



Ofcom's response to the  
House of Commons Culture,  
Media and Sport Committee on  
Nuisance Calls

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## Section 1

# Introduction

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.

In the Ofcom and the ICO joint nuisance calls action plan which we published on 31 July 2013,<sup>1</sup> Ofcom said it 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 were set out in our response to the House of Commons All Party Parliamentary Group report on nuisance calls.<sup>2</sup>

Below, we respond to the conclusions and recommendations of the Culture, Media and Sport Committee nuisance calls report ('the CMS report') that are directly related to the work of Ofcom in this area and also issues like consent, which although is the responsibility of the ICO, we believe that this could have an impact on all types of nuisance calls, including those for which Ofcom is responsible.

Ofcom is also fully committed to continuing to work with a range of stakeholders including the DCMS, Consumer organisations, the ICO and other regulators to help drive a coordinated response to the wider issue of nuisance calls for the benefit of consumers.

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

<sup>2</sup> [Add link to the APPG Response]

## Section 2

# Regulatory framework

### Consent

**The CMS report recognises consent as a key component of direct marketing and proposes a number of recommendations relating to the ease with which consent to receive marketing calls can inadvertently be granted,<sup>3</sup> the unfair trading of personal data<sup>4</sup> and processing of personal data.<sup>5</sup>**

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.<sup>6</sup> 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.

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<sup>3</sup> Paragraph 22 of the CMS Committee report

<sup>4</sup> Paragraph 24 of the CMS Committee report

<sup>5</sup> Paragraph 25 of the CMS Committee report

<sup>6</sup> <http://stakeholders.ofcom.org.uk/consultations/silent-calls/joint-action-plan/>

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 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.

## Section 3

# Prevention

### An effective TPS

**“The planned review by Ofcom and the ICO of the effectiveness of the TPS is long overdue and should provide much-needed data to inform further regulatory action.”<sup>7</sup>**

Ofcom and the ICO has commissioned research on the TPS. The research is being conducted in two phases. In Phase 1 research participants will fill out a diary recording any nuisance calls they receive over a one month period. Participants will then be matched and split into two groups (taking into account factors such as nuisance call volumes and demographics); one group will be signed up to the TPS and the other will not be signed up. Phase 1 is already complete. For Phase 2, the diary exercise will then be repeated for another month.

We will publish a report on this in summer 2014. The results of the research will help inform future work in this area.

**“More organisations could be encouraged to become TPS licensees by reducing the annual fee for smaller companies – including sole traders. This might achieve a closer regulatory relationship with the Direct Marketing Association to the benefit of companies and consumers alike.”<sup>8</sup>**

Ofcom is required to provide managed telephone and fax registers in the UK under Regulations 25 and 26 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (as amended) (‘the Regulations’). Ofcom is permitted by the Regulations to make arrangements for the provision of the registers to be discharged by some other person. The Telephone Preference Service Limited (TPSL) currently provides the registers, known as the Telephone (TPS), Corporate Telephone (CTPS) and Fax (FPS) Preference Services, on Ofcom’s behalf under an outsourcing agreement.

The Regulations enable Ofcom (TPSL) to apply a range of charging fees and can provide the register in whole or in parts to enable greater flexibility. The fees are approved by the Secretary of State and are set at a level that we believe will equal the costs incurred, or reasonably expected to be incurred, by Ofcom in discharging our duties.

The registers are available in full or in extracts ranging from 1% to 50% of the registers, with prices ranging from as little as £36 for an ad-hoc partial licence to £2640 for an annual full licence. They are available for constant access on an annual basis, or simply supplied on a one-off basis to ensure that the cost of using the TPS is not prohibitive. The registers are made available in a choice of three different formats, reflecting current demand, namely website download, CD Rom or printed hard copy.<sup>9</sup>

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<sup>7</sup> Paragraph 30 of the CMS report

<sup>8</sup> Paragraph 32 of the CMS report

<sup>9</sup> <http://corporate.tpsonline.org.uk/index.php/tps/cost>

## Technical fixes

**“We find BT’s justification for charging for caller display totally unconvincing and ask them to reconsider. Other communications companies who charge their customers for a similar facility should likewise consider providing this free of charge.”<sup>10</sup>**

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.<sup>11</sup> Consumers can also use the calling line identification (‘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.

In December 2013, we published information for consumers on phone company services offered by seven CPs<sup>12</sup> that may help prevent nuisance calls along with details of the charges that they apply and those that provide services free of charge. We will 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.<sup>13</sup>

**Companies need to promote a wide range of technical options available to their customers to screen, curtail, block and report nuisance calls. The more of these technical fixes that are included in standard packages, at no extra cost, the better.**

Some CPs already offer a number of network based solutions to help screen, curtail and block nuisance calls and, as mentioned earlier, Ofcom published information on some of these in December 2013.<sup>14</sup>

Services like caller display and voicemail, enable consumers, to some extent, to screen calls. Whilst we acknowledge that there are wholesale charges attached to the provision of these services we note that there are communications providers who are offering these services to consumers in standard packages and at no extra cost.

The network based call blocking services that exist today 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 fully address the issue of nuisance calls as it blocks some legitimate withheld numbers e.g. calls from Doctor’s offices or shelters.

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

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<sup>10</sup> Paragraph 38 of the CMS report

<sup>11</sup> Consumers need handsets capable of displaying the CLI information and only available CLIs are displayed.

<sup>12</sup> 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.

<sup>13</sup> [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](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)

<sup>14</sup> <http://consumers.ofcom.org.uk/2013/12/protecting-yourself-from-nuisance-calls-and-messages/>

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.<sup>15</sup> 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.

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)<sup>16</sup> 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.

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<sup>15</sup> Unless the recipient subscriber has opted out of calls from specific geographic areas.

<sup>16</sup> 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.

## Section 4

# Reporting nuisance calls

### Identifying callers

**“We recommend that the Government legislates to proscribe the withholding of caller identification in telephone calls made either for marketing or for establishing marketing leads. We discourage consumers from making any purchase arising from telephone marketing activity where a valid contact telephone number has not been provided.”<sup>17</sup>**

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 Statement of Policy on Persistent Misuse set out that callers should help consumers identify them by ensuring a valid and accurate CLI is available.<sup>18</sup>

### Short codes

**We recommend that Ofcom deploys its expertise and good offices to help landline operators overcome the barriers that prevent them from providing a short code nuisance call reporting service analogous to the one their mobile competitors already provide.**

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 blunt. It would not provide any 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. There may be ways to overcome this but they are likely to be more complicated and we are mindful of the underlying goal of making it easy for consumers to report nuisance calls.

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

### Making it easier to complain

**“We believe it would be more convenient for telephone users were they presented with a single straightforward online complaints form for all nuisance calls and texts. This can then be directed to the relevant regulator and an appropriate reply provided**

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<sup>17</sup> Paragraph 46 of the CMS report

<sup>18</sup> A1.56 and A1.57

<http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>

**to the complainant. Such a one-stop shop for complaints stops short of creating a single regulator. However, it would provide some elements of a “customer-facing” approach that such a regulator would bring and which the existing reporting mechanisms have failed so far to provide.”<sup>19</sup>**

As this recommendation is along the same lines as the CMS recommendation that there should be a single nuisance calls helpline, we have addressed the two issues together.

Ofcom understands that the current framework can be complicated, and it is not always clear to consumers which regulator is responsible for taking action on each type of call. However, both Ofcom and the ICO have been given responsibility in this area as individually, we are the regulators best placed to deal with our respective responsibilities. As the nature of nuisance calls vary, it is appropriate that they are dealt with by the most appropriate regulator.

To help direct consumers to the right regulator 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. ICO web-pages now mirror those of Ofcom and each one provides links which directs consumers 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 ICO/Ofcom websites.

On 20 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 information about how to stop nuisance calls or to whom they should complain. The most popular ways identified were calling the phone provider and using an internet search engine.

We now 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.

Whilst we do not feel that a single nuisance calls helpline is required, we do agree that it is important that regulators are able to draw on the range of intelligence relating to nuisance calls.

Ofcom is an active participant, and wholly supportive, of the Operation Linden delivery plan and its objective to capture and share intelligence effectively to identify, plan, deliver and promote coordinated activity to maximise enforcement opportunities for all types of nuisance calls.<sup>20</sup>

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<sup>19</sup> Paragraph 48 of the CMS report

<sup>20</sup> Operation Linden is the ICO’s strategic threat assessment focussing on the relationship between lead generation and unwanted marketing communications. To progress this work the ICO has developed a delivery plan to help ensure the stakeholder group (which includes regulators, consumer groups, trade associations and industry) captures and shares intelligence effectively and feeds this into co-ordinated activity to reduce nuisance calls.

## Section 5

# Enforcement

### Tracing calls

**“Service providers should put systems in place to facilitate the tracing of nuisance calls, something that is routine for emergency 999 calls. Making such a facility widely available may, we acknowledge, be subject to some resource constraints. While it will clearly not be possible to go after every transgressor that is no justification for a continued failure to take enforcement action on a scale that will provide an effective deterrent.”<sup>21</sup>**

Call tracing” of the type employed for enforcing against nuisance calls is not required for emergency 112/999 calls. The task for nuisance call tracing is generally to try and establish the name of the company or individual who made a call, some time after it was made, based on information provided by the consumer receiving the call. There are many features of this task which make it technically and operationally complex, and they don't apply in the case of vast majority of 112/999 calls.

For example, in the case of 112/999 calls, the telephone line or handset used to make the call will have been in the UK and its identity will (except in rare exceptional cases) be known by the party receiving it. Using this information, a return call can be made if required, or the location of the originator found using records which UK CPs originating 112/999 calls are required to keep. No call tracing is therefore required.

For nuisance calls, if the call is originated in the UK and called parties are given accurate information about the identity of the line or handset making the call, no “call tracing” is required here either. Call tracing is only required where accurate information is not conveyed with the call, for example because the CLI displayed is incomplete or false, or because the call came from overseas.

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

In order to trace a suspect call a consistent approach is needed between Ofcom and the CPs whose networks are involved in terms of the process and information flow that is used between them. The standardised data exchange format is intended to minimise the chance of a trace failing because of insufficient information being available at some point. NICC will also provide Ofcom with information about the volume of call traces that CPs can deal with and how long they hold the required data for. This should further reduce the chances of call traces failing, and allow us to focus our effort on those most likely to succeed.

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 is currently piloting the operation of the standard with industry. The necessary complexity of the new process means that it will need to be tested carefully and modifications may be required.

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<sup>21</sup> Paragraph 56 of the CMS report

Alongside the new call tracing standard, NICC's technical guidelines on Calling Line Identities (CLIs) sets out how CLI information should be handled by and passed between networks and then presented to customers. The overall objective is to ensure that Ofcom's CLI rules, and in turn the underlying privacy legislation, are complied with.

Ofcom asked the NICC to update this document because it is to some extent based on "legacy" PSTN signalling that predates the signalling systems used on more current voice solution. The update will improve the consistency of CLI presented to consumers and ensure the necessary information is available for tracing all calls regardless of how they are made. 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.

## **Joint working**

**"We welcome the Government's decision to amend section 393 of the Communications Act 2003 to permit Ofcom to share information with the ICO. We also appreciate the Government's undertaking to implement this measure "as soon as possible", given the careful consideration needed before any extension of data processing powers."**<sup>22</sup>

Ofcom has been working closely with the ICO and requested this change to allow Ofcom to easily share intelligence with the ICO. Therefore, we too welcome the Government's decision to amend s.393 of the Communications Act.

**"Ofcom should consider extending the application of its persistent misuse powers to cover all direct marketing calls. There is no reason why persistent abusers of the telephone networks should not be hit twice."**<sup>23</sup>

Not all direct marketing calls necessarily involve "persistent misuse" as the law currently defines it. Many may be legitimate calls. In addition, rules on double jeopardy and due process would be relevant to the ability to make persistent misusers of telephone networks subject to two lots of regulatory action in respect of the same matter.

However, given the breadth of the legislation, we do acknowledge that some forms of misuse, including other forms of direct marketing, may also represent contraventions of other consumer protection legislation. Where such legislative overlap exists and we are faced with a particular instance of misuse, our policy is to determine in consultation with the relevant authority, which legislative requirements are most appropriate and may be most effectively deployed.

## **A single regulator**

**"While we recognise that the existence of multiple regulators, each with a specific and limited remit in relation to nuisance calls, may be confusing to consumers, we see no obvious benefit in reorganising the current regulatory landscape. However, the complaints process must be more consumer-friendly and there should be clearer lines of accountability. Each of the main regulators should name an identified individual whom consumers can hold responsible for dealing with the problems of nuisance calls."**<sup>24</sup>

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<sup>22</sup> Paragraph 74 of the CMS report

<sup>23</sup> Paragraph 76 of the CMS report

<sup>24</sup> Paragraph 82 of the CMS report

**“We see no pressing case for a single nuisance calls regulator. We do see the case for a single point of contact for all nuisance calls and for the existing regulators to be more visible and accountable for both their actions and inaction.”<sup>25</sup>**

Ofcom has taken a number of steps to ensure that the complaints process is consumer friendly and that there are clear lines of accountability.

In terms of the complaints process, our Consumer Contact Team (CCT) is the first and single point of contact for consumers contacting Ofcom to complain about nuisance calls. The team is responsible for recording complaints and enquiries and, providing advice. We know that different consumers will want to contact us in different ways, so we have ensured that we can be contacted by telephone, email and an online form.

For those consumers with access to the internet we have placed a considerable amount of information and advice on our website, advising consumers how to complain about different types of nuisance calls, who to complain to and steps consumers can take to avoid nuisance calls; such as registering with the Telephone Preference Service which is a free service or making use of commercial products and services, some of which will be charged for, to help block unwanted calls. In October 2012 we published online consumer guides in collaboration with other regulators and consumer groups which have been viewed over 250,000 times. However, given not everyone has access to the internet, consumers can access the same information by calling the CCT.

As we mentioned in our oral evidence to the Committee, consumers will look for information and advice about nuisance calls from a range of sources, be it from the regulator, a consumer organisation, their MP or friends and family. Regardless of where they go, what is vital is that the same consistent advice should be available. We are therefore working with other regulators and consumer bodies to get information out to consumers in a variety of ways, including publicising this consumer information to MPs so they can share even more widely by blogging, tweeting and press releasing it which many do. At present we are working very closely with a number of consumer representatives including which? and the Communications Consumer Panel to identify the best ways to communicate information on how to report nuisance calls.

We have also been taking steps to ensure there are clear lines of accountability by explaining our specific role alongside other regulators.

We produce an annual Consumer Experience Policy Evaluation Report setting out our regulatory activity on a range of issues including nuisance calls (latest published January 2014). In addition, in July 2013 we published a joint action plan with the ICO on nuisance calls. We are in the process of updating the action plan to update consumers and industry on the progress that has been made and the steps we plan to take over the next few months. The updated joint action plan will be published in the first quarter of 2014. We believe that publications such as these and our work with stakeholders, ensure that there is transparency in the work that we do and visibility to consumers of our responsibility in this area.

In addition to our regular updates on our work to Parliament in July 2013 we hosted a Q&A session for MPs in the House of Commons with the ICO to hear MPs concerns and set out some of the challenges we face as regulators in tracing calls and taking effective enforcement action. We think it is important to host sessions such as these to be accountable on an issue Parliament is clearly concerned about.

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<sup>25</sup> Paragraph 83 of the CMS report

## **Sector-based regulation**

**“The Direct Marketing Commission would have more clout were it to be given greater authority to share relevant information with both the Direct Marketing Association and the Telephone Preference Service.”<sup>26</sup>**

Sharing of TPS complaints data is subject to Part 9 of the Enterprise Act 2002. A general restriction on disclosure of information relating to the affairs of an individual or any business is in s.237 of that Act. Information to which s.237 applies can, nonetheless, be disclosed to other bodies to facilitate the exercise of any function under (i) the Enterprise Act or (ii) other functions specified in Schedule 15 to that Act or (iii) subordinate legislation listed in a SI made by order of the Secretary of State. Ofcom can also disclose information to which s.237 applies for the purpose of, or in connection with, certain civil and criminal proceedings. However, if none of the specific disclosure gateways applies, such information (including TPS complaints data) cannot be disclosed. Each case will need to be assessed in relation to the above.

If wider information sharing is desirable, the law could be amended. This measure is unlikely by itself to make a significant difference. The ICO as an independent regulator has substantial powers via the PECR to deal with organisations that break the rules. However, should the current and proposed measures set out in our Action Plan prove to be ineffective, then we would consider changing the law to permit the sharing of data with third party organisations such as the DMC.

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<sup>26</sup> Paragraph 88 of the CMS report