The Information Commissioner's response to Ofcom's call for inputs on its review of persistent misuse powers

The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 (DPA), the Privacy and Electronic Communications Regulations 2003 (PECR), the Freedom of Information Act 2000, and the Environmental Information Regulations. He is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken.

The Information Commissioner welcomes the opportunity to respond to Ofcom's review of how it uses its persistent misuse powers, given the potential for coordination of those powers and the powers granted to the Commissioner under PECR.

The Commissioner's remit extends to the oversight and enforcement of unsolicited direct marketing contact via electronic means including via telephone.

The Commissioner supports action that would reduce consumer complaints about unwanted marketing calls, and the perceived nuisance that these cause to the public. He is committed to taking action against organisations which breach PECR when his regulatory powers allow.

He views Ofcom's persistent misuse powers as complementary to his own. The current threshold at which the Commissioner can take enforcement action against those who fail to comply with PECR is set at "substantial damage and distress". Whilst there is a current [consultation](#) proposing that this threshold is removed or lowered, in the meantime he views the lower threshold of "annoyance, inconvenience or anxiety", that can be applied by Ofcom under the Communications Act 2003, as helpful in allowing some regulatory action when he is unable to act. He also has a memorandum of understanding with Ofcom which facilitates joint working.

Q1: We would welcome views and evidence from stakeholders on (a) the main types of harm that consumers experience from nuisance calls in general and specifically in relation to silent and abandoned calls; and (b) how to measure the harm. You may wish to consider the following points in your response:

- *Evidence of changes in the nature and magnitude of the harm since we last reviewed the policy in 2010.*
- *Whether the harm differs across landlines and mobiles, consumers or the different types of calls (e.g. the time of day the call is received, whether it is a silent call or a live call).*
- *Types of harm other than wasted time and distress.*
- *Whether the distress caused by nuisance calls can be quantified and if so how.*
- *Evidence of how long it takes consumers to deal with silent and abandoned calls (e.g. X seconds or minutes to answer the phone, deal with the call, take steps to prevent further calls) and how that time should be valued.*
- *Views on the relationship between silent and abandoned calls and other call types.*

Unsolicited direct marketing accounts for only part of what consumers consider to be 'nuisance' calls, but it is however a significant part. It is our view that there is significant and compelling evidence of growing volumes of unsolicited live and automated telephone calls and SMS texts to UK consumers, and evidence that consumers are increasingly concerned about the problem and complaint volumes are also increasing.

It is the Commissioner's experience that unsolicited marketing calls are made to both landline and mobile numbers. The rules relating to making marketing calls to consumer telephones are not affected by the type of telephone that the call is received to (mobile or landline) so we do not hold definitive figures relating to the type of telephone receiving the calls.

Between setting up the online reporting tool in March 2012 and April 2014, over 323,000 complaints have been made to the ICO about unsolicited calls and texts, and the number continues to rise.[1]

Evidence from elsewhere also supports the case that the problem is growing:

- Complaints to the Telephone Preference Service (TPS) have been consistently rising - peaking at 10,000 a month for TPS in 2013.

---

[1] ICO Annual Report 2013/14 - http://ico.org.uk/about_us/performance/~/media/documents/library/Corporate/Research_and_reports/annual-report-2013-14.pdf

20141107 ICO consultation response to Ofcom review of persistent misuse powers

- Complaints to Mobile Network Operators (MNOs) via the 7726 reporting tool continue to rise, as have complaints from consumers who have received unsolicited live and automated calls on their mobile telephones.

We also note that a Which? survey from early 2013 found that 70% of those questioned had received unsolicited calls. This was a significant increase since a previous similar survey in 2010.

There is a sliding scale of harm caused by unsolicited calls and texts. Evidence from concerns referred to the ICO by the public show that 90% consider the calls to be inconvenient, annoying, a cause for concern, a cause of anxiety or a disruptive irritation. For certain members of society, particularly in vulnerable groups, the calls will cause much greater distress and harm. For example, shift workers may have their sleep patterns seriously disrupted, and people with a terminal illness or a disability may have to make a considerable effort to answer the phone.

The evidence is also clearly set out in a recent independent report from the media policy project at the London School of Economics (LSE)[2]. The report also highlights the wider costs to business and society of the problem:

- Costs to phone companies and regulators in handling complaints.
- The value of the telephone directory has been eroded, as two thirds of UK residential lines are ex-directory.
- Trust in and reliance on the phone is being undermined.

On the basis of this evidence, the Commissioner has put forward to DCMS a case for lowering of the threshold for enforcement action relating to unsolicited electronic marketing. The current threshold has proven difficult to establish and uphold in enforcement action, and we are consequently seeking a lower threshold to enable us to tackle the problem more effectively. The DCMS has recently opened a public consultation on this proposal.

Any steps which Ofcom can take to coordinate activities in this area with the ongoing work of the Commissioner would be positive as there is undeniably a significant problem to be addressed.

Section 3

---

[2] LSE Media policy project (2013) Nuisance calls: a case for concerted action.
http://www.lse.ac.uk/media@lse/documents/MPP/LSE-MPP-Policy-Brief-8-Nuisance-Calls.pdf

Q2: We would welcome views and evidence from stakeholders on what are the key drivers of (a) silent calls and (b) abandoned calls. You may wish to consider the following points in your response:

- *Whether the main driver for abandoned calls is the use of ACS or if there are other key drivers.*
- *Whether you agree with the possible reasons why consumers may receive silent calls and the extent to which they are likely to be a key driver of the overall volume of silent calls as set out in Figure 1.*
- *Evidence of the key drivers or silent or abandoned calls.*
- *Aside from mobile coverage, whether there are other issues specific to mobiles that could be causing silent or abandoned calls.*
- *Any information you have on how long organisations will ring consumers before disconnecting an unanswered calls (e.g. 15 seconds) or how quickly they connect consumers to a live agent (e.g. two seconds).*

Q3: We would welcome views and evidence on the use of AMD including (a) if call centres have changed their use of AMD in recent years and if so why (b) the volume of calls made by call centres with and without the use of AMD (c) false positive rates when using AMD and any data to suggest that the accuracy of AMD has improved in recent years.

Q4: We would welcome views and evidence on potential changes to the policy to help reduce the harm caused by silent and abandoned calls including those identified in Figure 2 (abandoned call rate and approach to AMD), Figure 3 (time limits for calling consumers and connecting to a live agent) and Figure 4 (good management and appropriate processes). You may wish to consider the following points in your response:

- *Views on whether it would be worth pursuing any of the potential changes identified in Figures 2 to 4 or if there are other potential changes that should be considered, for example, to make it clearer and easier for stakeholders to understand and follow or to specifically address calls made to mobile phones.*
- *Data indicating the likely impact of the potential changes in terms of reducing the harm caused by silent and/or abandoned calls and the potential cost of the change (both one-off and ongoing costs).*

Figure 2 under 3.19 includes references to abandoned call allowances that are based on percentages of total calls made. The requirement is that abandoned calls could not exceed X percentage of the total calls made within a particular period.

One concern that we would highlight with this approach is the potential for it to cause organisations to need to make more calls in order to level out the number of abandoned calls made over a particular period. For example, a call centre experiencing an unusually high number of

abandoned calls for whatever reason would be incentivised to make a higher number of calls than they might otherwise, in order to come within the appropriate percentage brackets. This could create a cyclical effect with consumers receiving more calls that they perceive to be a nuisance as a result of this type of blanket measure.

Section 4

Q5: We would welcome views and evidence on potential changes that could be made to the policy relating to the a) current five general examples of persistent misuse (misuse of automated calling systems; number-scanning; misuse of a CLI facility; misuse for dishonest gain – scams; and misuse of allocated telephone numbers) or b) other examples of persistent misuse.

You may wish to consider the following points in your response:

- *Whether the five general examples of persistent misuse remain relevant or if there are any changes or other types of persistent misuse that we should consider.*
- *Views on whether there are changes we should consider making to the policy relating to the provision of CLI information (noting the issues we set out in paragraphs 4.8 to 4.15).*
- *Views on whether it would be useful to clarify how we might use our persistent misuse powers in relation to calls made during unsociable hours and if so how and why.*
- *Views or evidence on the use of and harm caused by (a) localised CLI or multiple CLIs (b) IVM systems being used for outbound dialling where a consumer is kept on hold rather than immediately connected to a live agent.*
- *Whether a checklist and/or best practice guide would be useful and, if so, how such documents could be best developed and communicated.*

We agree with Ofcom's approach that use of misleading or inauthentic CLI information should be treated as misuse of the telecommunications network.

However, without enforcement activity in this area (and we recognise the challenges of identifying those responsible), the inclusion of obligations in respect of genuine CLI information may fail to have any impact on those organisations who are prepared to ignore their obligations.

In terms of the use of localised or geographical CLIs (paragraph 4.17), this is an issue which the Commissioner may need to consider further as potentially having fairness implications from the perspective of the DPA. Whilst leaving a genuine, localised CLI that a consumer can use to return an organisation's call could be beneficial from a cost perspective, there is a need to consider whether the leaving of such a number (in the absence

of any message) could mislead individuals into thinking that the call was from local friends or family or otherwise be deceptive.

The ability for an organisation to pick and choose which localised CLIs to leave (and potentially to have a range of CLIs which they can legitimately utilise) would also make it more difficult for consumers to make ad hoc decisions about which calls to accept on the basis of CLI display. Where consumers/subscribers are seeking to block callers by number, this choice of CLI would also make call blocking lists more complicated and lengthy.

We welcome Ofcom's intention to pass stakeholder views relating to PECR to us for our consideration. We note the reference by Ofcom at paragraph 4.13 to the constraints they are under in taking action where CLI is withheld on marketing calls, and consider that this issue could usefully be considered when the European Directive on Privacy and Electronic communications is reviewed.

Q6: We have not identified any significant changes to this section of the policy, relating to the issuing of notifications, at this stage. However, we welcome views and evidence from stakeholders on any changes they consider may improve the understanding or clarity of this section of the policy.

Q7: We would welcome information on the current operation of the outbound call centre market, in particular:
- *The size of the current outbound calling market e.g. the annual number of calls made as well as the value.*
- *The size of total annual costs in the outbound market (where possible split by operating costs and capital costs (or depreciation)).*
- *The average costs per call/per agent (or per agent hour).*
- *The split of call centre locations (domestic or overseas) that make calls to UK numbers.*

Q8: We would welcome any initial views and evidence on the potential costs and benefits of any of the potential changes to the policy. In particular, whether any of the potential changes would:

- *require investment in new technology or other capital costs;*
- *have an impact on efficiency and operating costs;*
- *have an impact on call-centre costs or call-centre prices (to their clients);*
- *affect competition in the call-centre market; and*
- *have a different impact on different types of call centre, and if so, what factors affect the level of impact.*

Q9: We would welcome any views on what factors may influence a call centre's likelihood of adhering to the current or a stricter policy.

20141107 ICO consultation response to Ofcom review of persistent misuse powers