fair telecoms campaign **briefing**

Input to Ofcom review of use of its "persistent misuse" powers - focussed on silent and abandoned calls

Introduction

This response to the call for inputs is offered in the form of a briefing that will be published to reflect a commentary on the situation regarding the persistent misuse powers and Ofcom's failure to properly address the issue of Silent Calls.

Ofcom has always been aware of my longstanding interest in this topic and, despite us having views in common on many other issues, my strong opposition to the way in which it has been proceeding on this. I have long believed that if the (very limited) powers that it holds had been deployed effectively, and in the manner intended by parliament, then the problems which they still seek to address would have been greatly diminished in their impact.

I see no justification whatsoever for Ofcom continuing to send both a direct and indirect message to those who make Silent Calls, to imply that this practice can be acceptable.

Again, I must repeat, and attempt to explain, my assertion -

Ofcom is engaged in persistent misuse of its persistent misuse powers.

Respondents to this consultation are being invited to comment on revisions to specific 'pseudo-regulations' covering "abandoned calls". Ofcom pretends it can use the persistent misuse powers to apply and enforce requirements on those who undertake certain activities, so as to minimise the degree of annoyance, inconvenience or anxiety they can cause. This pretence represents a misunderstanding and misrepresentation of the nature and purpose of these powers.

The powers are neither intended, nor suitable, for the purpose of regulating essentially legitimate activities (e.g. use of automated diallers) in fine detail. They are for the purpose of eliminating clearly unacceptable activities (e.g. habitually hanging up in silence when a call is answered).

This point was made clear to Ofcom by parliament, when the unanimous view of the Committee appointed to consider the granting of an increase to the maximum financial penalty available as part of the powers acceded to this request, but with the clear direction:

"We expect you to use your powers to eradicate the nuisance of silent calls"

See Hansard: 28 March 2006, Fifth Standing Committee on Delegated Legislation, Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2006.

The continuing refinement and execution of a policy that expressly permits the nuisance of Silent Calls to continue, aiming only to limit its impact, cannot satisfy this expectation. Conflating the related, but separate, issue of "abandoned calls", applying various particular requirements and attempting to limit the number of Silent Calls made each day (as a proportion of total activity) and the frequency with which one caller may make them to a particular victim (one per day) serves simply to complicate the issue and disguise an essential misuse of the misuse powers.

David Hickson
21 November 2014

My previous comments

The current situation is little changed from that which pertained after Ofcom first undertook an investigation to consider use of the persistent misuse powers. I was the "member of the public" who reported silent calls to me from MKD Holdings, aka Kitchens Direct, and enjoy the odd distinction of the being the only such person to have had the privilege of a specific case having been investigated. Despite the policy in force at the time, Ofcom switched to the pseudo-regulatory approach that it still follows as it pursued that case and subsequently.

(See http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_742/)

Many of the points made in this response have also been made (in my own name) in my responses to the previous consultations on this topic, and published by Ofcom:

6 Jan 2006	Statement of policy on the persistent misuse of an electronic communications network or electronic communications service
27 Jan 2008	Revised statement of policy on the persistent misuse of an electronic communications network or service
27 July 2010	Tackling abandoned and silent calls

As the alternative approach which Ofcom has taken on every occasion is now clearly seen not to have been effective, I see no good reason why it should not now reconsider previously rejected suggestions and comments.

Evidence presented to, and published by, the Culture Media and Sport Committee of parliament in the course of its inquiry into Nuisance Calls last year, also covered many of the same points.

Aug 2013	Written evidence submitted by the Fair Telecoms Campaign
Sep 2013	Supplementary written evidence submitted by the Fair Telecoms Campaign
Oct 2013	Further supplementary written evidence submitted by the Fair Telecoms Campaign

I would be happy for relevant additional material from any of those documents to be brought forward into the current considerations, to supplement this submission.

The persistent misuse powers - usage and abusage

Much of the problem with the issue arises from Ofcom's proper discharge of its **other duties** as defined in the Communications Act 2003. Ofcom is most certainly required to impose and enforce compliance with regulatory measures under the terms of **§45-§51 and §94-§104**. The powers under §128-§131 are constructed differently, as they have a quite distinct purpose.

The Persistent Misuse Powers do not, as widely misunderstood, extend the scope of Ofcom's regulatory responsibilities, and the power to impose and enforce compliance with General Conditions, to cover all call centres and other users of telecoms networks. They simply enable it to intervene in **specific cases**, which would previously have been covered by provisions in the Telecoms Licensing regime. They fill a gap that was left when this had to be abolished.

(See the Contents Page for each of the numbered sections of the Communications Act 2003.)

The **§128 Notification** is the initial phase of intervention. It is simply a Notification of Ofcom's determination that it has "***reasonable grounds for believing***" that a person has engaged in activity ***"… the effect or likely effect of which is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety***". It does not, indeed it cannot, represent a firm determination that a specific regulatory condition has been breached and that a penalty will follow - as Ofcom has no power to impose enforceable requirements in general in relation to potential "persistent misuse". Ofcom however is seen to invariably deploy this in the same manner as a **§94 Notification of contravention of conditions**, which follows such imposition.

The **§129 Enforcement Notification** is the only means that Ofcom has to apply any specific enforceable requirements on a user of a telecommunications network or service to cease "persistent misuse". This can only be applied in a specific case and only following a §128 Notification. This step is never used!

The **§130 Penalty** would be normally expected to follow a breach of the terms of a §129 Enforcement Notification, as this is the only situation in which Ofcom may readily have clear evidence of a breach of a regulatory requirement, so as to be able to proceed swiftly and firmly. Ofcom uses only the exceptional power to impose a penalty when no such breach has occurred.

Although the primary purpose of the §128 Notification should be to cause the misuse to cease, as soon as it is identified, Ofcom holds back from issuing such Notifications until it is ready to proceed directly to the imposition of a §130 Penalty. In some cases §128 Notifications have been issued in relation to activities that took place 18 months previously!

The **§131 Statement of Policy** is intended to expound Ofcom's ***"general policy with respect to the exercise of their powers"***. It may therefore guide potential misusers of the activities they should avoid - in case they may be unaware of what activities are likely ***"to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety"***.

This statement should not bind Ofcom in the determinations it may make, however Ofcom uses it to have that effect. Furthermore, it cannot serve as a Notification of Conditions (in the way that §48 applies to the powers in §94), however that is the procedural model which Ofcom follows.

Ofcom appears to be confused by its proper day-to-day role as a regulator, into failing to recognise that **"persistent misuse" is simply unacceptable behaviour that must be ceased immediately**. Instead it treats, for example, the habitual practice of hanging up in silence, as if this were something that it should try to reduce (regulate) by means of a stated policy and exemplary penalties against selected cases where the terms of this policy is found to be breached. (In some cases, penalties are imposed when not one Silent Call has been made!)

This is difficult to achieve because the very purposes of the legislation is being twisted. This may explain the delay between Ofcom having "***reasonable grounds for believing …***", so as to begin a formal investigation, and the issuing of the Notification. Furthermore, Ofcom finds itself having to defend an explicit authorisation of a certain proportion of calls made being Silent Calls.

Nobody could suggest that Ofcom would be able to prevent any Silent Calls ever being made. It is however surely unacceptable to publish a policy covering use of the powers against "persistent misuse" that includes a specified tolerance of this as habitual behaviour. (It cannot be said that habitually hanging up in silence when a call is answered is perhaps "necessary".)

How Ofcom got itself into this mess - a history

The initial position

The original Statement of Policy, which Ofcom inherited from Oftel, was very clear, at 4.5.3, in identifying a Silent Call caused by there being No Agent Available to pick up an automatically dialled call that is answered as an obvious example of persistent misuse.

It even went further, dismissing any relevance of the "percentage tolerance" approach favoured by the Direct Marketing Association in the following terms (at 7.6):

"***… because the 'persistent misuse' powers are framed with a view to the protection of individual consumers, it would be inappropriate to apply a 'percentage' approach. Where a large call centre generates, say, 200 short duration calls a day, it will not be a mitigating factor that these calls represent only 3 per cent of the call centre's output. From the standpoint of an individual who has received such a call, there is little comfort to be drawn from the knowledge that 97 other people did not.***"

(The sense of this comment is unchanged if one substitutes *'silent'* for *'short duration'*. The reference to *'97 other people'* should be taken to mean *'97% of those who were called'*. If the example given were followed through to give a number of people, it would be 6,467 each day!)

This version of the policy is no longer published by Ofcom, but it is available to view at
http://web.archive.org/web/20060106070234/http:/www.ofcom.org.uk/advice/misusestatement/misusestatement.pdf

It was to support and secure implementation of this policy that I became involved in this matter.

Concern is shown for the interests of nuisance callers

Ofcom engaged the Direct Marketing Association (in the claimed role of "co-regulator") when it came to consider use of the powers and develop a more "refined" policy.

Ofcom therefore took on board the sense of proportionality, balancing the interests of providers and consumers, which is required to show in its regulatory work, in respect of its use of the persistent misuse powers. It was recognised that users of predictive diallers would inevitably find that the No Agent Available situation would occur from time to time. As things stood at the time, treating the inevitable annoyance, inconvenience or anxiety that results from every Silent Call as persistent misuse would effectively outlaw use of this equipment.

Contrary to the terms of its published policy at the time, Ofcom therefore applied a percentage approach in its initial statement on the case of MKD Holdings and then later issued a Notification in respect of explicit daily breaches of the percentage limit. One is left aghast wondering what is the difference between the annoyance, inconvenience or anxiety caused on the days when the limit was not breached and that caused by the calls in excess of the limit on the days when it was.

I cannot find a copy of either of the MKD Holdings documents published online and have therefore uploaded copies as follows:

3 May 2005 Section 128 Notification issued to MKD Holdings

30 Apr 2004 Silent Calls Joint Closure Statement

(For the avoidance of doubt, it may be necessary to point out that my complaint related to Kitchens Direct/MKD Holdings; that from the DMA related to IMS Marketing.)

A solution is found for the case of the No Agent Available call

Given that call centres are prepared to place themselves in the position where a number will be called and no agent is available to speak - the very least the caller can do is announce who they are, very briefly explain what has happened and apologise. If, in the light of this owning up and handling whatever response is received, they are able to continue with the practice, then it cannot be outlawed. Obviously the only way that this can be done is by using a recorded message.

The Privacy and Electronic Communications Regulations #19 prohibits use of a recorded message for direct marketing purposes (without explicit consent). The message used to cover the No Agent Available situation must therefore be purely "informative" in content, otherwise it must be considered to be in breach of this regulation.

On recognising this situation, I therefore engaged in discussion with the Office of the Information Commissioner, which enforces compliance with the PECR. This led to a determination that, regardless of the original purpose of the call, if the message presented was apologetic in tone and purely "informative", then the call as concluded would not be seen to have a direct marketing purpose. This obviously leaves open the possibility that an excessive number of such messages, or any other indication of a direct marketing purpose would enable a breach of PECR #19 to be determined.

Similarly, if, in practice, use of any informative message were found to be causing a significant degree of annoyance, inconvenience or anxiety and to meet the criteria to warrant persistence, then there would be no reason for Ofcom to hold back from issuing a Notification of Persistent Misuse.

When I referred the matter, including the comments from the ICO, to Ofcom, it was my hope that this would enable Ofcom to hold firm to its stated policy on persistent misuse, confident that users of predictive diallers had no basis for claiming that Silent Calls were necessary.

Affirmation of the percentage approach and a new category of persistent misuse

The policy that emerged in November 2005, following a working group established by the then Department of Trade and Industry, involving Ofcom and the Direct Marketing Association, was the first version of the complex regulatory framework which remains, with added complexity, today.

This treated the No Agent Available situation in general, known as "abandoned calls", as a category of potential persistent misuse, according to the daily percentage of such calls. Failing to use an "informative message", i.e. making a Silent Call, was suggested as being an "aggravating" factor.

This simply enables Ofcom to act in the role of a regulator, using its information gathering powers to obtain data from the statistics available from diallers, along with answers to some questions in order to determine whether or not an operation complies with technical standards it has set.

We are essentially still in the same situation today. The focus is on attempting to regulate the behaviour of an essentially legitimate industry, not on eliminating unacceptable practice.

"Answering Machine Detection" finally makes an appearance

It has long been suspected that a significant proportion (perhaps even the majority) of Silent Calls experienced arise not from the No Agent Available situation but from the use of Answering Machine Detection equipment (AMD).

This equipment was developed at the time when answering services consisted only of tape recorder based devices attached to telephones. By listening to the first few micro-seconds of sound after the call had been answered, an automated dialler could readily detect the sound of a tape recorder starting up and thereby drop the call before connecting an agent.

Since use of mechanical recording devices ceased to be the norm, the methodology has been advanced, requiring much longer sound samples and relying on a variety of clues that may distinguish between a recorded voice and a live person.

AMD causes Silent Calls in two ways. Firstly, if an agent is connected they will miss at least part of the salutation, or may not even be connected in time, so as to give a proper response. On hearing nothing, the person called will hang up having received a Silent Call. (These cases are not considered by Ofcom, but it is only the experience of the person called that matters.)

The second example is the noted case of the "false positive". The AMD cannot be expected to be anywhere near 100% accurate. An answering machine may be "positively detected", but falsely, because a person has answered the call. Claims of percentages in excess of 95% are made, but it is not possible to verify any such claim under "live" conditions.

Whilst it can aid productivity to protect agents from having to deal with calls that are answered by machines, many call centre operators have abandoned use of AMD for the following reasons:

- Due to "false negatives", agents have to encounter machines anyway and are generally very quick to recognise them, so the additional loss of productivity is not great.
- The delay in the agent being connected to the caller greatly impedes the effectiveness of the conversation - e.g. asking for someone's name after they have already given it.
- AMD causes Silent Calls.

In 2008 Ofcom revised its policy to include a confirmed tolerance of Silence Calls resulting from use of AMD. Rather than returning to the essential principle of regarding the habitual practice of hanging up in silence as a clear example of persistent misuse (with use of the "Informative Message" to cover the NAA situation), it moved a step further away from this.

See Revised Statement … 10 September 2008

In 2010, this absurd decision was taken even further with the annoyance, inconvenience or anxiety caused by Silent Calls being further acknowledged by a further revision to the policy. This was expressly intended simply to reduce the impact by demanding that every positive AMD determination (a Silent Call in cases where the determination was false) should lead to the number not being called again for 24 hours - so as to ensure a 24 gap between Silent Calls from any particular caller to any particular victim.

See Tackling abandoned and silent calls - Statement 1 October 2010

The argument in favour of the 24 hour gap was presented with reference to complaints made to Ofcom, something which was noted to happen particularly when victims had received multiple Silent Calls on the same day. The clear inference of this argument being a primary objective to reduce the number of complaints made to Ofcom, regardless of the degree of annoyance, inconvenience or anxiety being suffered.

The consultation which preceded this statement, and the revised policy itself, included an economic analysis of the benefits to the call centre industry of making Silent Calls - the "Ember Analysis". The results from this were carried forward into a balanced argument about the benefits derived by consumers from industry having lower costs. This was used to provide a justification for tolerance of the habitual practice of hanging up in silence.

This nonsense is perhaps the best example I have of Ofcom being engaged in persistent misuse of its persistent misuse powers. It could be argued that considering the potential impact on consumer prices, in industries (not just the telecoms sector) where they move in direct proportion to overhead costs, falls within Ofcom's second statutory principal duty "***to further the interests of consumers in relevant markets***". In this case however it is seen to directly conflict with Ofcom's first such duty "***to further the interests of citizens in relation to communications matters***".

Essentially I cannot see how Ofcom has the authority to make a determination that the nuisance of Silent Calls caused by use of AMD is a 'price worth paying' for allegedly lower retail prices than would otherwise be imposed.

Answering Service Detection - ignored

At a time when a sizeable proportion of calls answered by an answering service use a service provided on the network, rather than by a consumer attached device, it would seem that a serious demand to make a definitive automatic determination about whether such a service had been deployed could be met more effectively. If there is a serious need for callers to automatically drop calls that are answered by an answering service, then one must wonder why this demand has not been met by the simple provision of some form of reliably detectable indication from the network.

A simple and effective technique to perform Answering Service Detection, using some of signal - even an audible tone at an agreed frequency - would surely place AMD, and the Silent Calls that it causes in the dustbin of history, where it has long belonged.

If Ofcom recognises this demand from users of telephone networks, one might wonder why it does not press the providers to deliver ASD. Instead it actively encourages use of a hopelessly outdated and chronically ineffective alternative technique (AMD) - which causes Silent Calls.

Summary

Ofcom's simple duty ***to further the interests of citizens in relation to communications matters*** denies this improper attempt to regulate call centres. The power in §128 to issue a formal Notification when made aware of ***habitual*** activity ***likely to cause annoyance, inconvenience or anxiety*** must be used whenever this occurs. Further intervention, using §129 Enforcement Notifications §130 Penalties may follow, where appropriate.

It must be made plain that hanging up in silence when a call is answered is simply unacceptable, and unjustifiable. Ofcom is expected, by parliament, to use its powers to eradicate the practice.

Our positive proposals

Viewing the wider issue of "Nuisance Calls" in general, we note that the powers of Ofcom and the ICO to regulate the marketing and customer contact activities of business - notably the sectors from which most Nuisance Calls originate - are greatly exceeded by those of other regulators.

It is not simply that the sectoral regulators are better placed to penalise wrong-doing, they are able to develop codes of practice appropriate to their sector in respect of telephone contact. There may be some areas, for example some financial and legal services products, where telemarketing should be simply prohibited. The manner in which consent to various forms of telephone contact can be readily given, or assumed, may differ between sectors.

The key issue is that the sectoral regulators have a close relationship with those they regulate and are much better placed to secure compliance with regulatory requirements - in some cases businesses have to be licensed in order to trade!

Obviously, avoidance of persistent misuse and compliance with the requirements of the PECR must remain as the bedrock for an effective refined regulatory structure and as the net to catch those who do not fall within it. Furthermore other regulators may wish to be guided by Ofcom on any matter relating to telecommunications.

This approach to regulation is fully within the spirit of that adopted by the present government, and its predecessor. The idea of a whole new regulatory structure to explicitly cover call centres, which is effectively what Ofcom is trying to do at present, is unthinkable. Regulation must be applied as close as possible to the businesses which it covers, and be properly sensitive to the needs of the businesses, their customers and other stakeholders with an interest (e.g. potential customers). Ofcom has that role, but only with reference to the communications sector.

We would urge Ofcom to pull back from trying to regulate the call centre industry, which it has neither the appropriate powers, nor any proper duty, to do. The persistent misuse powers should be, as intended, used for prompt and exceptional interventions in specific cases not covered by any regulatory regime.

As a starting point, we see it as imperative that all existing tolerance of the practice of hanging up in silence when a call is answered is expressly removed, from the formal statement of policy and from the general understanding. Given that Ofcom may not have the resources to act immediately against those who have continued this practice with its blessing, whilst it must do so whenever it can - after allowing a reasonable time for the practice to be ceased - this may provide an incentive for those able to impose regulations to have this effect to step in.

This could be timely, as the FCA is shortly planning to consult on issues including telephone contact.

Once again we extend an offer to work constructively with all parties who seek to see the issue of nuisance calls properly addressed.