fair telecoms campaign **briefing**

Comments on a House of Commons debate covering measures to "ban pensions cold calling"

These comments are addressed to members contributing to the House of Commons debate on 12 December 2018 granting approval to the draft SI "Privacy and Electronic Communications (Amendment) (No. 2) Regulations 2018" – alleged to represent a "ban on pensions cold calling".

It refers to comments made in the debate (see Hansard) with a link to each relevant passage.

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General remarks

You will be aware that we have described this move as a meaningless tweak to a regime that has long been proved to be ineffective in providing the protection that is sought, and claimed. Most of the cold calls being discussed are already being made in breach of the regime that is being tweaked. The high proportion of numbers already registered with the TPS means that these calls are already being made without the consent which the measure now removes from others having been withdrawn. Contrary to what **the Minister** says at Column 8 (link to text), "***those listed on it would still be protected by the ban***", this amendment adds nothing to their protection, i.e. it does nothing to address a significant majority of those cases offered in evidence.

We must take issue on two points with the hopes expressed by **the Minister** in his concluding remarks at Column 9 (link to text). Firstly, there is no evidence that "***this legislation will make a real impact in tackling pensions scams, deterring pensions cold callers by making their actions illegal …***". We would love to be able to share this aspiration, but recognise that this "insignificant tweak" cannot be expected to have any significant effect on those who are already breaking the law. Secondly, the inclusion of exceptions, with an even lesser requirement in terms of the nature of the consent required, contradicts the intention of "***… signalling to consumers that legitimate companies will not cold call them about their pensions***".

As considerations continue, by government and opposition parties, we remain keen to inform these deliberations and contribute the views we have formed from many years engaged with the issue of Nuisance Calls and the measures taken against them. I would be delighted to respond to any invitation to meet with members or officials at any time.

It is also important to note that, whilst it would have been untimely to refer to EU Directions and Regulations in the current political climate, parliament is limited in the scope of prohibitive measures it may take in general terms. This is due to the very liberal approach to unsolicited direct marketing found therein, which constrains what may be placed on the statute book. It is for this reason that the powers available to independent regulators, to go beyond what it is restricted by general regulation, are especially relevant.

It is for this reason that we seek for pressure to be put on **The FCA** and others.

What is consent (in general terms)?

The intention of the EU was for the provisions of the GDPR to be extended to what has become the PECR in the UK through what is known as the "e-privacy" regulations. These cover electronic communications, rather than the use of personal data, which is the focus of the GDPR. The point is that prohibition of unsolicited telephone direct marketing has to apply regardless of whatever personal data may be held by the caller. Much cold calling is undertaken using random dialling from lists of numbers known to be in use, i.e. with no reference to personal data.

The GDPR is brought into effect through the Data Protection Act 2018. This makes a number of amendments to the PECR, but it does NOT change the definition of "consent", which continues to be that in the Data Protection Act of 1998!

This is perfectly proper, given that the introduction of the "e-privacy" regulations, which will replace the PECR, is expected to occur whilst the UK remains bound to comply with EU regulations.

The Minster was therefore wrong (unless I am mistaken) to state "***consent under PECR is to be understood in accordance with GDPR***" at Column 9 (link to text). This may be true in cases where personal data already held is used as the basis for an unsolicited direct marketing approach. The new regulatory terms however undermine the strict GDPR definition of "consent", when stating that it may be deemed to have been given (to someone holding personal data) on the basis that "***the recipient might reasonably envisage receiving unsolicited calls for the purpose of direct marketing***".

Consent in response to a text message, or other approach

An interesting example was raised by **Mr Whitfield** (link to text) whereby an unsolicited direct marketing text message was used as the means of obtaining consent for a subsequent telephone call.

Given that some form of explicit consent is required (in all cases) for receipt of an unsolicited direct marketing text message, it is almost certain that the text message in question was in breach of the PECR. The same applies to automated telephone calls, faxes and emails. It is only in respect of attended telephone calls that consent may be assumed from those (relatively few) who fail to add their numbers to the TPS register.

This highlights two points. Firstly, that those who fail to add their numbers to the TPS register do not enjoy any protection in respect of calls other than those regarding pensions and claims management – a point made by **Ms Gibson** at Column 6 (link to text). Secondly, this SI does nothing at all in respect of the many illegal contacts – by text, email, automated calls and attended call to numbers on the TPS – which are no less a cause of concern than attended calls made to those with numbers not registered with the TPS. No breakdown has been offered, but one would suspect that this measure is addressing only a small proportion of the cases cited as evidence of its need.

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In the case referred to, there is nothing to suggest that the explicit consent provided would not be seen as providing perfectly adequate justification for the follow-up telephone call.

The same is true in respect of "introducers", especially those offshore, who, as independent operators, are not bound by the terms of this UK legislation, unless they are calling under the direct instructions of UK firms. If the consent held by the UK operator is valid, in its own terms, then there can be no breach in making a follow-up call. It may also be argued that a response to an enquiry is not "unsolicited direct marketing" and therefore does not even fall within the terms of this legislation.

Unsolicited direct marketing – what are we talking about

A major cause of concern around this whole issue is the essential validity of making an unsolicited direct marketing call to someone in their home or on their personal mobile phone.

The **fair telecoms campaign** argues that it cannot be considered valid to ever act in this way. We may even go further by suggesting that any business-related call to a home phone or personal mobile should only be made under the terms of a specific request. A telephone call is unique, as against other forms of contact (e.g. text message, email, letter) in that it demands the immediate attention of the called party.

There is a problem created by the nature of the relevant legislation (derived from the EU) in that a distinction is drawn between "solicitation" of, and "consent" to, direct marketing by telephone. The relevant regulations refer to "consent" to "unsolicited" direct marketing contact. If the terms of "consent" are drawn tightly, then its granting may be said to amount to "solicitation", rendering these regulations meaningless.

We would therefore challenge the suggestion made by **the Minister** at Column 9 (link to text) and **Ms Gibson** in response (link to text). If one takes the meaning of the word "legitimate" in a general sense, i.e. beyond the terms of specific regulations, then we do not believe that any "cold calling" is truly legitimate. Solicited response or necessary advice by telephone, covering any topic, is obviously a totally different issue, which should not be confused with "cold calling". We cannot however agree with **the Minister** when he refers at Column 9 (link to text) to supposedly "white-hat" cold calling. Anyone offering a product or service of even the slighted merit (through cold calling) would claim to be acting in the public interest.

It was especially disturbing to hear these comments in response to an intervention from **Ms McCarthy** (link to text) highlighting a death that may well have resulted from activities that could be described as being more strongly in the public interest than those referred to. Regrettably, **the Fundraising Regulator** still maintains that it is "ethical" for charities to engage in cold calling on a specific opt-out basis. Expecting donors to specify the specific organisations that they do not wish to contact them by telephone is an appalling further exploitation of people's goodwill.

Our view, in the light of widespread encouragement of people to register with the TPS as if this should be the norm, is that there is no valid use of cold calling as a marketing tool. We further argue that an opt-in, in very specific terms, should be a requirement for all B2C telephone contact.

Acknowledgements and thanks

We must convey thanks to all contributing members of the Committee, for the measured way in which the limited provisions of this measure were discussed.

We sincerely welcome the comment from **the Minister** at Column 4 (link to text) when stating that "***I emphasise that the Government do not consider this ban to be 'job done'***". There is the possibility, indeed the default position of the current draft of the "e-privacy" regulations (albeit itself with opt-out available to member states), that the opt-out nonsense of the TPS could be eliminated altogether. This was only an option in the original EU directive, which the government in place in 2003 was urged to take.

In consideration of the opt-in / opt-out issue in respect of consent, we argue that the burden of proof, by way of evidence, lies with the **DMA** and its members to show that the present position should be retained. Given the high volume of TPS registrations and the (partly consequent) abandonment of telephone cold calling to individuals by most responsible businesses, there are very few valid arguments for its legitimate continuation.

The related point to make to **the Minister** and others, and covered above, is that progress can and should be made by sectoral regulators, applying their own prohibitions of unsolicited direct marketing in a clear way, as they lay out and discuss with businesses the ways in which marketing may be conducted in their sector. **The FCA** is at the top of a list that includes others, such as **Ofgem** (energy supply), **Ofcom** (telecoms), **the Gambling Commission**, **the Scottish Government** (Greener Scotland) and **the Fundraising Regulator**.

With such an approach, the emphasis should be on achieving compliance and enforcement through review of practices, rather than the purely consumer-driven complaint-based approach of the **ICO**. (This addresses the point about consumer confusion made by **the Minister** at Column 8 (link to text).)

These regulators know their businesses and the ways in which they operate, and should therefore be able to achieve compliance. The **ICO** operates remotely as a national policeman, unable to drive behaviour and only able to intervene by responding, generally long after the event, to cases where sufficient numbers of complaints warrant deployment of limited resources.

I sincerely hope I will have the chance to discuss these matters with every Minister, including **Mr Glen**, who is engaged with this issue.

Finally, we must convey our particular thanks to **Ms Dodds** at Column 5 (link to text) for her lengthy and attributed recitation of paragraphs from the briefing paper which was distributed to all members of the Committee.

Members will have been aware of the points we made, and I am disappointed that we did not have the opportunity to explain them a little more fully in advance, so to enable a more fruitful discussion in Committee.

The offer to do so is still open!