fair telecoms campaign **briefing**

Stopping Nuisance Calls – by effective regulation

Introduction

This comprehensive briefing is broken into sections as listed below.

It is intended to fully outline our position on the contribution that effective regulation, well drafted and properly enforced, can make to address the problem of nuisance telephone calls.

Other effective measures are also required, because not all Nuisance Calls may be addressed simply by the imposition of regulation. These other measures are not covered in this briefing.

We regret that too much attention is given to measures which may have only a marginal impact on the problem, but are focussed on a satisfying a perfectly natural public desire for vengeance.

We direct our campaigning energies towards measures that will be effective in achieving our objective, which is to halt the nuisance being caused.

This briefing is timely, in that it is focussed on what may be achieved in the very near future. It makes specific reference to the **FCA** and the measures currently before parliament, which will transfer responsibility for the regulation of Claim Management services to the **FCA**.

Accident Claims and PPI are recognised as being currently the most significant cause of Nuisance Calls across the UK. These are closely followed (in the league table) by other financial services, regulated by the **FCA**.

The lengthy comments and linked items are, in part, intended to support and encourage those who may seek to join us in pursuing this cause, by providing ammunition for use in argument.

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Background

The **fair telecoms campaign** has been engaged with the issue of Nuisance Calls for many years.

My personal public involvement with the issue may be traced back to a **BBC Breakfast TV** interview on 6 May 2004 - watch. Sadly, the promising beginning of action to eliminate the problem was not carried through in the way that I hoped. We continue to battle on!

Ofcom and the **ICO** have failed, or been unable, to effectively address the problem of Nuisance Calls, as it has grown greatly since their present powers came into effect in 2003.

Whilst general measures will always be necessary, we have long been attempting to draw the focus onto the potential for the far more effective approach that may be taken by particular regulators, notably in the sectors that are seen to give rise to the highest numbers of complaints.

We submitted evidence to the (then) **Culture, Media and Sport Committee** inquiry in September 2013, both written and oral. A key point was noted in the Inquiry Report (at #87) as follows:

"***David Hickson told us: "What we need to do at this time is turn attention to those who have regulatory control over the industries that are making calls where we feel it is not appropriate ... Only the sectoral regulator … can say, 'Is this a proper means of contacting people? Is it not?'***""

We succeeded in getting our specific proposal in relation to Claims Management raised with the responsible Minister by **BBC Radio 4 You and Yours** on 29 January 2015 - listen.

After discussing other relevant issues and persisting through a number of attempts to evade the specific question, the interviewer finally succeeded in getting the Minister to acknowledge that our proposal was perhaps worthy of consideration. Nothing has yet happened.

On many recent occasions, minor tweaks have been made to the powers of the **ICO** and **Ofcom**. Each has been grossly over-hyped, in respect of its significance and likely effect. We de-bunk one such example and propose serious and effective alternatives for regulatory intervention and ways of avoiding the effect of Nuisance Calls in this **BBC News** interview on 25 February 2015 - watch.

A (two part) **BBC Hereford and Worcester** item, from the same day, clearly demonstrates how we have to battle the complacent, weak and ill-considered approach shown by the government and its friends, both the Direct Marketing industry and a particular alleged campaigning organisation. A government minister says that our positive proposals should be simply disregarded - listen.

We laid out our approach, identifying all the leading areas where specific regulators should take action in a briefing on 3 November 2016 - Banning un-solicited direct marketing telephone calls.

With specific reference to Claims Management, my MP raised this issue in oral questions to the Secretary of State for Culture, Media and Sport - watch. Sadly, our sensible proposal was totally rejected, as all comments focussed on possibly well-intentioned, but ineffective, measures.

Our views and approach outlined

The present means by which "Nuisance Calls" are made 'illegal' is through a piece of legislation which, despite much tinkering (with more to come), has been shown to be ineffective.

The **Privacy and Electronic Communications Regulations (PECR)**, derived from EU Directive 2002/58/EC, permit unsolicited direct marketing calls given some ill-defined notion of "consent", which is even assumed in the case of numbers not added to the **TPS** register.

Whilst action is taken to cover a tiny proportion of the numerous complaints submitted to the **Office of the Information Commissioner (ICO)**, it is clear that the deterrent effect of these actions has never served to halt the rise in the number of instances of nuisance that occur.

The **fair telecoms campaign** has long been calling for the primary means of regulation of this activity to be shifted to the more effective direct regulators covering the sectors from which this nuisance emerges - the **Claims Management Regulator** (Accident and PPI claims), **the FCA** (all financial services, including Payday Loans and Pensions), **Ofgem** (energy supply and "switching"), **Ofcom** (telecoms), **the Fundraising Regulator** (charity donations) and the **Scottish Government** (Energy Efficiency schemes, formerly the "Green Deal").

This list covers, based on the most recent 2017 figures released, **90%** of all complaints to the **ICO**. We believe that the role of the **ICO** in this regard should be as a "back-stop" to pick up those cases which are not subject to specific (thereby closer and more effective) regulation.

The **fair telecoms campaign** believes that the voice-to-voice telephone call, to homes and personal mobiles, is an inadmissible means of marketing any product or service. Even with a very high response rate, the overwhelming majority of calls (generally well over 95%) will be ineffective and therefore represent some degree of unnecessary nuisance.

Unlike other forms of marketing approach, the telephone call demands the immediate attention of the person being contacted and also engages them in a one-to-one dialogue with the caller.

Any competent marketing agent will naturally seek to convert any hint of serious interest into a sale – it is absurd to expect them to be bad at their job. This denies the opportunity for careful reflection and access to independent guidance, which is commonly seen as being necessary – notably in the field of financial services.

For these reasons we would expect regulators, including all those listed above, to determine (notwithstanding whatever general provisions may be in effect) that the direct marketing telephone call to homes and personal mobiles should be prohibited by their rules.

In many cases these regulators hold the most severe enforcement powers – e.g. cessation of a licence to trade - and in all cases they achieve a very high rate of compliance (albeit reluctant). They will also find strong support for total prohibition of telemarketing from many of those they regulate. In all these respects, this places them in a totally different position from that of the **ICO**.

Unlike many who campaign on this issue, the **fair telecoms campaign** is not interested in seeing severe penalties imposed in a spirit of vengeance, we want the problem to stop.

Coming developments

The **EU GDPR** is to be adopted into UK law, with effect from 25 May 2018, through provisions contained in the **Data Protection Bill**, which has just started its parliamentary stages in the House of Lords. This will be need to be amended to cover implementation of the "**Protection of Personal Data in Electronic Communications Regulations" (PPDECR)**, once approved by The Council. The **PPDECR** (sometimes known as the **ePR**) will replace the **PECR**, as it repeals Directive 2002/58/EC.

A significant relevant feature of these regulations is a clear and restrictive definition of the term "consent" - *this quote is from § 82 (2) of the **Data Protection Bill***:

"a freely given, specific, informed and unambiguous indication of the individual's wishes … by a statement or by a clear affirmative action"

(The highlighted words suggest that any reasonable interpretation must preclude any activity that is "unsolicited".)

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There is however a snag. Article 16 (4) of the **PPDECR (ePR)** includes the following provision:

"***Member States may provide by law that the placing of direct marketing voice-to-voice calls to end-users who are natural persons shall only be allowed in respect of end-users who are natural persons who have not expressed their objection to receiving those communications.***"

The UK government would most likely use this option to avoid the "consent" requirement, for voice-to-voice telephone calls, so as to retain the "opt-out" principle represented by the **TPS**.

The full "consent" requirements need not be met to reverse the "objection" represented by **TPS** registration, even though they always apply to all other forms of electronic communication.

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Ofcom has announced that, from 1 October 2018, communications providers will be subject to new stricter rules regarding the quality and accuracy of CLI data passed across the network.

Whilst this will be of little direct benefit to users who do not know who uses every possible valid telephone number, it will be of great assistance to measures being taken by network providers to detect and block nuisance calls. (This is another area we are working on.)

This **Ofcom** move supports another provision in the **PPDECR (ePR)**. Article 14 states that: "[Telephone companies] ***shall deploy state of the art measures to limit the reception of unwanted malicious or nuisance calls …***"

Once implementation of this regulation may begin, we will need to explore how far this provision will require all networks to offer the same "state of the art measures", so as to replace the ugly, exclusive and competitive environment that exists at present.

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A great opportunity to test out the will of the government, and perhaps achieve a breakthrough, is offered by the passage of the **Financial Guidance and Claims Bill**, which is approaching Report Stage in the House of Lords.

Part 2 of this Bill will transfer responsibility for the regulation of Claims Management Companies from a special unit within the **Ministry of Justice** to the **FCA**. (See over)

Prohibiting cold calling in respect of Claims Management

As **Claims Management Companies (CMCs)** are prohibited, by effective regulation, from receiving tip-offs from insurance companies, their direct marketing cannot be targeted. This, along with other reasons given above, makes a strong case for direct marketing by telephone being totally prohibited for this type of business, in particular.

Present regulations prohibit doorstep direct marketing in person – the arguments against use of one-to-one contact apply no less in respect of telephone calls.

Strong current Guidance suggests that registered **CMCs** exercise due diligence in ensuring that data, leads and referrals from third parties have been obtained under the same constraints that apply to the marketing activities of **CMCs** themselves. This Guidance must be made a Rule.

The authorisation (with a registration number) issued to **CMCs**, which is retained only through continued compliance with the regulations, is vital to the conduct of this business. Banks and Insurance Companies will not entertain approaches from intermediaries without a registration number. Solicitors are prohibited (by the **SRA**) from themselves telemarketing and from accepting leads or cases, other than from registered **CMCs**.

Whilst regulatory prohibition cannot impact directly on the independent agents who undertake lead gathering, it would make their efforts fruitless by cutting off their life-blood (fees from **CMCs**).

CMCs will generally (albeit perhaps reluctantly) seek to abide by the rules set. We believe that those against whom action has been taken in this respect have been genuinely confused about, or have sought to test the limits of, the present complex set of regulations regarding "consent". If direct marketing by telephone were simply prohibited, it would be much easier to comply.

How to do it

We have long argued that the **FCA** should prohibit direct marketing by telephone across all areas that it regulates. The importance of Guidance being available to those considering using a regulated financial service is inherent to the intent of Part 1 of the **Financial Guidance and Claims Bill**. The interactive nature of direct marketing by telephone serves to preclude use of Guidance.

Part 2 of the **Financial Guidance and Claims Bill** transfers responsibility for the regulation of **CMCs** to the **FCA**. This therefore provides an ideal opportunity to require (or at least encourage) the **FCA** to tighten up this regulation; indeed the need for such tightening is said to be one of the reasons for this transfer of responsibility.

We believe that a total prohibition of use of direct marketing by telephone (by **CMCs** and those who provide them with leads) is an obvious step that needs to be taken. Whilst possibly outside the scope of the Bill, the need for the **FCA** to apply a similar prohibition across the board may be worth mentioning in debate and discussion.

Beginning its consideration in the House of Lords, the Bill has already been subject to debate on this issue, following the tabling of amendments to this end by peers of all parties. It is intended that further such amendments be tabled at Report Stage, scheduled for 24 October 2017.

We suggest that such amendments be prepared for debate with the objectives stated overleaf.

Amending the Financial Guidance and Claims Bill – Report Stage

- **ft** The **FCA** must be required to implement changes to the rules governing CMCs as these are transferred to its regulatory rulebook. The key provision must be a total prohibition on CMCs using data gained through direct marketing by telephone, regardless of who made the call.
- **ft** It is vital that the government understands the difference between effective regulation – that imposed on identified organisations with a high probability of compliance – and what may be achieved through general regulation - which must consider a very wide set of circumstances and rely only on deterrence through enforcement action to achieve compliance.
- **ft** If the government and the **FCA** are minded to continue to permit direct marketing by telephone in respect of Claims Management, then the reasons for this decision must be clearly exposed, so that they may be set against public opinion.
- **ft** The provisions of the current regulations and the associated Guidance must be seen to support the likely effectiveness of a prohibition, which may be achieved by relatively modest adjustments. Replacing compliance with the code set by the **Direct Marketing Association** (an advocate of all direct marketing) with a prohibition on telemarketing, and translating guidance on due diligence in respect of leads into a specific requirement, is all that is required.
- **ft** The views of those leading Claims Management Companies which spurn telemarketing should find their way into discussion of this issue. Whilst smaller companies, with smaller marketing budgets, may claim that they are driven to use random direct marketing in order to compete, that argument cannot provide justification for tolerance of improper activity and nuisance.
- **ft** The views of others with deep knowledge and understanding of this sector, which may be supportive (in full or part) of our position, should be deployed in support of prohibition, not least in the authoritative verification of points made above.
- **ft** If, as may be the case, the argument that telemarketing is a necessary means of providing public information is advanced, this must be dismissed, as this method is wholly improper. The recent advertising campaign by the **FCA** in respect of claims against PPI mis-selling is an example of how public information may be properly disseminated.

The **fair telecoms campaign** is actively seeking to support the preparation, and proposal through debate, of (a) suitable amendment(s) to the Bill at Report Stage.

We call upon all those who share our desire for effective action to be taken against direct marketing by telephone (with the inevitable consequence of nuisance) to join us in this effort.

Nuisance Calls derive from many sources and not all such calls are made for the purpose of direct marketing. Some, but far from all, are made by those who are deliberately flouting regulatory and statutory provisions, so these cannot be addressed by regulatory measures.

Removing a regulatory tolerance of direct marketing by telephone, notably from the area recognised as the largest individual source of “nuisance calls”, must however be a very high priority, as we continue to campaign for other effective measures to be taken.