



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to the BIS consultation on raising the maximum penalty for the persistent misuse of an electronic communications network or service

January 2010

Introduction

Consumer Focus welcomes the opportunity to respond to the Department for Business, Innovation and Skills' (BIS) consultation on penalties for the persistent misuse of an electronic communications network or service. Consumer Focus, together with Age Concern and Ofcom, has been working to raise awareness of silent calls and how to avoid them. This was referenced in the Silent Calls EDM¹ tabled by Nick Harvey MP in October 2008. We remain committed to working with industry and government to bring about positive changes. This response is not confidential and we are happy for it to be published in full on Ofcom's website.

About Consumer focus

Consumer Focus is the statutory organisation campaigning for a fair deal for consumers in England, Wales, Scotland, and, for postal services, Northern Ireland. We are the voice of the consumer, and work to secure a fair deal on their behalf. We were created through the merger of three consumer organisations – energywatch, Postwatch and the National Consumer Council (including the Welsh and Scottish Consumer Councils). The new approach allows for more coherent consumer advocacy, with a single organisation speaking with a powerful voice and able to more readily bring cross-sector expertise to issues of concern.

¹ EDM number 1188 <http://edmi.parliament.uk/EDMi/EDMDetails.aspx?EDMID=38308>

Question 1

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

Consumer Focus supports BIS' proposal to increase the maximum penalty. Although instances of silent calls have fallen since 2008², they remain a significant cause of consumer detriment suggesting the existing approach needs to be improved. We are concerned that according to Ofcom 46 per cent of consumers continue to receive silent calls and 49 per cent of them say they are very inconvenienced by them³. As mentioned silent calls can be a particular cause of concern for elderly and vulnerable householders. This is not only due to the extra physical challenge that answering the phone can pose but also anxiety caused by not knowing or understanding why no one is on the line. For example, worrying that they are the victim of a prank or stalker, or that burglars are targeting their home.

We agree that the current maximum penalty is not high enough to represent a real sanction or an effective deterrent against those who consistently make silent and abandoned calls. It is particularly important that prompt and effective action is taken to ensure maximum compliance as while silent calls overall are declining, those to mobiles are rising, due to the lower number of mobile consumers registered with the telephone preference scheme. The potential for consumer detriment to mobile users is high. As pointed out in the consultation, consumers can be subjected to silent calls both at home and out of the house. Penetration in the mobiles markets is 120 per cent⁴ and growing, meaning that it is common for people to have more than one mobile handset. Multiple mobile users could be particularly adversely affected given the findings that the detriment caused by silent and abandoned calls falls disproportionately on a minority of consumers i.e. the worst effected five per cent of the population receive 35 per cent of all calls.

² Ofcom, *Telecoms Complaints Data*, October 2009

http://www.ofcom.org.uk/telecoms/ioi/bulletins/complaints/complaints_oct09.pdf

³ BIS *Raising the maximum penalty for the persistent misuse of an electronic communications network or service to tackle the problem of silent and abandoned calls to consumers a consultation document*. 26 October 2009. Evidence base for summary sheets, Figure 4, Page 29

<http://www.berr.gov.uk/files/file53311.pdf>

³ BIS, *Raising the maximum penalty for the persistent misuse of an electronic communications network or service to tackle the problem of silent and abandoned calls to consumers a consultation document*. 26 October 2009. Evidence base for summary sheets, Figure 13, Page 18

<http://www.berr.gov.uk/files/file53311.pdf>

Questions 2-5

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

The aim of any new maximum should be to achieve full compliance with the regulations. Of the options offered therefore, Consumer Focus' preference is that the maximum be increased at least to the highest level proposed of £2 million as this offers the greatest deterrent and maximum flexibility to Ofcom. However while we recognise that this level could deter the majority of companies from misuse of these calls, we remain concerned about the conclusions of the impact assessment, that even at this level the largest companies may still theoretically not be sufficiently incentivised to comply. With this in mind we question why the figure of £2 million (rather than £3, £4 or £5 million, for example) was chosen as an appropriate figure.

We also question the validity of imposing only a price limited penalty given the recognition that £2 million may not represent a large enough financial disincentive for some companies.

This is particularly the case as future-proofing any fixed penalty will always be a challenge. Ofcom was granted the power to increase its penalty from five thousand pounds to fifty thousand pounds in 2006, a ten-fold increase. In the three years since then, it is clear that this figure has become dated, with Ofcom calling for a forty fold increase, from fifty thousand to two million. If the previous ten-fold increase became dated within three years, it is possible that even a higher fixed penalty could in time lose impact.

While we recognise the legal concerns raised of an unlimited maximum penalty, which might clash with the exclusive powers of the Secretary of State, we would draw BIS and Ofcom's attention to regulatory practices in the energy market, laid out below, where a percentage of turnover is employed.

Government should reconsider the feasibility of setting a fixed penalty which is a percentage of annual turnover. This could operate either as a stand-alone fine or alongside a £2 million penalty depending on which is the greater or more appropriate sanction. This would arguably be more future-proof than a set figure, act as a more effective deterrent to larger companies, and potentially save money and time in the future should the current price limited cap become outdated. This combination approach could also be applied to misuse perpetrated by individuals who do not have a turnover. While there may be concerns about how this would be applied in practice, such an approach would allow Ofcom maximum flexibility to administer an appropriate fine and ensure that no sanction is disproportionate.

Question 6

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

It is our view that BIS and Ofcom should give further consideration to whether a percentage of turnover may be a better deterrent, especially for the bigger companies involved. We encourage BIS to look at the approach used in the energy industry. After concluding that there has been an infringement, Ofgem has the power to issue directions to bring an infringement to an end and to impose financial penalties for any infringements committed intentionally or negligently (up to 10 per cent of an undertaking's worldwide turnover⁵). For example, rather than looking at a subsidiary of a bigger firm, the focus should be on the parent company itself (Centrica, as opposed British gas, for example) The Office of Fair Trading (OFT) provides guidelines on penalties, which Ofgem adhere to. These are:

Level of penalty

6.56. In determining whether a penalty is appropriate and at what level, the Authority has, in accordance with Section 38(8) of the Act, had regard to the guidance on penalties issued by the OFT⁴²⁸ under Section 38(1) of the Act ('the Penalties Guidance').

6.57. The Penalties Guidance provides for the following five-step approach to the setting of any fines for breach of the competition rules:

- (1) calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking;
- (2) adjustment for duration;
- (3) adjustment for other factors;
- (4) adjustment for further aggravating or mitigating factors; and
- (5) adjustment if the maximum penalty of the 10 per cent of the worldwide turnover of the undertaking is exceeded and to avoid double jeopardy⁶

For example, a fine of £2 million would only be about 0.009per cent of Centrica's group revenue.⁷ If BIS and Ofcom have not already looked at practices used by other regulators, and the Office of Fair Trading, then we suggest that this would be a valuable practice.

It should be noted that the OFT rules allow for some adjustment, which may account for behaviour by individuals, but Ofcom may want to be clearer about the flexibility of the rules to account for anybody who engages in the persistent use of silent calls.

⁵Ofgem *Enforcement Guidelines on Companies and Investigations*, 28 September 2007
<http://www.ofgem.gov.uk/About%20us/enforcement/Documents1/Enforcement%20Guidelines%20post%20consultation.pdf> P5-6

⁶ Ofgem, *Decision of the Gas and Electricity Markets Authority Investigation into National Grid (formerly known as Transo) Case CA98/STG/06* 21 February 2008, Paragraph 6.56 and 6.57, Page 121.

<http://www.ofgem.gov.uk/About%20us/enforcement/NGmeters/Documents1/National%20Grid%20Competition%20Act%20Decision%202708.pdf>

⁷ Centrica *energy from start to finish Annual Report and Accounts 2008*, Page 4

http://www.centrica.co.uk/files/reports/2008ar/files/Centrica_Annual_Report_2008.pdf

Other comments

Consumer awareness

The consultation states that fewer mobile consumers are registered on the Telephone Preference Scheme than landline customers. Consumer Focus would welcome the opportunity to work with Ofcom and BIS to raise consumer awareness of the scheme. If more consumers are aware that they can prevent silent calls by using the Telephone Preference Scheme then this should have a positive downward impact on consumer detriment with falling complaint levels resulting in increased confidence in the market.

The enforcement regime

A penalty needs to be large enough so that it acts as a deterrent. It is also important that the threat of a bigger penalty is coupled with an effective enforcement regime so that instances of persistent misuse are identified early, and an appropriate course of action is identified. A large fine will be useless if companies know that there is a reasonable chance of not being caught. If rules introduced in March 2006⁸, around the short recorded information message identifying the source of the call, were more rigorously enforced, silent calls and complaint levels may be significantly lower. It is therefore essential that the regime is backed with effective pro-active monitoring.

It is also important that the rules and regulations governing silent calls are clear and understood by industry. An emphasis on penalties is productive for the reasons previously listed, but it is important that this is also coupled with a review of the usability and clarity of the current regulations, to ensure that they are communicated in the best possible way.

PhonepayPlus

The maximum level of penalty that can be imposed by Phone Pay Plus is two hundred and fifty thousand pounds. This figure is mentioned in the consultation to provide a benchmark. The conclusion the consultation draws is that 'non compliant larger businesses may not be sufficiently incentivized to comply with Ofcom's guidelines if penalty levels are at a maximum of 250,000'. The consultation also notes that Phone pay Plus would charge higher fines if they were able to.

Although the focus of this consultation is on preventing silent calls, the restrictions on PhonepayPlus may also be having a detrimental effect on consumers, and we urge BIS to look further at the maximum fine that PhonepayPlus are allowed to charge, in order to increase its effectiveness.

Lastly, while we welcome BIS' commitment to take prompt action on this matter – making the order to raise the maximum penalty in early 2010 – we would reiterate our call for Government to take appropriate time to explore the opportunity for a penalty based on a percentage of a company's worldwide turn-over. This could be either instead of, or as an alternative to the £2 million maximum limit proposed, giving flexibility to Ofcom to decide the most appropriate penalty.

⁸ Ofcom press release,01/03/06. http://www.ofcom.org.uk/media/news/2006/03/nr_20060301
These rules gave a maximum level of calls a company is allowed to make (three per cent), required call centres to play a recorded message, and required companies to enable Calling Line identification (CLI).

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