fair telecoms campaign **consultation response**

Response to: Tackling nuisance calls and messages - Consultation on action against rogue directors

The following comments are presented on behalf of the **fair telecoms campaign**, in response to Tackling nuisance calls and messages - Consultation on action against rogue directors,.

They supplement specific answers to the Consultation Questions, submitted formally online.

The measures proposed

Whatever the merits of the proposed mechanism, to ensure that **the Treasury** receives the benefit of financial penalties imposed by the **ICO**, these measures are surely not expected to have any significant impact on the scale of the problem of Nuisance Calls. The idea that these measures make Company Directors directly liable for the behaviour of their companies, in respect of unsolicited direct marketing, is a gross misrepresentation of what they set out to achieve.

It is utterly ridiculous to suggest that they have anything to do with a serious attempt to ensure that nuisance calls and text messages "***have no place in society***", when they only address unsolicited direct marketing that has been found to be in breach of certain requirements, and then only when a penalty imposed on a company is unpaid.

A more general statutory provision, promoted by **DBEIS** or the **MoJ**, to alter the legal status of company directors, applying liability for all statutory financial penalties imposed on their company, is surely what **Which?** is campaigning for, in the wider interest of consumer protection.

What is being done can only be seen as yet another weak and pathetic tweak to a regime that has been clearly seen to fail over the fifteen years that it has been in existence. As with other similar tweaks - the unnecessary fiddling about with the, perfectly adequate, need to show that the action was "***of a kind likely to cause substantial damage or substantial distress***", and the absurd idea that law breakers should be required to identify themselves - this will doubtless continue to be accompanied by loads of hyperbole and excessive claims about its likely effect.

Failing, not succeeding

By focussing exclusively on attempts to make minor tweaks to a regime that has been found to fail over the 15 years, the government is refusing to acknowledge the radical steps that are required to seriously address the problem. It is already noted that a lack of public faith in the ability of the ICO to address the problem is reflected in a falling number of reports.

This fact is misrepresented as if it were evidence that the scale of the problem were diminished, whereas this is demonstrably untrue. If the Minister is, as implied, pleased that the public are now accepting that Nuisance Calls are a fact of life that they have to live with, in many cases simply abandoning their use of landlines, and sees the falling number of complaints as an indicator of success, then this is deeply disappointing.

Government tolerance of cold calling

We see the tolerance of some unsolicited direct marketing calls, text messages and emails, which is reflected in the terms of the PECR and the policies of the government, as reflected by the **ICO**, as shameful and wholly contrary to the will of the people. We see it as disgraceful that those who implicitly or explicitly support this tolerance (e.g. **Which?**) seek to gain the support of those who clearly desire a total prohibition of cold calling.

We believe that any direct marketing contact that is not "solicited" is wholly unacceptable if undertaken through a call to a home landline or personal mobile telephone (and perhaps also by text message or email). It is to be regretted that the relevant EU Directive opens up the notion of a call that is "unsolicited", but made with "consent", because in reality this is just a nonsense.

Whilst bound by the terms of the relevant treaties (as a member of the EU), the opportunity could have been taken to define "consent", in this respect, so as to demand "solicitation". The concept of "consent", strengthened in the GDPR, is generally appropriate in respect of use of personal data, but not to the activity of a direct marketing telephone call.

Retaining the situation whereby "consent" is assumed, in respect of an attended telephone call only, when calls are made to numbers not registered with the **Telephone Preference Service** is a clear indication that the government has no intention of responding properly to the public demand to eliminate Nuisance Calls. The suggestion that removing this assumption when a call relates to Pensions or Claims Management is a major step, simply highlights the absurdity of leaving that assumption of consent in place for other cases.

Nuisance Calls not covered by the existing regulations

A significant proportion of Nuisance Calls have nothing to do with direct marketing. In many cases they are simply attempts to defraud and are thereby not covered by the PECR. It is quite foolish to pretend that, where there is deliberate criminal intent, a minor tweak to some irrelevant regulation, indeed any regulation, will make the slightest difference to that behaviour. Attempted criminal activity must be clearly separated from improper practice in pursuit of genuine business, and dealt with for what it is.

The existing regulations also fail to cover direct marketing undertaken as research. The purpose of "direct marketing" is fulfilled by attributing survey responses to a particular individual, as opposed to anonymised responses to genuine "market research", or indeed "opinion research". All "direct marketing" must be subject to the PECR regulations. Whilst some people may wish to be excluded from market and opinion research, it is important to ensure that both have access to the widest possible samples, given the value of this work.

Protection for consumers

No matter what regulatory restrictions are put in place, it is foolish to pretend that the issue of Nuisance Calls will be fully dealt with by this means. Under the forthcoming EU regulations (known as the "e-privacy regulations") all telephone service providers will be required to "***deploy state of the art measures to limit the reception of unwanted, malicious or nuisance calls by end-users***".

The "state of the art" is clearly seen to be the approach deployed by the **trueCall** device, which is also seen in the **BT** handset "**CallGuardian**" feature, **Talk Talk CallSafe** and **Sky Talk Shield**. Notwithstanding forthcoming regulatory requirements, the government should be working with all telephone service providers (landline and mobile networks) to ensure immediate deployment of this approach, which allows citizens control of which calls get through to make their phone ring and is known to be a most effective method for cutting off Nuisance Calls.

Considerable sums of public money are already being spent providing sufferers from dementia with the more advanced version of the **trueCall** device.

A modest investment to ensure that basic protection against Nuisance Calls is available on all telephone networks, free of charge to all those seen to especially vulnerable, would achieve far more in respect of the government objective than placing too much emphasis on enhancing the recovery of penalties that are imposed on the few who are acted against in respect of PECR breaches.

Total Prohibition of Cold Calling

The **fair telecoms campaign** has long been pressing for the issue of unsolicited direct marketing to be treated as an issue of business practice through focussed regulation, rather than simply an issue of data protection through the PECR.

This is seen clearly in our recent response to the Treasury consultation in respect of "Pensions Cold Calling" – see

- Response to "Ban on cold calling in relation to pensions: consultation on regulations", and
- Why the so-called 'ban on pensions cold calling' is not what it pretends to be.

The above focuses on the role of the **FCA** as the regulator of marketing activity by the financial services sector (now including Claims Management). There are however other sectors which are subject to specific regulation, extending beyond the general regulation, which need not be limited (for now) by the terms of EU treaties.

A total ban on cold calling (not the nonsense so-called by the Treasury) may be deemed appropriate by any sectoral regulator, and seen as necessary according to the scale of such activity in the sector.

This case is made in respect of financial services related to pensions (e.g. investments that may be focussed on withdrawn pension pots) and also Claims Management. It may also be made in respect of energy, telecommunications, charity fundraising and other sectors with statutory or voluntary regulators in place.

Summary

The only reason for the proposed measure not to go ahead would be if it were to further impede the work of the ICO, i.e. by requiring it to always ensure that a director can be held liable in the case of default, before a penalty is imposed on a company.

The lengthy delay that is always seen between the breach which is penalised and the imposition of the penalty, clearly shows that action has little or no preventive effect. It also suggests that a very large amount of work is required before action can be taken, which probably explains why so few cases are actually dealt with.

We do not want this to be made even more difficult, although one must fear that the effort involved in ensuring that assignment of personal liability for a corporate debt could be secured, in every case, will be significant.

To suggest that the proposed measures represent a serious step that will have any bearing on the problem of Nuisance Calls is fanciful and unsupported by any specific evidence.