fair telecoms campaign **briefing**

Banning Cold Calling through the terms of the Financial Guidance and Claims Bill

At the Second Reading Debate of this Bill in the Commons on Monday, many members referred to ways in which the terms of this Bill could be used or adapted to ban cold calling.

The **fair telecoms campaign** has long been involved in this issue. We note that most statutory and regulatory measures intended to halt the practice of making unsolicited direct marketing telephone calls have failed to achieve this objective.

Whilst some may point to the imposition of financial penalties by the ICO, some of which have been paid, it must be accepted that, in general, the problem remains as serious as ever. The practice of imposing financial penalties, often years after the calls have been made, has not been seen to be an effective way of addressing the issue.

It must be noted that the practice is, in effect, prohibited by the terms of existing regulations. These will be strengthened shortly, when the government fulfils its promise to adopt the terms of what is known as "the ePR", the EU regulation that complements the GDPR to cover electronic communications. Where an approach by telephone is "unsolicited", there can be no question that it has failed to meet the requirement for **explicit, informed** consent that is demanded.

There is however a misguided, ill-informed assumption that there may be some people who knowingly consent to receipt of unsolicited direct marketing calls, and so this assumption has to form the basis of the work undertaken by the ICO in enforcing the law. We recognise the simple fact that action by the ICO, even though it is now more frequent and slightly more empowered, is not addressing the problem to a meaningful extent.

ADDING A FURTHER STATUTORY PROHIBITION WILL HAVE NO EFFECT, IN ITSELF

The issue is all about effective enforcement action – **primarily the attainment of compliance**. Whilst inflicting penalties on wrongdoers may create the impression that all is well, unless it can be shown to have a significant deterrent effect it offers nothing more than a sense of revenge.

To achieve compliance, a law or regulation must be simply expressed and fit for the business environment to which it applies.

It is clearly understood, and further highlighted by the purpose of this Bill, that everyone must have the opportunity of accessing advice before acquiring any financial product or service. This must immediately preclude use of unsolicited direct marketing by telephone as a means by which any provider may secure business in this sector.

The FCA, and perhaps others (e.g. the Pensions Regulator) must apply and enforce a strict code of conduct which simply precludes unsolicited sales and marketing telephone calls. This need not affect use of the telephone in response to an explicit request to be contacted in this way – perhaps from an existing customer. It is the "unsolicited" marketing call which, at the very least, represents an unacceptable interruption to the life of a citizen. Consumers would always be advised never to respond positively to such a call, so there is no justification for permitting them to be made.

All those who fall within the scope of the regulatory powers of regulators must be covered by such a prohibition. Those who set out to break the law would never seek to comply with detailed regulatory provisions covering behaviour anyway. The clear public understanding that anyone who made an unsolicited marketing telephone call was breaking the law would perhaps help.

David Hickson


The terms of the Bill

Banning Cold Calling for Financial Services in general

Clause 4 of the Bill refers to an order to be made by the Secretary of State when advised by the SFGB that a particular area is suffering problems as a result of Cold Calling.

This starts from a fundamentally false assumption. Is there any aspect of financial services for which the Secretary of State would argue that unsolicited direct marketing by telephone serves the interest of the delivery of good financial services? The suggestion that it is generally beneficial, but subject to exceptions, must be properly justified if it is to form the basis for a new statutory provision. We believe that most people would, as we do, find any such suggestion to be laughable!

We would argue that the FCA must immediately be required to prohibit unsolicited direct marketing by telephone across the entire field of financial services. It requires no new statutory power to implement such a change to its code, but may need to be compelled to take this action.

The clause is drafted so as to cover the need for exceptional treatment of some areas, so perhaps such a mechanism may be required, whereby the FCA could be compelled to permit cold calling in certain cases. Maybe the SFGB could determine that access to certain valuable financial services is denied, because providers can only make them available through unsolicited telephone marketing.

This latter suggestion addresses the point about what is the exceptional case.

A most significant element of the drafting of the clause is the inclusion of "***the commercial use of any data obtained by such cold-calling***". This means that regulated bodies must ensure that they are not undertaking business obtained by cold calling "lead farmers". By placing this duty on licensed or well regulated bodies, this avoids the difficulty of detecting all nuisance callers, it simply dries up their source of revenue, thereby halting their operations.

Many have identified the fact the Clause 4 omits any reference to the mechanism for achieving compliance with a prohibition, and for undertaking meaningful enforcement activity against those who may breach the terms of such an order. "Banning" something is very easy. Presently, most cold calling is in breach of regulations. It is imperative that any proposed attempt at prohibition includes clear provisions for how this will be made effective in practice.

What is now Clause 4 had its genesis in amendment 2, at Report Stage in the Lords, which was passed despite opposition from the government. This was seen by its proponents as being the best that could be done within the scope of Part 1 of this Bill, as earlier drafts of the proposed amendment had been deemed to be out of order. The clear objective was to compel the FCA to impose and enforce a total prohibition on unsolicited direct marketing by telephone, most notably to cover the actions of those seeking to secure the investment of withdrawn Pension pots.

The breadth of this objective is most important, as any reference to "Pensions" in a prohibition will be readily circumvented by those who are not selling a Pensions product but are seeking to get their hands on cash that may become available to those of a certain age.

It is imperative that, in Committee (and as result of other action), this Bill reflects a proper and effective approach to the total prohibition of cold calling for the marketing of financial services.

Banning cold calling as part of a tighter regime for Claims Management

Part 1 of the Bill may not itself offer an adequate vehicle for the statutory prohibition of unsolicited direct marketing by telephone across the whole field of financial Services.

This is not true in respect of Part 2, which covers the detail of a stronger and tighter regulatory regime for Claims Management Companies.

Claims Management operations have long been identified as the leading source of Nuisance Calls and, in specific areas, cold calling has been used as the primary means of encouraging fraudulent claims. In many cases, the calling is undertaken by unregulated "lead farmers" who sell on the details of likely claimants to CMCs.

The **fair telecoms campaign** has long been pressing the Ministry of Justice to impose a strict prohibition on this means of marketing, through the CMR, as it already prohibits doorstep Cold Calling in person. It currently advises that care be shown in the handling of leads from third parties; we have been pressing for this to be made a specific regulatory requirement.

Our efforts have been resisted, with no attempt being made to explain why unsolicited direct marketing by telephone was so valuable, in the public interest, that it had to be permitted.

At Report Stage in the Lords, amendment 42 was tabled, moved and debated. We see the drafting of this amendment as representing the full and true essence of what needs to be done through this Bill – given that the FCA may not be minded to make the necessary changes itself.

This amendment was however withdrawn on the basis of a very clear commitment by the government that it would introduce a similar amendment in the Commons.

We were very disappointed to hear no reference to this (from any quarter) during the Second Reading debate.

Our campaigning objective is for the FCA to apply a total prohibition on use of unsolicited direct marketing by telephone across the board – if necessary being compelled to do so by legislation.

This Bill, without question, enables this to be achieved in respect of Claims Management Companies (affecting also their "lead farmers"), even if Part 1 does not allow for so radical a measure to be performed by this legislative vehicle.

We see it as essential that the government honours the commitment made, and most graciously accepted, in the Lords. It is also imperative that the purpose of scope of "amendment 42" be fully reflected in whatever the government may propose.

Notes

This briefing stands as our general comments on the situation following the Second Reading debate. It has been circulated to those known to have an interest in the issue.

We will be submitting additional specific evidence to the Bill Committee as well as making direct representations to relevant parties.

We will be delighted to cover any of these important points in focussed discussion or briefing with anyone who may be interested.