

**RAISING THE MAXIMUM PENALTY
FOR THE PERSISTENT MISUSE OF
AN ELECTRONIC
COMMUNICATIONS NETWORK OR
SERVICE**

**TO TACKLE THE PROBLEM OF
SILENT AND ABANDONED CALLS
TO CONSUMERS**

**GOVERNMENT RESPONSE TO
CONSULTATION**

23 MARCH 2010

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GOVERNMENT RESPONSE TO CONSULTATION BY THE DEPARTMENT FOR BUSINESS INNOVATION & SKILLS (BIS) ON RAISING THE MAXIMUM PENALTY FOR THE PERSISTENT MISUSE OF AN ELECTRONIC COMMUNICATIONS NETWORK OR SERVICE TO TACKLE THE PROBLEM OF SILENT AND ABANDONED CALLS TO CONSUMERS

A: EXECUTIVE SUMMARY

This document is the Government Response to the consultation <http://www.bis.gov.uk/Consultations/maximum-penalty-for-misuse-of-an-electronic-comms-network?cat=closedawaitingresponse>, which proposed to consider raising the maximum penalty for the persistent misuse of an electronic communications network or service mainly to tackle the problem of silent and abandoned calls to consumers.

The Government after careful consideration of 137 responses has decided to proceed to increase the maximum penalty from £50,000 to £2 million, which broadly reflects the views of 126 respondents that included consumers, companies, organisations and telecoms service providers, who felt that the maximum penalty should be increased to this level to deter persistent offenders from making silent and abandoned calls to consumers. The Government proposes to amend the maximum penalty in the Communications Act 2003 by statutory instrument as soon as possible.

Four respondents supported the maximum penalty being kept to its present level of £50,000 and felt that it is was adequate to deal with the problem of silent and abandoned calls. There was considerable support amongst 126 respondents for the maximum penalty to be increased from £50,000 to £2 million, which was particularly strong amongst those who had received such calls and had tried various methods to combat the problem. Some respondents felt that Ofcom needed to be more effective in enforcing the existing regulations as this would help to ensure that the problem was more effectively tackled. Seven respondents felt that an increase to either £250,000, £500,000 or £1 million would be appropriate in relation to the harm that was caused to consumers by silent and abandoned calls.

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B: INTRODUCTION

The Government undertook a consultation on 26 October 2009. This followed a request from Ofcom for BIS to increase the maximum penalty from its present level of £50,000 to a figure of up to £2 million. Ofcom considered that the current maximum penalty was not a high enough figure to represent a real sanction or an effective deterrent to offenders that continued to persistently misuse networks or services by making silent and abandoned calls. The Government felt on balance that an increase would be beneficial to consumers and therefore carried out a consultation on this issue. Ofcom was concerned that in 2008 it had inadequate fining powers to deal with a particularly serious case, where Barclaycard was found to have made an extremely large number of silent calls over an 8 month period, which resulted in Ofcom imposing a maximum penalty of £50,000. Ofcom had contrasted the levels of harm that might result from that scale of persistent misuse and its associated enforcement powers, with the position under its broadcasting powers in relation to the premium rate phone-in scandals. This was highlighted in 2007 when Ofcom imposed a penalty under the Broadcasting Act of £2 million as a result of the GMTV phone-in scandal. Separately, on 25 March 2009 64 MPs signed an Early Day Motion (EDM) on silent calls, to urge the Government to encourage Ofcom to use its powers under the Communications Act 2003 more effectively and 36 MPs issued individual press releases.

The Government's Digital Britain Report, which was published on 16 June 2009, provided a commitment to undertake a consultation on whether the maximum penalty for persistent misuse should be increased and a similar commitment was provided in the Government's Consumer White Paper, which was published on 2 July 2009. When the maximum penalty was previously increased in April 2006, from £5,000 to £50,000, Alun Michael, the Minister at the time, gave an undertaking to the House that the maximum penalty would be reviewed in the future and if necessary increased. In addition, Colette Bowe (Ofcom Chairman), during her appearance before the pre-appointment committee in January 2009 mentioned that the maximum penalty was deficient. She expressed concern for the elderly who were particularly disturbed by such calls and called for stronger fining powers.

Following the public consultation, the overall support of 126 respondents for the maximum penalty to be increased from £50,000 to £2 million has led us after careful consideration to conclude that we should now proceed to implement Option 5 below (Section D).

Respondents generally welcomed our proposal, but some felt that the increased maximum penalty would have less impact unless Ofcom took more effective enforcement action against offenders who persistently made silent and abandoned calls to consumers. We believe that the increased maximum penalty of £2 million will have a very significant impact upon persistent offenders by acting as a significant deterrent. In addition, we have been assured by Ofcom that it is fully committed to continuing taking rigorous formal and informal enforcement action in this area through its silent and abandoned calls monitoring and enforcement programme. Ofcom will continue to advise companies of its persistent misuse guidance and the requirements within and its action to date has included speaking at industry conferences and responding to individual requests for information.

C: APPLICATION TO N. IRELAND, SCOTLAND AND WALES

The consultation on a proposal to consider raising the maximum penalty for persistent misuse of an electronic communications network or service to tackle the problem of silent and abandoned calls has an impact across the whole of the UK. Therefore, the intention is that the proposals set out in this Government response will apply across the UK and the views of Northern Irish, Scottish and Welsh consumers have been included and considered by Government on the same basis as for England.

D: THE CONSULTATION PROCESS

The consultation ran from 26 October 2009 to 25 January 2010 and sought views on the following five options:

1. 'Do nothing', the current maximum penalty of £50,000 was adequate and sufficient and therefore should remain at its present level.
2. The maximum penalty should be increased to £250,000.
3. The maximum penalty should be increased to £500,000.
4. The maximum penalty should be increased to £1 million.
5. The maximum penalty should be increased £2 million as was requested by Ofcom.

At the time of the consultation, there was no preferred option. The consultation document was sent to a range of stakeholders for consideration and response, which included telecommunication service providers, companies, consumers and MPs. Also, it was made available for download from BIS's website and paper copies were orderable from BIS's publication orderline.

E: RESPONSES RECEIVED

137 responses were received and the breakdown by stakeholder groupings was as follows:

- 117 Consumers
- 11 Companies
- 3 Telecoms service providers
- 6 Organisations

The respondents are listed at Annex A

F: SUMMARY OF SOME MAIN ISSUES RAISED BY RESPONDENTS

A majority of respondents felt that the current penalty level of £50,000 was too low to represent a strong deterrent to offenders and 126 respondents were in favour of increasing the penalty to £2 million. They felt that the penalty level needed to be increased as it had failed to reflect the harm that was caused to consumers by silent and abandoned calls. This view was particularly strong amongst respondents who had recently been the victim of such calls. Even amongst those who felt that an increase to £2 million was not appropriate, there appeared to be an acceptance that the present level was insufficient and an increase of some level was required.

Ten respondents felt that the penalty should reflect the financial standing of the company by linking it to the turnover of the offending company particularly in cases where multiple calls were made to consumers. Another respondent felt that the penalty should be on two levels with commercial institutions such as banks being levied £3m and others £250,000, whilst some others argued for the maximum penalty to be on a no limit basis. Four respondents felt that the present level was adequate to deal with the problem of silent and abandoned calls and should be kept to its present level of £50,000.

There was some concern about the need for Ofcom to ensure that it made full use of its existing penalty powers before being granted an increase, which would more clearly demonstrate that they were serious in cracking down on silent and abandoned calls. Other respondents felt that for most offending companies reputational damage was more important rather than the size of any possible maximum penalty that could be levied by Ofcom. An increase to £2 million would not be appropriate, although some felt that a lower level of £250,000 could be acceptable if Ofcom provided better education of the rules and demonstrated more effective enforcement.

Some other issues raised by respondents

- There was some concern about the time that was taken by Ofcom to complete its investigations, which needed to show results more quickly.
- Callers ignored requests for further calls not to be made to them in situations where the identity of the caller was discovered and the offending company simply ignored such requests and kept making calls despite being told not to make further calls.
- A considerable number of respondents had resorted to trying various devices at their own expense in attempt to ensure that they were better protected from such calls and resented their need to do this.
- One respondent wanted to see a system similar to the USA, which was apparently based on a per call damages basis and allowed consumers to take action through a small claims court. Penalties of up to \$10 million were possible and a provision for ordering offending companies to immediately cease the activity was possible.
- A number of respondents were concerned that the current requirements appeared to allow silent and abandoned calls from overseas to be made without hindrance and this had become a safe haven for many offenders to avoid UK jurisdiction. This enabled the Call Line Identification (CLI) to be withheld, which needed considering.
- Silent and abandoned calls should be viewed in the same way that unsolicited spam e-mails were considered by consumers to be a nuisance.

- The previous maximum penalty increase, which was increased in 2006 from £5,000 to £50,000, was assumed by one respondent to have been made on a per call basis rather than for a series of persistent offences.
- Some felt that withholding the number of the caller should be made a criminal offence.
- Others felt that offenders should be denied a telephone service and the proceeds of the penalties should be used for enforcement purposes rather than being forwarded to the Treasury.

G: SUMMARY OF RESPONSES RECEIVED & GOVERNMENT RESPONSE

A summary of responses received is provided below along with analyses of these responses and the Government's response.

An updated impact assessment is attached at Annex C, which takes into account the responses received and the effects of increasing the maximum penalty to £2 million.

SUMMARY AND ANALYSIS OF RESPONSES RECEIVED

Option 1:

Maximum penalty remaining at the current level of £50,000?

Four respondents felt that the current maximum penalty was appropriate. Some respondents felt that it would not be appropriate to increase the maximum penalty from its present level as there was little evidence to show that the harm caused to consumers by silent and abandoned calls was similar to the financial loss that was caused by the GMTV phone in scandal.

133 respondents felt that the maximum penalty should be increased to a higher level. The current maximum penalty of £50,000 was felt by many to be insignificant for many offending companies. This was particularly the case for larger companies as it was seen as a risk worth taking and better enforcement by Ofcom was required. Also, some felt that an affordable maximum penalty of this size was too small as it was regarded as being part of the routine overhead operating costs of a company and a cost worth paying in financial terms.

There was some feeling amongst respondents that the maximum penalty should at least be kept at its present level until Ofcom had clarified its persistent misuse statement in relation to their requirements for Answer Machine Detection (AMD) issues as this is a major concern for many companies. Some respondents felt that the maximum penalty should be kept proportionate at the present level, and was adequate as the number of silent and abandoned calls was shown by research to be declining considerably on a monthly basis. Also, Ofcom had not applied a penalty to an offending company for more than 12 months, which indicated that the current maximum penalty level had generally managed to ensure companies were compliant with the regulations.

Some also felt that for most companies reputational damage was a far more important issue compared to the size of any penalty that could be levied by Ofcom and therefore the present level of £50,000 was appropriate. Some felt that the current maximum penalty was appropriate as most breaches were due to a lack of education and awareness of the issues. Better understanding of dialler technology would help to address the problem and some calls were bound to occasionally be made to consumers. Also, there was a feeling that any increase would have a significant effect on the viability of some companies and therefore it should remain at £50,000.

Option 2:

The maximum penalty being increased to £250,000?

Five respondents preferred an increase to this level and some of these argued that an increase to this level would be appropriate as such offences were similar to those for which Ofcom under the Broadcasting Act was able to issue a penalty of up to £250,000. Most other respondents expressed similar views as for Option 1, and felt that the current maximum penalty was too low to make a significant difference in deterring offenders from making silent and abandoned calls. An increase to £250,000 would continue to be seen as representing a relatively low barrier and would fail to form a strong deterrent to many offenders because it failed to reflect the considerable harm that was caused by silent and abandoned calls.

Also, some felt that while this amount was substantial and may be better suited in comparison to the existing maximum penalty of £50,000, it was not sufficient to act as any form of a strong deterrent. Others felt that this level would be about right and reflect the emotional harm that was caused to consumers including the damage to the reputation of offending companies. In addition, some respondents felt that £250,000 was acceptable and similar with the higher level Data Protection powers that Ofcom had. Others felt that this maximum penalty level would be disproportionate to the offence that was caused particularly as Ofcom's requirements were quite detailed. An increase to this level may lead to some small and medium size companies being driven out of business and therefore better education was needed rather than an increase in the maximum penalty.

Option 3:

The maximum penalty being increased to £500,000?

One respondent preferred an increase to this level. Similar views were expressed as for Options 1 & 2, and many respondents felt that whilst this would be a significant increase compared to the present level, this would still not be adequate. The level would be quite high, but not sufficient to act as strong deterrent to persistent offenders. It would fail to make a significant difference and allow many persistent offenders to continue with the practice of making silent and abandoned calls to consumers.

Some respondents felt that a maximum penalty of £500,000 would be disproportionate to the offence that was caused by silent and abandoned calls and the maximum penalty had increasingly moved away from being fair. They felt it would be difficult to accept how a ten fold increase in the maximum penalty would be the most appropriate level for many companies, particularly as to date most persistently offending companies had been fined far less than the current maximum penalty of £50,000. Therefore, it was felt that an increase to £500,000 would not be appropriate as it would be seen to be disproportionate.

Other respondents disagreed and felt that an increase to £500,000 could be a more appropriate maximum penalty as a ten fold increase would more clearly demonstrate the seriousness of the offence of making silent and abandoned calls to consumers. This maximum penalty would attract more negative public attention to offenders and reinforce the potential reputational damage to companies. Therefore, this would be a reasonably high maximum penalty, which would be set at more than the cost of preventing breaches and act as a stronger deterrent. Another respondent felt that this figure may be comparable with the Data Protection powers that were available to Ofcom for the more serious and deliberate type of offences and would be an appropriate increased maximum penalty level.

Option 4:

The maximum penalty being increased to £1 million?

One respondent expressed a preference to this level. Compared with Options 2&3, many respondents felt that an increase in the maximum penalty to £1 million would be a very substantial increase especially in comparison with the present £50,000 level. This would make companies who operated call centres sit up and take notice that the Government was very serious about tackling the problem. This maximum penalty level would be proportionate to the offence, which was caused by silent and abandoned calls.

However, some respondents felt that £1 million would still represent too low a figure to act as a strong deterrent especially to the worst and persistent offenders. Some felt that although this level could be acceptable, if an increase to £2 million was not made then some persistent offenders would continue to make silent and abandoned calls to consumers. Also, it was possible that in a few years there would be a need to have another consultation to consider

whether the maximum penalty should once again be increased and this would not be a good use of resources.

Some respondents felt that an increase to £1 million would be disproportionate and out of step with other similar regulatory penalties including those that applied to Premium Rate Services (PRS). Efforts should be focused on providing better education for those that used dialling equipment rather than increasing the maximum penalty. Also, an increase of this substantial level would be unreasonable and have a negative impact on many SMEs including driving many out of business. Several felt that the examples provided in the consultation document to highlight the problem did not relate to silent and abandoned calls, but rather to financial loss that was endured by consumers and therefore was an unfair comparison.

A number of respondents felt that Ofcom should more clearly set out how it calculated the imposed penalty and importantly also take into consideration the size and type of organisation the offender represented. Also, there was some feeling that the maximum penalty of £1 million would not be appropriate and instead there was a need for better understanding by Ofcom about how automatic dialling equipment operated including how the settings were set in relation to the rates for making calls.

Option 5:

The maximum penalty being increased to £2 million, which has been requested by Ofcom?

There was strong feeling amongst 126 respondents that £2 million was the most appropriate increased maximum penalty level in comparison to the other maximum penalty options. This level would be more likely to deter offenders from making silent and abandoned calls to consumers. Respondents felt that this level would send a very clear and positive message that such calls were not acceptable and make offenders take notice that effective action would be taken against them. This maximum penalty would be future proof and ensure that call centres were highly deterred from disregarding the rules because the current penalty of £50,000 had given offenders encouragement to make such calls and this new increased maximum level would ensure that this would no longer be the case.

However, ten respondents felt that even an increase to £2 million would still be a risk worth taking for offenders when compared to the costs of compliance for some, and therefore instead the maximum penalty should be linked to turnover and profit. Some felt that this level was insufficient for persistent offenders when compared to the USA, where penalties on a per call basis could be imposed for unsolicited automated calls. In the UK offenders continued to make calls in view of the low risk of being caught with only a handful of companies having been investigated by Ofcom. Therefore, the increased £2 million maximum penalty should include more effective enforcement action by Ofcom as an increased penalty by itself would be no substitute for tougher action. Some respondents felt that the problem would not be completely eliminated until offenders were prevented from operating from outside the UK and out of Ofcom's jurisdiction. Others favoured the maximum penalty increase to £2 million, but thought there was a case for setting it at an even higher level as the Impact Assessment had indicated an increase to £2 million may still not be enough in some cases. Also, one respondent felt that if the current maximum penalty level of £50,000 had become dated within three years, then £2 million could also lose impact within a few years.

A number of respondents felt that although the increased maximum penalty level of £2 million would be sufficient to deter smaller companies it may have an adverse effect on many in terms of the costs of compliance. Also, some felt that a number of silent and abandoned calls would continue to be made to consumers due to the technical issues concerning dialler settings and

any attempt was bound to fail regardless of whether the maximum penalty was increased to this, or any other maximum level.

Some respondents felt that a £2 million maximum penalty would be unreasonable and disproportionate to the offence that was caused and out of step with other similar regulatory deterrents. Also, there was a significant difference between silent and abandoned calls and monetary advantage that involved the GMTV phone in scandal. Some respondents felt that similar to options 2&3, this maximum level would drive SMEs out of business and there was some feeling that the current rules were too detailed and better education of the requirements were needed. In addition, some respondents felt that the statistics showed that silent and abandoned calls were on a downward trend, which indicated that most companies were already compliant with regulations and therefore an increase to this level was neither appropriate nor proportionate.

GOVERNMENT RESPONSE

- The lack of support for the maximum penalty being kept to its present level of £50,000 indicates that many share our view that this level does not effectively tackle the problem of silent and abandoned calls.
- The current penalty would continue to represent an insignificant amount and an acceptable cost to larger companies.
- Government agrees that it is fairly difficult to compare and quantify the emotional harm caused by silent and abandoned calls in comparison to the GMTV phone in scandals, which involved actual financial loss. However, for vulnerable consumers including those who receive calls late at night, it is possible that some might be prepared to incur a similar financial loss if this ensured that calls were stopped and would be a cost worth paying to have peace of mind.
- With regards to concern about Ofcom's persistent misuse guidelines in relation to Answer Machine Detection (AMD) usage, we note that Ofcom is intending to open a consultation on its persistent misuse policy that will examine AMD usage in more detail.
- Although the overall number of silent and abandoned calls complaints have declined, the levels are still unacceptable and a significant problem for consumers and groups such as the elderly and housebound. For some consumers even one silent call is one too many.
- On enforcement issues, under the Communications Act 2003, Ofcom has to follow a due legal process and carefully considers each case on its merits. It carries out a substantial amount of both informal and formal enforcement activity, some of which goes unnoticed by the general public and further details are outlined on page 15.
- Reputational damage may indeed be important for many companies, but this has not previously prevented high profile offenders from making large numbers of calls to consumers. Therefore, there is a need to ensure that a substantial penalty is in place to act as a stronger deterrent to those who may be tempted to disregard the guidelines by making silent and abandoned calls.
- Ofcom's guidelines concerning persistent misuse are clearly set out on its website at: http://www.ofcom.org.uk/consult/condocs/persistent_misuse/statement. Ofcom works closely with industry to ensure awareness and is currently reviewing its persistent misuse guidelines. It will consult on options later this year, which will further help to ensure its guidelines are understood. We believe some companies continue to

deliberately disregard the guidelines as any possible penalty is too low and a risk worth taking and ignorance should not be used as a defence to make such calls.

- Silent and abandoned calls should never be considered inevitable or acceptable behaviour, as they cause distress and anxiety to many consumers including those who are vulnerable.
- It could be argued that an increased penalty is unlikely to result in many companies going out of business because those who do not currently persistently make silent and abandoned calls, and continue not to do so, will be unaffected and only those that engage in persistent misuse will have enforcement action taken against them by Ofcom. A substantial penalty has to be in place otherwise there is a free-for-all, which results in consumers being annoyed or made anxious by unwanted calls.
- We agree with most respondents that an increase to £250,000 would be a relatively substantial increase compared to the present level and would be on par with Ofcom's powers under the Broadcasting Act. However, we are not convinced that this level would form a strong enough barrier to deter the most persistent offenders who would very likely continue to disregard the guidelines.
- With regard to £250,000 being similar to Ofcom's powers under the Data Protection Act 1998, the Information Commissioner's Office rather than Ofcom has responsibility for the enforcement of this act. We understand that Ofcom has obligations under the Act to ensure that they sufficiently protect personal data under Part II to Schedule 1 of the Act (paragraph 2(1)(b)).
- An increase to £500,000 would be a very significant increase in comparison to the present level, forming a very strong deterrent to many persistent offenders of silent and abandoned calls and offenders would be likely to think very carefully about deciding to make such calls or investing in controls to prevent such calls.
- An increase to £1 million would be very substantial in comparison with the present penalty. Offenders would be likely to think very carefully before deciding to make silent and abandoned calls to consumers. However, it may still prove insufficient for some of the larger companies who are responsible for making most of the calls and may need to be increased again in the near future.
- This penalty level may appear to be disproportionate in comparison to the penalty powers of Phone Pay Plus (PPP) in relation to Premium Rate Services. However, as mentioned earlier some may consider the harm caused to consumers in the form of anxiety and distress to be similar if not possibly greater particularly in relation to calls made to the elderly and housebound.
- We agree with the 126 respondents who expressed a preference for the maximum penalty to be increased to £2 million as this level will ensure that potential offenders are fully deterred from making silent and abandoned calls.
- It would be inappropriate to compare different national regulatory regimes as they are based on different constitutional and legal environments and what may be appropriate in one country may not be so in another. Also, we are required to work within the existing legal framework rather than being able to rewrite existing legislation.
- Ofcom's maximum penalty powers include £50,000 for persistent misuse, £250,000 for breaches of the Phone Pay Plus (PPP) Code of Practice, £250,000 or 5% of relevant revenue for broadcasting offences and 10 % of turnover of the relevant business for

contraventions of conditions set out under Section 45 of the Communications Act 2003. Ofcom can also impose a penalty of up to 10% of total turnover for breaches of the Competition Act 1998 for which it is the concurrent enforcement authority. Therefore, considering this we believe that an increase to £2 million would not be disproportionate in comparison with Ofcom's existing powers in other areas.

- An increase to £2 million would be highly likely to be “future proof” in view of it being a very substantial financial deterrent removing the need for it to be reconsidered again for some considerable time.
- Tackling silent calls remains a priority in Ofcom's annual plan; and informal enforcement activity has recently been carried out in several cases behind the scenes, which indicates that Ofcom is very serious about clamping down on offenders. This type of effective activity often goes unnoticed as it is not normally published within the public domain. From October 2008 to date, Ofcom has taken informal action against at least an additional eleven companies, which has helped to substantially reduce the level of silent and abandoned calls complaints made to it against those companies.
- Ofcom has assured the Department that it would use the increased maximum penalty powers to ensure that offenders are deterred from, and sufficiently penalised for, making silent and abandoned calls and is committed to ensure that it will make more effective use of their increased penalty powers.
- Also, as mentioned earlier Ofcom will later this year review its persistent misuse guidelines within a consultation. Any refinements it proposes will focus on securing a further reduction in harm to consumers, which will help to ensure additional consumer protection.
- To date, Ofcom has taken formal enforcement action against nine companies under s128 of the Communications Act. Coupled with this, the focus of Ofcom's more recent enforcement activity has been informal enforcement action. Ofcom, with what it believes to be a low maximum penalty at its disposal, has considered this informal action to be a proportionate method of raising awareness and specifically targeting some of the alleged generators of silent and abandoned calls.
- We welcome this type of additional enforcement activity by Ofcom, which will benefit consumers and demonstrates their commitment and determination to eliminate or at least substantially reduce the number of silent and abandoned calls that are received. However, both Ofcom and Government are of the view that this activity by itself will not provide a solution to the problem of silent and abandoned calls unless the maximum penalty is increased to £2 million to form a strong and substantial deterrent to potential offenders.

CONCLUSION

126 of 137 respondents were in favour of increasing the maximum penalty to £2 million, although there was some concern about the need for Ofcom to take more effective enforcement action and provide better education of the rules to the call centre industry. Therefore, the Government has decided to proceed to implement the maximum penalty increase to £2 million after careful consideration of the responses, as on balance an increase in the maximum penalty is felt to be beneficial to better protect consumers from silent and abandoned calls.

The new higher maximum penalty will provide a much greater deterrence and enable Ofcom to sufficiently and more accurately punish those that ignore the rules in this area. If the penalty is

to be raised, Ofcom is committed to using the higher maximum penalty to substantially reduce the problem of silent calls under its ongoing and silent and abandoned calls enforcement programme http://www.ofcom.org.uk/consult/condocs/persistent_misuse/statement. Furthermore, Ofcom is undertaking work to deepen its understanding of silent and abandoned calls so it can ensure that the increase of the financial penalty is used in the most effective way possible. Ofcom proposes to review the current persistent misuses guidelines in a consultation later this year.

H: NEXT STEPS

The next step will involve a draft Statutory Instrument (SI) to increase the penalty to £2 million being laid in Parliament as soon as possible.

List of Respondents

Consumers (117)

Responded as individuals

Companies (11)

Call Centre Helper

DJN Solutions Ltd

HSBC

Golfchics

Jackson & Jackson

Santander Cards UK Ltd

Sytel Limited

TrueCall

Unisys Ltd

Wedlake Bell

Westcot Credit Services Ltd

Organisations (6)

CBI

Communications Consumer Panel

Consumer Focus

DMA

NHS Blood & Organ Donor Line

The UKcards Association

Telecom service providers (3)

BT

Cable & Wireless

TalkTalk Group

List of Consultation Questions

Question 1

What are your views about the maximum penalty remaining at the current level of £50,000?

Question 2

What are your views about the maximum penalty being increased to £250,000?

Question 3

What are your views about the maximum penalty being increased to £500,000?

Question 4

What are your views about the maximum penalty being increased to £1 million?

Question 5

What are your views about the maximum penalty being increased to £2 million, which has been requested by Ofcom?

Question

Do you have any comments concerning the impact assessment, which we may find helpful when considering this issue further?

Summary: Intervention & Options

Annex C

Department /Agency: Department for Business, Innovation and Skills	Title: Impact Assessment on raising the maximum penalty for persistent misuse of an electronic communications network or service
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Stage: Final	Version: Final	Date: 19 March 2010
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Related Publications: BIS (2009): Consultation on raising the maximum penalty for persistent misuse of an electronic communications network or service to tackle the problem of silent and abandoned calls to consumers, Digital Britain Final Report (June 2009) and Consumer White Paper (July 2009).

Available to view or download at: <http://www.bis.gov.uk>

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What is the problem under consideration? Why is government intervention necessary?

Silent and abandoned calls are made by automated calling systems (ACS), also known as predictive diallers, which offer efficiency savings. However, ACS can also be set to dial more numbers than available staff and when the call is answered it is automatically transferred to an available agent. If no agent is available, then the call is disconnected, which results in the consumer receiving an abandoned call and if no recorded information message is provided then this becomes a silent call. Such calls can cause fear and anxiety to vulnerable consumers especially the elderly: a loss of welfare which businesses do not take into account hence there is a negative externality. Since the current maximum penalty of £50,000 upon offenders is believed to be an inadequate deterrent a more effective deterrent is required to ensure industry compliance with the regulations.

What are the policy objectives and the intended effects?

The objective of the policy proposal is to minimise the number of silent and abandoned calls, which lead to anxiety and distress. To do that, full compliance with the current legislation needs to be incentivised by increasing the level of penalty that is applied to offending businesses. The current maximum penalty of £50,000 may be too low to act as an effective deterrent for companies where the productivity gains achievable by using predictive dialling technologies are very large.

What policy options have been considered? Please justify any preferred option.

A range of options were considered including whether the current maximum penalty of £50,000 should remain at its present level or be increased to either £250,000, £500,000, £1 million or £2 million. In October 2009 the Government consulted on these options and received 137 responses. In light of 126 responses requesting that the penalty be increased to £2 million, the Government after careful consideration has decided to raise the maximum penalty to £2 million.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? BIS will carry out a Post Implementation Review in 2013 with input from Ofcom, who monitors this issue on a day to day basis and takes appropriate enforcement action against persistent offenders.

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister:



Date: 22 MARCH 2010

Summary: Analysis & Evidence

Policy Option: 5

Description: Increasing the current maximum penalty from £50,000 to £2 million.

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups'
	One-off (Transition)	Yrs	
	£ 0		
	Average Annual Cost (excluding one-off)		
	£ 0		Total Cost (PV) £ 0
<p>Other key non-monetised costs by 'main affected groups' There will be no costs for a complaint business whilst there are likely to be transitional costs for non-compliant businesses to comply with regulations. Costs to non-compliant businesses are not included in the accounting of costs and benefits of regulations. Any resulting increase in penalties leading to increased costs for businesses that are fined would be a transfer.</p>			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'
	One-off	Yrs	
	£ 0		
	Average Annual Benefit (excluding one-off)		
	£ Non Quantifiable		Total Benefit (PV) £ Non Quantifiable
<p>Other key non-monetised benefits by 'main affected groups' There will be benefits to consumers from reduced silent and abandoned calls which would lead to reduced anxiety and nuisance. Potential benefits to compliant businesses in the call centre industry from the reputation of the industry being restored and a more level playing field. In addition, there would be a reduced number of complaints made about silent and abandoned calls and consequently reduced enforcement costs and costs of handling complaints. Also, there would be reduced costs to consumers for calling the organisation back to query the call. Any resulting increase in penalties leading to increased revenues for enforcement authorities would be a transfer.</p> <p>Also, a considerable number of respondents had resorted to trying various devices at their own expense in attempt to ensure that they were better protected from such calls and resented their need to do this. Implementation of this policy option will help to further deter silent calls and could ultimately help reduce the need for consumers to spend money on devices to combat the problem.</p>			

Key Assumptions/Sensitivities/Risks Costs from any policy option would only arise to non-compliant businesses. Benefits associated with the policy will only arise if levels of compliance were to increase as a result of higher penalties available to the regulator.

Price Base Year N/A	Time Period Years N/A	Net Benefit Range (NPV) £ Not Quantifiable	NET BENEFIT (NPV Best estimate) £ Not Quantifiable
What is the geographic coverage of the policy/option?			United Kingdom
On what date will the policy be implemented?			JUNE 2010
Which organisation(s) will enforce the policy?			Ofcom
What is the total annual cost of enforcement for these organisations?			no additional costs
Does enforcement comply with Hampton principles?			Yes
Will implementation go beyond minimum EU requirements?			No
What is the value of the proposed offsetting measure per year?			£0
What is the value of changes in greenhouse gas emissions?			£0
Will the proposal have a significant impact on competition?			No

Annual cost (£-£) per organisation (excluding one-off)	Micro N/A	Small N/A	Medium N/A	Large N/A
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)	
Increase of	£ 0	Decrease of	£ 0	Net Impact £ 0

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

Evidence Base (for summary sheets)

Strategic Overview

In October 2008, Ofcom asked BIS to increase the maximum penalty of £50,000 that it can impose upon offenders for persistent misuse of an electronic communications network or service, proposing that the new maximum should be £2 million. Ofcom's view was that such an increase would enable them to tackle more effectively the serious problem of silent and abandoned calls as the current maximum penalty was felt not to be a high enough to represent a real sanction or an effective deterrent to persistent offenders. Furthermore, Collette Bowe (Chairman Ofcom), during her appearance before the pre-appointment committee in January 2009, indicated that the penalty level needed to be re-considered as the issue was a concern to the elderly who were very disturbed by such calls.

The Government broadly agreed with Ofcom's overall assessment that an increase in the maximum penalty would be beneficial as it will ensure that consumers are better protected from silent and abandoned calls¹. Although Ofcom's research now appears to suggest that the general level of silent calls may be decreasing as well as perhaps the levels of annoyance that they cause, the Government believes that an increase in the maximum penalty level is justified on the whole especially in the light of recent consumer complaints and breaches by companies.

In October 2009, the Government launched a consultation on whether the penalty for persistent misuse should be increased in order to strengthen consumer protection in this area, thus taking forward actions from the Digital Britain Final Report, which was published in June 2009². The consultation closed on 25 January 2010, which resulted in 137 responses being received and 126 respondents requested that the penalty be increased to £2 million.

Background

Persistent misuse: Silent and abandoned calls

Regulations about persistent misuse cover misuse of electronic communications networks or services in general. For instance, misuse would include number scanning, misuse of call line identification facility, misuse for dishonest gain and misuse of allocated telephone numbers. However, the driving forces behind the proposed changes to the maximum penalty are silent and abandoned calls.

Silent and abandoned calls are usually made by companies which use a computerised calling device known as an automated calling system (ACS). This is a machine that dials the telephone number and automatically transfers connected calls to an available agent. If the call is answered by a consumer but an agent is not available, the call is dropped by the dialler. In this scenario, the consumer will receive an abandoned call and if an automatic message is not left a silent call will result. In some cases, the telephone number of the calling party is not available, which means the consumer cannot find out who made the call.

During the 1980s most outbound work in call centres was carried out by operators dialling each number manually. Towards the end of the 1980s predictive diallers started to be increasingly used in the UK, for example for debt collections work, and early in the 1990s, marketing call centres started to use them, thus leading to the emergence of the problem of silent and abandoned calls.

¹ When the penalty was previously increased from £5,000 to £50,000 in April 2006, Alun Michael, the then Minister, gave an undertaking to Parliament that the penalty would be reviewed in the future and, if necessary, increased.

² A similar commitment was also provided by the Government in the Consumer White Paper, which was published on 2 July 2009.

Regulatory framework

The Communications Act 2003 empowered Ofcom to take enforcement action against the “persistent misuse of an electronic communications network or electronic communications service”. The Act defines misuse as causing or likely to cause unnecessary annoyance, inconvenience or anxiety to another person but does not specifically define what activities constitute misuse. This gives Ofcom the flexibility to interpret and amend the definition without requiring new legislation being passed through parliament. However, in order to raise the maximum penalty that is imposed upon offenders, legislation needs to be amended.

In April 2006 the maximum penalty for persistent misuse was increased from £5,000 to £50,000 following a public consultation issued by the then Department of Trade and Industry (DTI). At the same time, Ofcom published a ‘Statement of policy on the persistent misuse of an electronic communications network or service’. This statement set out Ofcom’s approach to enforcing against persistent misuse, including setting out a range of procedures that call centres could adopt which, taken as a package, Ofcom considers as mitigating factors when it is deciding whether to take enforcement action in a particular case. These procedures included:

- Limiting abandoned calls to a rate not exceeding three per cent of all live calls made in any 24 hour period for each campaign.
- Playing a brief information message giving details about the call in the event that a call is answered before an agent is available.
- Maintaining a 72 hour period before a number receiving an abandoned call may be called again.
- Providing calling line identification (CLI) information on outbound calls, so that consumers can know the number that is calling.
- Maintaining a minimum 15 second ring time.

In September 2008 Ofcom published revised guidelines, which took into account a growing concern about false positives caused by answer machine detection (AMD) technology. This technology filters out calls answered by answer machines in order to increase agent time on live calls. When a call is answered by a consumer who is mistakenly registered as an answer machine, it will be dropped by the dialler, and so a silent call is produced.

The issue

Main groups affected

Residential consumers who are recipients of silent and abandoned calls are the main group that is directly affected by the policy proposal. These type of calls are typically less harmful to businesses than individual consumers as few businesses target other businesses with predictive dialling technologies, but also because it is probably less intrusive for individuals to receive such calls in their work place than in their homes or on personal mobile phones.

Other groups directly affected by the policy proposal are the direct marketing industry, industries such as the financial services industry which are heavy users of ACS and other industries that use automatic calling equipment (e.g. debt collections)³.

It is very difficult to estimate the value of the UK call centre industry since many of its units are incorporated within businesses in sectors across the whole economy. This includes businesses from virtually all economic sectors, ranging from financial firms to telecoms and utilities companies.

³ It is possible that callers from the debt collection industry do not leave messages because of justifiable privacy reasons in case there are other people in the household.

According to a report by the then DTI⁴, in 2003 the UK contact centre industry employed approximately 500,000 call agents. The sector experienced a growth of over 200 per cent in the period 1995-2003, with the number of agents employed in the period increasing by over 350,000.

A more recent study by the Future Foundation (2008) for the Direct Marketing Association⁵ estimated that in 2007 the direct marketing industry employed directly over 600,000 workers and generated over £75 billion in revenues.

Only those contact centres and users of ACS that are likely to generate silent and abandoned calls are potentially affected by the policy proposals. The call centre industry generates a large amount of activity in both inbound and outbound calls. Only outbound calls can possibly generate silent and abandoned calls. Some estimates indicate that the proportion of activity generated by outbound calls is approximately one third of all activity generated by call centres.

Moreover, only those who generate outbound calls and are currently non-compliant will be negatively affected by the increase in the maximum penalty. Such centres and companies will either have to incur costs by increasing their level of compliance or they will run the risk of being investigated by Ofcom with larger financial penalties imposed if found not to be complying. On the other hand, compliant companies could benefit from higher levels of compliance if consumers become less annoyed about receiving silent and abandoned calls.

The impact of silent and abandoned calls

Data on the number of silent calls is only available for a limited period of time. The results of several surveys suggest that the general level of silent calls may be decreasing as may be the levels of annoyance they cause⁶. In fact, the number of silent calls has fallen since 2006 (see Figure 1). The number of complaints about silent calls received by BT through its Nuisance Call Advisory Line also shows a downward trend (Figure 2).

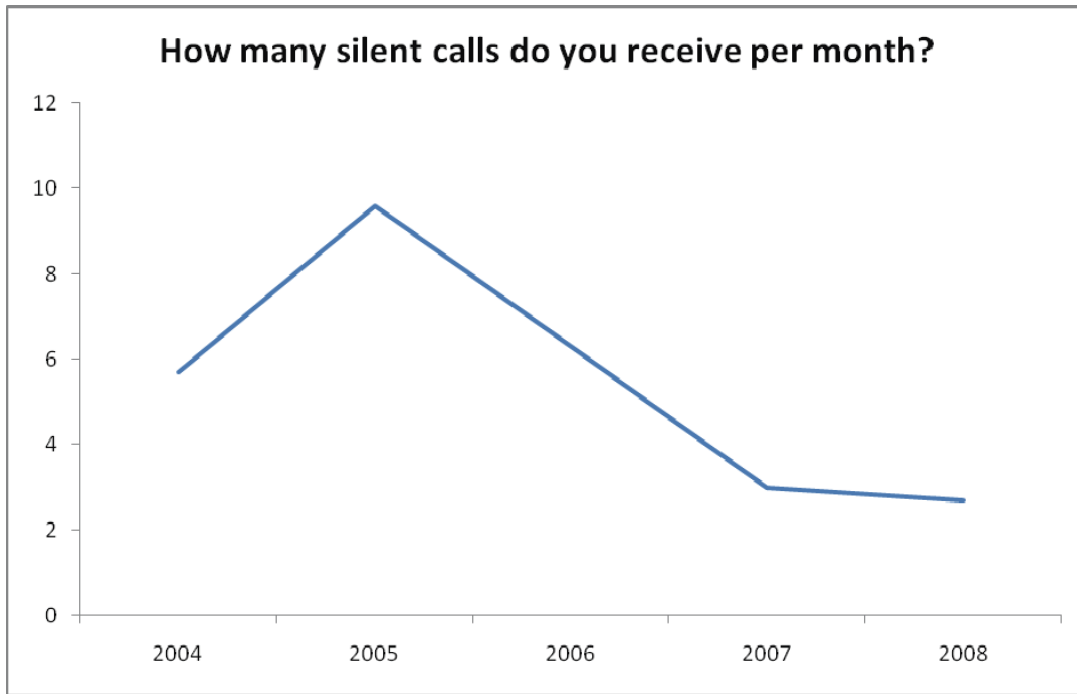
Further support is provided by Ofcom in its latest “The Consumer Experience – Research Report 09” publication, published in December 2009, which states that although there was a sharp increase in complaints between August and October 2008 peaking at 1,300 per month in October 2008, complaints have fallen since then to 400 per month in September 2009.

Figure 1. Average number of silent calls per month, UK

⁴ DTI (2004): The contact centre industry: a study; <http://www.berr.gov.uk/files/file32884.pdf>

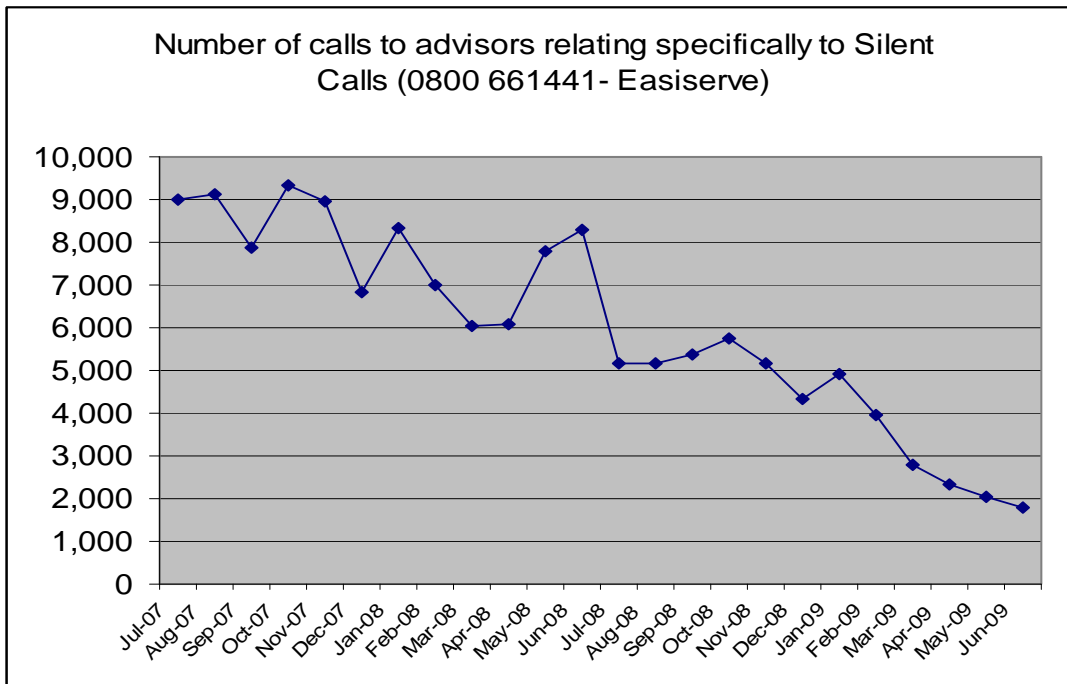
⁵ Direct Marketing Association (2008): Economic impact analysis 2008, the Direct Marketing industry http://www.apa.co.uk/uploads/apa_documents/economic-impact-2008-exec-summary.pdf

⁶ Available evidence only shows decreasing levels of silent calls rather than abandoned calls since the research has focused on silent rather than abandoned calls. It is nevertheless likely that a decrease in the number of silent calls occurs in parallel with a decrease in the number of abandoned calls.



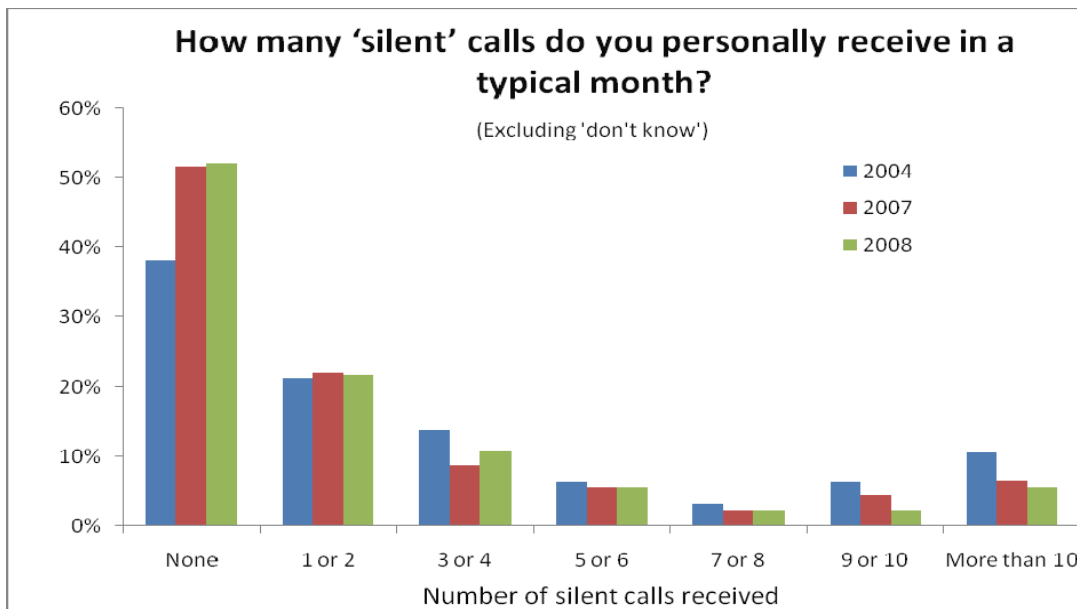
Source: TPS Report 2008. Data based on 2004-TNS; 2005-BMRB; 2007 & 2008- MORI

Figure 2. Number of complaints on silent calls received by BT



Source: Ofcom and BT

Figure 3. Number of silent calls received per month, %

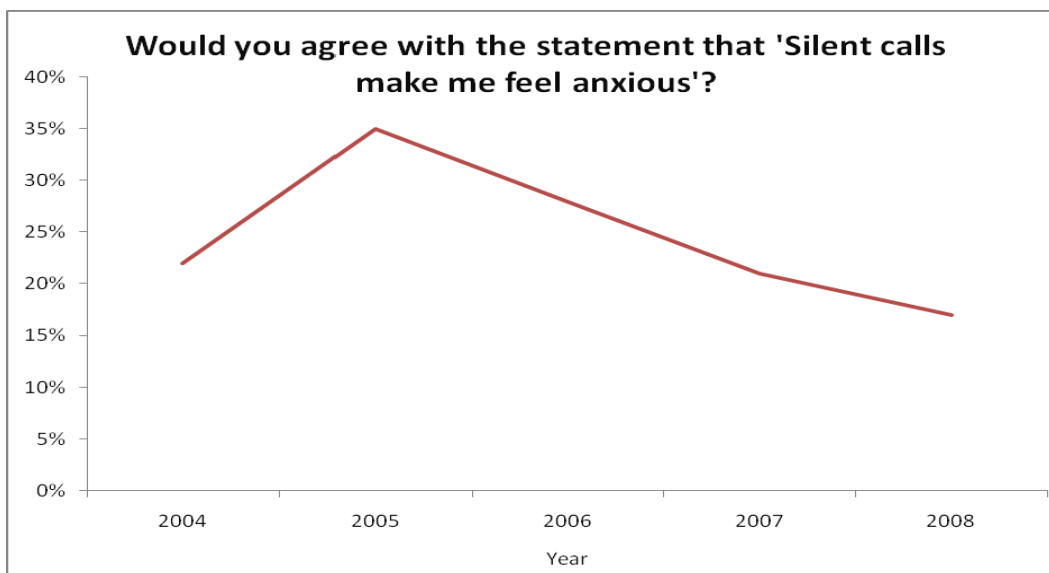


Source: TPS Report 2008. Data based on 2004-TNS; 2007 & 2008- MORI

The level of anxiety caused by silent calls also seems to have decreased in the last few years (Figure 4). TPS (2009)⁷ argues that the reduction in anxiety could be partly due to the fact that consumers can now obtain more information about the caller. Furthermore, Ofcom's 2006 guidelines require that calls originating from automatic dialling equipment must display a returnable and identifiable origin number. Increased compliance may have allowed consumers to call back and find out about the original source of the call, which typically is not malicious and which in turn may have reduced concern about silent calls, though it may not have reduced levels of annoyance.

Another reason for the decrease in public anxiety is the increased coverage of silent calls in the media, with greater public awareness of the real nature of silent calls helping many people to understand that most calls are caused by accidental or technological reasons rather than for malicious purposes. In addition, increased registration with Telephone Preference Service may also have been a factor that may explain the decrease.

Figure 4. Proportion of people who feel anxious when receiving a silent call



Source: TPS Report 2008. Data based on 2004-TNS; 2005-BMRB; 2007 & 2008- MORI

However, surveys carried out since the Brookmead Consulting Report (2005)⁸ have consistently shown that a relatively small proportion of the UK population receive the majority of silent calls, with most consumers not receiving silent calls at all. So even though the downward trend in silent calls is

⁷ TPS (2009): TPS report on unwelcome calls 2008; http://www.dma.org.uk/attachments/resources/4957_S4.pdf

⁸ Brookmead Consulting (2005): Silent calls research 2005; <http://www.brookmeadconsulting.co.uk/LinkClick.aspx?link=Brookmead%20report.pdf&tabid=360>

encouraging there is still a considerable proportion of people who receive an unacceptable level of such calls. For example, even though the number of people receiving no silent calls has increased from 35 per cent in 2004 to 52 per cent in 2008 the worst affected 5 per cent of the population receives approximately 35 per cent of all silent calls. This implies that the adverse impact of silent calls appear to disproportionately fall on some consumers.

The latest Consumer Concerns Omnibus Survey conducted by Ofcom in September 2009 suggests that over a quarter of adults (27 per cent) and nearly a third of adults aged over 65 years (31 per cent) said that they had personally received a silent call in the last 6 months

Furthermore, despite the apparent declining trend described above, there is still a significant number of people who feel anxiety as a consequence of receiving such calls (see Figure 3). This is particularly likely to have an impact on vulnerable consumers such as the elderly and those who live alone. A consumer survey carried out by TPS (2009)⁹ shows anecdotal cases in which some people who live alone suffer significant levels of anxiety. For example, some individuals worry about a next of kin being in trouble and not being able to speak. Some others fear that silent calls are caused by burglars checking whether or not they are at home.

Finally, even if anxiety levels have decreased, the levels of annoyance caused to consumers remains unacceptably high. Research carried out by Ofcom (Figure 5) shows that levels of inconvenience and concern remain very high. Additionally, Ofcom is concerned that greater use of AMD equipment and increasing numbers of marketing calls to mobiles may be an increased source of silent calls in the future.

Figure 5. Level of concern/inconvenience caused by silent calls

Level of concern/inconvenience caused by silent calls, Ofcom Research		
	June 2009	September 2009
Inconvenience	49% of surveyed adults were very inconvenienced.	46% of surveyed adults were very inconvenienced.
	28% of surveyed adults were fairly inconvenienced.	26% of surveyed adults were fairly inconvenienced.
Concern	36% of surveyed adults were very concerned	26% of surveyed adults were very concerned
	25% of surveyed adults were fairly concerned	29% of surveyed adults were fairly concerned

Source: Ofcom Consumer Concerns Omnibus Survey, CAPI Omnibus, TNS

Rationale for Government Intervention

Silent and abandoned calls are mostly generated as a by-product of businesses attempts to contact consumers. New and more advanced ACS¹⁰ and AMD¹¹ equipment allow increasing productivity (i.e. agents get more time directly connected to end consumers) but the use of this equipment has also increased the number of such calls received by consumers.

These technologies are based on assumptions as to how many of a series of telephone calls are answered and the moment a call is answered it is passed on to a live operator. If the operator is not ready, then a silent call will occur. This occurs because individual businesses which exploit the opportunity for increased efficiencies that these technologies provide do not take into account the costs of silent calls in terms of the annoyance and anxiety face by customers: this is a market failure known as a negative externality. However, businesses as a whole may face a negative economic effect (e.g. future earnings could be affected by consumer dissatisfaction with silent calls).

According to standard economic theory, in the presence of negative externalities the optimal solution would be to impose a penalty on those originating the silent and abandoned calls equal to the cost (anxiety, inconvenience) imposed to offenders. However, this solution presents some difficulties as:

- 1) Monetising the cost of anxiety and inconvenience is currently not possible due to a lack of available estimates. Studies using mainstream methodologies such as stated and revealed preference are not currently available for silent calls.

⁹ See footnote 7

¹⁰ Automated calling system

¹¹ Automated machine dialling

- 2) The policy objective is to eliminate completely such calls rather than internalising the externality effect caused by silent calls (which would suggest that a certain level of silent calls was still optimal).

As shown in Figure 4, the current regime of penalties may have contributed to a reduction of the negative effect caused by silent and abandoned calls. However, there are still significant levels of such calls and it would appear that for some companies it may still be profitable for them to generate such calls. This may be because the level of penalties does not a sufficient deterrent as the costs of non-compliance with Ofcom's regulations may be lower than the potential productivity gains achievable from non-compliance. If this is the case, an increase in the level of penalties could lead to a further decrease in the negative impact caused by silent and abandoned calls by making it more costly for offending companies to generate such calls.

Objectives

The objective of the policy proposals is to reduce the number of silent and abandoned calls and hence the associated anxiety and nuisance. To achieve that, full compliance with the current legislation is being targeted.

The current maximum penalty of £50,000 may be too low to act as a deterrent for companies where the productivity gains achievable by using predictive dialling technologies are very large¹².

Additionally, there have been a number of cases since 2007, which required Ofcom to fine Abbey National, Complete Credit Management, Space Kitchens, Bracken Bay Kitchens, Carphone Warehouse, Equidebt Ltd, Ultimate Credit Services and Toucan for breaches of its rules on silent and abandoned calls. The high profile case involving Barclaycard in 2008 resulted in Ofcom imposing the maximum penalty of £50,000 for breaching its rules on silent and abandoned calls, adding that without the limit of the statutory maximum, a larger financial penalty would have been imposed to reflect this misuse.

Increasing the maximum penalty available to Ofcom would strongly increase the incentives for non-compliant businesses to carry out the necessary changes in their business activity to reduce the level of silent and abandoned calls they produce, and will serve as a more effective financial punishment to offenders.

Options identified for consideration

Option 1: Business as usual (counterfactual) – Keep the maximum penalty applicable at £50,000.

Option 2: Raise the maximum penalty

The Government consulted on the following options for raising the maximum penalty:

1. Raise the maximum penalty to £250,000.
2. Raise the maximum penalty to £500,000.
3. Raise the maximum penalty to £1 million.
4. Raise the maximum penalty to £2 million.

The following options had also been considered but were discounted as they were not deemed to be feasible:

- A penalty cap expressed as a percentage of revenue or turnover would be an effective deterrent if the percentage was set at appropriate levels. Nevertheless, it has the disadvantage that it could not be applied to misuse perpetrated by those who do not have turnover (i.e. individuals).
- A hybrid mechanism whereby the maximum penalty is the greater of a percentage of turnover and an absolute monetary figure could also be an effective deterrent but it also has the disadvantage that it could not be applied to those who do not have a turnover (i.e. individuals).
- Issuing a penalty proportional to the length of the breach could potentially be an appropriate approach if the level of penalty that was set out was proportional to the size of the externality caused by the offenders. This could also be more proportionate than other options as it would penalise the

¹² See footnote 7

worst offenders with the largest penalties. However, there may be a degree of legal risk in such approach. For example, it would effectively allow Ofcom to set out an unlimited maximum amount of penalty. This would clash with the exclusive powers of the Secretary of State to establish a maximum penalty as established in the current legislative framework.

In light of the responses to the consultation, the Government has decided to implement the option of raising the maximum penalty to £2 million. Therefore, this impact assessment looks at the costs and benefits of raising the maximum penalty to £2 million.

Options analysis

Overview of Costs and Benefits

The key issue when considering the cost-benefit analysis of an increase in the maximum penalty is that the costs and benefits would only arise if there was less than 100 per cent compliance with existing Ofcom regulations on the persistent misuse of an electronic communications network or service). Therefore, the rise in the maximum penalty would only have an impact on non-compliant businesses, and any resulting increase in the penalties faced by businesses would be treated as a transfer with the costs to non-compliant businesses being fined being offset by increased revenues to the enforcement authorities.

In the box article overleaf, the possible impacts on non-compliant companies resulting from compliance with Ofcom's guidelines, assuming that in case of non-compliance there is a certainty that Ofcom will impose a penalty to the company, have been illustrated. It is important to note that companies will not only assess the costs of compliance against non-compliance, but also the risks of being investigated by Ofcom in the first place. If the risks of being caught are perceived to be low, then the risk adjusted penalty may be lower than the costs of compliance, incentivising companies to be non-compliant.

Box article: Analysis: What is the cost of complying for non-compliant businesses?

Businesses which decide whether or not to comply with regulation on financial grounds would find it rational not to comply if complying is cheaper for the business than not-complying (which is equal to the level of the penalty). For example, if the cost of complying is £150,000 and the maximum penalty for persistent misuse is £50,000 it may not be rational for a company to comply, given the likelihood of being investigated by Ofcom.

It is very difficult to determine the costs of achieving compliance for UK call centres. According to TPS (2009) there is not sufficient data available to provide a statistically significant estimate of these costs. In addition, the costs to businesses of complying depend on how compliant they currently are, and this information is not generally available. Hence, the figures presented below are only an illustration of the potential costs that might be incurred by non-compliant businesses rather than a precise estimate of their nature.

Even though costs from complying will vary for different businesses, TPS (2009) identified two main areas where costs can possibly be incurred:

1. Costs from adapting the dialler technology. These are one-off costs arising from the actions that must be carried out by businesses wanting to comply with Ofcom Guidelines. For example, this could include playing an information message when the answered call is not routed to an available agent, or limiting the abandoned call rate to 3%. This in turn depends on the level of compliance existing amongst businesses.

TPS (2009) determines that on average the cost of adapting the dialler mainly refers to limiting the abandoned call rate to 3%. For a business to comply with this there would be a one-off cost in the region of £132 per seat or agent. Using data from DTI (2004), the median size of a call centre in 2003 was 42 agents. Using this as a benchmark, we estimate that there is an average one-off cost per business of complying of approximately £5,000 (calculated as £132 x 42).

2. Costs from productivity losses from 3% abandoned rate: One of the main reasons why businesses may decide not to comply with the Ofcom Guidelines is that limiting the number of outbound calls, which could become silent and/or abandoned calls, has an impact on business productivity. For example, automatic predictive dialling systems increase the amount of time, for example per hour, that an operator speaks on the phone to end consumers.

An increase in the maximum penalty would lead to the following benefits:

- Potential benefits to consumers would include reduced consumer detriment by eliminating or at least reducing silent and abandoned calls. This would include for example a possible reduction in cost to consumers for calling back to query a call and also seeking out or listening to an organisation's information message. There also may be less incentive to purchase telephony equipment to avoid receiving silent and abandoned calls and the proposal may also benefit vulnerable consumers such as the elderly who may be distressed as a result of receiving silent and abandoned calls
- If the higher penalty is likely to lead to much higher compliance then compliant businesses in the direct marketing industry are likely to benefit with improvements in the industry's reputation and the opportunity to compete on a level playing field if all companies comply with legislations. Such businesses may have been experiencing increased search costs and lower productivity from their operators if, as a result of silent and abandoned calls, consumers have become more reticent and less receptive to marketing calls. Potential benefits include reduced consumer complaints and improved service, which may help to improve consumer loyalty, the reputation of the industry and a more sustainable business model with lower search costs that is compliant with the regulations. Also, there could be a possible reduction in operating costs including for example by handling fewer consumer complaints in customer service (there are approximately 3,000 complaints per month to BT's nuisance calls bureau).
- Reduced costs of enforcement activity as this may include a reduction in the number of cases being pursued in the longer term.

ii. Assessment of individual options

Option 1. Business as usual: Maximum penalty kept at £50,000

Our analysis suggests that for the median non-compliant business the maximum penalty currently applicable may not provide sufficient incentives for it to comply with Ofcom's Guidelines. Whereas the maximum penalty applicable to offenders is £50,000, we estimate that for a non-compliant business of 40 agents the annual costs from complying with Ofcom's Guidelines could be in the region of between

£180,000-300,000 per annum in productivity losses plus one-off costs of approximately £5,000 (see Table 1). These are clearly well above the current penalty levels, even before we take account of the fact that businesses will consider the likelihood of being investigated by Ofcom.

Current penalty levels are also unlikely to draw strong media attention (e.g. recent penalties imposed on Barclaycard did receive media attention but this was not as extensive as it would probably have been if a larger penalty had been imposed, hence limiting the impact that bad publicity could have as an additional deterrent for non-compliant businesses).

As a result, it is unlikely that many non-compliant businesses would be incentivised to comply with Ofcom's Guidelines by the current penalty regime and unlikely to implement the necessary changes to reduce the anxiety and nuisance caused by silent and abandoned calls.

Option 2. Raise the maximum penalty to £2 million

Raising the penalty to £2 million would result in a strong deterrent for most businesses. As the box article suggests, call centres with fewer than 400 workers would be better off complying with Ofcom's Guidelines rather than risking a potential penalty of £2 million. The compliance costs involved for the non-preferred options to comply are a relatively small proportion/ amount for a large company (profit margins). Therefore, it is still possible though that the largest businesses are not theoretically deterred by such penalty levels, even though the very negative publicity that would be followed in the media indicates that such levels would deter most if not all businesses from not following the Guidelines. Additionally, if such a penalty were to be imposed on a business it is very likely that it would draw a lot of media attention, with potential adverse impacts on its reputation.

Assessment of a lower upper limit of £250,000 suggested that larger non-compliant businesses may still not be incentivised to comply with Ofcom's Guidelines as their costs of complying could be larger than £250,000. For example, a business of 200 agents could theoretically incur productivity losses of between £900,000 to £1.5 million per annum as a result of implementing the necessary changes to their dialling systems and potentially additional one-off costs of nearly £60,000.

Hence, non-compliant large businesses may not be sufficiently incentivised to comply with Ofcom's Guidelines if penalty levels are at a maximum of £250,000, as the productivity gains they obtain are relatively larger. Additionally, businesses may discount the likelihood of being caught by Ofcom, which will reduce the costs of non-compliance.

Risks

While no impact is expected on compliant businesses, there could be costs to some consumers who like receiving marketing calls in their homes, although we anticipate these to be small in number. In fact, some consumers may draw on information received through such calls to obtain better deals in purchasing goods and services. As a result of larger penalties, some call centres may reduce the level of outbound calls they make, hence reducing the amount of information that consumers receive about goods and services through these calls. However, it is not clear how many consumers, if any, would be negatively affected in such a way.

Enforcement

Enforcement of the policy option will be in accordance with the principles of the Hampton code. Ofcom will remain as the institution responsible for enforcing against the persistent misuse of an electronic communications network or service, which includes a range of misuses including silent and abandoned calls. It is assumed that increasing the maximum penalty available will not increase Ofcom's costs as the enforcement authority.

Implementation

Implementation of the increased maximum penalty to £2 million will take place in view of 126 out of 137 responses, having expressed a preference for the maximum penalty to be increased to £2 million. A draft Statutory Instrument (SI) will be laid in Parliament as soon possible, which will be followed by debates taking place in both Houses and if approved, the increased maximum penalty will come into effect **10 days** after the SI is made and signed by the Minister.

Monitoring and Evaluation

Ofcom will monitor the effectiveness of the new increased maximum penalty of £2 million and is committed to using the increased maximum penalty to eradicate the problem under its ongoing and silent and abandoned calls enforcement programme. Also, Ofcom will undertake work to deepen their understanding of silent and abandoned calls, which will help with their enforcement activities.

Specific impact tests

Health

There may be positive health benefits as a result of reduced anxiety and stress suffered by consumers as a consequence of dealing with silent calls.

Other specific impact tests

Other specific impact tests have been considered including the Competition Assessment, Small Firms Impact Test, Legal Aid, Sustainable Development, Carbon Assessment, Other Environment, and Rural Proofing. After initial screening it has been deemed that no significant impact is anticipated in any case.

We have also considered the potential effects of these proposals on race, disability and gender equality. After initial screening as to the potential impact of this policy/regulation on race, disability and gender equality it has been decided that there will not be a major impact upon minority groups in terms of numbers affected or the seriousness of the likely impact, or both.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	No
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	No	No
Rural Proofing	No	No