EXPLANATORY MEMORANDUM TO

THE COMMUNICATIONS ACT 2003 (MAXIMUM PENALTY FOR PERSISTENT MISUSE OF NETWORK OR SERVICE) ORDER 2010

2010 No. 2291

1. This explanatory memorandum has been prepared by the Department for Business Innovation & Skills (BIS) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

This Order amends the Communications Act 2003 ("the Act") by raising the maximum penalty for persistent misuse, which Ofcom can impose upon offenders, from £50,000 to £2 million. The increased penalty is designed to act as a stronger deterrent to potential offenders of persistent misuse, which includes a range of behaviours including silent and abandoned calls.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The original penalty was £5,000 and was increased by statutory instrument in 2006 to £50,000 (S.I.2006/1032). 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 £50,000. 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 £2 million.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Minister for Digital Britain, Mr Stephen Timms, 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 2010 are compatible with the Convention rights.

7. Policy background

Silent and abandoned calls are usually made to consumers by companies using automated calling systems (ACS), also known as predictive diallers. These are essentially machines that automatically dial telephone numbers that can be set to only dial a number when an agent is available to take the call, however, ACS can also be set to dial more numbers than available staff. If the called party answers the call, then the dialler automatically transfers the call to an available agent. If no agent is available, then the call is disconnected, which results in the consumer receiving an abandoned call. If no recorded information message is played then the call will be silent.

The current framework for regulating silent and abandoned calls is set out in the Communications Act 2003 and Ofcom has responsibly for enforcement issues. In September 2008 Ofcom requested BIS to consider raising the maximum penalty from £50,000 to £2 million as it was felt to be an ineffective deterrent to persistent offenders. Ofcom considered a very serious case where an extremely large number of silent calls were made over an 8 month period and they were restricted in only being able to issue a maximum penalty of £50,000. Ofcom contrasted this with their broadcasting powers in relation to the phone-in scandals where for example, in 2007 Ofcom imposed a fine of £2 million as a result of the GMTV phone-in scandal.

When the penalty was previously increased in April 2006 from £5,000 to £50,000, Alun Michael, the then Minister, gave an undertaking to the House that the penalty would be reviewed in the future and if necessary increased. 64 MPs signed an Early Day Motion (EDM) on 25 March 2009, which amongst other issues on silent calls urged the Government to enforce Ofcom's regulations more strictly. Also, 28 MPs issued individual press releases to make known their concern about the problem of silent calls. On 16 June 2009 the Government published its Digital Britain Report, which provided actions and recommendations including a commitment to undertake a consultation on whether the penalty for persistent misuse should be increased. Also, a similar commitment was provided by the Government in the Consumer White Paper a better deal for consumers, which was published on 2 July.

The Government felt on balance that an increase would be beneficial for consumers, despite Ofcom's research seeming to indicate that the general level of silent calls may be decreasing, and agreed to hold a three-month public consultation. The consultation ran from 26 October 2009 to 25 January 2010 and 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.

8. Consultation outcome

The Government, after careful consideration of 137 responses, decided to proceed to increase the maximum penalty from £50,000 to £2 million to broadly reflect the views of 126 respondents who felt that the maximum penalty should be increased to this level to deter persistent offenders. Most respondents felt that the current penalty failed to reflect the harm that was caused to consumers by silent and abandoned calls and this feeling was particularly strong where respondents had received calls and tried various methods to combat the problem.

Four respondents felt that the existing penalty level was sufficient to deal with the problem and some felt that Ofcom needed to be more effective in enforcing the existing

regulations. Seven respondents felt that an increase to £250,000, £500,000 or £1 million would be appropriate in relation to the harm that was caused by silent and abandoned calls. 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.

There was some concern about the need for Ofcom to ensure that they made full use of their existing penalty powers before being granted an increase. 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 and 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. More detailed information is available in the Government Response document.

9. Guidance

Ofcom provides detailed guidance for companies to enable them to remain within the persistent misuse guidelines, which are set out at www.ofcom.gov.uk and works closely with industry to ensure awareness and has an ongoing educational program for users of dialling equipment.

10. Impact

There will be no impact or additional costs to compliant business from this penalty increase and the proposal will only have an impact on businesses that do not currently comply with the existing persistent misuse guidelines.

An impact Assessment for this Order is attached at Annex A.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 Most small business are not the main source of silent and abandoned calls, which in many cases involve large high profile business and therefore we do not expect them to be greatly affected by the increase to £2 million of the maximum penalty. Also, before imposing any penalty Ofcom carefully takes into account a range of factors including for example the size of the business.

12. Monitoring & review

Ofcom will monitor and review on a regular and constant basis how the increased maximum penalty of £2 million is working as a deterrent and will continue to provide education and awareness of their requirements for companies in relation to persistent misuse. In addition, BIS will carry out a Post Implementation Review in 2013 with input from Ofcom, who will monitor this issue on a day to day basis and take appropriate enforcement action against persistent offenders.

13. Contact

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Summary: Intervention & Options

Department /Agency:	Title:	
Department for Business, Innovation and Skills	**Impact Assessment on raising the maximum penalty for persistent misuse of an electronic communications network or service**	
Stage: Final	**Version:** Final	**Date: 19** March 2010

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**

Contact for enquiries: Stephen Fernando **Telephone:** 020 7215 6320

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:

Stephen Timms

..... Date: 22nd 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**

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-complaint businesses to comply with regulations. Costs to non-complaint 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.

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	**Total Benefit** (PV) **£ Non Quantifiable**

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.

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.

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 (ChairmanOfcom), 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 calls[1]. 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 2009[2]. 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.

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[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.

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.

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.

According to a report by the then DTI[4], 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 Association[5] 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.

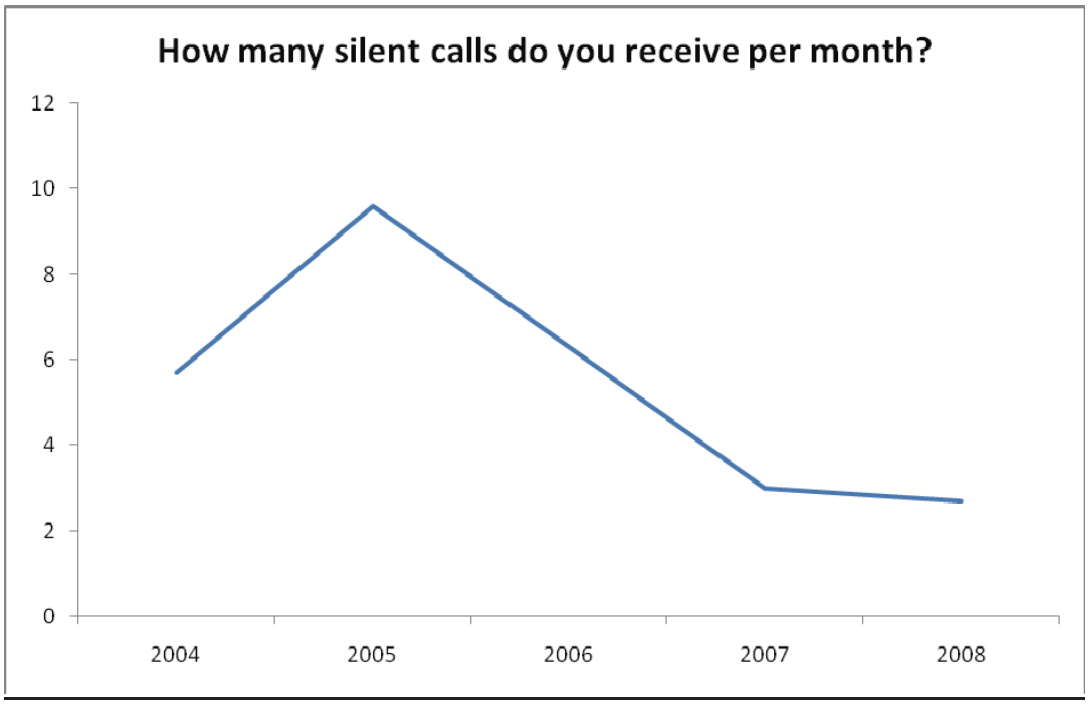
The impact of silent and abandoned calls

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 cause[6]. 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.

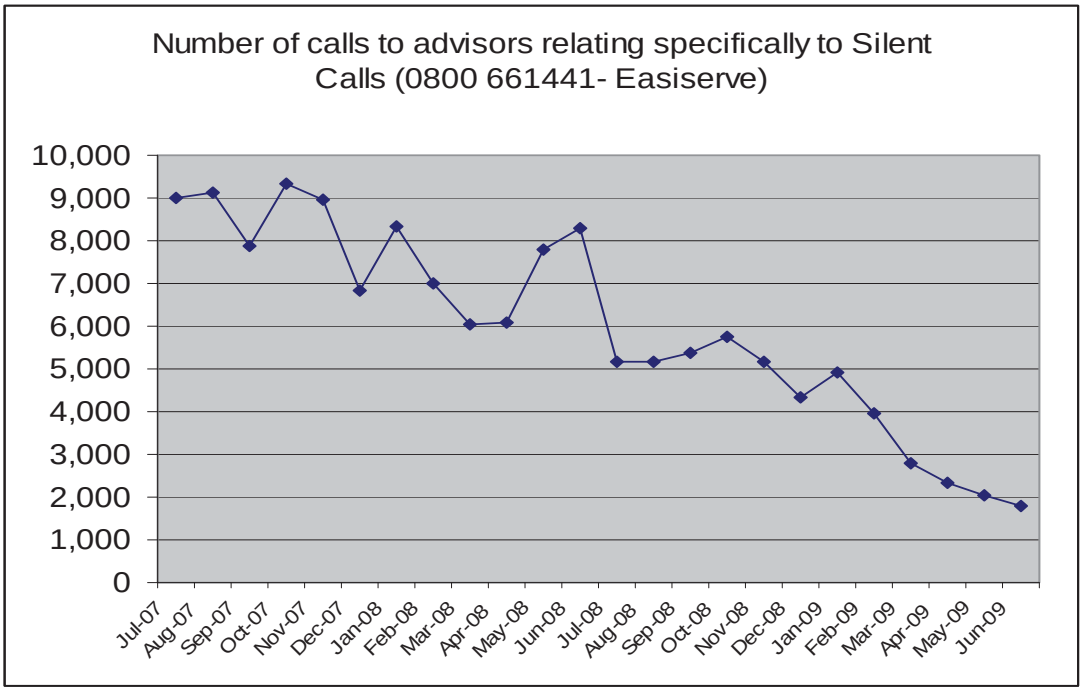
Figure 1. Average number of silent calls per month, UK

[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.
[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.



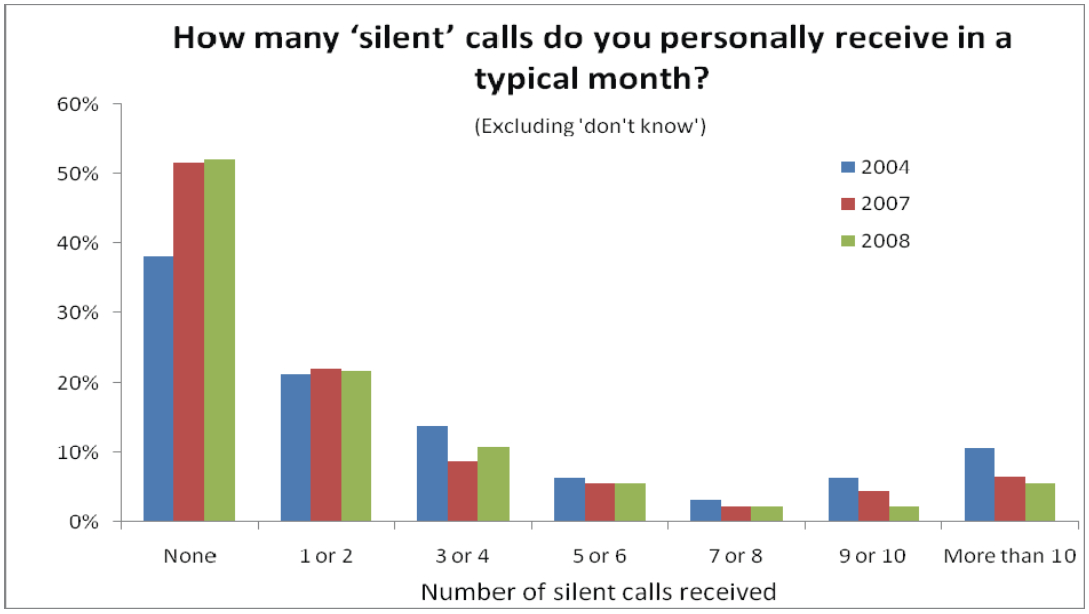
Source: TPS Report 2008. Data based on 2004-TNS; 2005-BMRB; 2007 & 2008-MORI

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



Source: Ofcom and BT

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

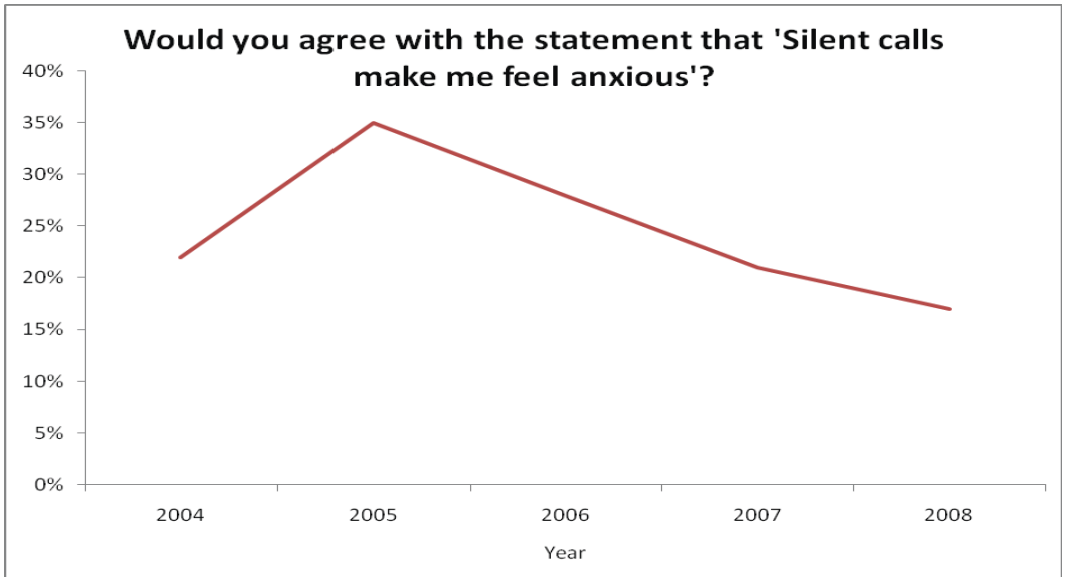


Source: TPS Report 2008. Data based on 2004-TNS; 2007 & 2008- MORI

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



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

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 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 ACS[10] and AMD[11] equipment allow increasing productivity (i.e. agents get more time directly connected to

[8] Brookmead Consulting (2005): Silent calls research 2005; http://www.brookmeadconsulting.co.uk/LinkClick.aspx?link=Brookmead%20report.pdf&tabid=360
[9] See footnote 7
[10] Automated calling system
[11] Automated machine dialling

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.
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 large[12].

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

[12] See footnote 7

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 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

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	***Results in Evidence Base?***	***Results annexed?***
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