fair telecoms campaign **briefing**

Financial Guidance and Claims Bill Report Stage (27 March)
MP briefing on amendments covering Cold Calling

This briefing offers the views of the **fair telecoms campaign** on the amendments, covering the issue of Cold Calling, tabled for Report Stage of the Financial Guidance and Claims Bill.

It replaces the briefing issued previously. The issues are discussed at length, with links to other relevant material, in our briefing – Debate on alternative proposals relating to Cold Calling ….

In the last few days a most significant report, prepared for the Scottish government although mostly addressing UK-wide data and issues, has been published – Effectiveness of actions to reduce harm from nuisance calls in Scotland. This report includes the significant recommendation, "***When nuisance calls relate to calls in a particular regulated sector, such as PPI or energy provision, sectoral regulators may be better placed than ICO or Ofcom to rule and enforce against inappropriate sales practices***".

Outline of our views on the relevant issues

The role of the ICO in enforcing compliance with the general provisions covering unsolicited direct marketing by "electronic" means, as covered by the terms of the PECR, has been shown not to have the effect of prohibiting the practice of Cold Calling.

We believe that a prohibition applied and enforced by the FCA in relation to all, or specific elements of the financial services sector is not only more effective, it is also a more proper way of regulating what is far more a business practice than a matter of misuse of personal data.

A most significant point in support of our argument is the fact that the FCA may apply a prohibition of use of leads obtained by Cold Calling, as an element of "due diligence". It is well understood that "lead farmers" are responsible for a significant proportion of such calls, and many of them operate outside the jurisdiction of the ICO or otherwise are extremely difficult to identify and punish.

Our objective is not to see more cold callers punished, but to eliminate the practice by strong and effective enforcement of compliance with a prohibition by an engaged regulator.

We also see the nonsense of the absurd concept of "consent" to an "unsolicited" direct marketing contact as an obstacle to the work of the ICO. Engagement with current and prospective clients by whatever means of contact they have "solicited" is no barrier to the proper conduct of business. Whilst consent to use of provided personal data is an important principle in data protection, Cold Calling may be undertaken by taking details from published telephone directories or at random.

There is also a strong relevance to a total prohibition of Cold Calling in the general thrust of the FG&C Bill. It seeks to ensure that all acquisitions of financial services are undertaken following careful consideration and access to independent Guidance. A key objective of Cold Calling, as opposed to other means of marketing, is to eliminate the possibility of careful consideration. For this reason alone, it should have no place in the financial service sector.

The FCA vs. the ICO

The FCA already holds the necessary powers to apply a prohibition of Cold Calling. The only relevance of a statutory provision is to compel it to use those powers to this end – it does not require any further enabling power. The ICO, by contrast, may only enforce the provisions of statutory regulations (the PECR in this respect); it has no power to make rules.

It is important to recognise that the terms of the PECR already prohibit unsolicited direct marketing (without consent) if it is undertaken by automated telephone call, fax, text message, email or by attended telephone call to those registered with the Telephone Preference Service.

The government approach to "banning" Cold Calling

The government approach to the issue has been clearly defined and is now seen in the terms of Clause 34 of the Bill.

This does nothing more than add a requirement for consent in respect of attended telephone calls to numbers not registered with the Telephone Preference Service, if the call was with reference to Claims Management Services. It makes **no change** in respect of the current situation of automated telephone calls, faxes, text messages, emails or attended telephone calls to those registered with the Telephone Preference Service.

As well as being contained in the terms of Clause 34, this policy position has also been expressed elsewhere. There is no reason to question that this will be the approach to be followed if the powers to act conferred by New Clauses 3 and 4 ever come to be used.

The approach of making a barely significant tweak to regulations yet hyping it up as a major development has been a repeated feature of action in relation to Nuisance Calls over the last few years. (We refer to this in our earlier briefing – see "Previous ineffective tweaks to the PECR").

A true ban of Cold Calling in the Financial Services sector

The powers already held by the FCA enable the imposition and enforcement of regulations covering the marketing of regulated products and services. Indeed, the FCA has a duty to regulate in the interests of stakeholders, notably consumers.

The fact that this may include the capacity to prohibit Cold Calling is seen by the inclusion of a ban on Cold Calling in respect of Mortgages, which is part of the current FCA code.

It is therefore vital to understand that any action taken to apply a ban on Cold Calling through this Bill need only be the imposition of a compulsion on the FCA to use powers which it already holds. There is no need to grant any new power, through a new statutory provision or by amending existing legislation, neither through this Bill nor by enabling secondary legislation to be presented to this end.

The basis of general statutory regulation regarding Cold Calling is currently constrained by the terms of EU Directives and Regulations. Because these regulations derive from concerns around the use of personal data, rather than the general propriety of business practices, they are hidebound by the absurd concept that there may be "consent" to receipt of an "unsolicited" direct marketing telephone call (or fax, text message or email).

The whole purpose of regulation of specific sectors is to go beyond the terms of general statutory provisions, by applying codes of conduct that are more demanding, as deemed necessary.

It is because the terms of the general regulations have been found to be ineffective in stopping Cold Calling, not to mention the weaker powers of enforcement against breaches, that a more appropriate and stronger approach (including a complete ban) must be taken.

The relevant Amendments and New Clauses

I address the **specific amendments**, as tabled, as may be addressed by MPs speaking in what is likely to be a single debate, with all of the following forming part of a single group.

Banning Cold Calling by Claims Management Companies

New Clause 8 reflects the terms of a cross-party amendment tabled to this effect in the Lords.

This was withdrawn due to a government assurance that an equivalent government amendment would be brought forward in the Commons. "That amendment" is now Clause 34 of the Bill.

New Clause 8 demands that the FCA imposes a ban; Clause 34 represents a minor tweak to a failed regime, failing to address every legitimate complaint that has been registered about Cold Calling by Claims Management Companies to date. (Clause 34 only addresses cases where a victim of a Nuisance Call has no legitimate grounds for complaint, because their failure to register with the TPS is taken to represent unqualified "consent" to all unsolicited direct marketing calls.)

All those who wish to see an effective "ban" on Cold Calling, must speak to and support **New Clause 8**, because it is the only tabled provision that could achieve such an effect.

New Clauses 3 and 4 – a government "ban"

The purpose of any enabling power is to permit the government to make an order that may not be amended by parliament.

The government approach, as discussed above, is very clear and therefore must be expected to be reflected in the terms of any order.

We therefore see it as imperative that the Minister be asked, when moving **New Clauses 3 and 4**, how it is proposed to "***make regulations prohibiting unsolicited direct marketing***", as opposed to the absurd current statutory provision (under the terms of an EU Directive) which permits such activity given "consent". The Minister should be compelled to confirm that the government proposes nothing more than continuation of the current failed regime, albeit with a minor tweak.

If, as suggested, the government intends to first make such an Order, under the terms of **New Clause 3**, by the end of the June 2018, one must wonder why the necessary provisions are not included in the terms of this Bill. Clause 34 lays out such provisions relating to Claims Management – why not Pensions?

There is an unclear reference to Ofcom, which already holds wholly discretionary powers to take whatever action it deems necessary in relation to any activity likely to cause "unnecessary annoyance, inconvenience or anxiety". Furthermore, Ofcom, like the FCA, has the statutory authority to make its own regulations. It is only the ICO which relies on, and conducts enforcement of, statutory regulations, such as those referred to in **New Clauses 3 and 4**.

The government position on how to undertake the prohibition of Cold Calling has already been laid out in detail - Letter from the Economic Secretary - 23 February 2018. If it does not intend to follow exactly the same approach as reflected by Clause 34 when using the powers conferred by **New Clauses 3 and 4**, then this change of policy must be explained.

There is a further major flaw in the terms of **New Clause 3** - in that it refers to "***direct marketing relating to pensions***".

As I understand it, the concern on this matter relates not solely to the marketing of pensions products, but to investments of various sorts which are marketed to those in a position to cash-in their pension pots.

Unless such a regulation were to be very carefully drawn, and capable of ready enforcement in respect of any relevant activity, one could see it failing to address a significant portion of what we all wish to be targeted.

Notwithstanding the general point about the unsuitability of direct marketing by telephone (and other "electronic" means) for all Financial Services, we believe that a wide, or total, prohibition of the practice by the FCA is essential to address what is generally understood by the term "Pensions Cold Calling".

We fear that any regulation which relies on the word "Pension" in its terms would be easily avoided by marketing that fails to include that word. Furthermore, taken at face value, the provision appears only to relate to the marketing of pensions products.

(N.B. The latter comments are written on the basis of experience of the ICO and its lawyers struggling with the wording of regulations.)

Amendments to New Clause 3

Amendment (a) seems to be a silly attempt to play with words. Surely there is little point in compelling the government to introduce some undefined measure, which could be wholly meaningless, as opposed to allowing it to introduce a largely meaningless measure.

Amendment (b) would be relevant if it were to be assumed both that **amendment (c)** was to be applied and that the government was to abandon the idea of applying regulation through the ICO.

Amendment (c) could be of interest if the government were to adopt it as its new preferred policy. There is no point in presenting the government with an option it has no intention of using.

It must however be noted that there is no need for the government to "make" a regulation for the FCA; the FCA is fully empowered to make such a regulation for itself. Furthermore, there is no reason whatsoever why parliament should pass the responsibility to compel the FCA to ban Cold calling to the government - this compulsion should have been placed on the face of the Bill.

Amendment (d) is redundant, as there is no need to amend the terms of the Act. The FCA already holds the powers necessary to impose and enforce a ban on Cold Calling.

Amendments relating to the Single Financial Guidance Body

When what became Clause 4 of the Bill was passed as an amendment in the Lords, defeating the government, it had been ruled that any amendment to Part 1 of the Bill must be in relation to the Single Financial Guidance Body. A cross-party group of Peers had intended to move an amendment to simply compel the FCA to ban Cold Calling in relation to Pensions and other Financial Services, similar to what we now see as **New Clause 8**, but this was ruled out of order.

The truth of the situation is that there is no need whatsoever to await a determination by the SFGB regarding the ill effects of Cold Calling. The government has made this determination itself in relation to Claims Management and Pensions, noting that the latter includes all vehicles designed for the investment of withdrawn pension pots.

It is most important that the SFGB is able to clearly guide against responding to any unsolicited direct marketing contact in relation to any Financial Service. Delivery of such Guidance is impeded by the absurd notion that some such contacts are legitimate, because they have been made with "consent". A primary objective of compelling the FCA to prohibit all unsolicited direct marketing contact is that this shifts the test onto the simple issue of whether or not the contact was explicitly "solicited". Resting on the terms of the PECR denies the simplicity of this prohibition.

The current Clause 4 of the Bill is now removed by **Amendment 11**. All of its provisions are however now covered elsewhere.

The active parts are replaced by **New Clauses 3 and 4**. The initial part, the presentation of evidence from the FSGB, is re-inserted (through **new sub-section 7(b) of Clause 3**) by **Amendment 10**. Consideration of this evidence from the SFGB is applied at **section 3 of New Clause 4**.

New sub-subsection 7(a) of Clause 3, in **Amendment 10** *raises a separate point – see below.*

Amendment "a" to amendment 10 goes along with the idea that the case for total prohibition of unsolicited direct marketing of financial services has not already been made, by seeking to set a timetable for regular re-consideration of this point. We believe that the case is thoroughly made.

It also seems to disregard the fact that the PECR will have been replaced by the new EU Regulation within the next few months, or at least before our obligation to apply it ceases in 2021.

Given that **Amendment 11** is approved, **Amendments 8 and 9** will be "orphaned". It is perhaps disappointing that these amendments have not been re-drafted to apply as further amendments to **Amendment 10**, where they would apply to the revised Clause 3 (7)(b)(ii).

These amendments do however seem to be somewhat redundant, given that the government has already "acted" in respect of Claims Management Companies, through Clause 34.

Furthermore, parliament has its opportunity to direct an effective approach in respect of Claims Management Companies, through **New Clause 8**.

The real and meaningful opportunity for the SFGB to become involved in securing an effective prohibition of Cold Calling, if efforts to achieve this within and without parliament fail, arises through the terms of **new sub-subsection 7(a) of Clause 3, in Amendment 10**.

Given that the SFGB recognises that the detrimental effects of the practice of Cold Calling fall within the scope of the FCA's powers (as they do) this is a matter that may be raised under the terms of 7(a), rather than leaving it to the government to take ineffective action – under the terms of 7(b).

Summary of points to be raised in debate

If we are seeking an effective regulatory prohibition of Cold Calling, including use of leads obtained through Cold Calling, this can only be achieved by the FCA.

The FCA already holds the statutory powers necessary to impose and enforce such a prohibition, on those who fall within the scope of its regulatory powers.

The role of parliament must be to press it to apply its powers in that way, if necessary by compelling it to do so through legislation. There is no essential need to amend existing legislation.

The government prefers to maintain the existing weak regime of general regulation, enforced by the ICO, which is well proved to be ineffective, due to a number of factors.

We argue that it is the process of unsolicited direct marketing that has to be halted, regardless of whether numbers are being dialled at random or if there may be some assumption that a specific target may have consented to the receipt of unsolicited communications.

The only valid direct marketing communications (by telephone, fax, text message or email) should be those which have been explicitly requested, to be delivered by the particular method used.

We regard this approach to be a "ban" on Cold Calling. The tweaks to the existing failed regime, as proposed by the government, primarily through **New Clauses 3 and 4**, must be called out for the nonsense that they are.

New Clause 8 is the only tabled amendment that attempts to compel the FCA to impose a "ban" on Cold Calling. This relates only to Claims Management Companies.

Barring a complete change of policy by the government, there is no amendment tabled that comes close to representing an effective "ban" of Cold Calling in respect of the investment of pension pots or any other Financial Service.

As new legislation is however not required in order for the FCA to impose the ban which parliament may wish to see imposed, Members are free to refer to the action that they wish to see taken when discussing any of the tabled amendments that fail to achieve the desired effect.

As stated above, it is understood that all of the amendments referred to in this briefing will be grouped together, so Members (other than those moving amendments) will have only one opportunity to comment.