



Ofcom's response to the
House of Commons All-Party
Parliamentary Group on Nuisance
Calls

Inquiry into the unsolicited marketing industry

Publication date:

15 January 2014

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Section 1

Introduction

Ofcom welcomes the All Party Parliamentary Group ('APPG') on Nuisance Calls recent report into the unsolicited marketing industry.

Using our powers relating to persistent misuse of electronic communications networks and services, Ofcom has lead responsibility for tackling abandoned and silent calls. We take this issue extremely seriously. Tackling the incidence and harm caused by these types of calls is one of our strategic priorities. Ofcom is also fully committed to working with a range of stakeholders including the APPG, Government and other regulators to help drive a coordinated response to the wider issue of nuisance calls for the benefit of consumers.

In the Ofcom and the ICO joint nuisance calls action plan which we published on 31 July 2013,¹ we said we would carry out work looking at possible technical and non-technical measures to help tackle nuisance calls. A number of the possible measures we have been exploring relate to the recommendations set out in the APPG report.

Below, we provide an update on this work as part of our response to your recommendations. We also wanted to take this opportunity to clarify a couple of points set out in the main body of the APPG report.

¹ <http://stakeholders.ofcom.org.uk/consultations/silent-calls/joint-action-plan/>

Section 2

Recommendations on improving compliance

Recommendation 1: Tightening rules around third party consent

The report recommended clarifying the relationship between consent and TPS registration i.e. registration to the TPS over-riding third party consent.

Ofcom strongly supports measures to make the question of consent to marketing communications clearer for consumers and think this could have a significant impact in tackling nuisance calls. Currently, many nuisance calls are likely to be legal as consumers have given their permission to be contacted, without realising they have done so, thereby overriding their registration with the TPS do not call register. The lack of clarity on consent affects perceptions over the effectiveness of being signed up to the TPS register.

The current legal framework around consent to receive marketing communications is complex with requirements spread across different pieces of legislation. The ICO is primarily responsible for consent issues under the Privacy and Electronic Communications (EC Directive) Regulation 2003 (PECR) and the Data Protection Act 1998.

As part of the joint Ofcom and the ICO nuisance calls action plan, the ICO committed to reviewing its direct marketing guidance to help provide greater clarity on consent.² It published updated guidance in September 2013.

The ICO noted in its evidence to the Culture Media and Sport (CMS) Select Committee nuisance calls inquiry that it will also consider whether to make a business case to DCMS to make changes to the laws on consent. This further work will examine whether:

- The consent requirements in PECR should be amended including time limited consent.
- Further information requirements should be placed on those sending unsolicited messages.
- The ICO should have extended audit powers under PECR.
- The ICO should be able to issue statutory codes of practice under PECR.
- Stronger legal requirements are needed to make sure the TPS is used to screen calls.
- Stronger legal requirements are needed to ensure the identity of the person sending the message is provided and to prevent 'spoofing'
- An obligation should be placed on organisations receiving calls to respect a caller's right to withhold their number.

A number of possible changes to the rules on consent have been suggested by various stakeholders including through submissions to the APPG and CMS Select Committee nuisance calls inquiries, Private Members Bills and Ten Minute Bills. We think it would be

² <http://stakeholders.ofcom.org.uk/consultations/silent-calls/joint-action-plan/>

beneficial for the ICO and the Government to consider the range of changes stakeholders have suggested as part of a review of the consent regime. This would allow the costs and benefits of a package of measures to be considered as a whole and could take recent developments, such as the impact of the ICO's new guidance, into account.

Recommendation 2: TPS lists are updated and checked in real time

The report recommended reducing the 28 day waiting period between signing up to the TPS and the opt-out decision becoming binding to real time i.e. taking effect immediately after registration.

Under existing legal requirements,³ a telemarketer is not deemed to have contravened PECR if the TPS subscriber has been registered for less than 28 days. This requirement places an obligation on telemarketers to ensure they renew their lists at least every 28 days. However, this does not mean that the benefits of registering with the TPS do not start straight away. The TPS website advises that subscribers who register with the TPS should see a gradual decline immediately as telemarketers regularly refresh their lists.

Recommendation 3: An accreditation scheme to help clean up the lead generation industry

As noted under the recommendation for third party consent, Ofcom considers it would be helpful for the Government and the ICO to review the consent regime. Issues relating to the buying and selling of personal data and how best to tackle problems relating to the lead generation industry, including the role an accreditation scheme might play, could be considered as part of such a review.

Recommendation 4: A requirement for persistent offenders to have their data management systems audited

As noted above, Ofcom considers it would be helpful for the Government and the ICO to review the consent regime. Such a review could include consideration of a requirement for businesses to have their data management systems audited for persistent non-compliance with data protection laws.

³ Regulation 21(3) of PECR

Section 3

Recommendations to make reporting easier and more effective

Recommendation 5: Caller line identification (CLI) / caller display should be provided free of charge

Ofcom considers caller display is an important service as it helps consumers to choose whether to answer a call or not and thereby shield themselves from potentially nuisance calls.⁴ Consumers can also use the CLI to report nuisance calls to Ofcom and other regulators and for the effective use of handsets and services that rely on caller display to block and filter certain calls.

Some communication providers (CPs) offer caller display to their customers (or a subset of their customers) free of charge, whilst other CPs charge a monthly fee. Ofcom is keen to ensure that consumers are able to easily compare the price of caller display and other services that CPs offer that can help consumers protect themselves against nuisance calls. On 10 December 2013, we published information for consumers summarising the main services offered by seven CPs⁵ along with details of the charges that they apply and those that provide services free of charge.⁶ We plan to update this information regularly to help ensure consumers have up to date information that, alongside other factors such as the subscription price and quality of service, is intended to help them make informed decisions about their choice of services and provider.

Recommendation 6: Every marketing call should carry valid caller line identification

PECR and the Privacy and Electronic Communications Directive contain provisions enabling a calling party to withhold their CLI. They also enable a CP to over-ride CLI withholding where, '...a subscriber has requested the tracing of malicious or nuisance calls received on his line'. The ICO has primary responsibility for enforcing PECR and any changes to these regulations would need to be considered by the ICO and Government, and are ultimately a matter for Parliament.

In the area Ofcom has direct responsibility, i.e. abandoned and silent calls under our powers to tackle persistent misuse of communications networks and services, our Guidelines set out that callers should help consumers identify them by ensuring a valid and accurate CLI is available.⁷

Recommendation 7: Providing a short code to report nuisance calls to fixed line numbers

Ofcom can see benefits in being able to quickly and easily report a nuisance call, without the hassle of having to ring, for example Ofcom, and complain. However, as a reporting tool, a single short code for nuisance calls would be extremely blunt. It would not give us any

⁴ Consumers need handsets capable of displaying the CLI information and only available CLIs are displayed.

⁵ Those with a market share above 1% or with a universal obligation to ensure that basic fixed line telecommunications services are available at an affordable price.

⁶ http://consumers.ofcom.org.uk/2013/12/phone-company-services-that-can-help-tackle-nuisance-calls/?utm_source=updates&utm_medium=email&utm_campaign=nuisancecallsCLI

⁷ A1.56 and A1.57 (<http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>)

information on why a call was seen as a nuisance by the consumer or was likely to be unlawful, so we would be unable to focus on those that are a result of actionable wrongdoing and whether it related to the rules Ofcom or another regulator is responsible for enforcing.

Short code reporting for SMS takes advantage of more modern mobile networks. In addition, functionality across mobile network operators is broadly equivalent. It may not be straight forward to translate this into fixed networks due to the wide variation in network systems and technologies.

Ofcom has started to discuss the technical feasibility of introducing a short code reporting system with industry in more detail. However, even if technically feasible, we note that this idea would still need careful consideration and consultation to progress further in a useful way.

Recommendation 8: Establishing a single point for collection of all intelligence data related to nuisance calls

Ofcom understands that the current framework can be confusing, and it is not always clear to consumers which regulator is responsible for taking action on which type of call. To help with this issue we have worked with the ICO to make both our websites clearer on our individual responsibilities, and to provide better sign-posting between the ICO/Ofcom websites. The ICO pages now mirror those of Ofcom and each one provides links which link to the correct pages on the other's website so it in effect works like a 'single' portal whilst maintaining flexibility in how consumers might access the information and seek to raise a complaint. There are also links between the Which? and the ICO/Ofcom websites.

We agree that it is important that regulators are able to draw on the range of intelligence relating to nuisance calls. We asked the Government to consider making a change to the Communications Act 2003 to allow Ofcom to share intelligence with the ICO more easily. The Government has advised that it is planning to bring forward the necessary legislative changes which we welcome.

On 19 December 2013, Ofcom published updated consumer guides on nuisance calls and we will be working with stakeholders to help promote the guides. To complement this work, we:

- Commissioned some high level consumer research to better understand where consumers would look for: (a) advice on how to stop nuisance calls; and (b) who to complain to about nuisance calls (e.g. would they call their CP, do a general internet search or look at a specific website, would they look at a their paper bill and/or their online account). This will help us to better understand the needs of different consumers (e.g. those without internet access) and any particular information gaps so we can consider the best way to address these. We plan to publish the findings of this research in January 2014 along with new trend data on the incidence of nuisance calls and messages in the Ofcom Consumer Experience Report.
- Plan to carry out a detailed assessment of the information provided by different organisations about nuisance calls, both online and over the phone, and to work with stakeholders to promote greater consistency. The aim will be to try and ensure that consumers receive similar advice about nuisance calls irrespective of where they access the information. We will also explore if there are ways that we can better share intelligence across different stakeholders.

Section 4

Recommendations to protect and empower consumers

Recommendations 9 and 10: Telecoms companies block numbers known to be making nuisance calls and pilot network level solutions to block nuisance calls

When discussing network based call blocking it is important to be aware of the various types of call blocking services that exist, and what many believe are the future network based services that some consider is the long term solution to nuisance calls.

Some CPs already offer network based solutions to help block nuisance calls and Ofcom published information on some of these in December 2013.⁸ These services typically only allow a small number of specific telephone numbers to be blocked (e.g. up to 10 numbers) or address classes of calls such as those with withheld CLI. All CPs are required to offer a service that enables withheld numbers to be blocked. This does not however address the issue of nuisance calls as it blocks some legitimate withheld numbers e.g. calls from Doctor's offices or shelters.

Several devices have been available for some years, to help customers deal with nuisance calls. These devices are plugged directly into the customer's phone line and the phone is then connected to the device and can be programmed to reject or screen certain calls, based on the telephone number that is presented. These devices tend to offer more features than the currently available network based services with scope to block a larger number of numbers. In some cases, the devices will be pre-programmed with several hundred numbers. Other devices screen calls by asking the caller to identify themselves to allow the consumer receiving the call to decide whether to answer or not. Providers of call blocking technology providers have indicated that they are keen to develop these more sophisticated call blocking services at the network level.

In principle, it may be possible to replicate some of the most sophisticated features of customer end devices, such as caller screening and large automatically populated block lists within the network. However, beyond the technical challenges this poses, network based call blocking raises a number of important legal issues that require careful consideration to ensure any approach is lawful. Call blocking is currently done at the customer's request. The customer has direct control over those that are blocked and those that are allowed to get through. Network blocking of numbers that are deemed by the provider to be nuisance calls and therefore blocked across the network raises a number of issues.

A key consideration is consistency with Article 28 of the Universal Services Directive and General Condition 20 which implements this Article in the UK. These broadly reflect a starting position that end-users should be able to access all numbers.⁹ This reflects that the role of a CP is generally to provide the service of conveying signals via networks, including between Member States across borders, so as to enable free movement of services and completion of the internal market. The blocking of calls is, in broad terms, an exception to these general rules.

⁸ <http://consumers.ofcom.org.uk/2013/12/protecting-yourself-from-nuisance-calls-and-messages/>

⁹ Unless the recipient subscriber has opted out of calls from specific geographic areas.

Any particular call blocking measures would have to be considered on their individual facts. However, the provisions referred to have an impact of the scope of the possible measures. Most squarely falling within those provisions are call blocking measures by a CP on a case by case basis where directed by Ofcom (i.e. where there is an established case of fraud or misuse on a particular number)¹⁰ or where the subscriber/end user specifically requests calls from certain numbers or certain types of call, such as from a particular location or those with a CLI-withheld, are blocked.

Ofcom would, nonetheless, of course, give further consideration to proposals for network based call blocking measures suggested by CPs. We note from the APPG report that BT ‘...regard their position as being a special one laid out by regulation which prevents them blocking use of the network’. We intend to discuss this further with BT.

The report recommends Ofcom issue assurances via a statement that call blocking is allowed under the terms of operators’ licences. Communication Providers are not issued licences, instead they are regulated through a general authorisation regime with the General Conditions of entitlement (that is, conditions which apply to all) and specific conditions (that is, conditions which apply to individuals).

Any changes or amendments to the General Conditions requires public consultation and therefore is not a simple or straightforward process. As mentioned above, there are a number of legal issues that will need to be considered around call blocking by communications providers.

Recommendation 11: Ofcom bring forward a strategy to protect vulnerable consumers including the development of a model for funding call blocking technology

Ofcom’s principal duty is to further the interests of citizens and consumers (where appropriate by promoting competition). This drives all that we do and, in carrying out our work, we seek to identify and tackle issues that are causing consumer harm. We actively consider the needs of different groups of consumers and the impact particular types of behaviour and remedies might have on them.

The Communications Act 2003 and the Universal Service Directive¹¹ require Ofcom, in performing its duties, to have regard to a range of factors, including several relating to vulnerable consumers or others groups who may be disadvantaged. Amongst other things, Ofcom is explicitly required to take account of the vulnerability of children and others whose circumstances appear to Ofcom to put them in need of special protection and the needs of persons with disabilities, of older people and of those on low incomes. Ofcom recognises that each of us may be vulnerable to harmful behaviour by CPs and other businesses at some point in time or due to particular circumstances. We take this into account when making and implementing our regulatory decisions.

For example, where there is evidence that a particular group of consumers – such as children, older people, disabled people, or those on low incomes - is systematically more likely to be vulnerable to harm than others we consider this when formulating and implementing new policies and enforcing existing policies. That is to say, it may be appropriate to give greater weight to the interests of such vulnerable groups of consumers

¹⁰ General Condition 20.3 states that the CP shall, where requested by on behalf of Ofcom on the basis of fraud or misuse, block access to telephone numbers and/or Public Electronic Communications Services and in such cases withhold revenue associated with such telephone numbers and/or public electronic communications services.

¹¹ Directive 2002/22/EC, 7 March 2002

when determining a particular course of regulatory action. In carrying out our work on nuisance calls, we are mindful that certain groups of consumers may be more vulnerable to nuisance calls and seek to take this into account in our work.

The report suggests that Ofcom develop a model for funding call blocking technology. This appeared to be linked to a suggestion by some stakeholders that the fines from breaches of rules relating to nuisance calls be used to provide call blocking technology to vulnerable consumers who have been affected by nuisance calls. Ofcom is required to return any money it collects from fines for breaches of the rules on persistent misuse to the Treasury to go into the consolidated fund. Ofcom does not have the authority to establish a fund for call blocking technology. The establishment of such a fund would need to be considered by Government and Parliament. We have raised this with Government.

Recommendation 12: Stricter rules around obtaining consumer consent and Setting limits around the trade in personal data

As noted under the recommendation for third party consent, Ofcom considers it would be helpful for the Government and the ICO to review the consent regime. Issues relating to the buying and selling of personal data could be considered as part of such a review.

Section 5

Recommendations to improve the regulators' capacity to take action

Recommendation 13: Establishing a new co-regulatory body for nuisance calls and texts

Any decision on Ofcom's duties is a matter for the Government and, ultimately, Parliament. Ofcom has powers to take enforcement action against those who are persistently misusing electronic communications networks or services, having regard to our statement of policy on persistent misuse. We take this issue extremely seriously and tackling the harm caused by these calls is one of our strategic priorities.

We are also playing an active role in the coordinated effort to tackle the wider issue of nuisance calls alongside the ICO and other regulatory bodies. Ofcom is also involved in regular discussions on the issue of nuisance calls with Government and will continue to assist in work towards a long term strategic solution.

Recommendation 14: Lowering the threshold for the ICO to take enforcement action

We understand that the ICO has submitted to Government a business case to amend the threshold for the ICO to take enforcement action and that this is currently being considered by Government.

Recommendation 15: Improving international cooperation

As the report highlights, Ofcom and the ICO recently announced our agreement with regulators from Canada and the United States to help tackle nuisance calls.¹² We will continue to look for other opportunities to work with our international counterparts to tackle nuisance calls.

¹² <http://media.ofcom.org.uk/2013/10/21/ofcom-joins-international-taskforce-to-tackle-number-%E2%80%98spoofing%E2%80%99/>

Section 6

Other measures considered by Ofcom

Call centre (or caller) accreditation

There is a concern that not all call centres are complying with all of the relevant rules intended to protect consumers from nuisance calls. Whilst some businesses may be deliberately flouting the rules, it has been suggested that others may just be unaware of all of the relevant responsibilities or are unclear on how best to deliver compliance. Ofcom therefore thought it would be useful to explore whether call centre accreditation could help address this issue.¹³

Our assessment is that we cannot mandate call centre accreditation with our existing powers – this would require a change in the law. We note that any scheme developed only by Ofcom could only apply to issues that fall within our remit i.e. persistent misuse. Any broader scheme incorporating compliance with PECR and the Data Protection Act would need to be developed in association with the ICO or by an independent third party. In the absence of a change in the legal framework, there is the option of promoting a voluntary scheme and we note that there are some private sector voluntary accreditation scheme initiatives currently in progress.

In its Connectivity, Content and Consumer paper, DCMS stated that it planned to keep the issue of nuisance calls under review and if it could not see clear progress that it would consider further legislation, for example, to license call centres.¹⁴ Government may therefore want to give early consideration to possible assessment metrics so that relevant data can be collected to inform its assessment of the effectiveness of the schemes at a later date and whether there is a case for legislative change.

Industry standards

Ofcom asked the Network Interoperability Consultative Committee (NICC) to develop a new industry standard for call tracing between networks, as well as revising current rules on how CLIs are passed between networks and then presented to customers.

The call tracing standard is expected to simplify and increase the likely success of the process as far as possible and support Ofcom and other regulators' enforcement work. The standard was published at the end of 2013. Ofcom will be piloting the operation of the standard with industry starting early 2014. The necessary complexity of the new process means that it will need to be tested carefully and modifications may be required.

Work on the revised CLI rules is expected to be completed early this year and following the review process, final publication is likely to be within the first half of 2014.

¹³ While we refer to call centres being accredited or licensed, the legal responsibility for persistent misuse falls to the entity which misuses the network. A firm using an in-house call centre would be responsible. Depending on the contractual relationship between a call centre client and a third party call centre, the principal may be the client and it may be responsible for any persistent misuse, rather than the call centre. Alternatively, the relevant business arrangements may make the call centre principal and responsible for any persistent misuse in its own right. The responsible entity therefore depends on the facts of the individual case.

¹⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/225783/Connectivity_Content_and_Consumers_2013.pdf

Section 7

Points of clarification

The report sets out the enforcement action that has been taken by Ofcom/ICO and considers the level of evidence and the available resources available to address the problem. There are two points of clarification we wish to make here. The first is the actual level of evidence required and the second is our ability to deal with the complaints we receive.

The report states that ‘Ofcom is only required to demonstrate “nuisance and annoyance”.’ The requirements we must meet are contained in section 128 of the Communications Act 2003, notification of misuse of networks or services. In order to exercise its power under section 128(1) to issue a notification, Ofcom must be satisfied that there are reasonable grounds for believing:

- a) that a person has used an electronic communications network or electronic communications services;
- b) that the effect or likely effect of that use, or of conduct arising from that use, is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety so as to amount to misuse; and
- c) that the misuse is persistent in that it is repeated enough to represent either a pattern of behaviour or practice, or recklessness as to whether persons suffer annoyance, inconvenience or anxiety.

Ofcom considers that the requirement to establish annoyance, inconvenience and anxiety is an appropriate threshold for enforcement action in respect of abandoned and silent calls. We have not found it unduly restricts our ability to take enforcement action.

The report then goes on to consider the resources available to Ofcom and the ICO and acknowledges the fact that we were not set up as a consumer facing complaint handling body. However, we would note that Ofcom’s Consumer Contact Team does record complaints and enquiries about abandoned and silent calls and does provide information and advice to consumers about nuisance calls. Ofcom continually monitors complaints about abandoned and silent calls. Ofcom can launch an investigation if it suspects an organisation is not complying with the Guidelines set out in our Statement of Policy on Persistent Misuse and, as a result, is engaging in such misuse.

Ofcom takes both formal and informal enforcement action to ensure compliance with the law on persistent misuse. Informal action can have the benefit of delivering quicker results to the benefit of consumers. Formal enforcement cases are resource intensive by nature. When investigating a company, Ofcom needs to gather all the necessary evidence to establish the facts. We must also follow due process and the legal framework requires that where we have reasonable grounds for believing that an organisation has persistently misused an electronic communications network or service, we must give that organisation an opportunity to make representations before taking a decision. Similarly, we would allow an organisation to make representations if we were to proceed and consider imposing a penalty on them. This means that we can only take on a limited number of formal cases in any given time period, but they have a wider deterrent effect.

Whilst we are continually looking for ways to make the process as efficient as possible, to enable us to do more cases over a shorter timeframe, we must still follow due process. This means that there is a limit to the changes we can make.