

Noetica's response to Ofcom's consultation

On

Use of persistent misuse powers

Focus on silent and abandoned calls

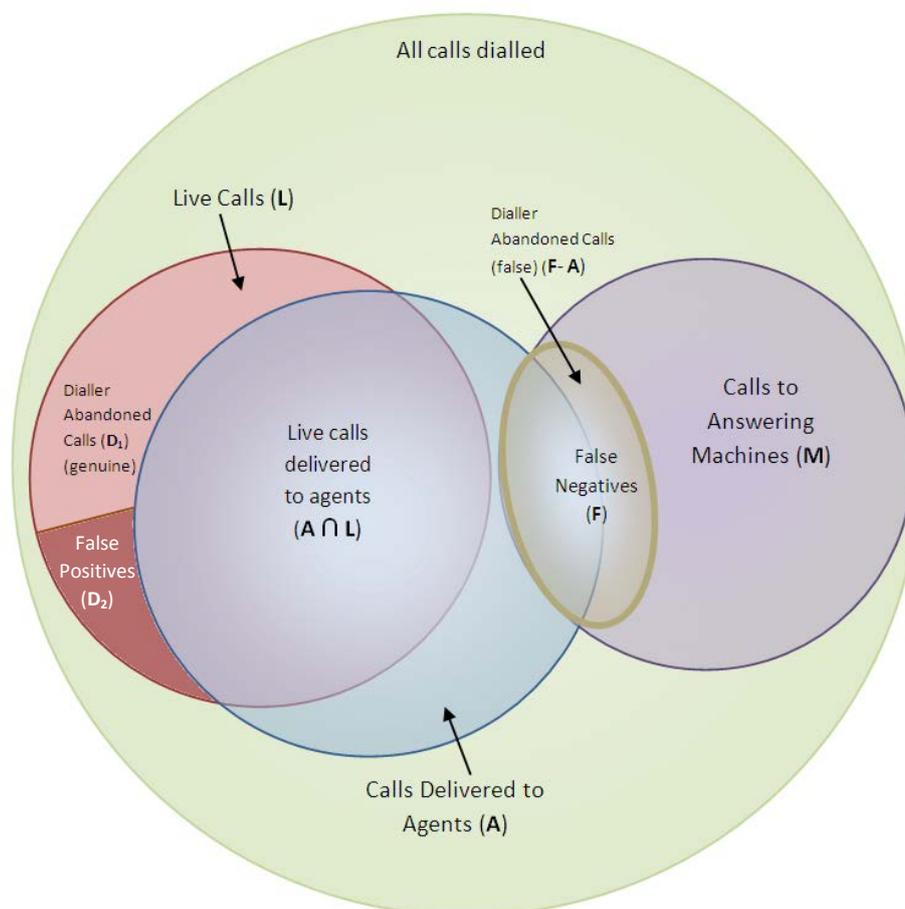
Noetica is a UK company specialising in contact centre software products. As part of our product portfolio we develop, market and deliver an Automated Calling System (ACS) also known as a dialler. As such, our customers are bound by the rules governing the misuse of ACS as defined by Ofcom and the ICO and updated by these bodies from time to time.

The opinions expressed in this response to the consultation paper issued by Ofcom are therefore rooted in our deep immersion and long term involvement in this market and are focused on recent technological advances which, in our opinion, are likely to have a fundamental and permanent effect on the volume and nature of silent calls generated by ACS in the future.

Our comments below relate largely to questions **Q3 & Q4** of **Section 3** and have some implications in relation to question **Q8** of **Section 6** within the Ofcom consultation paper.

Background

Below is a Venn diagram representing the different types of calls that an ACS can generate:



It is our view that it is largely AMD false positives (set D_2 in the diagram) that are culpable of generating silent calls from an ACS. As dialler abandoned calls (set D_1 in the diagram) must, according to Ofcom's regulations, play a brief message there is little else (apart perhaps from the probably negligible amounts of silent calls resulting from simultaneous hang-up, agent error or mobile coverage) that can cause silent calls.

Recent Technological Advance

Noetica has kept Ofcom abreast of the Live Person Detection (trademarked LPD™) technology invented and developed in its labs over the last two years. A complete description of this technology is available in a white paper that can be downloaded freely from the Noetica website (http://www.noetica.com/media/44819/live_person_detection.pdf).

Noetica has recently undertaken a legal review with the leading specialist counsel in this area, Mr Stephen Groom of Osborne-Clarke (<http://www.osborneclarke.com/lawyers/stephengroom/>) and his firm's report is attached as **Appendix A** to this response. We intend to open a dialogue with the ICO in the next few days on the basis of this report. The report confirms that legally, LPD™ is a safe technology.

Apart from being highly accurate in eliminating a very large proportion of answering machines (including voicemail, network services, etc.) LPD™ has been designed and refined over the last twelve months so that it will effectively eliminate the phenomenon of "false positives" altogether. This means that a dialler using LPD™ would not in practice be required to adjust its abandoned rate to allow for a "reasoned estimate" of false positives as required by the Ofcom statement of policy (2010).

As a result, not only is LPD™ effective at increasing performance in outbound call centres through the filtering of most answering machines, but also would allow diallers to operate at a higher pace and throughput without having to slow down in order to counterbalance false positives.

Noetica's Suggestion

In light of the remarks above, we would like to endorse one of the potential changes to the abandoned call rate and approach to AMD as quoted in point 4 of **Figure 2** of the consultation, namely:

"Differentiate between abandoned calls with message and silent calls and apply a lower or zero threshold for enforcing against silent calls"

In effect, we are proposing a ban on all silent calls generated by AMD. In reality, it would make sense to retain a low margin of error for borderline cases, so for instance allow a silent call rate of 0.1% or similar. In effect, this could be achieved by setting an upper limit of 2.9% for ACS (dialler) abandoned calls to ensure that the overall 3% limit of total abandoned calls is maintained.

This would in effect remove the controversial "reasoned estimate" rule, which has, in our opinion, always been open to abuse and far too vague to function effectively as a real and enforceable measure.

Such a change to the policy would effectively ban the use of traditional “cadence” method based algorithms¹. We feel that this is now reasonable, as alternative technologies (not only LPD™, but also other methods such as network level binary matching or network based AMD) are now available or are about to become available in the immediate to short term future. These new technologies should receive the encouragement they deserve in combating the scourge of silent calls.

Commercial Implications

Noetica has applied for patent for LPD™ technology in the UK (as well as the US, Canada and the EU). The patent is due to be published in the Register of Patents on the 12th of November 2014, with a view to a final patent being granted in May 2015.

It can, of course, be argued that due to the patent protection, Noetica would be in an unfair advantaged commercial position were our suggestions above to be adopted. We argue that this would not be the case due to the following:

1. Other technologies, such as network level binary matching (also under patent form DXI we believe) or network based AMD would be available.
2. Noetica will not restrict the use of LPD™ to its own ACS (dialler) product, but is planning to offer this to competitors in one of the following ways:
 - a. Licence the algorithm for other ACS manufacturers to develop for use in their product offerings.
 - b. Provide LPD™ as a pre-packaged API (Application Programmers Interface) for other ACS manufacturers to simply incorporate into their products.
 - c. Provide LPD™ as a cloud service which can be used by any developer of ACS (dialler) systems via web services.
3. The cost associated with this technology will be relatively modest when compared with the commercial benefits that it would deliver to users. We have measured a 40% increase in SPH (Sales per Hour) in call centres using LPD™. A small premium on technology will be more than compensated by the dramatic increase in productivity.

Conclusion

Noetica would like to propose a limit of around 0.1% of silent calls as a percentage of all live calls and reduce the corresponding dialler abandoned call limit to 2.9% giving an unchanged overall limit of 3% abandoned calls.

We feel that this will effectively end the problem of silent calls or indeed reduce it to an irrelevance. This is now possible because of significant recent technological advances.

¹ We are in fact convinced that even a 1% (or even higher) limit on silent calls would in reality result in a “cadence” method based AMD ban. However, imposing a lower limit (such as 0.1%) would simply send a clearer message to users and vendors of technology as well as the public.

Appendix A:



Report

**Commissioned by
Noetica Limited**

16 October 2014

Report

1. Our brief

- 1.1 We have been commissioned by Noetica Limited ("**Noetica**") to investigate and advise on the compliance of Live Person Detection with data privacy and electronic communication laws and regulations in the UK.

2. Live Person Detection ("LPD")

- 2.1 LPD is a new, patent applied-for method of outbound calling designed for call centres using automated calling, designed primarily to filter out answering machines so that call centre agents are only provided with live customer calls and telemarketers are better protected from falling foul of nuisance call laws.
- 2.2 According to Noetica's 2013 white paper titled "Live Person Detection - Technological Breakthrough" (the "**White Paper**"), unlike current answer machine detection systems that are designed to identify answering machines, LPD seeks to identify real live people. The White Paper explains that LPD does this by engaging the call recipient in conversation by playing one or more of three pre-recorded messages and then monitoring the ensuing dialogue using an algorithm which relies on certain basic principles.
- 2.3 Firstly, as soon as a dialled call is answered it starts listening for a high energy beep typical of an answering device and continues to do so for the duration of the algorithm's run. If at any point this is detected the call is immediately classified as a call to an answering device (a "**Non-Live Call**").
- 2.4 A second strand of the algorithm determines who is the most likely agent to receive the call, were it to be a live call, and then uses the recorded messages associated to that agent to attempt to engage the recipient in conversation. At the same time, the algorithm constantly monitors the incoming voice channel. If the "recipient" talks over the recorded messages, this is a possible indicator of connection to an answering device and the algorithm will then take steps designed to verify this.
- 2.5 If the algorithm leads to the deeming of the call as "live" it is immediately transferred to the agent, whose voice will in the majority of cases have featured in the recorded messages that have just been played. If the call is deemed a Non-Live Call, the user of LPD can choose whether to disconnect the call, play a recorded message, or transfer the call to an interactive voice response system ("**IVR**"). The advice contained in this report is based on the understanding that all users will choose to disconnect the call if a Non-Live Call is detected by LPD.
- 2.6 According to page 9 of the White Paper, the pre-recorded messages will fall into the following categories:

A prompt: $R_1(A)$ (for instance: "Hello?")

An introduction $R_2(A)$ (for instance: "Hi. My name is Jane and I am calling on behalf of Acme Corporation to discuss your recent enquiry.")

A clarification $R_3(A)$ (for instance: "Pardon me, I didn't quite catch that?")

(together the "**Recordings**"). This opinion is given on the basis that the messages played using LPD are exactly as stated in the Recordings (other than to allow for the respective agent and company's names to be modified accordingly). It is also given on the basis that the making of all relevant calls in the first place is compliant with Regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003.

- 2.7 We are also assuming that LPD will be used to contact recipients who have not previously notified the caller that for the time being they consent to receiving communications comprising recorded matter for direct marketing purposes by means of an automated calling system..

3. Privacy and electronic communications law compliance analysis

- 3.1 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (the "**Directive**") was introduced as part of a package of telecoms reforms designed to regulate the electronic communications sector and to amend existing regulations. The Directive concerns the processing of personal data and the protection of privacy in the electronic communications sector and is the precursor to the Regulations (as defined below).
- 3.2 The Privacy and Electronic Communications (EC Directive) Regulations 2003 (the "**Regulations**") implement the Directive in the UK.
- 3.3 Regulation 19(1) of the Regulations, as subsequently amended pursuant to Directive 2009/136/EC, states as follows:
- "A person shall neither transmit, nor instigate the transmission of, communications comprising recorded matter for direct marketing purposes by means of an automated calling or communication system except in the circumstances referred to in paragraph (2)."*
- 3.4 Regulation 19(2) only applies where consent is given by the recipient of the call to receive, on that telephone line, calls comprising recorded matter for direct marketing purposes made using an automated calling or communication system. Since LPD is used where recipients of calls have not given such prior consent, this exception will not apply in this instance
- 3.5 Therefore on the face of it, since the overall purpose of all the calls the LDP system is designed for is direct marketing, its use of pre-recorded messages at the start of the call would seem to fall foul of Regulation 19 (1).
- 3.6 Having analysed this further, however, although we have not found any case law in the UK which bears directly on this point, nor any case law at European Union level, we believe there are a number of countervailing factors which indicate a narrower interpretation of Regulation 19 and suggest strongly that enforcement action against LPD by any of the UK enforcement authorities would be surprising and, we believe, open to serious challenge.
- 3.7 As a starting point, it is useful to review indications from authoritative sources as to the mischief Regulation 19 is aimed at.
- 3.8 Article 13 of the Directive states:
- "Unsolicited communications*
*The use of automated calling systems **without human intervention** (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent."* (Emphasis added)
- 3.9 Could it be argued that in its natural and ordinary meaning, the phrase "use of automated calling systems without human intervention for the purposes of direct marketing" permitted of a narrower interpretation such that it applied to such systems only insofar as they communicate *direct marketing* messages without human intervention? If this were arguable, Article 13 would not be engaged by systems such as LPD, if, in the normal operation of LPD, the content of the recorded message was in isolation "not for direct marketing purposes."
- 3.10 Regulation 19(4) of the Regulations, defines an automated calling or communication system as:
- "a system which is capable of–*
(a) automatically initiating a sequence of calls to more than one destination in accordance with instructions stored in that system; and

(b) transmitting sounds which are not live speech for reception by persons at some or all of the destinations so called."

- 3.11 Regulation 19 (1), however, provides that "a person shall neither transmit, nor instigate, the transmission of communications comprising recorded matter for direct marketing purposes" by means of the systems defined at Regulation 19 (4) without consent. Again, in the light of our analysis of Article 13, this seems to be strongly capable of being construed as biting only on the use of automated calling or communication systems transmitting recorded matter insofar as the recorded matter is for direct marketing purposes.
- 3.12 There is also support for this approach in the ICO's Guide to Privacy and electronic communications (the "**ICO Guide**"). In the latest version of this, and in concordance with the wording of the Directive, the ICO states as follows:
- "The mischief that Regulation 19 aims to tackle is where a subscriber receives a marketing call that is a recorded message, with no opportunity to speak to a 'live' person. Such calls are particularly intrusive and can be unsettling for the recipient. So we take a firm line on this point. We believe that even if the recipient is given an opportunity to talk to a 'live' person at some point in the message, for example, 'to speak to a live operator, press 1', such a call would still be covered by the prior consent rule because recipients without touch-tone phones would be excluded from such an opportunity."*
- 3.13 Here ICO is clearly implying that it will not regard Regulation 19 as breached if, as we are informed is the case with LPD, all recipients of calls who pick up the call live will speak to a "live" person, without the need for a touch-phone.
- 3.14 Turning to Ofcom, it is instructive to refer to their "Revised statement of policy on the persistent misuse of an electronic communications network or service 2010." ("the **Policy**") This requires that, in the event of an abandoned call, a very brief recorded information message must start playing within a defined time after the call is picked up. Section A1.52 requires, inter alia, that the message "includes no marketing content and is not used as an opportunity to market to the person."
- 3.15 This is very much consistent with the narrower interpretation of Regulation 19 suggested at 3.9. On a wider interpretation of the Regulation, the inclusion of *any* recorded matter in such a call (made without consent), which has by definition been made using automated calling systems, would, without prior consent, put the caller in breach of the Regulation 19 because the overall purpose of the call is for direct marketing purposes, whether or not the pre-recorded content was itself of a direct marketing nature.
- 3.16 Clearly Ofcom would not require as official policy an action that it regarded as in breach of law, so this suggests strongly that it construes Regulation 19 narrowly and does not regard it as preventing the unconsented use of pre-recorded matter in calls made for direct marketing purposes using automated calling systems provided the pre-recorded content is not of a marketing nature.
- 3.17 It is also of interest to refer to Ofcom's recent Notification to Ageas Retail limited ("**Ageas**") of a penalty under Section 130 of the Communications Act 2003 (the "**Communications Act**"), dated 1 October 2014 (the "**Ofcom Notification**"). The Ofcom Notification relates to the recorded message played by Ageas in the event of an abandoned call in purported compliance with Ofcom Policy. The message was as follows:
- "Hello this is a recorded message from RIAS, we would like to provide you with a quotation for Home (Motor) insurance but we are currently unable to put you through to one of our advisors, we may attempt to call you again in three days however, if you prefer that we don't please call [X]. We apologise for any inconvenience caused."*
- 3.18 Ofcom initially found Ageas in violation of section 128 of the Communications Act. However, Ageas disputed the finding, arguing that there was no marketing intention or value in the message and that Ofcom's Policy and guidance did not elaborate on what constitutes marketing.

- 3.19 After consideration Ofcom reversed its original decision and decided that the above message did not include marketing content. The regulator said that although the point was finely balanced, it now took into account the "neutral wording" of the information message used, that the word "quotation" was used without any further details as to what the quotation would involve and [gave] the benefit of providing call recipients with some information about the call to avoid generating anxiety."
- 3.20 Based on this, it seems very unlikely that, assuming the narrow interpretation of Regulation 19 we put forward at 3.9, the words used in the Recordings set out at 2.6 would be regarded as marketing content or "for direct marketing purposes." If they were found to be not for direct marketing purposes, then even if the call recipient had not consented as required by Regulation 19 (2), Regulation 19 would not be breached.
- 3.21 The above assessment is based on the understanding that any Non-Live Calls are immediately disconnected by the user. If, however, as described in paragraph 2.5, a Non-Live Call is detected and the LPD user chooses to play a recorded message, this will breach Regulation 19 if the recorded message contains any direct marketing content. Noetica should advise users that extreme care must be taken when deciding the content of such a recorded message, to ensure that it does not contain any direct marketing language.
- 3.22 Should the user choose to direct the call to an IVR, as described in paragraph 2.5, there is a high risk of this breaching Regulation 19. If the call made to the recipient is incorrectly deemed a Non-Live Call by LPD, and the call is directed to an IVR, then the call will be in breach of Regulation 19, as expressed in the ICO Guide extract quoted at paragraph 3.12 above.

4. Conclusion

- 4.1 On its face Regulation 19 of the Regulations would appear to catch LPD's use of the Recordings in a call made without consent having previously been given to such calls, owing to the overall purpose of the call being for direct marketing,
- 4.2 However, the wording of the Regulations does not clearly specify whether, for the Regulations to apply (a) the automated calling system should be one that does not allow an opportunity to speak to a live person, or (b) that the content of the recorded message should be direct marketing.
- 4.3 Based on this, having analysed more closely relevant wordings of the Directive and referred to relevant guidance and actions from ICO and Ofcom, it seems likely that in the UK, a narrower interpretation of Regulation 19 would be adopted by the regulatory authorities.
- 4.4 This narrower interpretation would mean that provided the content of the Recordings themselves remained as they are, excluded any marketing message and that all Non-Live Calls are immediately disconnected, the normal operation of LPD as described in the White Paper should not give rise to enforcement action by the UK authorities under the Regulations. We say this particularly bearing in mind the clear benefits of LPD (which Ofcom has apparently recognised) in combating abandoned/silent calls, which continue to be a significant concern to UK regulators.
- 4.5 Even if there were such enforcement action, we believe that for the reasons set out above in section 3, there would be good prospects of dissuading the courts from finding that the use of LPD involved a breach of the Regulations.
- 4.6 In conclusion therefore, although, on a strict interpretation of the wording of the Regulations, there is a risk that the use in calls using LPD of the Recordings gives rise to a breach of Regulation 19, we deem this to be a low risk.

16 October 2014