fair telecoms campaign **briefing**

Financial Guidance and Claims Bill – Report Stage
Tabled amendments covering the issue of Cold Calling

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

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 service sector (and other direct regulators where appropriate) 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". We understand that many of the lead farmers 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 so-called "ban" in respect of Claims Management, currently Clause 34 of the Bill, simply added the requirement for consent in respect of calls to numbers not registered with the Telephone Preference Service, if the call was with reference to Claims Management Services. We expect the same approach to be taken using the powers to be granted by New Clauses 3 & 4.

The relevant Amendments and New Clauses

From my reading of the list of tabled amendments, I believe that the following cover cold calling:

- New Clauses **3**, **4**, **5** and **8**
- Amendment "**a**" to New Clause 3
- Amendments **8**, **9**, **10**, **11**, 25, 26, 28 and 29
- Amendment "**a**" to amendment 10

I will comment on each, as **highlighted** that has a material effect.

New Clauses 3 & 4 and related matters

As stated above, **New Clauses 3 and 4** simply enable the Secretary of State to make orders to the same minimal effect as Clause 34 in respect of other topics. Any attempt to present such a modest tweak to an existing failed regime as a "ban" must be duly mocked.

The ICO must do all it can, but where a direct regulator is in place and a total prohibition, covering also leads obtained by third parties, is required, then the ICO cannot fulfil this role. It may be noted that the FCA already prohibits cold calling in respect of Mortgage products and the SRA already prohibits cold calling by Solicitors.

Whilst one cannot say that a very modest tweak to the PECR is a bad thing, it can be seen as a total distraction from the change that is required and it should expose the government to mockery when the minimal effect is seen in practice, given that, as is likely, the move is over-hyped.

Amendment "a" to NC3 is meaningless unless the terms of the demanded regulation are specified, but the assumed intention of the Secretary of State is understood to be close to worthless anyway.

These clauses essentially replace the effective element of existing Clause 4, which is removed by **Amendment 11**.

The initial part of the provisions of Clause 4, relating to the FSGB are re-inserted by **Amendment 10 (new sub-subsection 7(b))**. *New sub-subsection 7(a) raises a separate point – see below.*

Amendment "a" to amendment 10 foresees the possibility of a regular series of meaningless tweaks to the PECR. Whilst it seems unlikely that the EU "e-privacy" regulations will come into effect, replacing the PECR, by the intended date of 25 May 2018, we may assume that they will be in place before the UK is relieved of the duty to adopt them (December 2020?).

A key provision of these regulations is that the removal of the possibility of consent to unsolicited direct marketing calls being assumed, as adopted by the UK in 2003. Adoption of this regulation in its basic form will render the government's approach to "banning" cold calling redundant, as "consent" would be required in all cases. We do not therefore need to be too hung up over what may happen in two years time.

Given that amendment 10 is approved, **Amendments 8 and 9** will relate to Clause 3 (7)(b)(ii).

These amendments may however have been drafted on the assumption that it is desirable, or necessary, for the Secretary of State to decide whether to compel the FCA to act using its existing powers or to apply a further (relatively meaningless) tweak to the PECR. *(This point is covered in our comments on New Clause 5 below.)*

New Clause 5

There is a striking similarity between **New Clause 5** and New Clause 3. The latter is the former with all references to the FCA removed, or vice versa.

This causes us to raise the point that the FCA does not (nor does Ofcom) require any new legislative provision to be able to act in the manner specified. Parliament could compel such action or, as seems to be the desire of the government, preclude it, but it does not need to be enabled.

Of these bodies referred to, it is only the ICO that is constrained to only enforce statutory provisions. It is therefore only action by the ICO for which the government may take direct credit. We have repeatedly wondered if there is a political imperative behind the government's refusal to press the FCA to use the powers it has already been granted.

There is no good reason why the FCA could not be compelled, directly, to prohibit cold calling by parliament. This does not however require any change to its powers and duties, so there is no need to include any power to enable secondary legislation, in respect of the FCA, in this Bill. If it is the will of parliament that the FCA acts in this way, then this can be expressed directly. It is clear that this is not the will of the government, for whatever reason.

One can however understand why, given that there is a (albeit relatively weak) statutory regime in place to cover unsolicited direct marketing, deriving from an EU directive, there may be a reluctance to add further relevant provisions to the statute book.

The debate around this new clause must however be taken as an opportunity for members from all sides of the house to send a message to the FCA about how it is expected to use the powers and duties it has already been given by parliament. This message must stand, whether or not this opportunity to potentially cause a new specific duty to be applied is taken.

As for Ofcom, it already holds powers, under Sections 128-131 of the Communications Act to proceed against anyone engaged in "persistent misuse of the telephone network". These are wholly discretionary and include the ability to simply issue a Notification, enforce prohibition of an activity and / or impose a financial penalty. These are intended to serve as a back-stop to cover activity, the likely effect of which is to "cause another person unnecessarily to suffer annoyance, inconvenience or anxiety", that is not covered by any specific regulatory provision.

New Clause 8

New Clause 8 is a corrected version of what was presented in the Lords at Report Stage as Amendment 42 and in Commons Committee as New Clause 9. The correction ensures that the provisions only come into effect once they are able to be carried out.

Part 2 of the Bill addresses the regulatory regime to be applied to Claims Management Companies once they come under the control of the FCA, in detail. It is therefore unquestionably in order for a detailed duty to be placed on the FCA in this part of the Bill. There are questions about the propriety of including provisions unrelated to the SFGB in Part 1 – not that this has been seen to inhibit the tabling of New Clauses 3 and 4.

Amendment 42 was withdrawn in the Lords on the basis of a government commitment to bring forward an equivalent measure in the Commons. When the Bill is returned to the Lords, it will be for peers to determine whether that commitment is honoured by the present Clause 34, which does nothing whatsoever in respect of automated calls, faxes, text messages, emails or attended calls to those registered with Telephone Preference Service.

In the Commons Committee, New Clause 9 was set against New Clause 6 (now Clause 34) and the Committee divided simply on the basis of the government majority obtained as a result of the amendment to Standing Order 87 last September.

Clause 34 is only harmful if anyone deceives themselves into believing that it represents a “ban” on cold calling to any meaningful degree. There is therefore no reason to remove it, unless it is to be misused.

New clause 8 represents a meaningful and effective ban on cold calling in respect of Claims Management. Whilst we wish for the FCA to go much further, it is appropriate that this ban be included in its new code for Claims Management Companies.

It will sit comfortably alongside an existing prohibition on doorstep direct marketing and existing strong guidance, albeit not a specific requirement, to show due diligence in identifying the manner in which third party leads are obtained.

As an exceptional measure, it will also sit comfortably alongside the existing FCA prohibition of cold calling in relation to mortgages. Furthermore, as solicitors are able to carry out work on Claims Management, even if not registered as CMCs, it will also fit in well with the fact that they are prohibited from cold calling by the SRA.

We hope, at the very least, that this New Clause will be subjected to serious debate by those who are well briefed on the issue, as we felt that this was lacking in Committee. We also feel that their Lordships (not to exclude at least one distinguished Baroness) deserve serious consideration of this matter, as they held back from possibly inflicting a second defeat on the government in relation to provisions regarding cold calling in this bill.

Amendment 10 (new sub-subsection 7(a))

This could have been the desired replacement for what is currently Clause 4. It does not specifically refer to cold calling, however it may fully cover it. Cold calling and use of leads derived from cold calling are undoubtedly practices that may be carried out by FCA-regulated “persons”, and they are unquestionably detrimental to consumers.

The fact is that we all know this already. Parliament can tell the FCA that it needs to act now. We do not need to wait for the SFGB to reach a conclusion that the government itself has reached.