EXPLANATORY MEMORANDUM TO

THE COMMUNICATIONS ACT 2003 (MAXIMUM PENALTY FOR PERSISTENT MISUSE OF ELECTRONIC COMMUNICATIONS NETWORK OR SERVICE) ORDER 2006

2006 No. 1032

1. This explanatory memorandum has been prepared by the Department of Trade and Industry and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

This Order amends the Communications Act 2003 ("the Act") in the light of a request from the Office of Communications ("Ofcom") relating to its powers regarding those who persistently misuse electronic communications networks or electronic communications services. It raises the maximum penalty for persistent misuse from £5,000 to £50,000. The maximum penalty will also be capable of applying to those who contravene a requirement of an enforcement notification given in respect of notified misuse. A person misuses an electronic communications network or service if the effect or likely effect of his use of it is to cause another unnecessarily to suffer annoyance, inconvenience or anxiety, or he uses the network or service to engage in conduct which has or is likely to have the effect of causing another person such annoyance, inconvenience or anxiety. Persistent misuse includes misuse repeated on a sufficient number of occasions for it to be clear that it represents a pattern of behaviour or practice or recklessness as to whether persons suffer annoyance, inconvenience or anxiety.

3. Matters of special interest to the JCSI

None.

4. Legislative background

4.1 This Order is to be made in exercise of the power conferred by section 130(9) of the Act. It is subject to the affirmative resolution procedure. Ofcom has the power to impose a financial penalty under section 130 of the Act if a notified misuser has persistently misused an electronic communications network or service, or has contravened a requirement of an enforcement notification (for stopping persistent misuse) given under section 129 of the Act. Section 130(4) of the Act provides that the maximum penalty that can be imposed in respect of such misuse is £5,000. Section 130(9) of the Act contains an order-making power to amend this maximum penalty. We are invoking this power to raise the maximum penalty to £50,000. The penalty will not apply to misuse or contraventions which occurred prior to the commencement of the Order.

5. Extent

The Order applies to the United Kingdom.

6. European Convention on Human Rights

The Minister for Industry and the Regions, Mr Alun Michael, has made the following statement regarding Human Rights:

"In my view the provisions of The Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2006 are compatible with the Convention rights".

7. Policy Background

7.1 Ofcom requested that the DTI consider raising the maximum penalty from £5,000 to £50,000, which could be levied by them on those that persistently misuse electronic communications networks and services, in view of mounting public and parliamentary concern about silent calls. Silent calls are often made by direct marketing companies and other organisations, which use a computerised calling device known as a predictive dialler, power dialler or automatic calling equipment. This equipment is essentially a machine that dials the telephone number and automatically transfers the call to an available sales agent. If a sales agent is not available the call is not picked up and the consumer will receive a silent call.

7.2 Ofcom considered that the current maximum penalty (£5,000) was not sufficient to tackle the level of consumer harm and worry that silent calls caused and that it was not a real sanction or deterrent. Therefore, Ofcom proposed that the maximum penalty should be increased to £50,000.

7.3 The Government held a three-month public consultation on the proposal. This ran from 31 October 2005 to 24 January 2006 and was e-mailed to 22 organisations and made available on the Department's website. There were a total of 6 responses, nearly all of which were supportive of increasing the maximum penalty. Concern was raised that it would have no impact unless Ofcom takes enforcement action against companies, which are persistently making nuisance silent calls. We believe that it will have an impact, as we understand that Ofcom is committed to taking appropriate enforcement action and that Ofcom will monitor and evaluate on a regular basis how the increased penalty is working.

Concern was also expressed that the proposed maximum penalty of £50,000 was lower than the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS) maximum penalty of £250,000, which can be imposed on those that breach the ICSTIS Code on premium rate services .The maximum penalty of £50,000 was proposed because under the Act, the scale of penalties is most severe

where there is a major abuse of the market or incitement to criminal action, followed by those actions which defraud or grossly mislead the public. At the lower end are penalties against actions which are harmful and offensive to the public but which do not involve direct financial harm. Under the broadcasting provisions of the Act, typical fines for serious harm and offence, which are compounded by wilful and reckless disregard of regulation, are of the order of £50,000.

The Order is necessary to give effect in UK law to the increase in the maximum penalty to £50,000.

8. Impact

8.1 A partial RIA for this Order is attached to this Memorandum and is available from Ihtsham Hussain at the DTI, details below.

8.2 The impact on consumers and business who abide by Ofcom's regulation is neutral. The impact on those persistently misusing networks and services, for example in making nuisance silent calls, will be that increased penalties may be levied by Ofcom. It may also be imposed on those who contravene a requirement of an enforcement notification given in respect of the notified misuse.

9. Contact

Ihtsham Hussain at the Department of Trade and Industry, telephone 0207 215 2969 or e-mail: ihtsham.Hussain@dti.gsi.gov.uk can answer any queries regarding this Order.

Regulatory Impact Assessment – Key Analysis

1. **Title of proposal**

CONSULTATION BY THE DEPARTMENT OF TRADE AND INDUSTRY ON A DRAFT ORDER RAISING THE MAXIMUM PENALTY FOR PERSISTENT MISUSE OF ELECTRONIC COMMUNICATIONS NETWORKS OR ELECTRONIC COMMUNICATIONS SERVICES TO TACKLE SILENT CALLS

2. **Purpose and intended effect**

- Objective -– To reduce consumer detriment from silent calls, by increasing the maximum fine.

- Background – Silent calls is a high profile issue with media interest and MPs and other interested groups are calling for the Government to take appropriate action to tackle this problem. The volume of silent calls appears to be growing in parallel with the industry's adoption of dialler technology over the last two to three years. The level of consumer harm and worry has grown significantly. Silent calls are usually made by direct marketing companies, which use a computerised calling device known as a predictive dialler, power dialler or automatic calling equipment. This is equipment is essentially a machine that dials the telephone number and automatically transfers the call to an available sales agent. If a sales agent is not available the call is not picked up and the consumer will receive a silent call. Often the number of the calling party is not available, which means the consumer cannot find out who made the call.

- Rationale for government intervention – Protection for consumers who are being plagued by silent calls. Silent calls are becoming more frequent and unless companies are deterred by a heavier fine the problem will continue to remain unresolved and cause a nuisance to consumers. Repeated and wilful breaches of the persistent misuse provisions under the Communications Act 2003 are a major concern to Ofcom and the proposed maximum penalty of £50,000 would be a proportionate sanction and deterrent for persistent misuse of predictive dialler technology by the call centre industry. A maximum financial penalty of £50,000 would send an important signal to operators of call centres to take reasonable care to prevent the harm and distress that silent calls cause.

- BT currently handles about 160,000 complaints a month about nuisance calls. Across all operators the nuisance call bureaux handle about 5,000 escalated complaints per month and Ofcom currently receives about 150 complaints a month. According to a survey published last month by Brookmead Consulting that was commissioned by the Direct Marketing Association, which is the trade body for the direct marketing industry, they discovered that 22% of the public felt anxious when they received a silent call and of those 41% were females aged between 16-24 years old. Also 37% felt they were unacceptably inconvienced by silent calls. On average about 6 silent calls per month were made to every consumer and some consumers received 2-3 silent calls per day.

3. **Consultation**

- Within Government- discussions with Ofcom and Direct Marketing Association at official level about the problem of silent calls and how best to tackle it.

- Public consultation – Extensive public consultation by DTI throughout 2005/06. DTI consulted from 31 October to 24 January. Following the consultation no major changes were made to the Order. The majority of responses did not express concern about any costs to legitimate business.

4. **Option – Maximum Fine:**

1. Raise maximum penalty to £50,000.

2. Raise the maximum penalty to less than £50,000, which will have some deterrent effect, but will not completely provide a solution to silent calls, as some companies will probably continue to make nuisance silent calls.

3. Do nothing and keep the maximum fine to £5,000.

5. **Costs and benefits**

- **Sectors and groups affected** – Direct marketing industry and in particular specifically those companies, which make nuisance silent calls to consumers without any regard for the anxiety that these calls cause. Other industries that use automatic calling equipment, e.g. financial services. Consumers are very concerned about this issue and have called for the Government to take appropriate and decisive action as they feel they should not have to suffer from the nuisance of such calls.

- **Benefits –** Consumers will suffer less detriment and anxiety. The direct marketing industry will be cleaned up and its good name restored and made more respectable, which will enable companies to concentrate on doing business without causing anxiety or distress to consumers.

- **Costs –** There will be no additional costs to either compliant business or to Ofcom as the enforcement authority. Initial assessment has shown that this proposal will have no impact on businesses that do not make silent calls and will only

affect those that continue to make silent calls. Therefore, this proposal will only effect a very small minority of direct marketing companies who make nuisance silent calls.

6. **Small Firms Impact Test -** We have discussed our proposal with interested parties and have identified no impact on compliant SMEs.
   Non-compliant SMEs will incur no disproportionate costs, which are also borne out by Ofcom's detailed analysis.

7. **Competition assessment –**There will be no adverse impact on competition. Benefits to companies will be that companies which make silent calls will be deterred substantially to leave the field clear for legitimate marketing companies who do not make silent calls.

8. **Enforcement, sanctions and monitoring**

Ofcom decides when and where to issue a penalty against anyone who persistently misuses networks or services including making silent calls. Ofcom reviews breaches on a case-by-case basis, based on level of consumer detriment and the seriousness of the breach. All adjudications are published on the website and initial decisions can be appealed against. Ofcom will continue to monitor the level of complaints about silent calls to see how the new penalty is working in practice.

Declaration and publication

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs

Signed *Alun Michael*

Date 2nd March 2006

Alun Michael, Minister for Industry and the Regions, Department of Trade and Industry

Contact point for enquiries and comments:
Communications and Content Industries
Business Relations 2
Department of Trade and Industry
Bay 244

151 Buckingham Palace Road
London
SW1W 9SS.

Tel:0207 215 2969