fair telecoms campaign **consultation response**

Response to FCA Consultation – 'Our Future Approach to Consumers'

The **fair telecoms campaign** is pleased to submit a response to the FCA Consultation on "Our Future Approach to Customers" - https://www.fca.org.uk/publications/corporate-documents/our-future-approach-consumers.

This response addresses only an issue of concern to the campaign. It may be seen to represent a response to Consultation Question #3, regarding the responsibilities of the FCA in relation to those of government and other regulators.

The role of sectoral regulators

Each sectoral regulator has a responsibility for setting and enforcing specific standards of conduct for the way in which those it regulates market their products and services and obtain business. Notwithstanding any relevant general regulations and statutory provisions, these standards must be appropriate to the interests of all stakeholders in the particular market being regulated.

As regards marketing activity, this must also consider the wider public interest, including those who are subjected to this activity, but are not persuaded to become consumers.

The sectoral regulator holds the primary responsibility for the conduct of those it regulates, as it is to that regulator that they look first for specific guidance.

Unsolicited direct marketing by telephone, to consumers

Unsolicited direct marketing by telephone, to consumers, is bound to be seen as a nuisance by those who have no interest in whatever is being promoted. The unwanted telephone call, as against other forms of direct marketing, is uniquely annoying, in that it demands the immediate attention of the subject at a time chosen by the caller. A regulator who permits this method of marketing therefore has to make a clear determination that this potential public nuisance is outweighed by the benefits derived from its use, otherwise it must be prohibited.

A further consideration applies in the case of Financial Services. It is clearly understood that those acquiring Financial Services must have access to "information, guidance and advice", or at the least give careful consideration to their options, before completing an acquisition. The interactive nature of a telephone call enables a marketing approach to proceed to a sale in the course of a single contact. It may be fairly stated that anyone engaged, not at their instigation, in a conversation with an agent marketing a financial service is, in some real sense, "vulnerable".

We believe that the FCA should give immediate attention to this issue and that this must lead it to **reverse its present policy of permitting unsolicited telephone direct marketing**, if only on the basis of the "further consideration" stated above.

In respect of B2B and less intrusive methods of direct marketing, we see scope for a more liberal approach. This must consider the interests of stakeholders and the public in general.

For example, in an area where scams have been found to be initiated by text message or email, there is a strong case for prohibiting use of these methods.

In all cases, it is most important that the FCA tunes its approach, in a timely manner, to ensure that all interests are balanced.

Due diligence in use of leads obtained by other parties

A prohibition of the practice of unsolicited direct marketing by telephone that covered only the activities conducted directly by "authorised persons" would not completely address the issue.

The prohibition must address the activities of those acting on behalf of authorised persons, whether or not by prior arrangement. It must cover both engaged agents and "lead farmers", who conduct marketing operations for business which only those authorised are competent to complete. Obviously the FCA cannot however directly regulate those who are not authorised.

To achieve this purpose, the direct prohibition must be accompanied by a requirement for authorised persons to apply due diligence in ensuring that leads they use have not been obtained by methods which they themselves could not have used.

The issue of "consent"

Statutory regulations covering unsolicited direct marketing are based on regulations covering use of personal data, and thereby apply the concept of "consent". We take the view that if a particular contact from a particular organisation has been clearly requested, then it cannot be "unsolicited" and cannot be deemed to be improper.

An unsolicited marketing approach must be unexpected, so there is no way that the recipient could have been in a position to provide meaningful informed "consent" to such an approach.

We believe that, in setting its code, the FCA should simply consider whether an approach has been explicitly requested ("solicited"), prohibiting unsolicited direct marketing approaches to consumers by telephone call.

The role of the ICO

The ICO is responsible for the enforcement of statutory provisions covering the protection of personal data. This extends to general rules covering unsolicited direct marketing by electronic means, including by telephone call. This role is entirely different to that of the FCA.

- The FCA defines the terms of its own regulations and is thereby able to swiftly reflect its understanding of the relevant markets through revised regulations and / or enforcement policies. The ICO can however only enforce compliance with the terms of statutory regulations.
- The FCA holds the power to disable the conduct of authorised business operations, through licensing and other regimes. The ICO, in contrast, may only impose financial penalties set at a level that cannot materially affect the business responsible for a breach.
- Getting away from the nonsense of "consent" to "unsolicited" contacts and applying rules regarding due diligence, means that only the FCA could impose the necessary requirements.
- The FCA has a direct regulatory relationship with those who operate in the Financial Services Sector. This enables the FCA to apply regulations that are clearly recognised as relevant, and it thereby achieves a much greater degree of compliance than that with general regulations.

Proposals to engage the ICO in direct regulation of the Financial Services market must be rejected.

The scope of a prohibition

These comments are made to cover the entire field of Financial Services, as we see no reason why any component sector should be exempt. There are however areas for which specific arguments have been advanced, in various ways, as a particularly strong case is seen to exist.

☒ **Mortgages.** There is already a prohibition in place covering this area.

☒ **Pensions** (or rather use of pension funds released under the "freedoms"). A government consultation, concluded in 2017, led to a determination that action is necessary. The government has expressed an intention to legislate, although no specific proposal is expected for some time.

☒ **Pay-day loans**. The government has also expressed an intention to act in respect of this area, in response to strong representations. Again no specific proposal has been tabled.

☒ **Areas determined by the Single Financial Guidance Body**. The Financial Guidance and Claims Bill currently includes a provision whereby the SFGB may specify areas for prohibition.

☒ **Claims Management Companies**. The government has undertaken to amend the Financial Guidance and Claims Bill to apply such a prohibition when the FCA takes on this responsibility.

The context of these comments

These comments are made in the context of parliamentary consideration of the "Financial Guidance and Claims Bill". They are presented as this comes before the Commons.

This Bill has been, and will be, subject to efforts to introduce a statutory duty on the FCA to apply a prohibition of unsolicited direct marketing telephone calls.

The government has undertaken to introduce an amendment in the Commons to apply such a duty in Part 2 of the Bill, with reference to Claims Management Companies. Clause 4 of the Bill, which will need to be tidied up in the Commons, seeks to introduce a complex process whereby demands from the Single Financial Guidance Body may compel the government to impose such a duty in particular cases, through some (undefined) process of secondary legislation.

Whilst we understand the joy that some take in saying "The government must …" or "The government has …", our concern is only that the necessary outcome is achieved in the most complete and effective way.

We understand that the FCA is fully competent to apply the necessary prohibitions through its code and undertake any necessary enforcement of compliance. If it may be aided by a statutory duty, then one cannot object, however we see it as most important that a strong and clear set of regulations are determined by the FCA, rather than being "set in stone" by legislation.

In an ideal world, we would see the FCA step forward to declare its intention to properly address this issue without the need to be compelled to do so by parliament. We are most reluctant to see the scope of what the FCA may do being unduly constrained by the drafting of legislation.

We trust that a sensible approach will be taken by all involved, and will be happy to engage in discussions to this end.