fair telecoms campaign **briefing**

Why the so-called 'ban on pensions cold calling' is not what it pretends to be

Introduction

This briefing presents our comments on the current government consultation, concerning the content of a forthcoming Statutory Instrument – Ban on cold calling in relation to pensions: consultation on regulations.

Our formal response to the consultation will be published once it is has been submitted.

Previous briefings

This briefing is further to other briefings we have issued, on this general topic, as the Financial Guidance and Claims Bill made its way through the parliamentary process:

- Guide to the "ban" on Cold Calling in the Financial Guidance and Claims Act 2018
- Notes on Cold Calling - as the Financial Guidance and Claims Bill begins ping-pong
- Another example of why direct regulators, e.g. the FCA, must ban cold calling
- Banning Cold Calling through the terms of the Financial Guidance and Claims Bill
- Financial Guidance and Claims Bill must compel FCA to ban cold calls
- Prohibiting Telephone Cold Calling in the Financial Services sector
- Do you trust the government to ban cold calling?
- Urging support for amendments to the Financial Guidance & Claims Bill to stop Nuisance Calls

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Why the so-called 'ban on pensions cold calling' is not what it pretends to be

Summary

This briefing draws attention to the fact that the government proposal cannot be seen in any way as a "ban on pensions cold calling".

The proposal is simply a modest tweak to the terms of the regime which already prohibits most of what is being addressed. It does nothing more than extend the existing protection, which is widely seen as not being effective or adequate, to a specific category. It also indicates cases of "pensions cold calling" that are not, and will not be, banned.

It specifically fails to do anything new in respect of attended calls to those with numbers on the Telephone Preference Service register, all automated calls, text messages and emails. The existing ban which already applies, albeit ineffectively, in respect of these is left in place.

We address the topic in full and present our own proposal for how the issue should be addressed in a much more effective manner.

After 15 years of failure, the existing regime must be complemented by other radical measures. A succession of minor tweaks, of which this is nothing more than yet another example, cannot mend a system that is fundamentally inadequate and ineffective.

Why pensions cold calling is being addressed

After the government introduced the "pensions freedoms" in 2015, great concern was felt that purveyors of questionable investments (including pensions savings schemes and annuities) may seek to encourage unwise withdrawal of funds, with cold calling used as a means of doing so.

Some of this concern has been shown to be well founded. The government has therefore undertaken to "ban pensions cold calling". The specific measures that are now out to consultation - Ban on cold calling in relation to pensions - however fall a very long way short of this objective.

During the parliamentary debates on what became the Financial Guidance and Claims Act, many arguments were advanced, through amendments, in favour of an alternative, effective approach – i.e. using the powers of the FCA to regulate marketing activity to apply a ban on cold calling.

For no good reason, these attempts were rejected, by use of the contentious government majority in the Commons Committee. This was after amendments in the Lords were withdrawn on the basis that the Government would introduce equivalent effective measures in the Commons.

The regulatory background

The EU Directive – 2002/58/EC, established the principle that unsolicited direct marketing by electronic means may only be undertaken with the "consent" of the target.

This was implemented in the UK, through the Privacy and Electronic Communications Regulations (EU Directive) 2003 [PECR], with the qualification that if the called telephone number is not recorded on the **Telephone Preference Service** [TPS] register then consent to such activity may be assumed in respect of an attended telephone call. In all other respects explicit consent is required.

The TPS register is run by the **Direct Marketing Association**, so members can avoid ringing those who express no wish to respond to approaches by telephone. It is overseen by the **Office of the Information Commissioner** [ICO], which is responsible for achieving compliance with the PECR.

Our views on where we stand at present

The **fair telecoms campaign** believes that unsolicited direct marketing by telephone (and also text message and email) is a fundamentally improper way of marketing financial services, across the board. This same principle applies to most, if not all, other products and services.

We also believe that because the provisions of the EU directive and the forthcoming further EU regulations address the matter of privacy rather than business process, they do not provide adequate protection. In the UK, data protection law is enforced through a detached regime with a wide and universal scope, which is ineffective in regulating marketing techniques.

We see the essential nature of marketing as being to draw the attention of consumers to products and services of which they are unaware. It is therefore somewhat bizarre to suggest that to benefit from marketing activity one has to first "consent" to receiving it from a particular party.

Because we are addressing "unsolicited" contact, this raises the further question as to how one may "consent" to receipt of marketing information without actually soliciting contact. It is hard to think of a realistic situation in which one could be content to be contacted by telephone with marketing information, except where one explicitly requests such contact.

Our view is that the notion of "consent" cannot have any true meaning in relation to "unsolicited" direct marketing. We firmly believe that contact is either "solicited" or not, i.e. that a prohibition, if necessary, should be applied to all unsolicited contact - without this meaningless qualification.

Furthermore, we see the assumption of "consent", which is deemed to apply in cases where there is an existing consumer relationship with the marketing organisation, as especially improper. Where such a relationship exists, it must be an easy matter to provide the consumer with the opportunity to request further marketing contact, should they so wish.

This provision is not only nonsense, it is explicitly anti-competitive. It suggests that existing providers may use a marketing device that is prohibited to new entrants to the market and competitors. We oppose cold calling, however one argument advanced in its support is that it provides new entrants with a relatively cheap way of introducing themselves to a market.

What is already banned

Placing a number on the TPS register has the effect of withdrawing the assumed "consent" to attended direct marketing telephone calls, which is otherwise required. Automated phone calls, attended calls to number registered with TPS, text messages and emails for the purpose of direct marketing are already prohibited, unless specific consent has been provided, or they are solicited.

Common experience is that this prohibition is far from effective in practice. Whilst action is taken against some who breach the rules, this can only be a monetary penalty that cannot have a significant effect on the continuation of the relevant business. Furthermore, this action may only be taken against those who conduct or initiate the marketing activity from within the regulatory scope of the ICO. It is not focussed on the businesses which may benefit from it.

Contrary to the impression which the government consultation document seeks to create, all cold calling (without consent) is already prohibited. The government proposes only a minor tweak, which affects only "pensions" and only attended calls to numbers not registered with the TPS.

Applying a ban on pensions cold calling

The government proposal

The government is currently consulting on how to apply the terms of section 21 of the Financial Guidance and Claims Act 2018, which created the opportunity to introduce secondary legislation to give effect to what is described as a "***ban on cold calling in relation to pensions***".

This description is misleading and wholly unworthy in respect of what is actually proposed.

The government proposes to do nothing more than remove the assumption of consent derived from a failure to register a number with the Telephone Preference Service. This measure is only intended to apply in certain cases and would only cover attended unsolicited direct marketing calls where the topic can be clearly established to be "pensions".

The existing prohibition of calls to numbers registered with the TPS, automated calls, text messages and faxes is completely unchanged. Nothing whatsoever is being done to strengthen this prohibition, which is far from being totally effective.

It is understood that around 80% of UK households have their number registered with the TPS. This proposal therefore only affects the remaining 20% of households, is only in respect of attended telephone calls and applies only to the extent that the existing prohibition is effective.

Some years ago Ofcom and the ICO conducted a study, which showed that this prohibition only reduced the incidence of unwanted direct marketing calls by 31%.

Where the current proposals fail to apply a ban on Pensions cold calling

No action in relation to various types of "cold calling"

The following types of "cold calling" are not addressed by the proposals. The existing prohibitions in the PECR, which are known to be widely breached, are untouched by the proposals:

- ☒ Contact by email #22
- ☒ Contact by text message #22
- ☒ Contact by fax (of no great significance, but part of the current regime) #20
- ☒ Contact by automated telephone call (no person present when the call is placed) #19
- ☒ Contact by attended call to a number registered with the TPS #21 (the original)

It may be assumed, from the approach being taken, that the government is totally content that the existing regulations, and the associated enforcement regime, already amount to an effective prohibition of cold calling (in relation to pensions) by these means.

The sections of the PECR, identified above, remain in place, with 21B to be added as a tweak to 21. (21A awaits implementation, applying the same tweak in respect of Claims Management.)

No action in respect of some cold callers

The other type of cold calling which is not addressed is that where "consent" may be deemed to have been given to a unsolicited direct marketing approach. Consent is said to be assumed when the target has an existing relationship with the caller.

"Legitmate" vs. "illegitimate" cold calling

A matter of great concern is the suggestion, by the entire context of section 7 of the consultation, that there is such a thing as "legitimate cold calling". This section implies that, so long as the caller is not attempting to scam the target, then it is perfectly acceptable to engage in the practice of unsolicited direct marketing by telephone. This is complete nonsense.

It suggests that the purpose of the revisions to the regulations is to add a further, less significant, offence to the charge sheet against those who set out to break the law through fraud or deception, i.e. prohibiting use of the means by which they commit that offence. This ignores the obvious truism that you cannot affect the actions of those who deliberately set out to break the law by changing the law.

Furthermore, we, and we believe most of the population, wholly reject the notion that it is ever acceptable to make an unsolicited direct marketing approach by telephone – whether or not the intention is to commit a criminal offence.

If someone specifically invites (solicits) such an approach then that is a totally different situation. Marketing is an essential element of a free society, but the methods used must be constrained. This must apply regardless of the merits of the product or service being promoted.

The suggestion that this measure is only directed at those who are deliberately setting out to break the law wholly misses the point of what is required.

Our suggestions

We see it as essential that solicitation of contact must be specific to the means to be used. Furthermore, if differing scales of prohibition are to be applied, then the telephone call must be subject to the most severe restrictions. Perversely, the present regime takes the reverse approach.

The **fair telecoms campaign** believes that the practice of unsolicited direct marketing by telephone (plus text message, fax and email) should be simply prohibited. Because of present treaty commitments to apply the terms of EU Directives and Regulations, this can only be done using specific regulatory mechanisms that cover particular sectors, i.e. specific regulations that tightening the provisions otherwise in effect through general legislation.

In this case, the **Financial Conduct Authority** is responsible for setting the standards to be followed in the marketing and delivery of financial services. It also holds the power to impose specific regulations and to undertake enforcement action against those who fail to comply. There should therefore be no need for new legislation to impose a ban on "pensions" cold calling, although parliament may remind the FCA of its duties and even compel it to take specific action.

The **fair telecoms campaign** has long been pressing the FCA, along with regulators covering other sectors, to impose a ban on cold calling, unless they can make a strong case to show that the public interest in total is served in a positive way by this activity.

As the government has now taken on a responsibility for this issue, it is now for the government to show that the practice of unsolicited direct marketing by providers of services related to pensions and the withdrawal of pensions savings is in the public interest, as it proposes only a heavily qualified ban on pensions cold calling applied through a proven ineffective enforcement regime.

Why a ban by the FCA would be more effective

The FCA has a good awareness of what is going on in the sector that it regulates, which covers all potential means for the investment of withdrawn pension savings – no matter how they may be described in a telephone call. In many cases it holds registers of, and issues licences to, practitioners. It also has considerable powers of investigation and enforcement, including the capability to effectively halt the business operations of an offending company and its principles.

This position may be contrasted with that of the Office of the Information Commissioner, which is responsible for enforcing the provisions of the PECR. Notwithstanding concerns about the extent to which both of these bodies use their powers, there can be no question that the FCA is better placed to apply a ban, in respect of those who fall within the scope of its powers.

A further significant point about the FCA is that it is able to prohibit the use of leads gathered by cold calling when the business is actually undertaken by a regulated body. This would have no regard to who made the cold call, probably a person outside the regulatory scope of the FCA and maybe also the ICO – i.e. perhaps overseas.

The terms of the PECR, or other data protection legislation cannot be effective in addressing independent 'lead farmers' based overseas, because once a lead is being processed in the UK the test for "consent" has either passed or does not apply.

If applied only to certain types of business (e.g. 'pensions', 'claims management' or 'financial services'), then this would cover the business actually being transacted, not the words that were used in the telephone call, or other communication. Past experience shows that the ICO is unable to proceed with cases unless the breach of the regulation is clearly seen in the content of the conversation or other material. (e.g. the direct marketing "purpose" of a call must be declared, which is why a "silent call" made with the intention of direct marketing cannot be followed up on.)

A further "meaningless tweak"

There have previously been other over-hyped "bans" on cold calling. In all cases, they have been nothing more than applying "meaningless tweaks" to a failed regime; see these briefings:-

- Our comments on the nonsense over a removed "threshold"
- Our comments on the nonsense over the provision of caller line identification

The government offers no evidence whatsoever to show that these tweaks to the PECR delivered any meaningful effect, neither does it, in any way, suggest how this may be any different.

Conclusion

The terms of the Financial Guidance and Claims Act are now law and it is unlikely that parliament would refuse the government its SI, given that it purports to take some action against cold calling.

We do however see it as essential that parliament and the public are aware that this measure is unlikely to have any significant direct effect on the practice of pensions cold calling.

Whatever happens with this measure, there is nothing to prevent the FCA from taking the step that parliament should have demanded by banning on cold calling in relation to pensions and indeed all other financial services, including handling leads so generated.