fair telecoms campaign **consultation response**

Response to: ICO call for views on a direct marketing code of practice

We are pleased to respond to this Call for Views.

Having been engaged in campaigning on issues relating to Nuisance Calls for the entire life of the PECR, latterly as the **fair telecoms campaign**, we have much to say on the topic. Indeed, there is much that we have said to be found in published material on this topic in our documents index.

Our primary concern about the forthcoming Code of Practice is regarding the place that it will (not) have in the library of every organisation that needs to follow it. This includes organisations which do not engage in direct marketing, but commission, or benefit from, it be undertaken by others. Regrettably, it cannot cover organisations that purchase the results of direct marketing undertaken independently by others, nor the sales activity that follows a marketing approach.

This regret is deepest in respect of cases where the organisation undertaking the direct marketing is overseas and therefore outside the scope of the regulations, or sufficiently small or (apparently) widely spread as to never come within the focus of the use of the ICO's enforcement powers.

The normal role of a "Code of Practice" is to cover the activities of a specific and recognised set of individuals or organisations. This enables any breach to be penalised on the basis that the required or prohibited action had been clearly specified directly to the offender.

It is important to recognise, in drafting this code, that it can only reflect possible interpretations of the terms of the Statutory Regulations and cannot, for example, provide a firm definition of terms such as "consent", other than repeating any definition that may be added to the PECR. It may be that parliament would wish to add such a definition ahead of its replacement by the e-privacy regulations, given that the definition from the GDPR was not (contrary to common misunderstanding) so added by the Data Protection Act 2018.

The most contentious element of the PECR, in relation to direct marketing, is the weaker treatment applied to attended telephone calls (the cause of the greatest potential ill effect) as against that applied to automated calls, text messages, faxes and emails.

Whilst grossly over-hyped adjustments have reenctly been made in respect of "Claims Management" and "Pensions", for all other cases the "opt-out" approach (through the Telephone Preference Service) applies. For the forms of contact that demand less immediate personal engagement, i.e. text messages and email, the more constraining "opt-in" approach remains.

The portion of the Code that clearly confirms that there is no need to obtain consent to call someone not registered with the TPS about any other matter, whereas consent is necessary to send them an email, should make interesting reading.

We recognise that this position is wholly absurd, however it is the law.

We also take the view that the idea of someone actively and explicitly "consenting" to an "unsolicited" direct marketing telephone call is also absurd. It is very hard to think of a situation where someone would be content to be contacted by telephone for the purpose of direct marketing when they had not solicited such a call.

Maybe the situation was different back in 2003, before the failure to achieve compliance with the terms of PECR had led us to the situation we are in today. It is however the 2003 regulations that must be reflected in the Code of Practice.

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Replies to Consultation Questions

Q1 The code will address the changes in data protection legislation and the implications for direct marketing. What changes to the data protection legislation do you think we should focus on in the direct marketing code?

Regrettably, it must be pointed out that explicit "consent" must have been obtained for attended telephone calls only when related to Claims Management and Pensions, whereas this may be assumed (barring registration of the telephone number with the TPS) in all other cases.

Somehow an interpretation of the legal duty that now falls on company directors, noting the potential for them to incur liability for a financial penalty in the event of a breach, must be specified. One is however at a loss to suggest how this may be done, given the nebulous nature of the relevant legislation.

Q2/3 Apart from the recent changes to data protection legislation are there other developments that are having an impact on your organisation's direct marketing practices that you think we should address in the code? / If yes please specify

It must be noted that some telephone companies (notably BT) are automatically blocking calls from numbers that make a high volume of calls – on the unverified assumption that these must be illegal direct marketing calls.

Those who make a high volume of legal direct marketing calls must ensure that the telephone companies which operate this system are made aware of the legality of their activities.

Disturbingly the same applies to those who make high volumes of service and information calls, or even make such calls at any volume without CLI, or with CLI withheld.

Sadly, this falls within the province of "direct marketing" not necessarily because of the nature of the activity itself, but because of an assumption of illegal direct marketing that is made by telephone companies. It may also be noted that the same false assumption is also made by many recipients of unexpected calls – e.g. from those conducting genuine and legal opinion research.

Q4/5 We are planning to produce the code before the draft ePrivacy Regulation (ePR) is agreed. We will then produce a revised code once the ePR becomes law. Do you agree with this approach? / If no please explain why you disagree

We wait to see whether parliament will take the default option of applying the "opt-in" approach to consent to attended unsolicited direct marketing calls, or take the opportunity to retain the present position on implementation of the ePR. In the current draft this exception is available.

As things stand, considerable effort will be required to highlight the fact that only calls relating to Pensions and Claims Management are covered by the "opt-in" – along with automated calls, text messages, faxes and emails – whereas other attended calls are subject to the TPS "opt-out".

The only significant change that must be applied by the ePR is the introduction of the GDPR definition of "consent".

There must be a danger that publishing a Code of Practice ahead of a tightening of the rules may lead to a short-term increase in direct marketing activity, so as to exploit the present situation. It may however be thought proper to encourage firms to take maximum advantage of the current weaker position whilst they still can.

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Q6/7 Is the content of the ICO's existing direct marketing guidance relevant to the marketing that your organisation is involved in? / If no what additional areas would you like to see covered?

We are responding not as any of the categories specified, because recipients of unsolicited direct marketing calls are not necessarily "***data subjects***". It is very important for the ICO to recognise that the PECR covers those who publish their telephone number in a telephone directory or who simply happen to have a number that is selected at random from a list of numbers in use.

Unsolicited direct marketing may be conducted through improper use of personal data held under the terms of the Data Protection Act, but it is wrong to assume that this is invariably the case.

Whilst the role of the ICO is primarily concerned with the protection of personal data, it is important to understand that its responsibilities in respect of the PECR extend beyond this.

Another important issue of scope, which can be lost in consideration of the issue of "consent" is that the PECR addresses "**unsolicited**" direct marketing. It must not therefore be confused with information that has been solicited. Many of the defences for this practice that are offered by the direct marketing industry relate to cases where information has been explicitly requested – that is not "consent", that is "solicitation".

Q8 /9 Is it easy to find information in our existing direct marketing guidance? / If no, do you have any suggestions on how we should structure the direct marketing code?

There appears to be an acknowledgement that it is not easy, which is indeed quite true. This so-called "Code of Practice" can only make references to, and offer interpretations of, legislation and perhaps precedent from tribunal cases. It cannot itself provide a "code of practice", as the term is generally understood. "Guidance", albeit by a different name, is the most that can be offered.

The **fair telecoms campaign** therefore focuses its efforts on regulators not constrained by the liberal provisions of EU Directives and Regulations. They must also justify tolerance of unsolicited direct marketing by telephone – a practice widely recognised as unacceptable. They can specify, issue and enforce genuine "Codes of Practice" with a reasonable chance of achieving compliance. They may also threaten imposition of more severe penalties than those available to the ICO.

Q10 Please provide details of any case studies or marketing scenarios that you would like to see included in the direct marketing code.

It is very difficult to think of any scenario involving "unsolicited" direct marketing by telephone that would not be obviously seen as being improper.

One fears that examples of solicited direct marketing will be offered, confusing "consent to unsolicited" with "solicited".

Q11 Do you have any other suggestions for the direct marketing code?

Wait until April 2018, to see if the UK will still be bound by EU Directives and Regulations.

Q12 Are you answering these questions as?

A third or voluntary sector worker

Q13 Please provide the name of the organisation that you are representing.

The **fair telecoms campaign**