



**RAISING THE MAXIMUM PENALTY
FOR PERSISTENT MISUSE OF
ELECTRONIC COMMUNICATIONS
NETWORKS OR ELECTRONIC
COMMUNICATIONS SERVICES TO
TACKLE SILENT CALLS**

A CONSULTATION DOCUMENT

31 OCTOBER 2005



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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

Executive Summary

The Department has been requested by the Office of Communications (“Ofcom”) to increase the maximum penalty, from £5,000 to £50,000, for persistent misuse of the telecommunications network to tackle the growing problem of silent calls more effectively. Ofcom and the DTI believe that a significant increase in fine is needed to stop companies making silent calls to consumers.

Explanation of the wider context for the consultation and what it seeks to achieve

Throughout this year and 2004, increasing numbers of consumers have been concerned about the receipt of silent calls and consequently MPs have been inundated with complaints from constituents. Therefore there is a strong demand by MPs and other interested groups for the Government to take decisive and appropriate action to tackle this growing nuisance.

A survey published in June 2005 by Brookmead Consulting, commissioned by the Direct Marketing Association, which is the trade body for the direct marketing industry, states 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 inconvenienced 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. Of those registered with the Telephone Preference Service Scheme (“TPS”), which provides protection to consumers from unsolicited direct marketing calls, 64% were unacceptably inconvenienced and 56% were made anxious by silent calls. Ministers and MPs have expressed concern about the impact on elderly and vulnerable people.

Silent calls are often made by direct marketing companies, 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. Often the number of the calling party is not available, which means the consumer cannot find out who made the call. Silent calls may also be generated by the financial services sector and companies engaged in number scanning activities, which dial a

sequence of telephone numbers to find out which ones are in service, the results of which are used to develop a “clean list” of numbers which have commercial value.

For a small charge most telecom service providers provide services such as Anonymous Call Rejection (“ACR”), which blocks incoming calls that withhold their number, and Silent Call Guard (“SCG”), which is a free service that may also help to reduce the amount of silent calls. However, ACR causes other problems because it blocks all incoming calls that withhold their number and therefore also prevents legitimate calls from being received from members of the family, from the local authority, from a doctor’s surgery and other business calls that a subscriber would wish to receive. These services therefore rarely prove to be useful or appropriate for consumers.

The Direct Marketing Association amended their Code of Practice in June to require that call line identification (“CLI”) be provided for all calls. This enables a subscriber to find out the number of the caller that has made the silent call by dialling 1471 and took effect on 1 September. This initiative by itself does not provide a full solution to the initial problem of a silent call being generated, but is a welcome development.

The current framework for regulating persistent misuse of the telecommunications network is dealt with in the Communications Act 2003 (“the Act”). The Act provides powers to Ofcom to take action against persons who persistently misuse networks or services in a way that causes unnecessary annoyance, inconvenience or anxiety, but which falls short of a criminal offence, and section 130(4) of the Act provides for a maximum penalty of £5,000. Section 130(9) of the Act includes an Order making power to enable the Secretary of State to increase the maximum penalty by affirmative Order. Ofcom published on 13 May 2004 a statement of policy on the persistent misuse of an electronic communications network or electronic communications service. Further information about this issue is available from: <http://www.ofcom.org.uk> (consumer guide/misuse statement).

The statement includes examples of behaviour, which may constitute persistent misuse. Ofcom successfully pursued two cases on 30 April 2004 against companies, which were found to have generated unacceptably high levels of silent calls. Ofcom has recently initiated a second investigation into one of the companies to ascertain whether the company is complying with the undertakings that were given following their initial action. Further information about these cases is available from: <http://www.ofcom.org.uk> (bulletins). In addition, Ofcom launched an investigation in June 2005 into a further seven companies, who were suspected of making silent calls and further details about the results of their investigation is available from: <http://www.ofcom.org.uk>.

The Government has been asked by Ofcom to increase the maximum penalty from £5,000 to £50,000 as Ofcom consider that the current maximum penalty is not a high enough figure to represent a real sanction or an effective deterrent against those companies that persistently misuse networks or services including making silent calls.

When the £5,000 maximum fine was set in 2003 there was not a widespread problem of silent calls by marketing companies. Indeed, the main target of the fine was to tackle calls from individuals such as problem neighbours, loutish behaviour, pranksters and those from hunting/anti-hunt and similar protest groups and their members. For such cases, a penalty of £5,000 was the maximum amount for a “standard penalty” offence under criminal law and applied to criminal damage, and to various other comparable offences. Most interested groups felt that the amount was acceptable and adequate to deal with nuisances that were present at the time.

Circumstances have now changed and the recent growth in the numbers of silent calls caused by commercial activity means that it is appropriate to revisit the maximum fine level. This consultation seeks views on the DTI proposal to raise the maximum penalty from £5,000 to £50,000. The proposed maximum penalty will provide a substantial deterrent to those who persistently misuse networks or services including making silent calls and will provide considerable reassurance to consumers that the Government takes this issue very seriously. The proposed amount is the same that Ofcom has in place for similar nuisance broadcasting breaches and would be more proportionate to the harm that silent calls causes.

Timing

Subject to this consultation we hope to make the order to raise the maximum penalty to £50,000 in early 2006. A Government response to this consultation will be published within 3 months of its close.

Consultation Details

Comments are invited on the attached draft order and on any of the issues raised in this consultation, to be submitted by **24 January 2006** to Ihtsham Hussain:

Email: ihtsham.hussain@dti.gsi.gov.uk

We prefer to receive responses e-mailed as a Microsoft Word attachment.

Address for postal responses:

Ihtsham Hussain
Communications and Content Industries
Business Relations 2
Department of Trade and Industry
207 Red

151 Buckingham Palace Road
London
SW1W 9SS.

When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organization represents, and where applicable, how the views of members were assembled.

A list of those organisations and individuals consulted is in Annex C. We would welcome suggestions of others who may wish to be involved in this consultation process.

Additional copies

You may make copies of this document without seeking permission. An electronic version can be found at www.dti.gov.uk/consultations

Confidentiality & Data Protection

Your response may be made public by the DTI. If you do not want all or part of your response or name made public, please state this clearly in the response. Any confidentiality disclaimer that may be generated by your organisation's IT system or included as a general statement in your fax cover sheet will be taken to apply only to information in your response for which confidentiality has been requested.

Access to information held by or on behalf of DTI is governed by the Freedom of Information Act 2000. Any requests for information received by DTI in relation to this Consultation will be administered accordingly.

We will handle any personal data you provide appropriately in accordance with the Data Protection Act 1998.

Respondents who wish to keep some or all of their response confidential are requested to place any confidential material into a clearly marked annex.

Code of Practice on Consultation

A copy of the Code of Practice on Consultation is in Annex D.

If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

Nick van Benschoten,
Consultation Co-ordinator
Department of Trade and Industry
Better Regulation Team
1 Victoria Street
London SW1H 0ET

E-mail: Nick.vanbenschoten@dti.gsi.gov.uk

Tel: 020 7215 6206

Fax: 020 7215 8303

List of Questions

1. The new level of fine is targeted at those companies that make nuisance silent calls and who require a higher level of deterrent than that which exists at the moment. Ofcom's analysis shows that the majority of silent calls appear to have grown and become an increasing problem over the last two to three years. Ofcom's view is that the current maximum penalty is inadequate for the level of consumer harm and worry, particularly to young women (16-24), the elderly and people who are vulnerable or live alone, and fails to serve as a real sanction or as a deterrent.

Therefore, do you agree that the maximum penalty for persistent misuse of the telecommunications network to tackle silent calls should be raised from £5,000 to £50,000?

2. The Government considers that it is necessary to take action against silent calls by raising the maximum penalty and is justified in the light of recent consumer complaints. Silent calls are driven by the lack of an appropriate deterrent against persistent offenders and this issue will not naturally fade away unless it is tackled. If you disagree please comment.

3. What other steps

Background

Policy Proposals and Argument – Raising the Maximum Penalty

Why Ofcom has chosen the figure of £50,000 for the new maximum penalty

Section 130 of the Act provides that the maximum financial penalty for persistent misuse is £5,000 for each contravention. The Act carried forward the original rationale for this offence, namely nuisance calls by malicious individuals. The maximum penalty may still be appropriate for that purpose, and such conduct is also a criminal offence. The majority of silent calls are generated by the call centre industry using predictive dialler technology. Evidence for this is that the volume of silent calls appears to have grown in parallel with the industry's adoption of dialler technology over the last two to three years. Ofcom's view is that the current maximum penalty is inadequate for the level of consumer harm and worry, particularly to the elderly and vulnerable, and fails to serve either as a real sanction or as a deterrent.

Maximum financial penalties under the Act range from £5,000 for persistent misuse, through to £100,000 (which it is proposed be raised to £250,000) for breaches of the Independent Committee for the Supervision of Telephone Information Services ("ICSTIS") Code of Practice, to £250,000 for broadcasting offences, and to 10 per cent of total turnover for breaches of the Competition Act 1998 for which Ofcom is a competent authority. The scale of penalties is most severe where there is a major abuse of the market or incitement to criminal action, followed by those against 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 and which are compounded by wilful and reckless disregard of regulation are of the order of £50,000. Therefore, a figure of £50,000 as a maximum penalty for repeated and wilful breaches of the persistent misuse provisions would be consistent with the Act's overall framework. It would also be a proportionate sanction and deterrent for persistent misuse of predictive dialler technology by the call centre industry.

A study called "The UK Contact Centre Industry", commissioned by the DTI in 2004, showed that larger call centres that use predictive dialler technology typically employ 500 agents. The typical salary of an agent is £12,000-£15,000 and their full employment cost is about £25,000 per annum. Salary costs represent about two thirds of the total costs of a call centre, although the use of predictive dialler technology can increase all throughputs by up to 300 per cent. The maximum benefit of using predictive dialler technology is therefore about £8 million per annum.

Taking a conservative assumption of productivity gain/cost saving and offsetting the cost of using predictive dialler technology, the benefit of using such technology is about £5 million per annum for large call centres. A maximum financial penalty for persistent misuse of £50,000 therefore represents a one per cent cost on benefits that would otherwise be gained. Therefore, for a 'lower end of scale' breach under the persistent misuse provisions, a maximum financial penalty of £50,000 would be consistent with the Act's framework and would send an important signal to operators of call centres to take reasonable care to prevent the harm and distress that silent calls cause.

Why Ofcom has not to date tested the current £5,000 maximum penalty

Ofcom closed two investigations in 2004 against MKD Holdings and Intelligent Marketing Solutions Ltd, who were found to have generated unacceptably high levels of silent calls. Both companies gave written undertakings including commitments to reduce the number of silent calls made. In April 2005 Ofcom completed a second investigation into silent calls made by MKD Holdings and investigated seven companies in relation to silent calls.

The level of consumer harm and worry in relation to silent calls has grown significantly even since the MKD Holdings investigation. Although customer complaints do not measure the absolute volume of silent calls, which is unquantifiable, they offer a useful measure of the level of public concern. BT reports that it 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. Ofcom currently receives about 150 complaints a month.

While Ofcom is committed to using its existing powers to the fullest extent, including the power to impose financial penalties on the worst offenders, the collective experience in dealing with these companies has led Ofcom to the conclusion that its current powers merely contain the problem of silent calls rather than eradicating it. Therefore, it is Ofcom's view that the current maximum penalty is inadequate for the level of consumer harm and worry and fails to serve either as a real sanction or as a deterrent. Ofcom therefore needs the sanction of a substantially increased maximum penalty of £50,000, which would enable them to tackle the problem of silent calls more effectively.

What Happens Next

The Government is proposing to increase the maximum penalty from £5,000 to £50,000. A draft order is attached at Annex A and comments are invited on it. Following consideration of all those comments received the order will need to be laid in draft before Parliament and approved by a resolution of each House before it can be made.

Regulatory Impact Assessment (RIA)

The key considerations relating to the limited proposal in this consultation is included in the summary regulatory impact assessment at **Annex B** to signpost the relevant analysis.

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. Consumers will welcome this decision as they have been increasingly calling for the Government to take appropriate action. Therefore, the only people who would possibly be affected would be a small minority of direct marketing companies who make silent calls. Moreover, this change does not alter the rules governing the industry, but rather the penalty for habitually and persistently making silent calls. Companies not making silent calls will be completely unaffected. Also, this does not affect the administrative burden on Ofcom as enforcer of the Act, since there is no change to the rules or how they are to be enforced.

Annex A

*Draft Order laid before Parliament under section 130(10) of the Communications Act 2003,
for approval by resolution of each House of Parliament.*

STATUTORY INSTRUMENTS

2006 No.

ELECTRONIC COMMUNICATIONS

**The Communications Act 2003 (Maximum Penalty for
Persistent Misuse of Network or Service) Order 2006**

Made - - - - *2006*

Coming into force - - *2006*

Whereas a draft of this Order has been laid before and approved by a resolution of each House of Parliament;

Now, therefore, the Secretary of State, in exercise of the power conferred upon him by section 130(9) of the Communications Act 2003⁽¹⁾, hereby makes the following Order:

Citation and commencement

1. This Order may be cited as the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2006 and shall come into force on2006.

Amendment of maximum penalty

2. In section 130(4) of the Communications Act 2003 for “£5,000” there is substituted “£50,000”.

[2006]

[Name]
Minister of State for Industry and the Regions
Department of Trade and Industry

⁽¹⁾ 2003 c. 21.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends section 130(4) of the Communications Act 2003 (“the Act”) so as to raise the maximum penalty that the Office of Communications can impose under section 130 of the Act in respect of persistent misuse of electronic communications networks or electronic communications services from £5,000 to £50,000.

A partial regulatory impact assessment has been prepared for this instrument and a copy is available from the Department of Trade and Industry, Bay 207, 151 Buckingham Palace Road, London SW1W 9SS and can also be found on www.dti.gov.uk/ [].

Annex B: 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 inconvenienced 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. We plan to consult for 12 weeks starting on **31 October 2005**.

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.

9. **Declaration and publication**

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

Signed

Date

Minister's name, title, department

Contact point for enquiries and comments: name, address, telephone number and email address.

Annex C: List of Organisations and Individuals Consulted

Phil Jones, ICO

George Kidd, ICSTIS

David Stewart, Ofcom

Robert Dirskovski, DMA

David Hickson,

Sarah-Jane Amey, NTL

Matthew Copeland, Telewest

Theresa Brown, BT.

Ian El-Mokadem, Centrica

Huw Saunders, Kingston Communications

Domhnall Dodds, UKTA

Alan Stone, Your Communicaitons

Cathy Gerosa, Premium Rate Association

Anders Holst, Telecom1

Tony Couch, NOC

Bryan Petch, Flextech

Neil Penny, NYT Group

Dr Susanne Lace, NCC

Allan Williams, Consumers Association (Which)

Richard Sills, Otelo

Gregory Hunt, CISAS

Wendy Martin, LACORS

Margaret Humphreys, LACORS

Mr J Raith, TUFF (Telecoms Users' Fraud Forum)

Annex D

The Consultation Code of Practice Criteria

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

The complete code is available on the Cabinet Office's web site, address <http://www.cabinetoffice.gov.uk/regulation/consultation/index.asp>

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