

Response to Paper on furtherance of the interests of citizens

Introduction

I am pleased to respond to this consultation with a series of thoughts on relevant points. I offer these for consideration and to draw attention to the nature of Ofcom's principal duty to citizens as stated in the Communications Act 2003. I refer to my responses to previous consultations as well as other formal and informal representations I have made to Ofcom, I hope without undue repetition.

In these comments I refer particularly to the telecommunications aspect of Ofcom's work, and with special reference to personal issues of concern as a campaigner.

The duty to "consumers" is only to those in "relevant markets", so a "market" has to be identified before one can identify where the interests of "consumers" lie, as distinct from those of "citizens". In the broadcasting area the distinction between citizens and consumers is much harder to recognise, as those whose interests Ofcom has a duty to further rarely have a direct commercial relationship with those whom Ofcom regulates. It is therefore very difficult to identify what is a "consumer" interest there.

The invitation to contribute to this consultation invites general comments, rather than posing a series of specific questions. If there had been a question such as "Do you agree with the comments made in the consultation paper?" my answer would be a profound - NO.

I will not however address every point with which I disagree.

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The Consultation Paper

The Introduction to the Paper indicates how Ofcom mistakenly conflated the nature of people as both citizens and consumers in performance of its duties by adoption of the term "citizen-consumer". This odious term has the most unacceptable political overtones, which I will resist the temptation to address at length.

Much of the description of how the two potentially conflicting duties are now allegedly being separated indicates that no proper separation has been achieved. Many examples refer to the interests of citizens as being nothing more than having the ability and right to consume services. This is no difference. I do not believe that one needs to distinguish between currently active consumers and those seeking to act as consumers, as their interests are inseparable.

This latter point is seen most clearly by the suggestion that "convergence" is a key issue of relevance. All of the points made with reference to this relate only to the issue of the ability to consume services in relevant markets. That is a "consumer", not a "citizen's" interest.

The attempt to dilute the interests of citizens into some wishy-washy concept that is simply to do with ethical considerations and sits above the hard and specific interests of consumers is to totally misunderstand the duty. The first principal duty is in no way subsidiary to the second, as is strongly implied. The suggestion at 2.33 that citizens' interests are only those that are common and consumers' interests are only those that are individual is complete nonsense. Both apply severally and collectively.

Suggesting that the interests of citizens is something to do with a particular view of what is for the benefit of the nation in general (referred to as the "public interest" - a quite different concept), whereas the interests of consumers only apply to particular individuals, dominates the thinking behind much of the document. This misguided approach renders much of the Paper quite meaningless as an attempt to clarify Ofcom's duties.

The issue is further confused by the fact that the public interest referred to appears to be little more than extending the scope of the relevant markets and participation therein. The assumption underlying this approach raises many political issues that Ofcom cannot take for granted. For example, the argument that citizens should be obliged to acquire access to the world wide web in order to participate in society is not beyond dispute.

The true distinction is clearly given in the terms of the Act. It is consumers IN RELEVANT MARKETS whose interests are to be furthered in fulfilment of the second principal duty. The first principal duty covers those of all citizens, and only in relation to communications matters, whether these interests may be as consumers in markets not regulated by Ofcom or not as consumers at all.

The basic failure of the paper to recognise these simple facts, as expressed in the Act, means that I will have to repeat these points in the context of other remarks.

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Duties in relation to telecommunications (rather than broadcasting)

In telecommunications, Ofcom's statutory regulatory powers and responsibilities cover those who provide specified telecommunications services. It is the current and potential consumers of those services who are the "consumers" whose interests Ofcom must act to further, as they participate in the "relevant" markets.

The promotion of competition is the only mechanism that is referred to in the Act, as a means of furthering the interests of consumers. This does however mean that there are no other mechanisms that may be used, as indeed this is only to be used "as appropriate". This is loosely recognised at section 2.2, but then contradicted at 5.1.

Promoting competition is neither the only mechanism, nor indeed even a necessary mechanism, for promoting the interest of consumers. Competition in relevant markets is not stated by the Act as being relevant to furthering the interests of citizens. Indeed, the interests of citizens in communications matters that Ofcom has a duty to further is not restricted to those relevant markets where Ofcom may promote competition.

If Ofcom believes, as it may be suggested or implied in the paper, that promotion of fair competition is the only function that it is capable of performing in fulfilment of its two principal duties, then it is clearly incapable of fulfilling them properly.

In the field of telecommunications, Ofcom's duty to citizens covers all aspects of their interest in communications matters, other than that as participants in the market for Ofcom-regulated telecommunications services in a consumer relationship with regulated telecommunications service providers.

With reference to the specific examples that follow, covering my particular areas of concern, examples of organisations that are not regulated by Ofcom include:

- Users of revenue sharing telephone numbers, who thereby engage in an indirect commercial relationship with callers as consumers of their services and may misrepresent the nature of this relationship.
- Public sector bodies using non-geographic numbers, that fail to adopt those from the 03xx range despite the total unsuitability of revenue sharing in the provision of public services for which there is no service fee payable by the public service user.
- Call centres and others, making "Silent Calls".

The "victims" of these activities are citizens whose interests in these "communications matters" need to be furthered. Ofcom has a duty to do this.

Whilst every telephone user is a consumer of their telephone service provider, any involvement that Ofcom has in the relationships referred to here must be in furthering the interests of citizens, unless the "organisation" is that telephone service provider.

This duty is quite separate from that to consumers of telephone services (primarily the "organisations" in these cases), and it must be fulfilled.

In these cases the duty to citizens is in conflict with the interests of those who are primarily the consumers of telephone services. The Act specifies that such a conflict between the principal duties may arise and advises of how it must be addressed.

It must be noted that the Paper contains no reference to this feature of the distinction between the two principal duties, i.e. when it applies directly in specific cases, as laid out in subsection 3.8 of the Act.

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The previous consultation on Ofcom's Consumer Policy

My response to the earlier consultation made a number of points that are worth repeating here, as they relate to the current Paper also. The earlier Statement addressed the same issues, although approaching from the alternative perspective.

The definition of the principal duties

Ofcom began that Statement by misrepresenting its duty to citizens as being in relation to "communications markets", rather than "communications matters". This critical difference is important and this misinterpretation is reflected in the Paper for this consultation also, although without misquoting the terms of the Act. This is seen by the absence of any attempt to distinguish between communications "matters" and "markets".

The citizen's interests in relation to communications matters extends beyond the activities of providers in the markets over which Ofcom holds powers to impose direct regulatory requirements. Many of Ofcom's functions are exercised by influence and use of indirect powers of regulation and therefore both may and should be applied not only to the specific markets that it regulates directly.

Conflicts between the two duties

The earlier Statement also misrepresented the position with regard to a conflict between the principal duties. This later Paper has simply avoided addressing the issue properly by referring to citizens' interests as arising only when strategic issues are under review and confusing them with "the public interest".

Where the interests of many consumers in relevant markets are being considered it is possible that there may be a conflict with the interests of many citizens in relation to communications matters. That is however nothing to do with the quite separate "wider public interest" that appears to be the issue being addressed by the examples given at sections 4.10 and 4.11.

Misuse of a telecommunications network or service - "Silent Calls"

The earlier Statement covered use of the powers under ss128-130 of the Act at length.

These powers however only apply to users of telecommunications networks and services and are constructed to protect citizens from their misuse by whoever may undertake such activity, and whoever may be its victim.

Ofcom has no powers to impose general regulatory requirements on users of telecommunications networks and services. The victims of persistent misuse are not necessarily in any commercial relationship as "consumers" of those who practice it. Persistent misusers may be operating in any market, or none; it cannot be assumed that they are operating in a market regulated by Ofcom (although this is possible).

For these reasons, exercise of the persistent misuse powers is in fulfilment of Ofcom's principal duty to citizens, not that to consumers.

Whilst it may suit Ofcom's administrative convenience (and consequently distort the manner in which the powers are used) it is quite wrong for the use of these discretionary powers to be exercised in implementation of Ofcom's Consumer Policy, if this is thereby seen as relating to the second principal duty.

I cover the way in which Ofcom is failing to carry out its duty to citizens properly in this regard below.

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Examples of Ofcom's failure to fulfil its duty to citizens

Silent Calls

The one example which I have stressed throughout by dealings with Ofcom is in relation to those who persistently misuse telecommunications networks or services, as specified in section 128 of the Act, notably by making "Silent Calls".

In this case, Ofcom fails in its specific duty by failing to properly acknowledge that it has no general regulatory powers, other than those that may be used to further the interests of consumers in relevant markets. The persistent misuse powers do not include any capacity to impose general regulations whatsoever.

The only way in which a Silent Caller may be required to cease the practice is by issuing a section 129 Enforcement Notification, following a section 128 Notification that has identified a particular activity by a particular "person" as representing "persistent misuse".

The "Statement of Policy" issued in accordance with section 131 does not place anybody, other than Ofcom, under a duty to comply. Ofcom's attempts to use the qualified powers to impose a financial penalty following only a section 128 Notification are therefore commonly inadequate, as its Chief Executive admitted publicly with reference to the recent case involving Barclaycard.

If Ofcom properly acknowledged the different nature of its duty to citizens and the consequent different nature of its powers, as against those which permit the imposition of general regulations that apply in respect of the interests of consumers, then it would use the powers that it has more appropriately and effectively.

There is little or no market pressure to cause Silent Callers to cease the practice, as it is rarely carried out in the context of a commercial relationship with consumers.

It is therefore necessary for Ofcom to place those who are persistent in it under a regulatory obligation to cease as the earliest possible opportunity. This means that Ofcom must use the initial phase of its powers (the section 128 Notification) as soon as the necessary conditions for that alone have been met.

Waiting until it has collected enough evidence to impose a section 130 financial penalty before taking any action whatsoever (other than publication of its Statement of Policy, which has no regulatory effect) delays the time when the practice is ceased. It also risks rendering the maximum penalty inadequate in proportion to the amount of nuisance caused, because so many instances of misuse are covered.

Ofcom's duty is to cause any misuse to cease at the earliest possible time. This is what furthers the interest of citizens, not the imposition of a financial penalty.

The evidential basis required to justify issuing a section 128 Notification is modest - it is certainly much less than that required for a section 130 financial penalty. Where Ofcom was not totally convinced that the practice of Silent Calling had ceased, following representations made in response to the Notification, a section 129 Enforcement Notification should be issued in all cases. This would enable Ofcom to impose a section 130 penalty, up to the maximum allowed, for each instance of a breach. The option of further enforcement action through injunction would also be available.

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Ofcom's failure to deal properly with this issue appears to arise partly from a failure to recognise the distinction between the two principal duties.

That to consumers in relevant markets is supported by powers to impose and enforce general regulations on identified suppliers in those markets. No such general powers exist to further the interests of citizens. Ofcom is however able to take firm action in individual cases, but only after the offender has been brought within the scope of Ofcom's enforcement action by the imposition of specific obligatory requirements through use of the section 129 Enforcement Notification. It is the issuing of the Enforcement Notification that is equivalent to the imposition of regulatory requirements where Ofcom has general regulatory powers.

Use of the Statement of Policy on Persistent Misuse as a pseudo-regulatory instrument is a mistaken and improper way of dealing with the matter. That Statement bears only on Ofcom. The section 128 Notification cannot be used as if it were covering a breach of a specific regulation with which the offender was obliged to comply.

Use of revenue sharing telephone numbers, other than those formally defined as being used for "premium rate" services

Ofcom furthers the interests of consumers of "premium rate services" through self-regulation undertaken on its behalf by PhonePay Plus.

The question remains as to what Ofcom is doing to further the interests of those who are, in the terms of Ofcom's duties, "citizens" who indirectly pay users of revenue sharing numbers when calling them.

"Revenue sharing" on telephone numbers means that the caller is indirectly paying, or subsidising the telephone service of, the person called. There are cases where the originating telecommunications service provider fails to fully reflect their additional costs in the rate charged for the call, however this perverse discounting does not in any way undermine the essential fact.

Under the Communications Act, Ofcom has the opportunity to define the number ranges covered by "premium rate services". The users of numbers that fall within these ranges are thereby classified as providers of telecommunications services and subject to regulation by Ofcom, so that those who call them become "consumers" in respect of Ofcom's principal duties.

At the present time the revenue sharing 084x and 087x ranges are not classified as being used for premium rate services. The interests of those who call them, in relation to those being called, can therefore only be furthered under Ofcom's duty to citizens.

One clear option for Ofcom is to extend the definition of "premium rate services" to cover all services on which callers incur a "premium rate" because revenue sharing is in effect. (Ofcom has been trying to take a small step in this direction for some time as it has been engaged in frequently delayed efforts to reclassify 0871, 0872 etc., although currently without success.)

This obvious and straightforward move, to equate "premium rate" charges with "premium rate services", has not been taken for a variety of reasons.

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Placing regulation of the use of all revenue sharing ("premium rate") numbers under the control of the subcontracted self-regulator of providers of "premium rate services" would not work. PhonePay Plus appears to be unable to deal properly with the relatively modest number of additional members that Ofcom is currently seeking for it to handle.

Furthermore, it would not be appropriate for this self-regulatory body to handle those who do not use receipt of telephone calls as a significant channel of income for their businesses. Meaningful and effective self-regulation can only occur where there is a sufficient degree of common interest between those involved. This does not exist between providers of SES and those who seek to obtain modest subsidy of the costs of operating their customer complaints departments.

Ofcom nonetheless has a duty to protect the interests of citizens who may be misled as to the nature of the commercial relationship they are entering with someone who solicits a call to a revenue sharing number. Clear pricing of the services that are provided to them as consumers by their Ofcom-regulated telephone service provider notwithstanding, users of revenue sharing numbers often make their own claims about the cost of calling them. These are often inaccurate, out-of-date or worthless.

Whilst Ofcom has no direct regulatory powers in this regard, it has a duty to citizens that must be fulfilled.

One way in which this must be undertaken is by ensuring that proper information about the nature of revenue sharing numbers is placed in the public domain and promoted. In making representations to many users of revenue sharing numbers, I have been unable to refer to a simple statement from Ofcom that defines the position clearly. When Ofcom has provided comments to journalists these have often been inaccurate and / or incomplete.

Secondly, Ofcom should be working closely and publicly with bodies that do have regulatory powers in this regard. There is some evidence of such activity, however it is apparently conducted in private and is not sufficiently clear and bold.

Many users struggle to find the right terms to use to describe the cost of calling non-geographic numbers. (This also applies to the non-revenue sharing 03 range.)

Telephone service providers use a wide variety of terms, as use of potentially misleading descriptions (on the edge of legality) is a vital tool in any competitive market. Doubtless Ofcom supports this, believing that the consumer requires a high level of information and education in order to understand their bill. This however leaves the citizen confused in dealing with those who wish them to call.

It is not uncommon for reference to be made to the costs, carefully selected, from one of BT's many tariffs, often that (BT Standard) which applies to very few of its customers. This information, which is already misleading, is rendered meaningless by the qualification that "costs may vary". This information is virtually useless and more likely to mislead than to help.

It is vital to understand that this is an issue related to Ofcom's duty to citizens, as it covers the relationship between the caller and the person being called, not those with either of the telephone service providers.

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As Ofcom is in the prime position to provide a clear and objective set of terms for general use, it should acknowledge its duty to citizens and at least offer such a vocabulary, even if it is for others to ensure that it is used. Ofcom should also be seen to be strongly disapproving of meaningless, deliberately misleading and obsolete terms such as "local rate" and "lo-call".

If its use were to be enforced in relevant markets by Ofcom, such a vocabulary would also be valuable in enabling consumers to make comparisons between various tariffs from competing providers. As Ofcom has failed to introduce such a vocabulary and oblige its use for this purpose, one must assume that it has held back from doing so in order to promote competition between telephone service providers.

As Ofcom judges its own success on the number of people who "switch" providers, it is obviously in Ofcom's interests for consumers to make mistaken decisions so that they have to keep switching from one provider to another, after they have seen their bill. A properly transparent market enables consumer pressure to be placed on providers without the need for "switching" as the best prices have to be brought forward and consumers will be able to make the right decision for their needs once.

The lack of transparency that promotes "switching" may be seen to be in the interests of consumers in relevant markets, who are perhaps defined as those who enjoy playing around looking for the best deal this week. It is not however in the interests of citizens.

A particular example - the NHS

An example of one of the rights of citizens, referred to at section 2.21 of the statement, is the right to obtain "free treatment from the National Health Service". (This right is actually misstated as being only that to "seek free treatment".) It is therefore clearly in the interests of citizens that they should be able to exercise this right when using the telephone to arrange treatment from NHS providers.

To the clear knowledge of Ofcom this right is denied to many citizens as NHS patients. 0845 4647 is a revenue sharing telephone number that is used to deliver the services of NHS Direct. Also, many GPs and some NHS Hospitals use call type "g6" 0844 telephone numbers, which not only provide revenue share as cash, rather than a subsidy of telephone costs, but are also more expensive, than geographic numbers, to call on all tariffs of all types from all telephone service providers.

In February 2005, the then Secretary of State for Health issued a statement referring to the costs of calling 0844 and 0845 numbers as being at a "guaranteed low rate". This is of course nonsense; there neither is nor was any such guarantee.

I am not aware of any attempt by Ofcom to further the interests of citizens by correcting this gross error, either before it occurred, or subsequently.

Aside from its regulatory role in relevant markets, Ofcom has a clear duty to citizens to ensure that their interests, as Ministers or officials in the Department of Health or as the victims of its unintended errors, are furthered in relation to telecommunications matters. In this case that interest is reflected in their need to have a proper understanding of the important issues raised in relation to communications matter.

These issues are known to Ofcom, and an understanding can be derived from a close study of material published by Ofcom. That does not however mean that Ofcom's duty is fulfilled. The fact that a government minister can put his name to such a gross misunderstanding of the situation, and allow it to stand without correction, is sufficient to show that Ofcom has failed.

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Promotion of the 03xx range of numbers

In 2007 the 03xx range came into use with strong supportive regulation. This provides an option for those who need the benefits of non-geographic numbers but without the income from revenue share and with an assurance that callers will pay no more than the cost of calling a geographic number. Whilst the cost of calling a geographic number remains the base point of telephone charges this is a satisfactory solution to the problem caused by all non-geographic numbers having previously been subject to the revenue sharing mechanism. Should the market change so that this ceases to be the base point for call costs, then the 03xx regulations would need to change also.

This move was clearly in performance of Ofcom's duty to citizens in relation to communications matters. It enables citizens to benefit from the provision of services that use the benefits of non-geographic numbers without having to pay the provider.

Whilst Ofcom has provided the means for a solution to be adopted, the interests of citizens are not actually furthered until and when adoption of 03xx numbers occurs by those whom they call. This applies particularly to bodies in the public sector.

Relatively few public bodies have adopted 03xx numbers so far and there is no evidence of any efforts that Ofcom may be making to encourage adoption.

The Department of Health has been conducting an investigation into use of revenue sharing 084x numbers since January this year. Evidence presented to this investigation by those who actually profit from this practice has been made public. There is no public record of any evidence having been presented by Ofcom.

It is known that Ofcom was engaged with officials in the Cabinet Office over this matter and came to disagreement on two issues. Firstly, there was a dispute about how number ranges for use by public bodies would be allocated. At that time, Ofcom stuck with its traditional approach, insisting that ranges would be allocated to telephone service providers, even though this frustrated plans for an extensive roll out of 03xx numbers across the public sector. It is of interest to note that Ofcom has now shown more flexibility on this issue, as numbers in the 116 range will be allocated to users.

The second point of disagreement related to a request for Ofcom to exceed the bounds of its current authority by capping the prices of telephone services offered to public bodies. It is understood that no effort was made by the government to seek for Ofcom's statutory powers to be extended, so as to enable this request to be satisfied.

Perhaps as a result of these disagreements, Ofcom has clearly failed to generate the necessary enthusiasm in the Cabinet Office in general, and by its Contact Council in particular, to ensure a speedy adoption of 03xx numbers by public sector bodies.

Beyond its powers of "behind the scenes" influence Ofcom also carries enormous potential to openly influence activity, and provide support to those who are seeking to do so through campaigning efforts, by clear and bold public statements.

There is no reason why Ofcom should not use its position to further the interests of citizens, other than through the imposition and enforcement of regulations. Indeed, as this duty extends beyond the "relevant markets", although only covering their interests in relation to communications matters, this is the very duty that it is failing to fulfil.

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Ofcom's powers of regulation and enforcement

The Communications Act provides Ofcom with duties and powers of regulation. Not all of its duties are fully supported by the toughest possible powers to impose and enforce regulation. Indeed, its duty to promote competition WHERE APPROPRIATE is interpretable inversely as discouragement to intervene in a market that is seen to be effective to some degree. Ofcom is seen to assume that it is the need for intervention that has to be justified, whereas it is the promotion of competition that must be specifically justified as being appropriate.

Ofcom's policy of only using its powers of regulation and enforcement with a "light touch" is a separate issue of debate. Perhaps this actually arises, as it is seen to apply, out of Ofcom's need to be sure that it has full legal cover for any action against any party, when this is likely to be opposed or challenged in law.

This obsession with legal propriety is even seen in this consultation, where statements in one House of Parliament and those of a newly enobled peer are cited in support of arguments that are only being made before the court of public opinion.

This creates the impression that Ofcom is operating like a dodgy business, trying to keep its toes just on the right side of the law. This makes it defensive, unnecessarily slow to act and invariably appearing short of confidence in all of its public dealings.

Much of what Ofcom has to do to further the interests of citizens has to be done without the imposition of enforceable regulations. Its regulatory powers are mostly directed towards furtherance of the interests of consumers in specified relevant markets. Those markets which it does not regulate, e.g. the provision of NHS services and all those which may give rise to the making of Silent Calls, may nonetheless be affected indirectly by work that it may do "with a light touch" to further the interests of those who may be consumers in those "irrelevant" markets, i.e. citizens with an interest in relation to communications matters.

Conclusions

As it approaches the end of its sixth year, Ofcom should have at least started to get to grips with its role and duties and become confident in its actions.

It has avoided the possibility of oversight from Consumer Voice, retaining its own tame panel of specialist consumer advisors. Parliamentary scrutiny of its activities remains very modest. Its first Chief Executive has now moved on to pursue his political career outside Ofcom. It should therefore be free to act boldly in the performance of its two principal duties, without having to look over its shoulder.

It should reject the idea that "the interests of citizens in relation to communications matters" is the same as the woolly concept of "the public interest". It should recognise that all cases where its functions address these interests, where they are distinct from "the interests of consumers in relevant markets", fall within its first principal duty.

Where the need to further those interests enables use of powers of enforcement, they should be applied properly, not as is they were powers to enforce generally imposed regulations. In cases where regulation may not be imposed, Ofcom should nonetheless perform its duties to the best of its abilities, with confidence and imagination.

David Hickson

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