fair telecoms campaign **briefing**

A ban on cold calling could be nearer than we think - we don't have to wait for Brexit to be completed!

The current (pre-Brexit) position

The present regime used to penalise "Nuisance Callers" relies on the absurd notion that someone could consent to receiving unsolicited direct marketing telephone calls. [1]

This is how the terms of an EU Directive were applied in UK law back in 2003, through the **PECR** - . *"Privacy and Electronic Communications (EC Directive) Regulations 2003" - SI 2003/2426* [2]. The [3] "**Great Repeal Bill**" will hopefully sort out this nonsense in due course, however the weight of EU Directives that have been implemented in UK legislation means that this will have to wait its turn.

As the people of the UK voted on 23 June to "take back control" of law making, [4] the basis of **Ofcom** will have to be reassessed, because its principal functions, defined in the **Communications Act 2003** [5] implement a key principle of the single market – that the interests of consumers are served primarily by competition between loosely regulated businesses in a wide market. [6]

A clear majority (equivalent to 13/25 vs. 12/25) of enfranchised UK citizens expressed the view that this foreign concept is not acceptable to them. We thereby demand that this excessively liberal approach to business be curtailed. This is seen to apply most notably to sources of labour, but no limit was placed on the scope of this demand by the terms of the referendum.

What could be done now – by parliament

The "**Digital Economies Bill**", currently being considered by parliament, addresses the direct marketing provisions of the **PECR** [7] but, due to our continued membership of the EU, it fails to address the key point. If parliament were to be brave enough to assert its authority and reflect the clearly expressed view of the people of the UK, then it could make the necessary change to apply a total prohibition on unsolicited direct marketing telephone calls, as this is clearly what is wanted.

The idea that an unsolicited direct marketing telephone call to a home landline or personal mobile phone could ever be an acceptable business practice is the nonsense that we have to remove from our statutory regulatory environment.

There are powerful regulators who should play their part

The provisions of the **PECR** are enforced by the Office of the Information Commissioner (**ICO**), using its severely restrained penalty powers under the terms of the **Data Protection Act**. [8]

The marketing of services in many sectors is however governed primarily by specific regulators. They have the power, and duty, to impose conditions on how products and services are marketed, according to the needs of the particular market which they control. They also, unlike the **ICO**, have extensive powers of enforcement including the potential to prevent companies from trading, by withdrawing licences or the imposition of financial penalties which severely impact the business.

The list which follows details the areas for which the **ICO** records the most (92% in total) complaints about unwanted telephone calls – with the name of the relevant regulator alongside it.

These regulators must firstly accept responsibility for the nuisance calls that are generated because they permit telephone marketing in their sector. They must then consider taking action to prohibit use of the telephone in the marketing of products and services in their sector, covering both principal providers and the agents who generate leads for them, acting on their behalf.

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The fair telecoms campaign calls on the regulators listed below to act now.

We believe that use of the telephone for unsolicited direct marketing calls cannot be justified in these sectors. Whatever consumer benefit there may be is surely outweighed by the disbenefit of the nuisance which is undoubtedly caused to what will always be an overwhelming majority of citizens who are disturbed by being contacted to no useful purpose.

This argument applies even before one considers the extreme annoyance and distress that is caused to many victims of unwanted telephone calls.

The following table shows, for 2016 up to the end of August [9], the numbers of complaints to the **ICO** about calls "by type". Whilst the numbers are meaningless in relation to the known incidence of nuisance calls received [10], the percentages represent the extent to which unwanted direct marketing telephone calls originate from businesses regulated by the bodies named.

Regulator	Type of business / activity	Reports	% age
Claims Management Regulator (within the Ministry of Justice)	Accident claims, PPI	31,706	44%
UK (now ceased) **and Scottish Governments**	Energy Saving schemes	23,348	32%
Financial Conduct Authority	Banking, Debt management, Insurance, Payday loans	5,770	8%
Ofcom	Broadband, phone, TV or other telecoms services	2,170	3%
Ofgem	Energy supply	1,919	3%
Gambling Commission	Competition, Gambling	1,196	2%

The remaining 8% of reported sources of nuisance calls includes 4% attributed to attempted fraud, - a separate issue. The approach of calling on these regulators to prohibit use of direct marketing by telephone cannot be said to be a total solution to the problem of nuisance calls. It is however more likely to be successful than the over-hyped solutions implemented recently.

Why nothing has been done about this so far

The unsolicited direct marketing telephone call may be anathema to consumers, but it is not so to those who engage in marketing. This includes the **Political parties**, who canvas for our votes, and commercial bodies such as **Which?**, which actually seeks to collect email details from those who complain about unwanted marketing calls for the purpose of marketing its own services.

The **Direct Marketing Association**, which runs the **Telephone Preference Service**, argues that consumers benefit from marketing calls. When challenged, it however fails to produce any evidence of a case where such benefit is found **when the call was unsolicited**.

The primary problem however is with the interpretation of the **EU Directive (2002/58/EC)** [11] which sought to protect the freedom of businesses to interrupt the lives of potential customers, by introducing the absurd concept that a citizen may consent to receipt of unsolicited telephone calls.

Regrettably, sectoral regulators have been content to extend this notion to form part of the regime that they impose on those who they regulate, by failing to prohibit the practice of making unsolicited direct marketing telephone calls. **This practice must now end**.

Notes

1. See regulation 21 of the PECR – at this link.
2. The PECR was enacted (and has been subsequently amended) as secondary legislation, to implement the terms of a (then) EC directive. (see note 11 below). See notes from the ICO.
3. The Government has announced that, in preparation for the end of whatever negotiations may proceed following the triggering of "Article 50", a bill will be presented to parliament "***so that EU law ceases to apply and domestic law can take its place on the day of exit***". A specific target will be provisions enacted through secondary legislation to give effect to EU law
4. In his statement to parliament of 10 October 2016 (see Hansard), the Secretary of State for Exiting the European Union referred to "***the will of the British people, expressed in the EU referendum result, that Britain should once again make its own laws for its own people***".
5. Confirmation that Ofcom, which was established by the Communications Act 2003, was formed in line with the requirements of the Single Market is found in Note 9 of the Explanatory Notes which accompanied the Communications Bill when it was placed before parliament.
6. The key principal of the Single Market is expressed in the principal duty of Ofcom to "promote competition" - see CA3(1)(b). Ofcom interventions are restrained by this requirement.
7. Clause 77 of the Digitial Economy Bill proposes publication of a ICO Code of Practice indicating how to comply with the law and defining "good practice" for (digital) direct marketing. This is however simply more words about the existing provisions, there is no indication that this could represent a radical change of position regarding the nonsense of consent to unsolicited calls.
8. The factors that have to be considered when taking enforcement action in respect of a breach of the terms of the PECR are laid out in the formal ICO guidance. A clear indication of the weakness of the powers was however offered to the Culture, Media and Sport Committee in evidence presented by Simon Entwisle of the ICO on 10 September 2013. The exchange begins at Q159 at this direct link. The limits on the ICO's ability to impose a meaningful penalty must be set against the ability of others (e.g. the Claims Management Regulator) to withdraw or suspend a company's licence to trade for a suspected breach of regulations.
9. The figures are based on grouped year-to-date totals for "live" and "automated" calls from the latest version of the ICO publication - Concerns reported by type, 2016 (csv).
10. In giving evidence to the Committee considering the "Digital Economy Bill" last week, Lindsey Fussell (Consumer Director of Ofcom) said "***We estimate that consumers in the UK will receive about 4 billion nuisance calls this year***" – see link at theyworkforyou.com. That estimate makes the 72,110 total of reported calls used in our calculations equivalent to only 0.0027% (1 in 37,000) of those estimated to have been received in the 8 month period up to August 2016.
11. The provisions covering unsolicited direct marketing calls, introducing the nonsensical concept that subscribers may effectively "consent" to receipt of such calls, is found at Article 13 of the Directive – see this direct link.