DMA advice on persistent misuse

May 2017

About this document

This document outlines advice to contact centres and brands in the light of Ofcom's statement on persistent misuse. It is the result of consulting widely in the industry and with Ofcom themselves. Ofcom have not endorsed our advice but have given some input to it.

The DMA gives members guidance in parallel to changes in policy from regulators. In this case the DMA offers members new guidance but it is less prescriptive than usual given the nature of revised statement of policy. Ofcom's latest statement is such that the DMA cannot accept any liability for any actions resulting from an organisation's use of the guidance within this document.

Members should adhere to the DMA Code in dealing with their customers or prospects.

https://dma.org.uk/uploads/5628a1a29b3dc-interactive_code_21_oct_2015_5628a1a29b344.pdf

We would welcome more input from members on this guidance.

Rufus Grig of Callmedia* and advisor to the Contact Centre Council has worked closely with the DMA and the Council on this guidance and will continue to work with us to establish clear advice for organisations using predictive dialling equipment.

Background

On 20th December 2016 Ofcom published a revised statement of policy on the exercise of its enforcement powers regarding persistent misuse of the telecommunications network. This is essentially the document that governs how individuals and companies should behave when using the telecoms networks, and for the last decade has been concerned with the operation of outbound calling systems including progressive diallers, predictive diallers, automated outbound messaging systems, interactive voice messaging (IVM) systems and other forms of automated outbound calling.

Ofcom first considered the use of automated calling systems in their revised statement published in 2006 where for the first time a set of rules were introduced governing how predictive diallers ought to be used to minimise the nuisance and anxiety caused by abandoned and, in particular silent calls. There then followed subsequent revisions to the statement in 2008 (explicitly referencing the use of Answer Machine Detection (AMD) and "silent" calls) and 2010, further detailing the use of AMD, and also introducing some strictures around the use of IVM.

Ofcom launched a consultation on 2nd December 2015, publishing the revised statement on December 20th, 2016.

References

Ofcom's Statement of Policy on the exercise of its enforcement powers on Persistent Misuse

The Communications Act, 2003

Privacy and Electronic Communications Regulations (2003)

Some Important Definitions

The following terms will be used throughout this document.

Predictive Dialler

A predictive dialler is a type of outbound calling technology which aims to maximise the productivity of the calling agents by a reducing the amount of time they spend between calls, waiting for the next recipient to answer the phone. Diallers use algorithms to determine when an agent will next become available to manage a call, and when the next call recipient will be connected. Consequently, the predictive dialler constantly monitors the status of the contact centre and the response rates of the outbound calls it is making, and attempts to make outbound calls in sufficient quantities and at appropriate times such that the gap between agents finishing one call and starting the next is minimised.

Abandoned Call

This mathematical approach is not fool proof however, occasionally a call recipient will answer their phone and there will not be an agent available to speak with them. When this occurs, the dialler plays a short information message to the call recipient, identifying the organisation making the call, the purpose of the call and some other key information, and the call is then disconnected. This is known as an **abandoned call**. While abandoned calls are clearly a nuisance for the call recipient, they tend not to cause anxiety, because the identity of the caller, and the purpose of the call, are made very clear, together with a mechanism for contacting the organisation responsible.

Silent Call

A silent call is one where the call recipient answers the phone to find nothing but silence. As well as causing a nuisance, a silent call can also cause some considerable anxiety, particularly for some more vulnerable sections of the population.

Silent calls are frequently made by technology called **Answer Machine Detection (AMD)**, which attempts to determine if the call has been answered by an answering machine or voice mail service rather than a live person, with the intent of further improving the productivity of the contact centre by not transferring calls connect to answering machines to agents.

To be clear, the DMA calls for the absolute eradication of silent calls, because of the anxiety they can cause and because of the lack of accountability on the part of the caller.

Interactive Voice Messaging (IVM)

This technology is used to automate more than simply the setup of the call and to conduct part or the whole call automatically, using technologies such as call prompts, DTMF (tone) and speech recognition.

The technology can only be used in circumstances where the recipient of the call has given prior explicit consent for marketing and so is typically only used legitimately in customer and account service scenarios between an organisation and its customers, for applications such as:

- reminders that payments are due or overdue
- informing a customer that there is a status change on an account
- reminders that a service is due

As consumers we are all in receipt of many of these – often as explicit or thinly disguised marketing calls. Such calls are in breach of the Privacy and Electronic Communications Regulations (2003), known as PECRs, which are regulated and enforced by the Information Commissioner's Office (ICO).

However, where they are used in a consensual business relationship, Ofcom does now set out some examples of how the use of an IVM system, even with consent, could constitute persistent misuse.

The 2016 Statement of General Policy on Enforcement of Persistent Misuse - Overview

There are a number of fundamental changes to the statement published in 2016, when comparing it to its predecessor document published in 2010:

1. The new document makes it clear that Ofcom consider any predictive dialling that generates abandoned calls, even that which generates no silent calls at all, could be considered misuse. The guidelines, rather than providing a safe harbour for organisations operating outbound contact centres, simply represent Ofcom's priorities for investigation and enforcement action.

2. As part of Ofcom's drive to remove the implication of the safe harbour, they have removed a lot of the clarity which existed in previous documents. For example, they no longer publish a maximum rate for abandoned calls.

3. Ofcom clarify that silent calls present their priority for investigative and enforcement action and explicitly state that silent calls caused by false positives from the use of AMD can no longer be included in the abandoned call rate (ACR).

4. Ofcom make some recommendations about the use of IVM, particularly regarding the treatment of call recipients who are being transferred to live agents.

5. There is new guidance on the use of Calling Line ID (CLI) – with an explicit prohibition on the use of multiple CLIs to try and increase the connect rate.

6. There is a stronger section on management practices and processes and Ofcom suggest that they will prioritise for enforcement action any organisation where there is flagrant or deliberate non-compliance.

7. Ofcom set a date of March 1st 2017 for contact centres to comply with their updated statement.

The Main Issues

The End of Safe Harbour for Abandoned Calls

Section 128 of [The Communications Act of 2003](#) describes the steps Ofcom must take if they determine that a person (or company) has persistently misused the communications network, and also sets out the criteria under which persistent misuse is defined.

Section 128, section 5, states:

> *(5) For the purposes of this Chapter a person misuses an electronic communications network or electronic communications service if—*
> > *(a) the effect or likely effect of his use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety; or*
> > *(b) he uses the network or service to engage in conduct the effect or likely effect of which is to cause another person unnecessarily to suffer*

In Ofcom's analysis of their own consumer research, they conclude that abandoned calls are a cause of annoyance, inconvenience or anxiety and since all predictive diallers generate abandoned calls it is their view that the use of predictive diallers may cause persistent misuse.

Section 131 of the Communications Act requires Ofcom to publish a statement of their general policy with respect to the exercise of their powers under sections 128 to 130, and it is this document that has been revised, the new edition being published on 20th December 2016. Since the first time that abandoned calls were covered in this statement, published on 1st March 2006, Ofcom have made it clear that abandoned calls constitute misuse, and that multiple abandoned calls constitute persistent misuse. In the 2006 Statement, Ofcom introduced a set of "operating procedures" which, if adopted as a package, would act as mitigating factors in establishing the gravity of a particular act of misuse.

At a high level, those procedures included:

- A limit on the number of abandoned calls made as a percentage of all calls made by the contact centre and answered by consumers. Guidance was given as to how that **abandoned call rate (ACR)** should be calculated.
- A rule stating that if a consumer had been the recipient of an abandoned call, another call could not be made to that recipient for another 72 hours unless it could be guaranteed that there would be a live agent in the event that the call is answered.
- If an abandoned call has to be made, that a short information message be played that gave the name of the calling organisation, and details of how to contact that organisation
- A Calling Line ID (CLI) must be presented for all calls. Any calls returned to that Calling Line ID must be handled appropriately.
- Calls must ring for a minimum of 15 seconds before being disconnected and considered "no answer".

Although never explicit in the documentation, it was generally taken by industry, that adherence to these procedures would provide a "safe harbour", effectively rendering an organisation compliant with the relevant regulation.

In the 2016 updated statement, Ofcom effectively remove this notion of safe harbour, indeed they clarify explicitly that no safe harbour exists (paragraphs A4.18, A4.20). In order to reinforce this point, they also remove the figure of 3% from the "operational procedures" section (Annex 2 of the statement). They are keen, however, to point out that the legal and regulatory issue has not changed (A4.29).

This does create an unhelpful situation of ambiguity for organisations operating predictive dialling equipment. It is clear from much of the tone and practical guidance contained in the statement, and backed up by meetings held with them, that Ofcom does not expect contact centres to cease operating predictive diallers, or to consider predictive dialling to be "banned". If that were the case, they would surely say that explicitly. On the contrary, Annex 2 of the document contains detailed guidance on the mitigating factors that an organisation can take into account when operating predictive diallers. Annex 3 is devoted in its entirety to detailing how the abandoned call rate ACR) should be calculated. It would surely be surprising for Ofcom to have set this out in the statement if their intention was to prevent it from ever being used.

However, there are some specific issues that need to be taken on board by organisations when evaluating their response to this document:

- Ofcom will prioritise enforcement action against those organisations that make the most abandoned calls, regardless of the percentage of abandoned call rates (A2.6)
- Ofcom will prioritise based on the number of consumer complaints the activity attracts (A2.6)
- Ofcom will prioritise where there is evidence of flagrant or deliberate non-compliance with the law or disregard for the policy (A2.6)

In the example provided of how to calculate the abandoned call rate in Annex 3, the abandoned call rate comes at 1% of all "live" calls, that is, calls answered by live individuals. Some organisations are taking this as a "steer" from Ofcom, and reducing their abandoned call rate to 1%. This will not guarantee that they will not take action if less than 1% calls are abandoned. For example, if many hundreds of these calls were made in a short period at an unsocial hour and were still less than 1% and complaints were received, Ofcom could still take action.

The Prioritisation of Silent Calls

Ofcom state categorically that their priority, before abandoned calls, will be to pursue enforcement action against organisations that continue to make silent calls (A2.3). Any organisation carrying out any activity that repeatedly and methodically makes silent calls should cease that activity immediately. This includes most forms of answer machine detection (AMD). What's more, Ofcom had previously tacitly allowed the making of silent calls with AMD technology by allowing contact centres to factor "false positives" generated by AMD into the abandoned call rate. This is no longer the case.

Silent calls can, and frequently are, generated accidentally by consumers and businesses alike: assuming the outbound call is not going to be answered and therefore hanging up at the exact moment the call is connected, and being cut off by a lack of mobile phone signal when travelling are two common examples.

However, it is silent calls being systematically generated that Ofcom are seeking to focus on in their enforcement, whether generated by a predictive dialler abandoning a call and failing to play an information message, or by an AMD "false positive".

The Use of IVM

In some applications, an IVM is configured so that it asks the recipient of the call if they would like to speak to a live agent. When this is the case, Ofcom introduces for the first time in this statement the fact that this could result in an abandoned call if the call recipient indicates that he wants to be connected to an agent, but no agent is available and so hears an information message instead. (A1.10, point 2).

Ofcom also state that if the recipient of an IVM call chooses to be put through to an agent, but then experiences an "unfairly long wait time" to do so, that could constitute misuse. This is not being defined as either an abandoned call, or a silent call – simply as "misuse" (section A1.28). Moreover, "unfairly long wait-time" is not defined, and Ofcom simply state that it will be assessed on a "case-by-case" basis. However, some further guidance is given on how they may prioritise enforcement:

- if the contact centre is making many more calls than they have live agents to handle, i.e. it is very clear they have no regard for the consumer experience (A1.29 point 1).
- if recipients are kept on the line for "unreasonable times" without being provided with feedback such as the caller's identity, the purpose of the call, position in queue and the likely waiting time (A1.29 point 2). Ofcom go on to say (A1.31) that even if such queue notification is given, the activity still might be deemed to be misuse if the call recipient is kept in a queue for a "manifestly excessive" time. Again, "manifestly excessive" is not defined.

Industry Advice

Work with your compliance team

We suggest early engagement with compliance officers on the approach to adopting Ofcom's newly-stated stance. While a careful reading of the previous statements does make it clear there was no absolute guarantee of a safe-harbour before the current statement was published, it was widely accepted that a safe-harbour did, in practice, exist. It was a notion that went unchallenged by Ofcom in numerous public meetings in which they participated, and is reinforced in the adjudications and penalty notices they have issued in the past where they have tested a contact centre's activity against the previously published "operational processes".

Ofcom are keen to point out both in the statement (A4.29) and in meetings with the DMA that the situation has not fundamentally changed.

However, the lack of clear direction on an abandoned call rate to aim for makes it difficult for a compliance officer to produce a clear statement of compliance.

Given that Ofcom's approach has been non-prescriptive and focuses on impact and attitude, it is suggested that a similar approach be taken to achieving compliance. Organisations should seek to demonstrate that they are taking every measure to minimise the exposure of consumers to abandoned calls, that staff are well trained, that records are well kept, maintained and monitored, and that efforts are made to reduce complaints and reduce annoyance to customers.

Understand the procedures noted by Ofcom and ensure they are demonstrably followed

There are a number of processes set out in Annex 2 of the document, and organisations should ensure they make every effort to adhere to them.

Managing the impact of abandoned calls

A long-standing process for minimising the impact of abandoned calls is the "72-hour rule" – that in the event of a call being abandoned, no call should be made to that number within 72 hours unless the contact centre can guarantee that the call will not be abandoned – that there will be an agent reserved to handle the call in the event that it is answered. In this revised statement, Ofcom make it clear that it "may be appropriate in some circumstances" to take account of the call recipient, rather than just the number dialled. Thus, if a call is made to a recipient's landline, then an organisation should take steps to ensure that a call cannot be abandoned to his mobile or landline for a 72-hour period.

Time of day

Ofcom also state for the first time that time of day will be taken into consideration, although they make no statement on what a suitable time of day is. It is recommended that organisations have a clear policy as to what time of day they carry out their operations and produce documentation to show why this is reasonable for their particular activity and for their particular customer group.

The DMA and the Financial Conduct Authority (FCA) all have Best Practice guidelines that can help an organisation determine this.

CLI

While Ofcom make it clear that the use of multiple CLIs may well be permissible in many circumstances, misuse of a CLI must be avoided. Our advice is that unless there is a genuine justifiable reason for using multiple CLIs – for example, for contact centres representing multiple brands, or the need to route inbound calls separately by different campaigns or activities, then contact centres should seek to minimise the number of CLIs they use. A useful exercise is to imagine explaining to a member of an Ofcom investigation team why you are using different CLIs and imagine how comfortable you will feel with that explanation!

It is recommended that members do not use different CLI's based on geographical regions that could mislead consumers about the caller's whereabouts.

Length of time a call should ring

Ofcom stipulate that a call should ring for a minimum of 15 seconds. However, they also suggest it may cause a nuisance if a call rings for a very long time when the recipient simply doesn't want to answer it. In the interests of good performance, we recommended a ring timeout of 18 seconds.

Operational Checks

Whilst dialler manufacturers provide features within their applications that allow contact centres to control their dialling practices, it is recommended that members demonstrate awareness of the potential impact of Agent behaviour and how this can potentially cause misuse and harm.

Members should have practices in place that audit Agent behaviour for potential misuse and harm. Brief examples of such checks are below and are suggested and not exclusive:

- Short call reports
- Quality Auditing for Agents making Silent Calls (by placing themselves on mute)
- Any previously witnessed call avoidance techniques in the centre

Members should also demonstrate their awareness of the potential likelihood of causing harm for differing activities. For example if you are dialling a list of data where there is an existing relationship with the customer, it could be assumed the activity would be unlikely to cause harm or distress (following the correct guidelines found elsewhere in this document). Conversely where dialling 'colder' data where there is limited or no relationship with the call recipient, you may be more likely to cause harm or distress. Members may therefore wish to consider altering their dialling behaviour for existing customers and prospects based on the likelihood of causing potential harm or distress (for example dialling colder data with a lower Nuisance Call Limit).

Information message

The content of the information message is clearly defined in the document (A2.16 and A2.17). However, given that Ofcom state that the number of complaints will also have a bearing on their decision to investigate and or penalise organisations, anything that can be done within the information message to mitigate likely complaints should also be taken into consideration.

Management, practices and processes – and record keeping

As mentioned above, Ofcom have switched from a prescriptive approach to one which is more "principles based". They themselves set out in a number of cases that they consider that organisations which act recklessly, or without care and attention to the impact their operations have on their customers and the public at large, are more likely to be penalised.

The advice given in section A2.21 includes:

• testing the dialling systems when they are set up or changed
• ensuring the dialling technology is managed by competent persons
• set the dialling rate appropriate to the circumstances (for example based on volume of data, agents, current connect rates or time of day)
• monitor the performance of their agents.

All quality contact centres will already be doing most of this as part of their ongoing practice, but it may be worth ensuring that it is documented. For example, running sample campaigns including

managers, supervisors and technical staff as the call recipients to monitor the experience of customers – either as a regular activity when things change, or having regular "seeds" within lists would demonstrate that due care and attention is being given to the experience of consumers.

Answer Machine Detection

Do not use Answer Machine Detection that relies on the call having to be connected for the detection to take place – otherwise there is no way to avoid making silent calls.

Seek to minimise the impact of your calls

In several sections of the statement, Ofcom refer to the "harm" caused to consumers by misuse, including abandoned calls. This is a clear reflection of the Communications Act which says (Section 128 4(b) that Ofcom must prioritise cases that cause harm. Therefore be sure that in all your processes you consider the potential harm as well as the annoyance, inconvenience and anxiety that could be caused as a result of your activities. Ensure that you have evidence to support your considerations, and demonstrate how your processes take this into account.

Consider your approach to the abandoned call rate

The making of calls which are ultimately abandoned is a by-product of the use of a predictive dialler – and organisations should demonstrate that they are doing what they can to reduce this. Most contact centres have many processes which seek to improve the connect rate and hence ultimately reduce the abandoned call rate, and these should be documented and evidenced: for example, managing "best time to call", optimising which numbers are called and list sorting all help and should be considered mitigating factors.

This can also be considered in the approach to the abandoned call rate. Do not treat it as a target to be reached, rather an absolute limit which must not be breached.

Consider reducing your abandoned call rate maximum

As already discussed in this document, Ofcom maintain that very little has changed from the 2010 statement – albeit that the 3% maximum abandoned call rate has been removed. They have also said that the absolute number of calls that are made may be seen as a factor.

Contact centres that make high volumes of calls may consider reducing their abandoned call rate to 1%. The example given in Annex 3 of the statement shows an ACR of 1%, and although Ofcom have made it clear that there is no significance in the use of 1% as an example, it may well be defendable in the case of an investigation if all other guidelines and regulations have been adhered to. This may be the case for larger operations and high-profile brands, which in the past has attracted the attention of Ofcom's investigations team.

Seek to minimise complaints

If nobody complains about you, Ofcom are unlikely to investigate you. While they can ask the network operators for the names of organisations making very high volumes of very short calls, they are extremely unlikely to investigate an organisation for which there are no or very low volumes of consumer complaints.

Carefully examine the experience of call recipients in the event of an abandoned call. Can your wording and explanations be as conciliatory as possible? Encourage consumers to contact you rather than regulators if they wish to take up an issue.

Another strategy is to call users back almost immediately in the event of an abandoned call (with a reserved agent of course) and apologise straight away.

Additionally, should your dialler enable you to do this, then you could create rules which mean that any customer who receives a nuisance call only be dialled in preview or progressive mode for the remainder of that campaign.

IVM

For any organisations currently using IVM, it is clear that Ofcom are likely to start investigating the experience of customers. You should make every effort to ensure that the IVM experience is a positive one for every step of the process.

Particular care needs to be taken when the IVM is transferring calls into an inbound contact centre. There is considerably less control in this environment than there is in a dialler, because the agents are not under such close control. While Ofcom clearly allow for some queuing to take place, careful monitoring of the pacing of the IVM will ensure call wait times are very low, if not zero. Consider having overflow skills or groups where calls can be routed to a backup group in the event that wait times are becoming at all "unreasonable".

Finally, if your IVM is configured such that it will disconnect a call in the event that there are no agents available to speak with them, then that must be considered an abandoned call. An abandoned call rate must be calculated based on the live calls made by the system, and as given in Annex 3 of the statement, and the reporting on abandoned calls with IVM must be stored and considered with all other records.

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