



I present this response in the name of the **fair telecoms campaign**.

This response must be taken in addition to the response to the “call for inputs” for this on-going review, as published at [this link](#). That document highlights my lengthy and extensive involvement with the matter of Ofcom’s policy and the issue in general.

I look forward to making further contributions to the review process as it perhaps reaches the interim conclusion represented by the publication of a revised Statement of Policy.

I will offer some general comments and then seek to address the individual consultation questions.

## General Comments

- It is reassuring to note a sizable shift of position, at least in the declared objectives, following responses to the Call for Inputs. Whilst my response must, due to my role as a campaigner, continue to be critical, I am keen to acknowledge the fact that many of the points made have, in some cases after many repetitions, been accepted. **I want my gratitude for this to be recognised, before it may be thought to be absent, as I engage in further repetition of points made on many previous occasions.**
- This response comes alongside a response to the DCMS consultation on “*Requiring direct marketing callers to provide Calling Line Identification*” – published at [this link](#). My response to that consultation makes a number of references to Ofcom and the topic of this consultation. I will briefly repeat a key point here, whilst also wishing for all of the many relevant comments made in that response to be considered as part of my response to this consultation.

I have long promoted the idea that “persistent misuse” should be considered to cover the habitual practice of a caller failing to accurately and adequately identify themselves to the person who answers. In a voice telephone call, this can only be done by voice – it is nonsense to suggest that provision of CLI identifies the caller; that is not how voice telephone calls work anyway, regardless of the benefits that CLI can give to those who are to take advantage of it.

A totally “silent” call would obviously fit within this, whereas an “abandoned” call (supported by an Informative Message) would not. Although if an abandoned call were not supported by an Informative Message it would become a “Silent Call”, from the perspective of the recipient the nature of the two is quite different – albeit that they join with worthless marketing calls and untimely calls from friends and family in the general category of “unwanted” calls.

**We risk heading for the situation in which an unwarranted fascination with CLI will effectively deny anyone who wish their calls to be answered the opportunity of withholding CLI. This is a compelling reason for re-focussing on voice in a voice telephone call.**

Notwithstanding the comments about the relationship between “silent” and “abandoned” calls given below, and noting the misnomer of BT referring to calls with CLI withheld as “anonymous”, a voice telephone call in which the caller fails to give their name, or that of the person or organisation on whose behalf they are speaking, is “anonymous”. Unless the person called explicitly invites anonymous calls (e.g. Crimestoppers) it is “misuse” and, if practiced as a matter of habit, “persistent misuse”.





## Responses to Specific Consultation Questions

### **Q1: Should Ofcom's policy on persistent misuse continue to have as its main focus the tackling of silent and abandoned calls?**

It is questionable whether Ofcom should have a specific policy on "persistent misuse", as against a general policy on how it may use its powers to address cases that arise. Its duty is to act, using the powers under §§128-130 whenever a case of activity that may represent persistent misuse comes to its attention, having regard to the Statement published under the terms of §131. Use of the §128 Notification, §129 Enforcement Notification and §130 Penalty should be applied after judgement has been made on each, principally **in furtherance of the interests of citizens**.

The pseudo-regulatory nature of the current, recent and proposed versions of the Statement of Policy, represented by an excessive focus on "causes", indicates a misguided attempt to extend Ofcom's powers of regulation to cover the Outbound Call Centre industry. A much simpler and clearer approach to policy would nonetheless probably result in Ofcom's activities continuing to be focussed on the misuse practiced by this industry. That does not however demand that an equivalent amount of effort needs to be focussed on the formation of detailed policy.

### **Q2: Have we identified the main causes and effects of silent and abandoned calls, and are there any others we should take into account?**

As Ofcom has no power of regulation over those who make silent and abandoned calls, it has no need to look closely into potential causes, as it only has to consider actual activity and its (likely) effect. It is however comforting to note that Ofcom no longer regards use of AMD as making Silent Calls "necessary" because of the financial benefits it is alleged to deliver to consumers.

### **Q3: Do you agree with the other forms of misuse we propose to include in the policy?**

The definition of "Other forms of misuse" given at 3.38 in the draft revised Statement of Policy appears to be adequate. I do not agree with the practice of any form of misuse.

### **Q4: Is there any other evidence we should take into account in relation to the causes and effects of the other types of misuse identified (misuse of ACS, misuse of a CLI facility and breaches of the PECRs)?**

Some of the attempted stipulations regarding CLI appear to be unduly focussed. Paragraph 3.28 suggests that if a normal switchboard number or a residential number is habitually offered as CLI, then this may represent persistent misuse unless certain unusual specified conditions are met.

Many companies include marketing messages for callers waiting on hold to be connected to an agent or department, after calling their switchboard number, which may have been given as CLI. I do not always offer callers, who may be returning a call from my CLI, an explicit opportunity to opt-out from further calls or messages. There are some people who are fearful of giving their name when answering calls to their home, which may have been made using their CLI.

Returning to Q1, it seems that someone has unwanted marketing calls on the brain. The pool of evidence, and the subsequent considerations, should extend much wider than some chosen area of focus, no matter how significant. **It is one thing to have a focus on a well recognised issue of nuisance, but quite another for this focus to cause blindness to the wider world.**





**Q5: Do you have any comments on:**

- a) the evidence of consumer harm from the forms of persistent misuse we propose to include in the policy (and on silent and abandoned calls in particular); and**
- b) our approach to estimating the consumer harm from those forms of misuse?**

This pseudo-scientific approach to setting out the basis on which a determination about whether or not a Notification is justified in a particular case seems to imply that officers of Ofcom are incapable of making a decision that is not derived from a stated policy and some form of arithmetic calculation. I hope this does not fairly reflect their capacity for exercising judgement

One notes the number of Notifications issued each year and the considerable time lag between Ofcom becoming aware of the misuse and the publication of the Notification, in every case. It is therefore clear that long and careful consideration of very many factors is required before a determination to issue a §128 Notification can be made, despite the minimal amount of evidence required to provide “*reasonable grounds for believing*”. The likely unnecessary annoyance, inconvenience or anxiety caused by the activity must surely be only one of these factors.

There is no evidence of how long a determination about whether or not to issue a §129 Enforcement Notification takes, as this always results in a negative determination.

The imposition of a §130 Penalty demands consideration of many more factors, especially those governing the level of the Penalty. It is somewhat surprising to note that this determination is generally made relatively quickly, despite the much greater amount of evidence required.

One wonders why all of the factors, and the appropriate weightings, for each stage of the use of the powers have not been included in the draft Statement of Policy. **Surely this is taking the matter of publishing a policy, regarding an essentially discretionary series of decisions, too far.**

**Q6: Do you agree with our provisional view that we need to make changes to the 2010 policy in order to address the causes and effects of persistent misuse in a more effective way?**

**The policy needs to be changed in order to remove the expressed tolerance of the practice of hanging up in silence when a call is answered. It also needs to be simplified, by removing the improper pseudo-regulatory approach that was first adopted in 2005.**

It is for the voluntary regulators of the Call Centre industry in setting their codes, and others who may habitually practice misuse, to determine the steps they need to take to avoid ever hanging up in silence, or causing unnecessary annoyance, inconvenience or anxiety in any other way.

Without the power, or duty, to actually regulate use of telephone networks and services, it is for Ofcom to offer guidance as to what may be regarded as persistent misuse. It must do so without tying its hands in any way, beyond the need to have regard to its Statement of Policy. The more precise the Statement, the harder it is for Ofcom to intervene by using its powers.

That said, it is comforting to note that Ofcom’s considerations have caused it to remove some of the wholly improper tolerances previously found in its policy. The extent and the degree of any intervention must always be proportionate to the “offence”, and the capacity to intervene will always be influenced by resources. The principal duty to further the interests of citizens is not however discharged if these natural limitations are reflected in the way that policy is declared.



**Review of how we use our persistent misuse powers -  
Focus on silent and abandoned calls****Q7: Do our proposed changes target the right forms of persistent misuse and their causes and effects? If not, which forms, causes and effects should we target?**

In exercising discretionary powers, albeit having regard to a published policy, **it would be quite improper to suggest that there is any form of persistent misuse which could be practiced without fear of intervention – because it is not an “Ofcom target”.**

It must be very plain to those who are practicing persistent misuse, but have escaped receipt of a formal Notification, that Ofcom’s resources in this area are severely limited (notwithstanding an over-tolerant Statement of Policy). One may deploy additional resource to pursue a specific target, but to declare that some forms of misuse are not being targeted is to encourage their practice.

**Q8: Do you agree with our proposed definitions of (i) silent calls and (ii) abandoned calls?**

No.

**Anyone who makes a call and fails to identify themselves, accurately and adequately, by voice, when the call is answered, is misusing the telephone network.** (An exception may be made in cases where anonymous calls are explicitly invited.) Becoming engaged in a telephone conversation with an anonymous caller, especially over a matter of business, is unquestionably inconvenient, likely to be annoying and potentially a cause of anxiety. The experience, in all respects, is similar to that where the anonymous caller fails to engage in any conversation at all.

The causes of this effect will vary, but the effect is sufficiently distinct for this definition to warrant the term “Silent Call” – or “Anonymous Call”, if one prefers.

If practiced as a matter of habit (i.e. persistently) there can be no argument to support a claim that the harm is caused “necessarily”. This is persistent misuse.

**The “Abandoned Call”, which is not “Silent” or “Anonymous” because of the presentation of the Informative Message, is no different from any other worthless telephone call from an identified caller.** Being both clear and brief, it probably causes far less annoyance, inconvenience or anxiety than most other unwanted calls.

Whilst the “Abandoned Call” is an inevitable (necessary) consequence of the efficient use of ACS, there are very many unwanted calls that could not pass any reasonable test of “necessity”, on any scale. Whilst Ofcom is in no position to treat the habitual practice of making unnecessary unwanted calls as persistent misuse, per se, it chooses to set a limit (reflecting “necessity”) for the percentage of abandoned calls that will be treated as representing persistent misuse.

This is driven entirely by the “cause”, disregarding the fact that far more harmful effects are seen from other causes.

One is driven to despair on hearing reports of a company being fined by Ofcom for making “silent or abandoned calls”, when not one of the calls it made was Silent. The despair arises from knowing that if slightly fewer of the calls it made were not connected to an agent, but every unconnected call resulted in Silence, then this would not have been classed as “persistent misuse”. One also wonders if calls that were not abandoned caused greater inconvenience, annoyance and anxiety.

Hopefully we are moving on from some of this nonsense, but Ofcom’s improper love affair with dialler statistics has not yet been abandoned.



**Review of how we use our persistent misuse powers -  
Focus on silent and abandoned calls****Q9: Do you agree with the proposed policy on silent calls – that these should be Ofcom’s highest priority for enforcement action, however caused and in whatever number?**

Silent (and later, abandoned) calls have represented, almost exclusively, the cases of persistent misuse which have been identified by Ofcom, since the first use of the powers in 2005 – following up on a report initially made by myself. Given that this pattern continues, Ofcom should continue to react to cases that come to its attention according to proper priority. That priority must however be determined by the cases that come to its attention, rather than being set as a matter of policy, notwithstanding what may reasonably be expected or forecast.

Ofcom has no powers to impose general regulations in this area, the only power to impose an enforceable requirement being through the §129 Enforcement Notification. The issuing of a §128 Notification is not an “enforcement action”, as the terms of the §131 Statement of Policy bear only on Ofcom, in the exercise of its discretionary powers, not on any regulated group.

It is however of great relief to note the departure from a rigid qualification in terms of percentage and cause in the policy regarding how persistent misuse may be determined. Use of the phrase “*in whatever number*” perhaps overstates the point, given that a proper determination of persistence must be made before a Notification may be issued and all intervention must be proportionate.

**Q10: Do you agree with the proposed policy on abandoned calls:**

- a) that cases where a caller’s abandoned call rate is three per cent in any 24 hour period or more should represent a higher priority for enforcement and;**
- b) where we take enforcement action, we should take into account all abandoned calls a caller makes?**

No.

It is not for Ofcom to determine what is “necessary” for the effective use of ACS, in terms of abandoned calls. Where any habitual behaviour is found to cause significant inconvenience, annoyance or anxiety, Ofcom should be led primarily by the effect (and / or likely effect) in making a determination about whether or not intervention is necessary.

Getting into the detail of specifying detailed rules for the calculation of an ACR has no place in an area where Ofcom has no power to impose specific regulatory requirements in general.

“Enforcement action” can only be in respect of the terms of the §129 Enforcement Notification that is imposed, and must obviously take into account all breaches of the relevant terms.

**Q11: Do you have any information that would help to quantify further the potential costs and benefits of this proposal?**

Effective, if belated, action by Ofcom in response to the demand from parliament to “... *use your powers to eradicate the nuisance of Silent Calls*”, in 2006, alongside action by other regulators in respect of unsolicited direct marketing by telephone, may shortly contribute to a fundamental restructuring of the telemarketing industry. This would have considerable benefits and costs.

One would not suggest that further resource be wasted on quantifying every possible scenario to which any revised §131 Statement may contribute. Any analysis must however be qualified on account of the fact that a radical change may be coming, and this policy may be playing a part.



**Review of how we use our persistent misuse powers -  
Focus on silent and abandoned calls**

**Q12: Do you have any comments on our proposed changes to the policy in relation to persistent misuse arising from:**

**a) misuse of ACS;**

Insofar as use of predictive dialling (without an Informative Message to cover abandoned calls) and use of AMD are clearly identified as inevitable causes of Silent Calls, the steps that need to be taken to avoid persistent misuse should be totally clear. Ofcom does not hold any power to ban the use of AMD (other than in support of agent decisions), nor to compel use of the Informative Message to cover abandoned calls. It can however send a very clear message about how it intends to use its powers in any case of persistent misuse that comes to its attention.

I hope to be able to welcome and endorse such a message when a revised clear Statement of Policy is published and covered by the media.

The position on IVM remains a little foggy. Regulation 19 of the PECR clearly specifies that explicit consent (to this particular form of contact) is required where a call has a direct marketing purpose.

Ofcom is in no position to make any such stipulation as a general imperative requirement, through a definition of persistent misuse. In an environment where breaches of this provision of the PECR are commonplace, there is merit in those who use IVM, for purposes other than direct marketing, at least giving clear notice that this technique will be used, if not restricting its use to cases where explicit consent has been provided. There could be an opportunity for this point to be made in the general discussion of this point in the relevant section of the policy. For example, consent (or advance notification) could be given as a factor that may be considered when making a determination about whether the effect of any use of IVM represented persistent misuse.

**b) misuse of a CLI facility**

See the response to Q4 above, which represents also part of my response to this question.

It may be an issue of timing, but it is quite extraordinary that this (extended) Ofcom consultation does not refer to the DCMS proposal to change the PECR so as to require CLI in certain cases. It is even more extraordinary that the DCMS consultation on this proposal makes no reference to Ofcom's policy regarding misuse of CLI, as an example of persistent misuse!

My response to the DCMS consultation urges for that silly proposal, and wicked distraction from serious efforts to address the issue of nuisance calls, to be dropped. If however it were to be taken forward, then it is imperative that the measures to be taken against those who misuse CLI (as an enforced regulatory requirement) are clearly outlined and understood.

I believe that the reference to "controlled premium rate" in paragraph 3.27 of the draft statement should be amended to read "premium rate". There is no opportunity to declare a "Service Charge" within the content of CLI! (See [Clear Call Rates for Everyone.](#))

**c) breaches of the PECRs**

Bringing the issue of unsolicited direct marketing calls within the scope of the persistent misuse powers begs an interesting question. This is addressed at length overleaf.



### Review of how we use our persistent misuse powers - Focus on silent and abandoned calls

The **fair telecoms campaign** is firmly of the belief that the concept of “consent” to an “unsolicited” voice telephone call, for the purpose of direct marketing, must now be seen to be a complete nonsense (notwithstanding the complexity of the concept in the first place). The public reaction to the experience of marketing telephone calls over the 12 years that the present PECR has been in force, now makes the idea of someone knowingly and deliberately consenting to an unsolicited marketing call completely absurd, or at least highly irregular.

The PECR is however the implementation of an EU directive and, whilst such matters continue to bear on UK law, the nonsensical provision must remain in some form, even though many such calls (where some genuine and legitimate form of “consent” may be offered as a defence) undoubtedly cause unnecessary inconvenience, annoyance or anxiety.

PECR # 19 should have been drafted to prohibit Silent Calls (without explicit consent to such calls) when the purpose of the call is unsolicited direct marketing. It was however submitted to the Commission that, because the ICO would only use the content of the call as providing evidence of its purpose, Ofcom’s use of the persistent misuse powers would be effective in enforcing such a prohibition. It could therefore be argued that Ofcom’s persistent misuse policy is, at least in some respect, an implementation of the EU directive and must therefore fully respect its terms.

**I believe that, at least some modest, consideration should be given to the possibility of treating the habit of making direct marketing calls that are unwanted and cause unnecessary inconvenience, annoyance or anxiety as an example of persistent misuse, even though the caller may satisfy the ICO that it held valid “consent”, as represented by the terms of the PECR.** The fact that the person called had never intended the “consent” to be used in this way is of no concern to the ICO, but may be of relevance to a determination of persistent misuse. I could present a challenge – **if not, then why not!**

**Q13: Do you agree with the way we propose to assess the harm from cases of persistent misuse and prioritise enforcement action? In particular, have we identified the right factors to take into account and do you agree with the way we propose to apply them?**

The issuing of §128 Notifications is not “enforcement action”. The nature of the persistent misuse powers means that enforceable requirements can only be imposed in particular cases, using the §130 Enforcement Notification. Imposition of a financial penalty for a breach of the terms of an Enforcement Notification must be assessed according to the terms of that Notification and the extent of the breach, along with Ofcom’s extensive policy regarding the levels of penalty that may be imposed.

**Q14: Do you have any further comments or views on other aspects of this consultation or the proposed policy set out in Annex 5 which are not covered above?**

It is interesting to note (I had missed this previously) that users of numbers may be subject to a Notification of Persistent Misuse for a breach of the terms of National Numbering Plan, in addition to the obligation of compliance which is imposed on providers through General Conditions.

This raises the question of how EE (both a user and provider) is permitted to use 07 mobile numbers for its consumer call centres, without being subject to a Notification of Persistent Misuse. It has wriggled through a loophole in the terms of the Consumer Contract Regulations 2013, which, exceptionally, permit use of mobile numbers for consumer contact with small businesses.

