOM, QUITE IMPROPERLY, ABANDONED IN OCTOBER 2005**

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## Ofcom's approach to Silent Calls (continued)

Ofcom has subsequently continued to play the role of regulator, setting limits for the percentage of calls generated by a dialler that may be abandoned, suggesting how long one may wait before determining that no agent is available before abandoning a call etc.

Whilst this approach suits Ofcom's style, it has nothing to do with the nature of the persistent misuse powers, which contain no competence for the imposition of general regulations.

Most significantly, it is wholly improper to start off on the basis of trying only to **limit** the scale of misuse by regulation. Ofcom's duty is to **eradicate** it wherever it can, using the powers provided to it by parliament.

## The persistent misuse powers

The persistent misuse powers (in ss 128-131 of the Communications Act 2003) are designed to allow Ofcom to intervene in any particular case that comes to its attention where it recognises that unnecessary annoyance, inconvenience, or anxiety are being caused by a persistent activity in misuse of the telephone network.

Hanging up in silence clearly meets these requirements. This effect is in no way mitigated by the number of other calls made that day. Anyone found to be engaged in such a practice deserves to be issued with a Notification of Persistent Misuse, under the terms of S128.

Where the response to this Notification, and any further investigation deemed necessary, does not leave Ofcom confident that the persistent behaviour has been halted, Ofcom is able to issue a Section 129 Enforcement Notification specifying the behaviour that must be ceased.

Once a Section 129 Enforcement Notification is in place, AND ONLY THEN, the offender is under an enforceable duty to cease their misuse. This effect is NOT created by Ofcom publishing its Statement of Policy on use of the Persistent Misuse powers. That Statement bears only on Ofcom, under the terms of Section 131.

The imposition of financial penalties (up to the maximum allowed) is then available to Ofcom, under the terms of Section 130, for each breach of the terms of the Enforcement Notification (not just once for each initial Notification as stated in the Consultation Document). If such imposition of penalties is seen as inadequate then Ofcom has the opportunity to seek an injunction, so that further breaches may be subject to criminal sanctions, as determined by a court.

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## **How Ofcom acts in respect of Silent Calls**

The false suggestion that Ofcom has a regulatory role in this respect is widely propagated, and even seems to have infected the understanding of the BIS Department.

It is understood that Ofcom has “rules”, however it is not widely recognised that they are not seen in practice to simply amount to a “prohibition” on the making of Silent Calls.

All action taken by Ofcom has been in support of the 3% limit on abandoned calls. One company was subject to action and a £32,500 penalty on the basis of not having made a single Silent Call.

Rather than following the approach suggested by the nature of the persistent misuse powers, Ofcom follows the same approach that it uses when dealing with possible breaches of regulations by providers of telecoms services. In that totally different situation, a registered list of companies are notified that they are subject to specific regulations and advised of their duties, including any changes. In these other cases this situation exists up to the point where Ofcom has completed its investigation and found that a Notification of a breach must be issued.

Ofcom fails to issue Section 128 Notifications at the point where it has the minimal sufficient evidence necessary to advise a company that it is practising persistent misuse (i.e. habitually making Silent Calls). The weight of evidence necessary for such a Notification is not the same as that necessary to impose a financial penalty. The purpose of the persistent misuse powers, where no specific enforceable regulations can exist, is for the misuse to be Notified as soon as possible so that it can be halted.

Ofcom disregards use of the Section 128 Notification in the specific circumstances that apply here, unlike in those where enforceable regulations are being enforced.

Ofcom effectively pretends that regulations are in force and waits until it has collected sufficient evidence to impose a penalty. This is done, not as a reserved sanction available for breaching notified requirements, but on an assessment of the harm done by previous action on first instance. The penalty, now seen as an inevitable follow-up to the initial notification, is somehow determined according to Ofcom’s complex (and, to most readers, incomprehensible) criteria.

The persistent misuse powers do permit the use of penalty immediately following the issuing of a Section 128 Notification. This provision was presumably intended to cover misuse that has become sufficiently severe in its effect as to warrant a penalty, because it does not come to Ofcom’s attention in time to act to halt it. By its exclusive use of this approach, Ofcom is actually causing this effect.

This is “para-regulation”, which is both unfair, in that those against whom it is applied are not adequately aware of their specific duties, and ineffective, as has been seen by the fact that Ofcom’s actions under its current policy have done little to affect the nuisance experienced.

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## Why the request to increase the penalty should have been resisted

- The request for an increase to the penalty appears to be based purely on the assumption that it will have a deterrent effect. Unless Ofcom can show cases where Silent Calls have continued to be made by those whom it has served with Enforcement Notifications and repeatedly imposed penalties, up to the present maximum, with no effect on behaviour, then it cannot be said to be necessary in connection with actual use of the powers.

As with Ofcom's pretence that it is able to impose enforceable regulations on users of automated dialling equipment, it seems to be openly admitted that it is all a bluff.

- When Ofcom has not commenced any investigation since April 2007, most Silent Callers would think themselves unlikely to be the subject of its attentions.
- Given that penalties of £30,000 and £35,000 were considered sufficient to address the misuse by Abbey and Carphone Warehouse respectively, one may wonder who would think themselves likely to warrant a penalty of more than £50,000.
- The "rules" which are seen to be enforced (the wording in the Statement of Policy is so convoluted that it is beyond common comprehension) clearly demonstrate a tolerance of Silent Calls up to the "3% limit". If adherence is to be simply promoted by the announcement of an increased maximum penalty, then attention will be drawn to this feature.
- Unqualified granting of the request could be seen as an endorsement of "the rules" and the way in which Ofcom is misusing its powers and failing to perform its general duty to citizens. It is most clearly failing to fulfil the duty placed on it by parliament, when expressed in the terms - "***we expect you to use your powers to eradicate the nuisance of Silent Calls***".

The Department should not have presented its intention to comply with Ofcom's request for consultation without addressing any of these issues.

Whatever may be the effect of an increased maximum penalty, this is certainly not the primary issue that needs to be addressed in considering why Ofcom has failed in its, feeble and improper, efforts to address the issue of Silent Calls.

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## **My suggestions for a way forward for the Department**

I had hoped to be able to participate in discussions during the Consultation period regarding the manner in which Ofcom could be granted the increase, as it were, in return for commitments to start using its powers properly. Despite this being a very proper use of the consultation process, that opportunity was not offered to me.

I sincerely hope that parliament will not be content to simply grant a further increase, without assurances about significant policy changes, given that Ofcom has failed to act in the way previously directed by parliament.

During the time that remains before (assuming general support for the proposal in response to consultation) the Department decides on a figure and presents the SI, I see it as imperative that Ofcom provides some indication of the way in which it will strengthen its approach to this matter, so that parliament may be content to grant the Department and Ofcom the requested increase.

I will be very keen to deploy my knowledge and understanding of the topic in support of such efforts.

The level of penalty available to Ofcom should be that which is genuinely needed to facilitate actual and proper use of the powers which it holds. If a larger maximum penalty may have some deterrent effect on some, then one would not wish to oppose it being granted.

The real action that is required in response to the continuing level of public concern is simply expressed as follows:

1. Ofcom should acknowledge that habitually failing to announce who you are when telephone calls are answered (remaining silent being the very worst and clearest case) is unquestionably “persistent misuse”, which must be halted. Degrees of action and levels of penalty in response to the scale of the nuisance and other possible mitigating factors are a secondary issue, which sit outside a determination of what is “persistent misuse”.
2. Ofcom should acknowledge that it cannot act as a “regulator” in this regard. Where persistent misuse is occurring, Ofcom has a duty to use the powers it holds to take effective action to cause every instance to cease.

I fear that the request for an increased penalty is seen by Ofcom as an alternative to taking the action which would have been effective in addressing this issue some years ago, had Ofcom handled it properly.

**David Hickson**

**25 January 2010**