



## Introduction

The **fair telecoms campaign** is delighted to have been explicitly consulted on [this proposal](#). In addition to our simple response - confirming that "option 3" is the only sensible action to be taken - we will also take this opportunity to comment on the [Nuisance Calls Action Plan](#), which this fulfils, in terms of legislative measures, for the time being.

## Removing the 'threshold'

The threshold, which **the Department** proposes to remove entirely (despite the many misleading references to "lowering it"), has no relevance to the terms of the PECR or its enforcement, and should have been removed many years ago. This proposal is for a necessary, but relatively meaningless, bit of tidying up, prompted only by a rather perverse determination by a Tribunal.

The suggestion that this modest measure has a key place in a "Nuisance Calls Action Plan" is quite absurd. In fact it confirms the foolishness of the Plan, which reflects the notion that, contrary to all the evidence of history, the powers of the **ICO** in enforcing compliance with the PECR make a significant contribution to addressing the problem of Nuisance Calls.

Many 'PECR 19-24' enforcement cases have proceeded satisfactorily, as it is unquestionable that the practice of making unsolicited telephone contact for direct marketing purposes, on any substantial scale, is indeed "*likely to cause 'substantial damage' or 'substantial distress'*". The **ICO's** failure to establish this likelihood to the satisfaction of a Tribunal in one case now prompts the necessary and overdue correction to the "borrowed" DPA enforcement powers. These will however continue to contain the limitation which prevents the **ICO** from inflicting **substantial damage or substantial distress** on the finances of the offender. Notwithstanding the upper limit of £500,000 on the absolute level of a penalty, this is a far more significant reason for the **ICO** being unable to act effectively in taking "*tough action*" against those breaching the terms of the PECR.

## The place of the PECR, the ICO (and Ofcom) in taking action against Nuisance Calls

We see the **ICO's** role, enforcing compliance with the terms of the PECR as a means of sweeping up the minor cases that cannot be addressed by serious focussed action against Nuisance Calls by those regulators able to "*take tough action and issue monetary penalties against the worst offenders*" as part of a "*robust enforcement regime*" - to quote the Minister. Removing a threshold which restricts the **ICO** to acting in only the more serious cases confirms this role.

The PECR provides a generalised basis of regulation for this area. It relies on definitions of "Direct Marketing", "Consent" and "Unsolicited" all of which may be fairly interpreted differently in different contexts, not to say by different people. It covers unattended telephone calls (19), faxes (20), attended telephone calls (21) as well as emails and text messages (22). As such, it provides a useful means for catching those who fall through a, currently absent, net of proper regulation of the activities of businesses, and their supporting agencies, in respect of their use of the telephone.

The "Persistent Misuse" powers held by **Ofcom** offer a further "catch-all" mechanism. These are unrestricted in scope, covering any use of the telephone network likely to cause "inconvenience, annoyance or anxiety". The proposal to duplicate this provision (option 2) is clearly ridiculous.





## Nuisance Calls Action Plan

This consultation is in respect of the key activity undertaken under the terms of the [Nuisance Calls Action Plan](#). The action already taken to permit Ofcom’s information gathering powers to enable enforcement of regulations covering action on Nuisance Calls may be need to be extended, as explained below.

The comments which follow accompany the [oral](#), [written](#), [supplementary written](#) and [further supplementary written](#) evidence we presented to the Culture, Media and Sport Committee inquiry last year, covered by [its report](#).

Also relevant is [the response we provided](#) to the recent [Ofcom consultation](#) on use of its persistent misuse powers.

Our comments are presented as follows:

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## Myth-busting

Discussion around the issue of Nuisance Calls is littered with some very silly assumptions and myths. We seek here to address some of them.

### **“Telemarketing needs to be banned, except where consent is granted”**

As indicated above, **unsolicited** telephone calls, faxes, emails and text messages are already banned - under the terms of the PECR. The only exemptions are cases where non-specific consent to direct marketing contact from unknown parties is granted either explicitly, or (in the case of attended telephone calls only) by a failure to add the number called to the TPS register.

Nuisance calls that involve some form of deceit, scam or criminal activity are obviously illegal under the terms of other legislation.

**What is required is effective regulatory action to cause the illegal activity to cease. The problem is that the wrong regulatory bodies and structures are being used.**



## Consent to Marketing

The relevant provisions of the PECR contain an odd combination of concepts - "Consent to unsolicited contact for direct marketing purposes". It is not easy to understand how the terms "**consent**" and "**unsolicited**" interact in simple terms.

If I invite my telephone service provider to advise me of new products and services that it may offer, then that is soliciting contact. If I wish to be advised of what alternative services may be available from other providers in the market, then there is no way that I can grant explicit consent to this without soliciting such contact from specific providers.

Under the terms of the PECR, the only way in which one may 'consent' to 'unsolicited' marketing is by ticking one of the boxes commonly seen on paper or on-line forms to allow the recipient to pass one's details to unknown other parties, or in the case of regulation 21 (attended telephone calls) by failing to record the telephone number on the TPS register.

The key purpose of marketing in a competitive economy is to make consumers aware of the range of alternatives available to them. By definition, this cannot rely on any concept of explicit consent to receipt of the information - because the whole point is that it is previously unknown.

A significant example is the broadening of provision of telephone services, where **Oftel** required **BT** to release its customer telephone numbers so that its competitors could use telemarketing as a means of offering their services. **BT** responded by seeking to get all of its customers registered with the Telephone Preference Service under the banner of "Privacy at Home"!

We await publication of the report of the **Which?**-led Task Force on Nuisance Calls (expected on Monday December 8). If, as demanded by many, this were to recommend that consent to direct marketing can only exist between a specific consumer and a specific business, then this would amount to a total ban on telemarketing - i.e. "unsolicited" direct marketing telephone contact.

As the relevant PECR provisions cover only "unsolicited" direct marketing contact, implementation of such a proposal would effectively render these provisions redundant.

**Our preferred approach is for the benefits of telemarketing to consumers and the economy to be determined and covered by appropriate regulations for each market.**

## "Direct" and "Indirect" marketing activity

One issue that commonly arises in discussion is that of "surveys".

The PECR does not cover genuine market research, which can include political opinion as well as views about particular products. Many direct marketing activities are however dressed-up as being research. Generalised marketing data is of great value to businesses and others and it is important that this can be obtained readily, from the widest possible cross-section of society.

Our view is that the distinction can be found in the purpose for which the information is being obtained - is it "direct", i.e. about the preferences of a particular individual for the purpose of promoting particular products or services to them or; indirect, i.e. about their views as a member of a section of the population. **Clarification of this distinction, in these terms, would be of great benefit.**





## I need to know who is calling me

In the context of a voice telephone call, the only way in which the identity of the caller may be firmly established is by voice - i.e. after the call has been answered. If necessary, as is commonly the case with that of the person answering the call, a simple announcement of the name may need to be confirmed by the sharing of certain information not known to any other person.

It is a common myth that CLI identifies the caller. This is untrue for two reasons.

Firstly, **it is only where the CLI provided is known to the person being called that it can be related to the identity of a caller. In terms of identifying the caller, an unknown number is no different to there being no number being provided at all.**

Secondly, invariably when a call is generated by a call centre, and potentially in other cases, the CLI presented bears no relation to the line from which the call was made. The CLI is whatever number the caller wishes the person called to see. Those likely to be thought to be making nuisance calls will commonly present a non-working number with a prefix likely to cause the call to be answered, indeed in some cases they present the number being called!

Insofar as CLI does identify the caller, it is a vital feature for allowing calls from recognised callers to be accepted without challenge. It can also be useful for recording a caller's number for the purposes of making a return call.

It is ridiculous to suggest that CLI can be used to identify those who wish to withhold or conceal their identity. Efforts to devise some mechanism to ensure that presentation CLI bears some relation to the identity of the person making the call have been underway for many years (in many countries) and have yielded nothing of value.

The government has recently come forward with a proposal for the selected withdrawal of the right to withhold CLI (see [Lords Hansard 26 Nov 2014 : Column 915](#)). The suggestion that anything would be achieved by adding the provision of CLI to the requirement to have consent when making unsolicited direct marketing calls is absurd.

A regulation that requires those who breach it to identify themselves, so that they can be "prosecuted", may sound wonderful - but a moment's thought shows how ridiculous it is. *(The Minister was clearly not thinking straight, as she also implies that those making all "unsolicited direct marketing calls" were liable to "prosecution", rather than the absence of consent potentially leading to the imposition of a civil penalty.)*

Two analogies are commonly used when referring to the situation of withheld CLI.

- It is suggested that withholding CLI is like presenting oneself at someone's front door wearing a total face covering. Unfortunately, a voice telephone call only ever permits one to hear the voice of the person presenting a call. CLI is sadly not analogous to a 'spy-hole' which allows one to always see the face of the person at the door, before opening it.
- We suggest that requiring provision of CLI, for the purpose of tracing Nuisance Callers, is like requiring burglars to always leave behind a business card showing their photograph, permanent address and daytime telephone number, so that the Police may apprehend them more easily.





## **Only answering, or refusing, calls from known numbers is an effective way of avoiding Nuisance Calls**

The most effective way of avoiding Nuisance Calls is to never answer the telephone. Sadly one effect of the failure of the government and the regulators to address the problem is that many people are drawn to cut themselves from calls that they would have been pleased to receive.

**The telephone provides a most valuable, in some cases vital, means of allowing communication between people. Any remedy that limits this significantly must be regarded as ineffective.**

There may be some who are unable to fully engage in contact with the world and therefore need to restrict their use of the telephone to receive incoming calls to those on a small list of known numbers. For most of us however there needs to be a secondary mechanism that allows other calls to get through.

There may be circumstances in which it is appropriate to block calls from certain numbers, which may be recognised either by the (presented) CLI or the true calling line identity. One cannot however be certain that a particular person will always use the same CLI or call from the same line, so this can never be a guarantee of blocking calls from a person (individual or corporate).

Unless one can be sure that a "white list" covers every possibility of calls that one would wish to receive, one must accept that this approach, if followed exclusively, will cut one off from calls - possibly very important calls - that one would have wished to receive.

If "blacklisting" became more common, so that it significantly limited the scope of the activities of those who are on certain blacklists, then they would surely take steps to ensure that their calls got through. The current blacklisting approaches most likely do little more than redirect the nuisance from those who benefit from them, to those who do not.

Without engaging in the nonsense that would be involved in seeking to compel provision of CLI in some cases, but not others, we believe that some progress could be made in this field, in response to public demand.

We propose that all those who are unable to provide a number, for a return call that specifically identifies the caller, should consider offering some form of generic CLI which offers a free-to-caller number that provides some (albeit limited) information about the identity of the caller. Whilst we do not believe that this will make a significant contribution to efforts to deal with actual Nuisance Calls, it may help remove some genuine calls from being mistakenly placed in this category.

We recognise that there are organisations which make telephone calls but are unwilling to identify themselves until the identity of the person answering the call has been verified, because to do so may compromise the privacy of the person being called (e.g. collections agencies and many personal support organisations, such as helplines). Some sensible protocol needs to be devised and applied to address the stand-off that can arise in this type of situation.

It may be that there needs to be a generic "personal call" presentation CLI number that could be used to cover such cases. This would obviously be of very limited value and would be open to misuse (in the same way that spoof CLI may be readily provided anyway), but it would address the apparently strong consumer desire to see 'something' on their caller display.





## A Proper Plan

We believe that the issue of Nuisance Calls has to be addressed in two quite separate ways:

- 1. Regulating the way in which the telephone is used by those who may make Nuisance Calls.**
- 2. Enabling consumers to filter out Nuisance Calls, but without blocking wanted calls.**

**We see it as vital to understand that these are two quite separate issues.** Work on each may, indeed must, proceed in parallel. There may be some cross-over, but many are misled into thinking that this is a single issue. Progress with the first may diminish the need for the second, but there can be little hope of it ever being wholly removed.

A point that must be considered in both respects is that those who are set on continuing the activities that cause nuisance will react to whatever measures are taken. Most Nuisance Callers are already breaking the law, in some respect. Those who will not react positively to changes in regulation will simply seek to find another way of continuing their activities. For example, compelling provision of CLI will simply exacerbate the presentation of "spoof" CLI, which is already widely practiced in reaction to many people refusing to accept calls where CLI is withheld.

### Regulation of telephone contact

Regulation of the activities of businesses in the UK is properly carried out by bodies fully engaged with those whom they regulate, so they can ensure that regulation is refined and proportionate to the needs of providers and consumers in the relevant market. To quote section 1.3 from the [Regulators Code](#):

***"Regulators should ensure that their officers have the necessary knowledge and skills to support those they regulate, including having an understanding of those they regulate that enables them to choose proportionate and effective approaches."***

Noting other elements of the Code, it is quite clear that **neither the ICO, nor Ofcom (except in relation to the Communications sector), are well placed to discharge the duty of regulating how businesses engage with consumers and others, so as to avoid causing nuisance.** This applies to the formation of appropriate regulations, the securing of compliance and taking effective and robust action against those who fail to comply.

Direct marketing is but one of many aspects of activity that can give rise to Nuisance Calls, so it is imperative that the regulators covering those sectors in which they are known, or are likely, to occur address the full range of measures that are necessary and appropriate to address them.

Clear and specific standards for telephone contact with consumers, and those who are potential consumers, need to be established and made subject to a **"robust enforcement regime"** that properly reflects each specific environment.





For example:

- There may be areas (e.g. some **financial services**) where marketing by telephone may be deemed to be wholly inappropriate, and must be prohibited under all circumstances.
- There may be some areas where it is deemed acceptable for a trader to approach existing customers by telephone with information about related products and services, or perhaps only about that which they have purchased. This applies to a number of sectors, e.g. the **energy** sector where companies commonly offer other services such as **telecoms**.
- Where sales lead gathering is commonly undertaken by agents through telemarketing, it may be appropriate to prohibit use of information gathered in this way - given that overseas agencies cannot be expected to comply with standards set in and for the UK. **Claims Management** and **Green Deal** arrangements are classic examples of this at present.

**Regulation of this type can only be applied and enforced by those who are closely engaged with those they regulate and understand the needs of the industry.** Example of statutory regulators may be seen from the **highlighting** above.

It is ridiculous to expect that further refinement of the PECR provisions, as enforced by the **ICO** across all sectors and covering only a very wide definition of "direct marketing", can be expected to be applied appropriately, achieve compliance and have the necessary strength of enforcement action without being too weak in some areas and too strong in others.

The terms of the PECR apply equally to unsolicited telephone calls from an MP to a constituent and an offshore branch of a company with a UK office offering a wholly unsuitable product or service to millions of potential customers. We strongly believe that regulation in this area requires a more refined approach and an ability to secure and enforce compliance, well beyond that which could ever be within the scope of the **ICO**.

## **Reporting of cases to multiple bodies**

Someone receiving a "Nuisance Call" has many ways of getting it dealt with, by contacting:

- Whoever answers the number given as CLI
- The 'organisation' named within the course of the call
- Their telephone service provider
- TPS Ltd.
- The ICO
- Ofcom
- Trading Standards / The OFT (via the **Citizens Advice** Consumer Service)
- The Police
- Which? or some other consumer organisation known to be active on this issue
- The relevant sectoral regulator (**Claims Management Regulator, FCA, OfGEM, Ofcom** etc.)

Depending on the case, any one of these could be the most effective, for the consumer.

Notwithstanding the possibility of being able to resolve an issue directly with the caller, we see this as a wholly unsatisfactory situation. We note that **Ofcom** offers a variety of guides to help victims through this maze. There are lengthy and complex, but even then do not adequately address the full list of possibilities.





## **Our proposed "Nuisance Calls Agency"**

**We therefore (continue to) propose the establishment of what could be called a "Nuisance Calls Agency".** We continue to believe that this would be best placed within **Citizens Advice**, as the initial contact point could be closely aligned with its Consumer Service and the policy and action roles with its responsibilities as the statutory advocate for the consumer interest - the latter role inherited from Consumer Focus.

The Agency would serve as the initial central contact point for reports of Nuisance Calls - consolidating existing resources spread across a number of public sector bodies, either in a real or "virtual" sense. Assessment of reports would however be undertaken on an "open" basis, considering the full breadth of possibilities about where action could best be taken. The Agency would be able to consolidate reports and present cases for action to the respective regulators, as most appropriate.

Sadly, when extending use of the identity of callers (obtained by **Ofcom**) to the **ICO**, the Department failed to consider the possibility that other regulators and agencies may be involved in dealing with Nuisance Calls. This omission will obviously need to be corrected.

Placing the Agency within a body already holding a relevant statutory role could enable the full specifics of this information to be shared with the agency itself. Alternatively, there is the possibility of by-passing use of the **Ofcom** powers by persuading Telcos to extend their interpretation of "appropriate bodies" in the relevant data protection legislation beyond **Ofcom**. (There are other ways in which this hurdle could be overcome.)

The Agency would also have a positive policy role in co-ordinating, possibly in conjunction with **DCMS**, the totality of the regime that was in place. All of this is fully within the scope of the statutory role which **Citizens Advice** is now starting to adopt, over a long period. This operation could be scaled up or down, depending on its effectiveness, but would be largely resourced by re-assignment of existing report-handling personnel.

## **Monitoring the need for, and success of, intervention**

Given the current state of the situation and long proven failures of both the **ICO** and **Ofcom** to get across the issue of Nuisance Calls, there is no question that action as radical as this is required if there is to be any serious impact on the problem from where it stands at present.

There is a major difficulty with measuring the scale of the problem on the basis of the level of complaints, as there are a number of factors in play. People will tend to only take the time and trouble to complain about something if they see any prospect of their complaint leading to action. Complaint levels always peak after action is announced. Having complained once to no effect, it is unlikely that a further complaint will be submitted (perhaps each month, so as to fit the way that statistics are recorded) if the problem continues or even if it gets worse.

Looking at trends in monthly numbers of newly presented reports may be of some value, but it says little or nothing about the scale of the continuing problem. **Assessment of the true position, from a citizen/consumer perspective - rather than that of a regulator measuring its "performance" - would be an important function for this proposed Agency.**





## Action by consumers

The worst effect of Nuisance Calls is that they destroy faith in the telephone system as a whole.

Many consumers have chosen to give up their landlines, divert all calls to an answering service or answer the phone with trepidation at certain times of day, if at all. Others have spent considerable sums of money on scam "nuisance call protection" products and services.

There are a variety of services on networks or using devices attached to, or built into, handsets which block certain calls altogether. These calls are classified either by the true calling number (e.g. BT "Choose to Refuse") or by lists or groups of presentation CLI (or the absence thereof).

Blocking particular numbers may be effective in a situation where an individual is being targeted by a person or organisation. It must however be noted that once a block has been recognised, the offender could fairly readily adapt their approach to evade the block.

Blocking groups of source numbers, and / or calls from withheld numbers may be effective in avoiding Nuisance Calls, but it carries the significant risk, in many cases, of blocking wanted calls. If a consumer understands this risk and is happy to take it, then one cannot deny them this option, however we see it as something that should never be recommended.

When addressing a consumer approach that is to be recommended, one suffers the problem of there being only one proprietary product and technology (used under licence) which deploys this approach. With the qualification that it is only the approach that is being commended - not any specific implementation - we must continue.

**An effective approach for consumers is to have the ability for calls from recognised numbers to be handled as normal, but all other calls to be checked.** (It is vital requirement to be able to immediately classify any call as being from a "good" number, once this is recognised.)

Under this approach, all unrecognised callers are required to identify themselves, by a brief voice announcement. This announcement (if any is made) is then offered for the recipient to decide whether or not to engage in conversation. If they do, then there is the option for all further calls from the number to be put through automatically, if not, then there is the option for all further calls from the number to be refused.

Experience in use has demonstrated that most potential Nuisance Callers simply do not announce themselves. Answering Machine Detection equipment - which is deployed on automated diallers, a common cause of Silent Calls - will drop the call when the invitation to leave an announcement is offered. In both cases, the recipient is not even troubled by their telephone ringing.

This facility is equivalent to every user having an "electronic PA" - who puts known callers straight through, but challenges others and only offers calls where the caller provides some form of identification that may be assessed. The option to divert all calls, or all calls from unknown callers to an answering service completes the picture.

The proprietary product offers many additional features. The basic approach however meets the essential requirement of permitting normal and proper use of the telephone to continue, without significant impediment. The majority of call-blocking approaches seen in the market fail this test.





## Specific proposals and recommendations

- The proposed necessary correction to the powers of the **ICO** - to allow it to impose financial penalties for the less serious breaches of the terms of the PECR - by removing the requirement to show the likelihood of 'substantial damage' or 'substantial distress' must go ahead.

It is specifically to deal with less serious cases that the **ICO** powers will be valuable. For this reason, we have no hesitation in supporting option 3.

- It must be recognised that neither the **ICO**, nor indeed **Ofcom**, may appropriately undertake regulation of the activities of companies in those sectors covered by specific regulators. The relevant and appropriate sectoral regulators must therefore be immediately engaged on addressing the issue of the conduct of telephone contact by those whom they regulate, and agencies that operate on their behalf.

There has been some modest action from the Claims Management Regulator and an indication of interest from the **FCA**. These must be taken further and others, notably **Ofcom** and **OfGEM**, need to be engaged on this matter.

- From a citizen and consumer perspective, it is unacceptable for there to be a mass of allegedly co-operating bodies, so that it is impossible for there to be proper accountability, nor any clarity about how to present reports of Nuisance Calls that are likely to be taken seriously.

We propose that this be addressed by the establishment of a Nuisance Calls Agency within **Citizens Advice**, to enable alignment with its existing statutory Consumer Service and consumer policy advocacy roles. We do however recognise that the latter is not yet fully in effect and so this may take some time to achieve.

Some, possibly short term, alternative must however be put in place to enable both ready and effective reporting - for the attention of effective regulators - and also the clear lines of accountability which are lost or smudged when "co-operative action" is underway.

- Consumer access to effective call filtering technique(s) must be facilitated as far as is possible. Deployment of the effective technique referred to above on a network basis has already been proved, and is being discussed with the telephone service providers. Every possible support must be given to the effort to make effective call filtering available as a network service. At the same time, use of all techniques that risk blocking wanted calls must be discouraged.

Many local authorities have seen fit to provide call filtering devices to those considered to be especially vulnerable to the effects of Nuisance Calls. Once this facility becomes available (at much lesser cost) on a network basis, it is vital that some suitable scheme for subsidised or free provision of the appropriate service to those seen to be especially vulnerable is put in place.

As consideration of this issue progresses in various forums, the fair telecoms campaign and myself will be happy to contribute to these discussions. Having been publicly involved with the issue of Nuisance Calls since 2003, having given considerable consideration to all the matters that have arisen over this period and having no specific "axe to grind", I believe that we have much to offer.

**David Hickson**  
**6 December 2014**

