

# Combatting nuisance calls and texts

Appendix: A comparative policy study of practices  
in multiple countries

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## United Kingdom

### Situation in the UK

The UK set up the Telephone Preference Scheme (TPS, the UK name for its Do Not Call List) in 1999. This was later the basis of UK compliance with the relevant parts of the European Union’s Privacy and Electronic Communications Directive 2002<sup>1</sup>. Market research in 2005 into silent calls and in 2008 into nuisance calls<sup>2</sup> showed some decline in the problem, presumably due to the TPS becoming a somewhat effective protection<sup>3</sup>, but later levels of nuisance calls started to rise again<sup>4</sup>. From late 2011 complaints to both the regulators involved (ICO and Ofcom) started to rise, and complaints got a big boost in 2012 when the ICO introduced an online complaints form (“snap survey”) which made complaining much easier.

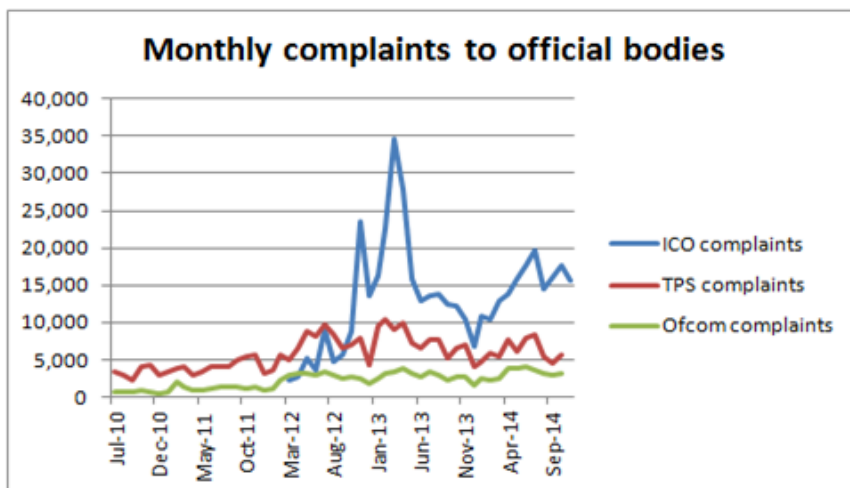


Figure 1 Complaints about nuisance calls<sup>5</sup>

<sup>1</sup>Implemented through the Privacy and Electronic Communications Regulations 2003.

<sup>2</sup> Brookmead Consulting (2005), *Silent Calls Research*,

<http://www.truecall.co.uk/media/1933/Brookmead%20report%202005.pdf>; Brookmead Consulting (2008), *TPS report on unwelcome calls*,

<http://www.truecall.co.uk/media/1934/Brookmead%20Report%202008.pdf>. A MORI survey carried out for the 2008 report found that respondents were receiving an average of 4.6 unwanted calls a month, compared with 5.6 a month in 2007. The most recent comparable figure (from Ofcom omnibus research) is 8.4 calls a month. Behind all these averages there is considerable variation – for example in Ofcom’s 2014 diary research at [http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance\\_calls\\_research/](http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance_calls_research/) (covering a month), 16% of panellists received no unwanted calls, 20% received just one or two calls, and 29% received 20 or more.

<sup>3</sup>The 2008 Brookmead report said that TPS reduced the number of unwanted calls by about a half, for those numbers registered with it. Recent Ofcom research shows that the corresponding reduction is now about a third: <http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/tps-effectiveness/>

<sup>4</sup> Records of calls received by customers of the trueCall call blocking device showed an increase of around 40% over 18 months in nuisance calls (personal communication from Steve Smith of trueCall).

<sup>5</sup> Sources: <http://stakeholders.ofcom.org.uk/enforcement/telecoms-complaints-bulletin/>, <https://ico.org.uk/action-weve-taken/nuisance-calls/>, and information supplied directly by ICO.

Figure 1 shows how complaints have risen steeply in the last few years, with a lot of short-term variation, which appears to be linked to the publicity given by large fines to offenders. Figure 2 splits complaints by type (except for complaints to TPS), and shows that aggregated complaints have fallen slightly in the last year, but they are still high by historic standards.

Following initiatives in 2012, consumer discontent was focused by a campaign *Calling time on nuisance calls and texts*<sup>6</sup> launched in March 2013 by the consumer organisation Which?. Support for this campaign now stands at over 136,000. The profile of the issue was further boosted by other activity, including publicity around StepChange Debt Charity’s *Got Their Number* report and campaign<sup>7</sup>. In parallel, many Members of Parliament found their postbags filling up with constituents’ complaints about nuisance calls and texts; Parliamentary Questions, debates and petitions led to the formation in 2013 of an All Party Parliamentary Group on Nuisance Calls<sup>8</sup> led by Liberal Democrat MP Mike Crockart. The Select Committee on Culture, Media and Sport<sup>9</sup> also took an interest in the problem, and by late 2013 each parliamentary group had published its report, including a list of recommendations to the government.

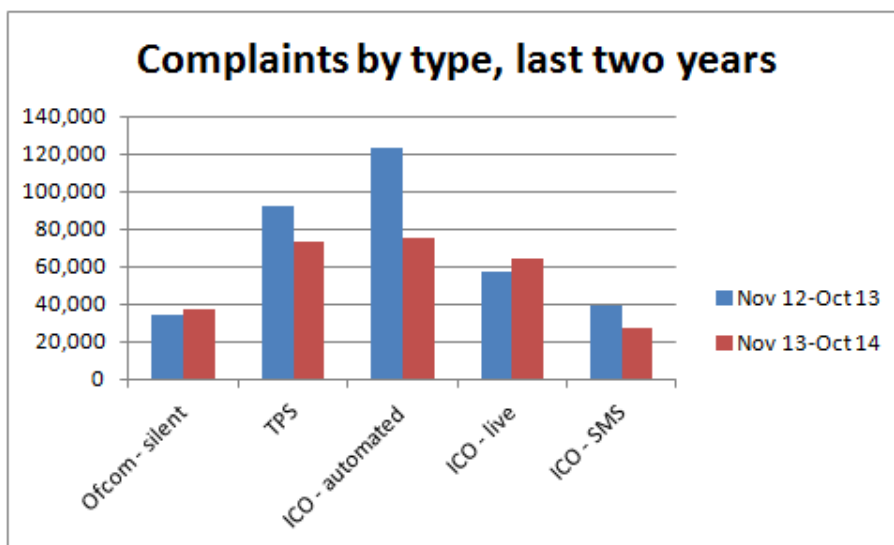


Figure 2 Complaints by type, years to October 2013 and October 2014

<sup>6</sup> See <http://www.which.co.uk/campaigns/nuisance-calls-and-texts/>. The most recent of several lively Which? conversations on related issues is at <http://conversation.which.co.uk/technology/cli-caller-line-identification-display-marketing-phone-calls/>. Which? say that this issue has generated the most interest of any of its campaigns to date.

<sup>7</sup>The report (published in 2013) is at [http://www.stepchange.org/Portals/0/Documents/media/reports/got\\_their\\_number.pdf](http://www.stepchange.org/Portals/0/Documents/media/reports/got_their_number.pdf) and the campaign continues at [http://www.stepchange.org/got\\_their\\_number.aspx](http://www.stepchange.org/got_their_number.aspx).

<sup>8</sup> <http://www.publications.parliament.uk/pa/cm/cmllparty/register/nuisance-calls.htm>; its report is at <http://www.which.co.uk/documents/pdf/all-party-parliamentary-group-on-nuisance-calls-inquiry-339341.pdf>

<sup>9</sup> <http://www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/inquiries/parliament-2010/nuisance-calls/>

The government responded to this concern by holding high-level “Round Table” meetings of interested parties, chaired by Minister Ed Vaizey, from time to time, and in March 2014 by publishing an Action Plan<sup>10</sup>. Operational responsibility remains with the two regulators, Ofcom and ICO, who have recently issued their own updated action plan<sup>11</sup>. Disappointingly, despite considerable activity aiming to reduce the problem, diary panel research commissioned by Ofcom<sup>12</sup> showed no change in the incidence of nuisance calls between early 2013 and early 2014, while research by trueCall showed a 40% increase in nuisance calls to its customers in 18 months<sup>13</sup>. In fact Ofcom now says<sup>14</sup>:

“The volume of 'nuisance' calls is rising, driven by the falling costs of generating calls via Internet Protocol (IP)-based telephony. IP-based telephony also allows nuisance callers to alter their caller line identification (CLI), not only making nuisance calls more difficult to control but enabling a range of serious frauds.

We are working with international stakeholders on technical approaches to tackling these issues, alongside our joint action plan with the Information Commissioners Office (ICO) to address nuisance calls.”

## Rules in the UK

Responsibilities for nuisance calls are split between two regulators, the rationale being that silent calls have no marketing content and so cannot be caught by the Privacy and Electronic Communications Regulations 2003 (PECR). Under the “persistent misuse” provisions of sections 128 to 130 of the Communications Act 2003, Ofcom is responsible for enforcement on silent and abandoned calls<sup>15</sup>; while under PECR the Information Commissioner’s Office (ICO) is responsible for

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<sup>10</sup>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/299140/Action\\_Plan.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299140/Action_Plan.pdf)

<sup>11</sup> Ofcom and ICO (2014), *Tackling nuisance calls and messages: update on the Ofcom and ICO Joint Action Plan (December 2014)*,

[http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/JAP\\_update\\_Dec2014.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/JAP_update_Dec2014.pdf)

<sup>12</sup> [http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance\\_calls\\_research/](http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance_calls_research/)

<sup>13</sup> Information provided by Steve Smith of trueCall, based on analysis of customer records.

<sup>14</sup> In to its Draft Annual Plan 2015-16, [http://stakeholders.ofcom.org.uk/binaries/consultations/draft-ann-plan-15-16/summary/Draft\\_Annual\\_Plan\\_Consultation.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/draft-ann-plan-15-16/summary/Draft_Annual_Plan_Consultation.pdf)

<sup>15</sup> Ofcom also has responsibility for interpreting what is meant by the term “persistent misuse”. In the context of silent and abandoned calls, changing technology requires periodic review and re-interpretation. Ofcom first stated its interpretation in 2004, and reviewed this policy in 2006, 2008 and 2010. The consultation and outcome of the 2010 review are available at <http://stakeholders.ofcom.org.uk/consultations/silent-calls/>. A further review is in progress - see <http://stakeholders.ofcom.org.uk/consultations/review-persistent-misuse-powers/>. At the date of writing (December 2014), the consultation has closed but no further statement has appeared; 34 responses are available online.

enforcement for live and recorded telemarketing calls and spam texts. In brief<sup>16</sup>, the main general provisions on unsolicited telemarketing are:

- The TPS holds a register of numbers which are opted out from receiving unsolicited telemarketing calls. For live “cold”<sup>17</sup> telemarketing calls to be legal, calling lists must have been checked against the TPS register and opted-out numbers removed from the list. Callers must also remove called numbers from their lists on request.
- The TPS is run on behalf of Ofcom by the Direct Marketing Association (DMA). Members of the DMA must comply with its self-regulatory Code of Practice, under the supervision of the Direct Marketing Commission<sup>18</sup>. DMA membership is voluntary, but it includes many large companies.
- All calling lists must have been correctly sourced, in accordance with data protection rules and with customers’ consent to whatever handling of their personal data has taken place.
- Recorded telemarketing calls are illegal unless the recipient has opted in to receiving them.
- Marketing texts are illegal unless the recipient has opted in to receiving them.
- Predictive automated diallers (often used in call centres) must be calibrated so that on average no more than 3% of answered call attempts will be abandoned because no live agent is available at the call centre, and when this happens a recorded information message must be played<sup>19</sup>.
- When a call to a number has been identified by Answering Machine Detection equipment as being picked up by an answering machine and therefore hung up<sup>20</sup>, at least 24 hours must pass before another attempt is made to call that number without the assured presence of a live agent.

There are also various sector-specific restrictions on marketing activity which may affect nuisance calls. For example, claims management companies, which have been blamed for a lot of recent problems, are regulated by the Claims Management

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<sup>16</sup> A fuller summary of the provisions is contained in the March 2013 letter by ICO and Ofcom to industry at [http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/ICO\\_Ofcom\\_letter\\_200313.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/ICO_Ofcom_letter_200313.pdf), and more detail still within the consumer guide at <http://stakeholders.ofcom.org.uk/enforcement/nuisance-calls-guide>.

<sup>17</sup> “Cold” here means calls from companies with which the person called does not already do business. Permission to call a company’s customers is assumed, but can be withdrawn. The TPS rules apply only within the UK jurisdiction.

<sup>18</sup> <http://www.dmcommission.com/the-dma-code/>

<sup>19</sup> And no repeat call may be made to that number within 72 hours without the assured presence of a live agent.

<sup>20</sup> Automatic answering machine detection (AMD) equipment can and does make mistakes. When it mistakes a live human being for an answering machine, it hangs up and the person experiences a silent call. Silent calls also have a variety of other causes.

Regulator within the Ministry of Justice, and its rules include compliance with the DMA Code of Practice. The Financial Conduct Authority also restricts telemarketing of mortgages, and, following pressure from StepChange Debt Charity<sup>21</sup> and others, is moving towards restricting telemarketing of high-risk financial products such as payday loans<sup>22</sup>.

Recent developments include:

- A new ability for Ofcom to share information with ICO for enforcement purposes. This required an amendment to S.393 of the Communications Act 2003, and came into force in the second half of 2014<sup>23</sup>.
- A lowering of the threshold for ICO to proceed against potential offenders, from its current level of “substantial damage or substantial distress”.
- An undertaking to consult on secondary legislation which would require all marketing calls to carry calling line identification (CLI)<sup>24</sup>. At the same time, the government announced steps towards banning cold calling by payday loan providers.
- The report<sup>25</sup> from a working group chaired by Which?, on consent to third-party use of personal data for marketing purposes, put forward 15 recommendations, mainly about clarifying and promoting good practice, but with the potential to lead to new regulations if this is felt to be justified at a future review.

## Enforcement

In September 2010, the maximum fine that Ofcom can impose for persistent misuse went up from £50,000 to £2m, and in May 2011, ICO was empowered to fine up to £500,000 for serious breaches of the PECR.

Ofcom<sup>26</sup> and ICO<sup>27</sup> both keep running accounts of their enforcement actions to date online. At the date of writing, Ofcom had fined 13 companies a total of £1.9m and ICO had fined 8 companies a total of £0.7m. Two of ICO’s cases had been appealed, one (in 2013) successfully<sup>28</sup> and the other (in 2014) unsuccessfully<sup>29</sup>. The

<sup>21</sup> <http://www.stepchange.org/Mediacentre/Pressreleases/paydayloansnuisancecalls.aspx>

<sup>22</sup> See, for example, *COBS 4.8 Cold calls and other promotions that are not in writing* at <http://fshandbook.info/FS/html/handbook/COBS/4/8>

<sup>23</sup> See [http://www.legislation.gov.uk/ukxi/2014/1825/pdfs/uksi\\_20141825\\_en.pdf](http://www.legislation.gov.uk/ukxi/2014/1825/pdfs/uksi_20141825_en.pdf).

<sup>24</sup> See Hansard account of debate on 26.11.2014 at [http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/141126-0001.htm#stpa\\_73](http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/141126-0001.htm#stpa_73)

<sup>25</sup> Which? (2014), *Report of the Nuisance Calls and Texts Task Force on Consent and Lead Generation*, <http://www.staticwhich.co.uk/documents/pdf/nuisance-calls-task-force-report-388316.pdf>

<sup>26</sup> [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_905/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/)

<sup>27</sup> <https://ico.org.uk/action-weve-taken/enforcement/>

<sup>28</sup> Information Tribunal (2013), *Christopher Niebel vs Information Commissioner*, Decision of the First-Tier Tribunal, Appeal No: EA/2012/0260,

first appeal turned on a failure to show that “substantial distress” had been caused, while the second remarked:

“It seems to us that, when hundreds of people who are registered with TPS receive unsolicited marketing calls, there is a very significant and weighty chance of substantial distress being caused, i.e., the degree of risk is such that there may very well be substantial distress, in two ways:

a. First, among the hundreds of people there may very well be one or more who are more sensitive than the average person, and accordingly suffer substantial distress as a result of such a call. This might be (for example) because they are suffering from physical or mental ill-health, or because they have recently been bereaved, or because they work from home and are close to a deadline for sending out a piece of work, or because of a recent bad experience with the same or another telesales company, or because the call comes at a time when they are awaiting a telephone call on a matter of great importance, or because they are elderly and vulnerable. There are many other possible reasons. The significant and weighty chance of causing substantial distress to one person is sufficient for the threshold test to be satisfied.

b. Secondly, among the hundreds of people affected there will be some whose sensitivity is significantly greater than average, so that they will suffer not merely irritation but some distress from the call, albeit falling short of a substantial kind. Given the numbers involved, the aggregation of the distress suffered by these people will easily pass the threshold of substantiality.”

Both regulators also warn companies and aim to bring them into compliance, with ICO in particular using this approach<sup>30</sup>.

Work continues to improve availability of calling line identity (CLI) and traceability of problem calls, aiming to help enforcers to track down potential offenders, as well as end users to decide whether or not to answer calls (and to report on unwanted

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i1106/Niebel,%20Christopher%20EA.2012.0260.pdf>

<sup>29</sup> Information Tribunal (2014), *Amber Upvc Fabrications Limited vs Information Commissioner*, Decision of the First-Tier Tribunal, Appeal No: EA/2014/0112, [http://www.informationtribunal.gov.uk/DBFiles/Decision/i1435/Amber%20UPVC%20Fabrications%20Limited%20EA.2014.0112%20\(15.12.2014\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1435/Amber%20UPVC%20Fabrications%20Limited%20EA.2014.0112%20(15.12.2014).pdf)

<sup>30</sup> See <https://ico.org.uk/action-weve-taken/nuisance-calls/> and <https://ico.org.uk/action-weve-taken/spam-texts/>. The Joint Action Plan update at [http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/JAP\\_update\\_Dec2014.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/JAP_update_Dec2014.pdf) also contains material on recent enforcement.



calls). The state of play was described in an Ofcom presentation<sup>31</sup> to an industry forum. A low-capacity call tracing mechanism now exists, using Ofcom as the data hub when calls pass between networks. This is being used to address some serious cases, such as those involving fraud. Ofcom's draft Annual Report for 2014-15 says:

“... Voice over Internet Protocol (VoIP) technologies enable callers to alter their caller line identification (CLI) so as to obscure their identities, enabling a growing number of cases of serious fraud. Ofcom has been working with the NICC (a technical forum for the UK communications sector that develops interoperability standards) and communications providers to improve means of tracing nuisance calls across networks.

A longer-term goal is the introduction of CLI 'authentication' practices. We are engaged with the US Federal Communications Committee (FCC)'s work to develop technical solutions to CLI 'spoofing', which will be delivered through the Internet Engineering Task Force (IETF) and International Telecommunications Union, and have established a related Memorandum of Understanding with other national regulatory authorities. This type of solution will require the development of CLI authorisation through a certification scheme.

We anticipate undertaking further work on nuisance calls in 2015/16 that will aim to deliver CLI assurance in the UK, predicated on the progress of standardisation work in the IETF in 2015. We will complement this with our ongoing work with other regulatory and standards bodies and engagement with BEREC (the Body of European Regulators of Electronic Communications)<sup>32</sup>.”

## Advice and technical support for consumers

The larger communications providers offer online advice to their customers on how to minimise the nuisance call problem, and some also offer a telephone advice line. The mobile operators now provide the shared short code 7726 (spelling SPAM) to which unwanted texts can be forwarded, and work together behind the scenes, in co-operation with the regulator ICO, to detect and where possible suppress spam texts<sup>33</sup>.

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<sup>31</sup> Saunders, Huw (2014), *Nuisance calls and CLI spoofing – progress to date and the way forward*, Powerpoint presentation to NICC Open Forum 2014,

<http://www.niccstandards.org.uk/meetings/2014huwsaunders.pdf?type=pdf>

<sup>32</sup> Ofcom Draft Annual Plan 2015-16, [http://stakeholders.ofcom.org.uk/binaries/consultations/draft-ann-plan-15-16/summary/Draft\\_Annual\\_Plan\\_Consultation.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/draft-ann-plan-15-16/summary/Draft_Annual_Plan_Consultation.pdf)

<sup>33</sup> For more detail, see the Mobile Broadband Group's submission to the All Party Parliamentary Group at

[http://www.mobilebroadbandgroup.com/documents/mbg\\_nuisance\\_calls\\_evidence\\_appg\\_060913.doc](http://www.mobilebroadbandgroup.com/documents/mbg_nuisance_calls_evidence_appg_060913.doc)

BT, still the largest fixed line provider, has a specialised Nuisance Call Advice Line (NCAL) which in the last few years has been receiving tens of thousands of calls each month (peaking at around 60,000). Ofcom's 2013 consumer research<sup>34</sup> confirms that most people (34% unprompted rising to 52% prompted) think first of their phone providers as sources of advice on nuisance calls, while only 4% unprompted and 17% prompted think of the regulators, Ofcom and ICO. Nonetheless Ofcom now provides the fullest consumer guide to dealing with nuisance calls and texts. The original text has now been supplemented by a video and an easy-read version<sup>35</sup>.

Communications providers offer limited network services to help consumers control the calls they receive. Ofcom has described these and tabulated their prices<sup>36</sup> within its consumer guide. In the last couple of years BT has also marketed several models of cordless telephone for their call blocking capabilities, which are said to have sold over a million units. The most recently launched and best-selling of these, the BT8500<sup>37</sup>, boasts improved "trueCall" technology similar to that in the stand-alone trueCall<sup>38</sup> units which currently represent the high functionality end of the UK call filtering and blocking market<sup>39</sup>.

All these efforts should have provided relief from nuisance calls for many people. However, a strong view is often voiced that consumers should not have to foot the bill for protection from a nuisance which is none of their making. This view has the most force in connection with vulnerable people, who may be targeted by telemarketers or scammers, and are unlikely to be aware of protection measures, or (often) to be able to pay for them.

The All Party Parliamentary Group recommended that Ofcom should "develop as a matter of priority a strategy for helping vulnerable consumers. This should include a model for funding call-blocking technology for the most vulnerable – people suffering from dementia or other cognitive impairments for example." Over a year later, the

<sup>34</sup> See page 177 in Section 9 on consumer Protection of the 2013 Consumer Experience Research Report, at <http://stakeholders.ofcom.org.uk/binaries/research/consumer-experience/tce-13/6-protection.pdf>

<sup>35</sup> All these can currently be accessed at <http://consumers.ofcom.org.uk/phone/tackling-nuisance-calls-and-messages/?a=0>

<sup>36</sup> At <http://consumers.ofcom.org.uk/phone/tackling-nuisance-calls-and-messages/phone-company-services-that-can-help-tackle-nuisance-calls/>

<sup>37</sup> Advertised at [http://www.shop.bt.com/learnmore/bt-branded-products-and-services/the-new-bt8500/?utm\\_source=nonbroadband\\_email&utm\\_medium=email&utm\\_campaign=email181214-PSTN&utm\\_content=YD00](http://www.shop.bt.com/learnmore/bt-branded-products-and-services/the-new-bt8500/?utm_source=nonbroadband_email&utm_medium=email&utm_campaign=email181214-PSTN&utm_content=YD00)

<sup>38</sup> See <http://www.truecall.co.uk/home.aspx>

<sup>39</sup> Though the cordless phones lack the online management option available with the stand-alone units. See the Which? blog from November 2013 on this topic at [http://blogs.which.co.uk/technology/phones-3/call-blocking-devices-everything-you-need-to-know/?utm\\_campaign=actionfb&utm\\_medium=social&utm\\_source=facebook&utm\\_content=&utm\\_term=&cmp=actionfb](http://blogs.which.co.uk/technology/phones-3/call-blocking-devices-everything-you-need-to-know/?utm_campaign=actionfb&utm_medium=social&utm_source=facebook&utm_content=&utm_term=&cmp=actionfb). Other similar devices are now available.

only people who appear to be acting in this area are individual Trading Standards departments, who report<sup>40</sup> considerable success with the handful of consumers they are able to help. Reports on these pilots should provide a good basis for scaling up such efforts.

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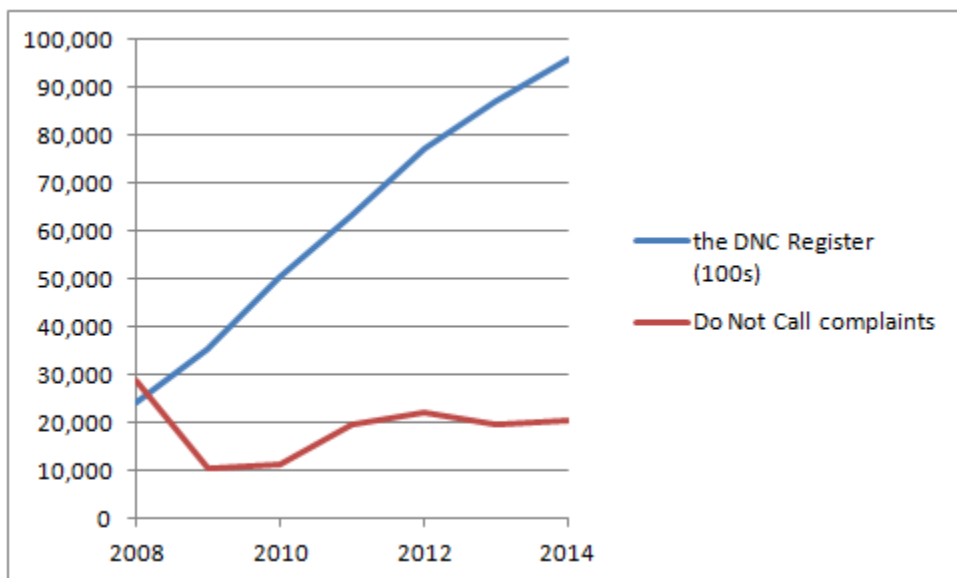
<sup>40</sup> See for example *Ground-breaking trading standards investigation targets nuisance calls*, 5 September 2013, <http://www.tradingstandards.gov.uk/extra/news-item.cfm/newsid/1258>. See also 25 September 2014 update *Block cold calling scammers – a trading standards initiative wins national award* at <http://www.tradingstandards.gov.uk/extra/news-item.cfm/newsid/1642>. One report is available online at <http://archive.angus.gov.uk/callblockingpilot/AngusCouncilcallblockingevaluationreport190813.pdf>

## Australia

### The situation in Australia

Compared with the UK and US, the incidence of unsolicited phone calls is low, with only around half of adults reporting that they had received them during the previous six months. Reasons for this probably include the relatively small size of the market, and rather higher call charges, both of which make Australia a less profitable proposition for telemarketers than larger English-speaking countries.

As shown in **Figure 3** and **Figure 4** (both based on Australian Communications and Media Authority (ACMA) statistics<sup>41</sup>), the level of telemarketing complaints to ACMA is also low, compared with the USA and UK, and has remained fairly static since the Do Not Call register started in 2007, though the size of the register has increased every year and continues to grow. Complaints about Spam SMS are measured separately, and at present would add around 50% to the total, though as shown in **Figure 4** they have fluctuated a good deal, apparently partly in response to new reporting systems (such as the special number 0429 999 888 introduced in 2010 for forwarding offending SMS to ACMA).



**Figure 3 Do Not Call cumulative registrations (in 100s) and annual complaints**

<sup>41</sup> Do Not Call statistics: <http://www.acma.gov.au/Industry/Marketers/Do-not-call-register/Telemarketing-standard/do-not-call-register-statistics> supplemented (for spam SMS) by Annual Reports for 2009-10 and 2011-12.

	<i>Do Not Call complaints</i>	<i>SMS spam complaints</i>	<i>Numbers on the DNC Register</i>	<i>DNC complaints per 1000 numbers on DNC Register</i>
<b>2007-08</b>	28,804	588	2,420,000	11.9
<b>2008-09</b>	10,644	992	3,540,000	3.0
<b>2009-10</b>	11,229	1,718	5,040,000	2.2
<b>2010-11</b>	19,711	8,195	6,360,000	3.1
<b>2011-12</b>	21,969	7,411	7,700,000	2.9
<b>2012-13</b>	19,677	14,107	8,740,000	2.3
<b>2013-14</b>	20,462	9,162	9,600,000	2.1

**Figure 4 History of Do Not Call registrations and complaints**

Consumer research published by the telecom regulator ACMA in late 2013<sup>42</sup> showed that 51% of adult Australians had received unsolicited phone calls during the previous six months. The calls disproportionately affected fixed lines - 60% of people who had only fixed lines had received these calls, compared with 16% of people who had only mobile phones. The frequency of telemarketing calls was also greater for people with only fixed lines – 58% received them once a week or more. Older people were also more likely to receive the calls than younger people, which ties in with older people being more likely to have only fixed phones. 75% of Australians had also received calls from charities, researchers or other organisations that are exempt from the Do Not Call regulations. 77% of people who received unsolicited calls found them a problem in some degree, with the seriousness of the problem increasing with frequency of receipt and age. Younger focus group participants were less likely to be abrupt or hang up on telemarketers. Most participants aged 18–34 said they tried to be polite and did not hang up on telemarketing callers; older participants did not think it rude to hang up on them.

A 2013 research report for the Office of the Australian Information Commissioner<sup>43</sup> commented on hardening attitudes towards telemarketing:

“...the backlash against unsolicited marketing activity is gaining pace, with the majority feeling annoyed (56%) with the contact or concerned about how their details were obtained by the organisation contacting them (39%). In 2013, just under half (45%) were annoyed by this activity versus just over a quarter (27%) in 2007. Australians were less likely to feel it was “a bit annoying, but mostly harmless” (11% in 2013 versus 23% in 2007). “

<sup>42</sup> *Unsolicited telemarketing calls and spam: Consumer experiences*. Research Report.

<http://www.acma.gov.au/theACMA/unsolicited-telemarketing-calls-and-spam-consumer-experiences>

<sup>43</sup> *Community Attitudes to Privacy*. [http://www.oaic.gov.au/images/documents/privacy/privacy-resources/privacy-reports/Final\\_report\\_for\\_WEB.pdf](http://www.oaic.gov.au/images/documents/privacy/privacy-resources/privacy-reports/Final_report_for_WEB.pdf)

In a 2009 enquiry by ACMA into community attitudes to unsolicited calls<sup>44</sup>, people who had heard of the Do Not Call Register but had not registered their numbers were asked why this was. Around 40% of this group said that they did not get or were not bothered by the calls, while around 60% might have liked to be registered, but had not managed to register for one or other reason. Most people who had registered reported a decrease in the unsolicited calls they received.

Since the Do Not Call Register started operation in 2007, about a million numbers have been added to it each year. Originally registrations were supposed to last for three years. This was later extended to five and then eight years. This year there has been a consultation on further extending the registration period, leading to an announcement in October 2014 of indefinite registrations. The consultation paper<sup>45</sup> included the option of removing the need to register, that is, reversing the default from opt-out to opt-in, pointing out that it would be logical to do this once the vast majority of Australians had opted out. Consumer respondents supported this option.

## Rules in Australia

The Do Not Call Register Act 2006, the Telemarketing and Research Industry Standard 2007 and the Fax Marketing Industry Standard 2011 set out rules applying to telemarketing and fax marketing<sup>46</sup>. The Do Not Call Register Act allows Australians who do not wish to receive unsolicited telemarketing calls or marketing faxes to list their private-use fixed and mobile phone numbers and fax numbers on the register. There are no specific rules aiming to limit silent or abandoned calls.

Unsolicited telemarketing calls and faxes must not be made to numbers on the register unless they fall into the category of designated telemarketing calls or faxes. Certain calls from government and religious organisations, charities, members of parliament, electoral candidates and educational institutions are considered designated calls.

The Telemarketing and Research Industry Standard and the Fax Marketing Industry Standard set out rules all telemarketers, fax marketers and researchers must follow, including:

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<sup>44</sup> *Community Attitudes to Unsolicited Communications*. Research Report.

<http://www.acma.gov.au/theACMA/newspoll-report-community-attitudes-to-unsolicited-communications>

<sup>45</sup> Department of Communications (2013) consultation on the duration of DNC registration and consultation responses:

[http://www.communications.gov.au/telephone\\_services/do\\_not\\_call/registration\\_period\\_on\\_the\\_do\\_n](http://www.communications.gov.au/telephone_services/do_not_call/registration_period_on_the_do_n)  
[ot\\_call\\_register\\_discussion\\_paper](http://www.communications.gov.au/telephone_services/do_not_call/registration_period_on_the_do_n)

<sup>46</sup> The Industry Do Not Call portals, with links to legislation and enforcement information, are at <https://www.donotcall.gov.au/dncrtelem/index.cfm> and <http://www.acma.gov.au/Industry/Marketers/Do-not-call-register/Telemarketing-standard>

- Outlining the hours/days when telemarketing/research calls and faxes cannot be made or sent.
- Explaining what information must be provided to those being called or faxed. This includes providing, within seven days of the call, details of where the caller obtained the name and number of the person called.
- Ending telemarketing calls when requested.
- Providing opt-out functionality for marketing faxes.
- Including a valid calling line identification number.

Some states have a slightly different standard, such as different times when telemarketing calls may not be made. Western Australia recently brought its standard into line with the national standard.

All consumers are protected by the requirements of the industry standards, whether or not they have listed their numbers on the register. The standard permits calls using recorded or artificial voices, as long as they include a mechanism for providing the specified information on request (e.g. by pressing a certain key).

Additional requirements under the Privacy Act apply to consumer credit records. The personal information in your consumer credit report may not be used or disclosed by a credit reporting body or a credit provider for the purpose of directly marketing goods or services to you. The Privacy Act also includes the (recently updated) 13 Australian Privacy Principles (APPs)<sup>47</sup>. APP 7 relates to direct marketing. Essentially it outlaws the use of information about an individual for the purpose of direct marketing, or passing on that information to another entity for the purpose of direct marketing, unless the individual does not object. The individual's expressed wishes about use of the information for direct marketing must be respected.

Consumers who have listed their numbers on the register may complain and report unsolicited telemarketing and fax marketing calls to the ACMA, which has the power to investigate and take enforcement action in response to breaches of the Do Not Call Register legislation. All Australians are able to make complaints to the ACMA about potential breaches of the industry standards. Complaints can be made by phone or by completing online forms at <https://www.donotcall.gov.au/enquiries.cfm>. Complaints can also be made to the Privacy Commissioner or the Telecoms Industry Ombudsman as well as to ACMA, but the other authorities generally refer them to ACMA. A formal MoU has recently been issued between ACMA and the Privacy Commissioner.

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<sup>47</sup> *Australian Privacy Principles*. Privacy Fact Sheet 17.  
[http://www.oaic.gov.au/images/documents/privacy/privacy-resources/privacy-fact-sheets/privacy-fact-sheet-17-australian-privacy-principles\\_2.pdf](http://www.oaic.gov.au/images/documents/privacy/privacy-resources/privacy-fact-sheets/privacy-fact-sheet-17-australian-privacy-principles_2.pdf)

As mentioned above, the industry standard requires CLI to be delivered for telemarketing calls, so the absence of CLI is automatically a matter that warrants ACMA’s attention. Where CLI is absent but there is information from a complainant about the date and time of a call, ACMA can obtain call charge records from telephone companies, and then match this information to records in the Independent Public Number Database to find out the owner of a number. A project is underway to examine how to improve tracing of VoIP and international telemarketing calls.

## Enforcement

Figure 5 how ACMA uses the different stages of its graduated enforcement approach. This starts by informing the company concerned about possible rule breaches, which already deals with a high proportion of cases; only some companies need to be warned about possible penalties, and very few end up incurring penalties. The last column shows the total of formal proceedings since 2011. Only 26 cases have reached this stage, the vast majority being dealt with by advisory letters and informal warnings (the latter are issued where the ACMA receives five or more complaints within any 180-day period about the same person or business). Fines are only applicable in the final two categories, of infringement notices and court proceedings. So far the average level of penalty in the 9 cases which have so far reached these stages has ranged between AU\$6,600 and AU\$147,400, with an average of around AU\$56,000.

Fewer complaints were received in 2012-3 than in the previous year, due in part to a decline in the number of complaints about the ‘Microsoft Imposters’ scam following joint action by the ACMA, the US Federal Trade Commission and the Canadian Radio-television and Telecommunications Commission in October 2012. In 2013–14, there was an 85 per cent increase in complaints raising potential breaches of the Industry Standard.

During 2013-4, the ACMA saw an increase in the number of complaints received about the PC Virus scam and the introduction of a variant scam relying on Telstra’s brand to deceive the public. The ACMA previously targeted these calls in 2012 due to the high number of consumers on the Do Not Call Register complaining about receiving them. At that time, the ACMA partnered successfully with other overseas regulators, and joint action saw complaints about these calls fall from 50 per cent of all Do Not Call-related complaints received by the ACMA to about 15 per cent.

In early 2014, when it noticed reports about these calls from consumers increasing, the ACMA once again targeted this scam by communicating with Telstra and quickly publishing consumer warnings<sup>48</sup> to alert the public to the new variation. This action

<sup>48</sup> Included among ACMA do-not-call press releases and announcements since 2006 at: <http://www.acma.gov.au/theACMA/About/The-ACMA-story/Facilitating/do-not-call-register-information-for-the-public#media>



first stemmed the rise and then decreased the number of complaints received about these calls to under 14% by the end of the financial year.

Activity	2012–13	2013–14	2011–14
<b>Consumer complaints</b>	<b>19,677</b>	<b>20,462</b>	
Telemarketing	19,335	20,232	
Fax marketing	342	230	
<b>Enquiries</b>	<b>10,927</b>	<b>11,335</b>	
<b>Business compliance</b>	<b>1,057</b>	<b>1,067</b>	
Advisory letters	918	951	
Informal warnings	139	116	
<b>Investigations</b>	<b>11</b>	<b>6</b>	
Formal warnings	3	2	26
Enforceable undertakings	2	2	25
Infringement notices	3	1	7
Court proceedings			2

Figure 5 Summary of ACMA telemarketing compliance and enforcement activities<sup>49</sup>

In 2011, the ACMA issued a case study report on its Do Not Call register<sup>50</sup>, including comparisons with other Do Not Call operations in Canada, the USA, and the UK. This underlined the effectiveness of the graduated system for compliance, saying that:

- The number of marketers progressing through all three stages of compliance was **less than two per cent** of all entities complained about.
- Complaints ceased for **80 per cent** of all marketers following contact from the ACMA.
- **Over 90 per cent** of consumers reported experiencing a drop in telemarketing calls after listing their fixed lines on the register. For mobile telephone users, **almost 80 per cent** of users report a reduction in the number of telemarketing calls they receive.

<sup>49</sup> ACMA Annual Reports, 2012-13 and 2013-14.

<http://www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/annual-report>

<sup>50</sup> *Meeting the ACMA standard: The Australian Do Not Call Register. Case study.*

[www.acma.gov.au/webwr/\\_assets/main/lib550025/Do\\_Not\\_Call\\_Register\\_Case\\_Study.docx](http://www.acma.gov.au/webwr/_assets/main/lib550025/Do_Not_Call_Register_Case_Study.docx). See also the US Federal Trade Commission's comments on this document, *Letter from Federal Trade Commission Office of International Affairs to Telemarketing Investigations Section of Australian Communications and Media Authority. Review of ACMA case study of its Do Not Call register.* <http://www.ftc.gov/sites/default/files/attachments/international-consumer-protection/110216acma-donotcall.pdf>

Updating these findings, in 2013–14, 92 per cent of businesses contacted by the ACMA required only a single advisory or warning letter to address compliance issues.

ACMA sets targets for complaints handling, which for telemarketing mainly means acknowledging receipt of complaints; its performance against targets in 2012-3 is shown in **Figure 6**.

Days to finalise	Target	Performance
7	50%	92.2%
14	75%	97.0%
21	90%	98.7%

**Figure 6 ACMA’s telemarketing and fax marketing complaints handling performance, 2012-13<sup>51</sup>**

The ACMA *Corporate plan 2013–16* sets out new key performance indicators for unsolicited communications compliance activities. These KPIs are:

- The number of complaints and reports about unsolicited communications received from businesses after they have been sent informal warnings is low.
- The number of complaints about unsolicited communications within targeted priority areas reduces.

ACMA and the Privacy Commissioner have recently signed a Memorandum of Understanding<sup>52</sup>, “to formalise a streamlined approach to telecommunications, spam and telemarketing matters”. Provisions include appropriate information-sharing in investigations, and statistical information about telecommunications privacy issues.

## Advice and technical support for consumers

The main consumer portals to the Do Not Call Register<sup>53</sup> include general advice to consumers on dealing with unwanted calls and texts.

To help businesses meet their unsolicited communications obligations and the public deal with unsolicited marketing, the ACMA engages in targeted educational activities. This includes:

**Industry blogs**—the ACMA produces two blogs<sup>54</sup> aimed directly at businesses that engage in telemarketing, fax marketing and e-marketing. They promote and encourage businesses to comply with the rules:

<sup>51</sup> ACMA Annual Report, 2012-3

<sup>52</sup> <http://www.acma.gov.au/Citizen/Stay-protected/My-privacy-world/Online-identity/australian-privacy-commissioner-and-acma-sign-memorandum-of-understanding#>

<sup>53</sup> Main public Do Not Call portals: <https://www.donotcall.gov.au/>, <http://www.acma.gov.au/Citizen/Stay-protected/My-privacy-world/Reduce-unwanted-calls>

- *Successful e-marketing ... it's about reputation*
- *Better telemarketing ... take the right line.*

**Social media**—as well as using traditional channels, the ACMA increasingly engages with members of the public on telemarketing and spam-related issues via Facebook and Twitter. These channels also enable the ACMA to quickly issue alerts and warnings about apparent phone, email and SMS scams in circulation

Australia's incumbent fixed line operator, Telstra, does not offer any specific privacy features beyond “know who's calling” through CLI delivery, though its consumer advice page on unwelcome calls<sup>55</sup> suggests using Message Bank for call screening, Smart Ring to identify unknown callers, or as a last resort Silent Line (with a new number). All these services attract monthly charges. Vodafone Australia<sup>56</sup> recommends a few simple techniques for handling unwanted calls and texts, including phone apps, on its website. Call blocking devices are not prominent on the Australian market.

Consumer complaints generally are often dealt with by state Fair Trading offices. Western Australia offers consumers descriptions of 21 current phone scams (as of November 2014)<sup>57</sup>.

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<sup>54</sup> Relevant ACMA blogs: <http://www.acma.gov.au/Industry/Marketers/Do-not-call-register/Telemarketing-standard>, <http://www.acma.gov.au/theACMA/ACMAi/Investigation-reports/Telemarketing-and-spam-investigations>

<sup>55</sup> <http://www.telstra.com.au/consumer-advice/unwelcome-calls/call-types/index.htm>

<sup>56</sup> <http://support.vodafone.com.au/articles/FAQ/Stopping-unwelcome-calls>

<sup>57</sup> At [http://www.scamnet.wa.gov.au/scamnet/Types\\_Of\\_Scams-Phone\\_Scams.htm](http://www.scamnet.wa.gov.au/scamnet/Types_Of_Scams-Phone_Scams.htm)

## Germany

### The situation in Germany

By Isabel Kuhn

Germany has strict legislation on nuisance calls. Nevertheless, spam, predictive diallers and unsolicited marketing calls are still common problems. Written complaints filed at the responsible authority, the Federal Network Agency (BNetzA) decreased until 2012 but considerably increased in 2013, which may be the result of the introduction of a new electronic complaint form. The problem is partly due to the fact that many companies are operating or using call centres from abroad, which makes it hard to get hold of the people responsible. Also, new phone numbers are easily used as soon as the ones used before get identified and disconnected. Even stricter laws introduced in 2009 and 2013 regarding unlawful marketing calls, which make it possible to issue fines up to 300,000 Euro against those who are breaching the regulations, did not result in a solution of the on-going problem.

#### ***Phone number misuse***

Phone number misuses are violations of the regulations of the Telecommunications Act (TKG) or the Unlawful Competition Act (UWG) with regard to the use of phone numbers<sup>58</sup>. The most common forms of phone number misuse in Germany - predictive diallers, spam and unsolicited marketing calls - are explained in more detail below. Beyond that, unlawful line identification restrictions, violations of obligations to state call prices or violation of regulations on call queues also represent cases of phone number misuse<sup>59</sup>.

In 2013, BNetzA received 63,874 written complaints and queries from consumers concerning phone number misuse (including unlawful marketing calls<sup>60</sup>). That is 30% more than in 2012 (48,855). The main subjects of the written complaints and enquiries were Spam (53%) and predictive diallers (39%). Additionally, the BNetzA received 20,690 telephone complaints and enquiries on the topic. 3,924

<sup>58</sup>BNetzA 2013d: Themenblatt Rufnummernmissbrauch, [http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Verbraucher/Rufnummernmissbrauch/Themenblatt/ThemenblattRufnummernmissbrauch.pdf?\\_\\_blob=publicationFile&v=3](http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Verbraucher/Rufnummernmissbrauch/Themenblatt/ThemenblattRufnummernmissbrauch.pdf?__blob=publicationFile&v=3)

<sup>59</sup> Regulations on pricing and call queues will not be discussed in more detail in this report because of the focus on nuisance calls. Pricing and call queues were furthermore only a minor concern to consumers in 2013: Only 1.5% of the written complaints on phone number misuse that the BNetzA received in 2013 were directed at pricing. Call queues were not a topic at all (see Annual Report 2013: 82).

<sup>60</sup> Unfortunately it is not always clear what exactly BNetzA refers to when using the term “Spam”. Sometimes the Agency refers to marketing calls, sometimes including predictive diallers, and sometimes it defines “spam” exclusively as an attempt to make recipients of messages (SMS, Emails or Faxes with phone numbers) or ping calls call back. Here the term seems to refer (also) to marketing calls.

administrative proceedings against companies that committed phone number misuse were initiated by the BNetzA in 2013<sup>61</sup>.

### **Predictive Diallers<sup>62</sup>**

Predictive dialling, which may result in “silent calls”, is a method used by Call Centres to enhance their efficiency: computer-based programmes call several phone numbers at once. The attempt to make a marketing call is generally not unlawful. But it is in individual cases nevertheless possible to initiate administrative proceedings, if the frequency of calling is so high or the times of calling are so inconvenient that it represents unacceptable nuisance in accordance with the UWG<sup>63</sup>. The number of complaints about predictive diallers has increased significantly since October 2013.

### **Spam**

The BNetzA defines Spam as the reception of unsolicited marketing messages (via SMS/ Email/ Fax) or marketing calls, including ping calls, which aim to make the receiver call back a high priced number<sup>64</sup>. In 2013 the BNetzA received 59,018 complaints relating to spam. That is more than twice as much as in 2012 (24,063)<sup>65</sup>.

Most complaints were related to telephone spam (68%). 28% of the complaints concerned fax spam and 4% were complaints about email spam that contained a phone number<sup>66</sup>.

Typical cases of **telephone spam** are:

- **Premium SMS:** the consumer receives a SMS containing a short phone number. The goal is to provoke calling the number or sending a SMS back or to download a picture. =
- **Ping calls:** The (mobile) phone only rings once and a calling number shows up on the display that can be called back. In case of a call-back, sometimes a recorded message gives a high priced number that the consumer should call.
- **Winnings announcement:** The consumer receives a call – often by an automatic machine – telling them that they have won something. In order to get access to the prize or get more detailed information, the consumer is invited to call a high priced number or press a button on the phone. Even though this behaviour is prosecutable as fraud, according to information of the Federal Ministry for Justice and Consumer Protection there have been only few criminal

<sup>61</sup> BNetzA 2013a: Annual Report 2013: 82-83.

[http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/ReportsPublications/2014/2013AnnualReport.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/ReportsPublications/2014/2013AnnualReport.pdf?__blob=publicationFile&v=2)

<sup>62</sup> Please note: The BNetzA counts predictive diallers in their annual report as a form of spam.

<sup>63</sup> BNetzA: Missbrauchsfälle

[http://www.bundesnetzagentur.de/cln\\_1422/DE/Sachgebiete/Telekommunikation/Verbraucher/Rufnummern/missbrauch/Missbrauchsfaelle/missbrauchsfaelle-node.html;jsessionid=BC79253B9A6A8276616FB696F5B93790](http://www.bundesnetzagentur.de/cln_1422/DE/Sachgebiete/Telekommunikation/Verbraucher/Rufnummern/missbrauch/Missbrauchsfaelle/missbrauchsfaelle-node.html;jsessionid=BC79253B9A6A8276616FB696F5B93790)

<sup>64</sup> BNetzA: Missbrauchsfälle, *ibid.*. If not indicated otherwise, the following information comes from this source. Please also note the information in Footnote 61.

<sup>65</sup> BNetzA counts predictive diallers here as “Spam” (see BNetzA Annual Report 2013a: 83, *ibid.*). See also Footnote 61: These numbers might include marketing calls.

<sup>66</sup> BNetzA 2013a: Annual Report 2013: 82-83. *Ibid.*

complaints and even less convictions, mostly because the perpetrators could not be identified or the relevant course of events could not be reconstructed. Those responsible often operated within criminal structures, often from abroad<sup>67</sup>.

**Fax Spam** are unwanted marketing faxes which aim to provoke a call-back or to access a high priced fax. The messages often cause extra nuisance by not including any information on the sender, arriving at night and using paper and ink. .

**Email Spam:** The sending of unsolicited emails to private persons is generally illegal according to §3 and §7II UWG. BNetzA can only become active though (in accordance with the TKG) if a calling number is being promoted in the email.

### **Phishing**

BNetzA states that complainants often receive unwanted calls in which they are asked for sensitive personal data such as contact addresses, bank details, credit card numbers or passwords.

The BNetzA is generally not able to pursue these cases because they usually do not represent a form of phone number misuse as defined in TKG and UWG. Persons concerned should contact their bank and the responsible authority for criminal prosecution. Consumer protection agencies might also help<sup>68</sup>.

### ***(Unlawful) Marketing Calls***

Both unsolicited marketing calls and marketing calls with restricted line identification are unlawful. The BNetzA can initiate administrative offence proceedings in the case of a breach of the regulations on marketing calls (for the rest of the cases of phone number misuse this is not possible, they can only cause administrative proceedings).

In 2013, the BNetzA received 33,147 written complaints on unlawful marketing calls (compared to 29,264 in 2012). The agency initiated 159 fine proceedings. In most cases, fines were imposed or warnings issued (82 fines with a total value of € 540,000 and 29 warnings). The sectors that were most commonly affected were energy services, telecommunications, insurance and finance. BNetzA reports that many of the proceedings initiated were very time-consuming due to the frequently very difficult and highly complex nature of the investigations and the recourse of fine recipients to appeal<sup>69</sup>.

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<sup>67</sup> Bundesministerium der Justiz für Verbraucherschutz 2013: Unerwünschte Telefonwerbung. [http://www.bmfv.de/DE/Themen/TelekommunikationundDatendienste/UnerwuenschteTelefonwerbung/unerwuenschteTelefonwerbung\\_node.html](http://www.bmfv.de/DE/Themen/TelekommunikationundDatendienste/UnerwuenschteTelefonwerbung/unerwuenschteTelefonwerbung_node.html)

<sup>68</sup> BNetzA 2013e: Themenblatt unerlaubte Telefonwerbung. [http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Verbraucher/Unerlaubte\\_Telefonwerbung/Themenblattunerlwerbung.pdf?\\_\\_blob=publicationFile&v=4](http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Verbraucher/Unerlaubte_Telefonwerbung/Themenblattunerlwerbung.pdf?__blob=publicationFile&v=4)

<sup>69</sup> BNetzA Annual Report 2013a: 86 ibid.

The German Consumer Advice Centres (CAC) are currently conducting an online survey in which people who received unwanted marketing calls could share their experiences. Between July 1 and September 30, 2014 93% of the (so far) 2,806 self-selected participants received marketing calls, even though 84% of the participants never consciously consented to receive such calls.

In about 30% of the cases where participants of the survey received marketing calls, this had financial consequences (like the withdrawal of money from their bank accounts or the reception of bills). Another consequence was revealing sensitive personal data.

The problem is, according to the CAC, even bigger than the numbers suggest because many consumers do not officially complain about receiving unsolicited marketing calls<sup>70</sup>. The CAC aim to bring the lawmakers' attention to the urgency of the problem and advocate improved legal regulation with the survey.<sup>71</sup> Even though unsolicited marketing calls are unlawful, in many cases contracts that were made on the phone are still legally valid.

In October 2013, the law was changed so that contracts on lottery games that were agreed upon on the phone now need written confirmation. The survey of the CAC whose findings are summarised in the figure below (as well as the statistics provided by the BNetzA) show though that unwanted marketing calls are also common in other fields, such as telephone and internet providers, banking and insurance, energy supply and newspapers/ magazines. The most effective regulation in the view of the CAC would be therefore to broaden the rule for lottery games to any contract that was made on the phone.<sup>72</sup>

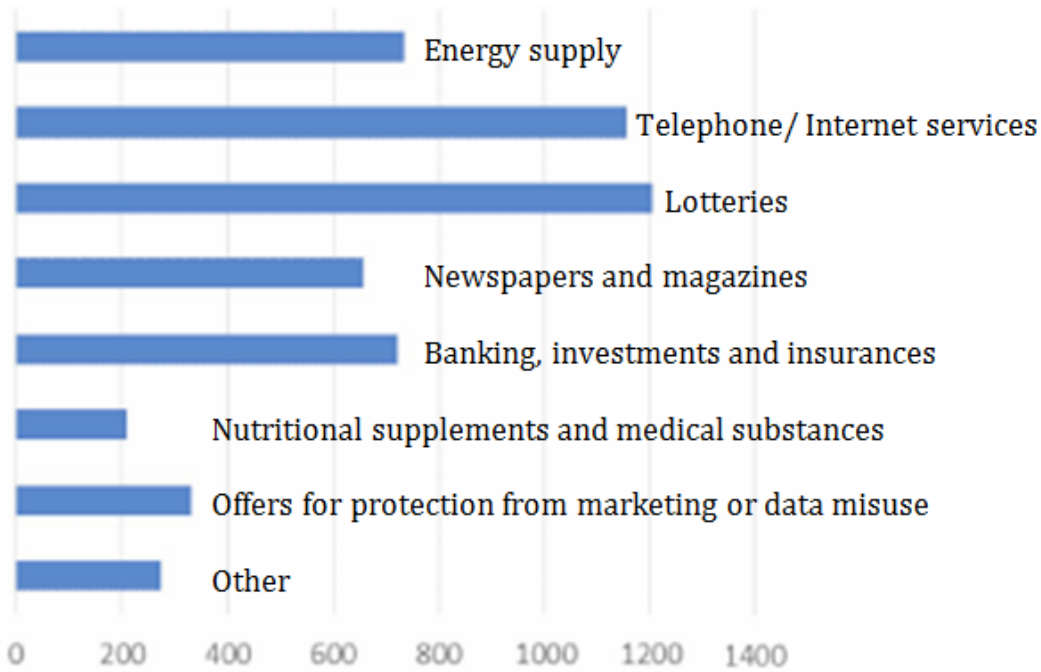
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<sup>70</sup> Verbraucherzentrale Bundesverband 2014 Telefonwerbung nervt noch immer. <http://www.vzbv.de/13962.htm>

<sup>71</sup> Verbraucherzentrale Rheinland-Pfalz 2014, Unerlaubte Telefonwerbung – gesetzliche Regelungen greifen zu kurz. <http://www.verbraucherzentrale-rlp.de/unerlaubte-telefonwerbung---gesetzliche-regelungen-greifen-zu-kurz>

<sup>72</sup> Verbraucherzentrale Rheinland-Pfalz 2014. Ibid.

## Content of marketing calls



Source: Verbraucherzentrale (2014), Online survey on “unlawful marketing calls”, preliminary findings of September 30, 2014

## Customer satisfaction surveys = marketing calls?

Customer satisfaction surveys on the phone are considered to have a marketing character and fall therefore under the regulations for unlawful marketing calls<sup>73</sup>.

## Rules in Germany

The most important applicable laws relating to nuisance calls are:

- The **Unlawful Competition Act** of 2004 (Gesetz gegen den unlauteren Wettbewerb, short **UWG**), amended by the Act against Unlawful Marketing Calls (Gesetz zur Bekämpfung unerlaubter Telefonwerbung) in 2009 and the Improper Business Practices Act (Gesetz gegen unseriöse Geschäftspraktiken) in October 2013. The UWG aims to protect consumers from unlawful business practices as well as other market participants from unfair competition in the form of illegal activities (§1 UWG).
- The **Telecommunications Act** of 2004 (Telekommunikationsgesetz, short **TKG**). It aims i. a. to protect the interests of the consumers in the field of telecommunications and to ensure fair competition on the telecommunications market.

<sup>73</sup> Jurisdiction of the OLG Cologne. See Verbraucherzentrale Bundesverband 2013, Telefonische Kundenbefragung nur mit Einwilligung erlaubt. <http://www.vzbv.de/13442.htm>



In Germany it is illegal to make a **marketing call** to a private person without the prior explicit consent of the called person<sup>74</sup>. In other words, this is an “opt-in” regime for all marketing calls.

Consent can be given by ticking a box in a text pre-formulated by a company, but it must be clearly recognizable to the consumer. If the declaration of consent is part of the general terms and conditions, it must be stated in a separate paragraph with no other content. The declaration must precisely name the companies and the products that may be promoted on the phone<sup>75</sup>. A declaration of consent that was made by a consumer can be informally withdrawn at any time<sup>76</sup>.

It is illegal to **restrict the line identity** when calling for marketing purposes<sup>77</sup>.

Since 2013, contracts on the participation in **lotteries** that were agreed to on the phone need written confirmation in order to be legally valid<sup>78</sup>.

Other contracts do not need an extra confirmation but the consumer has the right to revoke them in accordance with the general regulations for revocation of contracts (which generally means within 14 days after the contract was agreed or after receipt of the commodity)<sup>79</sup>.

## Enforcement

The **Federal Network Agency** (Bundesnetzagentur, short BNetzA) is the responsible authority for combatting phone number misuse<sup>80</sup>.

Phone number misuse can be violations of the TKG (for example unlawful line identification restrictions, violations of obligations to state call prices or monitoring of compliance with the regulations on call queues) or breaches of the UWG, for example in the form of unsolicited marketing calls and (other kinds of) Spam<sup>81</sup>.

Unlawful marketing calls are an **administrative offence**. Unsolicited marketing calls can be fined with up to €300,000<sup>82</sup>. Since 2013, calls made by automated calling

<sup>74</sup> § 7 UWG Gesetz gegen den unlauteren Wettbewerb [http://www.gesetze-im-internet.de/uwg\\_2004/BJNR141400004.html](http://www.gesetze-im-internet.de/uwg_2004/BJNR141400004.html)

<sup>75</sup> Verbraucherzentrale Nordrhein-Westfalen (2014): Werbeanrufe , Telefonwerbung <http://www.vz-nrw.de/werbeanrufe>

<sup>76</sup> BNetzA 2014h: Unerlaubte Telefonwerbung – Hintergrundinformationen, [http://www.bundesnetzagentur.de/cn\\_1422/DE/Sachgebiete/Telekommunikation/Verbraucher/UnerlaubteTelefonwerbung/Hintergrundinformationen/hintergrund-node.html](http://www.bundesnetzagentur.de/cn_1422/DE/Sachgebiete/Telekommunikation/Verbraucher/UnerlaubteTelefonwerbung/Hintergrundinformationen/hintergrund-node.html)

<sup>77</sup> § 102 II TKG: <http://dejure.org/gesetze/TKG>

<sup>78</sup> Regulation of the Improper Business Practices Act from October 9, 2013

<sup>79</sup> Verbraucherzentrale Nordrhein-Westfalen 2014: Werbeanrufe, *ibid*.

<sup>80</sup> Regulated in the TKG, esp. § 67 TKG

<sup>81</sup> BNetzA 2013d: Themenblatt Rufnummernmissbrauch, *ibid*.

<sup>82</sup> §20 UWG. The Improper Business Practices Act from October 2013 raised the maximum fine from 50,000 € to 300,000 €. Fines apply only if a private consumer (as opposed to a competitor or a company) was called. Mere attempts to make unlawful marketing calls cannot be fined (BNetzA 2013f: Unerlaubte Telefonwerbung)

machines are included in the regulations<sup>83</sup>. Line identity restriction when calling for marketing purposes (also if prior consent was given) can be fined with up to €100,000<sup>84</sup>. The BNetzA is responsible for these cases (see below).

All other cases of **phone number misuse** can lead to **administrative procedures** initiated by the BNetzA (see below).

Recipients of **nuisance calls** (or Faxes/ Emails/ SMS) that represent an **unlawful act** in the sense of §3 UWG and §7 UWG have the **right to correction** (*Beseitigung*) **and** if there is a risk of repetition to **cease and desist** (*Unterlassung*)<sup>85</sup>.

Competitors, consumer protection agencies, competition agencies and legally responsible federations for the promotion of commercial or freelancing professional interest as well as Chambers of Industry and Commerce and of Craft can claim the right to cessation granted in § 8 UWG. They have the possibility to fight for their rights in **court** if a **warning** to the defendant failed to end the unlawful behaviour<sup>86</sup>.

There are also **arbitration boards** available, for example at the BNetzA (see below).

Those who committed an unlawful act in the sense of §3 or §7 UWG are obliged to pay **compensation** for the damages that were done to competitors<sup>87</sup>. Private persons derive a right to financial compensation from § 823 BGB.

Additionally, consumer protection agencies and federations as mentioned above can force the committer to **surrender the profit** generated through the unlawful acts to the federal budget<sup>88</sup>.

Moreover, telephone providers are obliged to **block phone numbers** in cases of regular or serious phone number misuse after issuing a **warning**<sup>89</sup>.

## Complaints Forms

For the purpose of fighting phone number misuse, BNetzA collects detailed information from consumers who complain about being the target of phone number misuse.

To make it easier for both sides, the BNetzA offers on its website complaint forms, which are categorized (marketing calls, phone number spam, predictive dialler,

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<http://www.bundesnetzagentur.de/DE/Sachgebiete/Telekommunikation/Verbraucher/UnerlaubteTelefonwerbung/unerlaubtetelefonwerbung-node.html>)

<sup>83</sup>See §7 UWG. Also included in the regulations of the UWG are **Fax and electronic post**, but the regulations for electronic post are less strict (no need for prior consent).

<sup>84</sup> § 149 TKG

<sup>85</sup> This is not directly regulated in the UWG but in § 1004 BGB (Bürgerliches Gesetzbuch, German Civil Code). [https://www.juris.de/purl/gesetze/\\_ges/BGB](https://www.juris.de/purl/gesetze/_ges/BGB)

<sup>86</sup> §12 UWG

<sup>87</sup> §9 UWG

<sup>88</sup> § 10 UWG

<sup>89</sup> §450 TKG

pricing, waiting queues) and ask for all the relevant information. These can be printed or scanned and then sent to the Agency<sup>90</sup>.

Alternatively, an online complaint form is available since 2013. It is not divided into categories because by answering questions at the beginning of the form (e.g. “Did you receive a) SMS b) Call c) Email d) Fax”) it becomes automatically tailored to the correct form for complaint<sup>91</sup>.

## Processing

BNetzA files and registers every complaint and pursues the leads in order to evaluate if any law has been violated. If necessary, the agency can demand information on the holders of phone numbers from phone companies<sup>92</sup> and collect evidence independently (for example by searching offices) if phone number misuse is suspected<sup>93</sup>.

The different stages of processing are the following: The complaints are first examined by one of the regional offices. If they find that a law has been violated, they pass the case on to the BNetzA’s head office in Bonn. Depending on the legal background, the case will be dealt with further by the relevant section. If they also find that the case constitutes a violation of the law, the BNetzA can react quickly through administrative proceedings and in the case of unlawful marketing calls through administrative offence proceedings (see below for further detail).

The duration of the process varies according to various factors<sup>94</sup>.

## Possible Administrative Measures

If the BNetzA has secured knowledge of an unlawful use of a phone number, it can adopt “appropriate” measures<sup>95</sup>. It can initiate administrative procedures and in the case of unlawful telephone marketing and line identification restriction administrative offence proceedings<sup>96</sup> against for example phone providers, invoicing companies or service providers. The administrative proceedings are directly enforceable, but legal proceedings are allowed<sup>97</sup>.

<sup>90</sup> see BNetzA 2014b: Beschwerde einreichen.

[http://www.bundesnetzagentur.de/cln\\_1412/DE/Sachgebiete/Telekommunikation/Verbraucher/Rufnummernmissbrauch/Beschwerdeeinreichen/beschwerdeeinreichen-node.html#doc269026bodyText11](http://www.bundesnetzagentur.de/cln_1412/DE/Sachgebiete/Telekommunikation/Verbraucher/Rufnummernmissbrauch/Beschwerdeeinreichen/beschwerdeeinreichen-node.html#doc269026bodyText11)

<sup>91</sup> See BNetzA Beschwerdeformular,

<https://app.bundesnetzagentur.de/rnmportal/Pages/Beschwerdeformular.asp>

<sup>92</sup> § 127 TKG

<sup>93</sup> §§ 128-129 TKG

<sup>94</sup> BNetzA 2013b: Beschwerdeordnung § 4, *ibid.* See also pp 30-31 of BNetzA Annual Report 2012 Magazine.

[http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/ReportsPublications/2013/AnnualReport2012Magazin.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/ReportsPublications/2013/AnnualReport2012Magazin.pdf?__blob=publicationFile&v=2)

<sup>95</sup> § 67 I TKG

<sup>96</sup> BNetzA 2013b: Beschwerdeordnung § 1 *ibid.*

<sup>97</sup> BNetzA, Rufnummernmissbrauch –

<http://www.bundesnetzagentur.de/DE/Sachgebiete/Telekommunikation/Verbraucher/Rufnummernmissbrauch/rufnummernmissbrauch-node.html>; BNetzA 2013a: Annual Report 2013: 86, *ibid.*

Typical measures taken by the BNetzA are:

- Issuing of warnings
- Orders to deactivate phone numbers<sup>98</sup>
- Ban on invoicing and payment collection<sup>99</sup>
- Banning of business models
- Issuing fines in cases of unsolicited marketing calls and line identification restriction

### Information on Measures Taken

The BNetzA publishes the administrative measures that were taken against particular cases of phone number misuse on their website in the form of a comprehensive list that goes back to 2004, and also in the form of press releases<sup>100</sup>. Information on completed fine proceedings (administrative offence proceedings) can be found in press releases and in the Annual Reports.

### Case examples

#### Unlawful marketing calls<sup>101</sup>

In 2012, a company was making unsolicited marketing calls, promoting the “German consumer vest”, promising consumers to protect them from unwanted marketing calls. The consumers were supposed to pay 100 Euro for this service using the “payment on delivery” procedure. As well as missing consent of the consumers to the calls, a fake phone number was displayed on their phones, which did not correspond to the real number that they were using. This is equal to an unlawful line number restriction.

After the BNetzA had received complaints from consumers, it initiated two administrative offence proceedings against the company, which had to pay a 30,000 Euro fine by the end of 2013<sup>102</sup>.

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<sup>98</sup> Telephone providers are obliged to deactivate numbers in cases of phone number misuse (§450 TKG)

<sup>99</sup> Only valid for the period of the ban, not ex post facto for already paid bills. In these cases, the consumer should speak to the phone company and seek advice from a consumer protection agency and/or a lawyer (BNetzA 2013d: Themenblatt Rufnummernmissbrauch, ibid)

<sup>100</sup> For the list see BNetzA Rufnummernmissbrauch Maßnahmenliste, [http://www.bundesnetzagentur.de/cln\\_1411/DE/Sachgebiete/Telekommunikation/Verbraucher/Rufnummernmissbrauch/Massnahmenliste/Massnahmenliste-node.html](http://www.bundesnetzagentur.de/cln_1411/DE/Sachgebiete/Telekommunikation/Verbraucher/Rufnummernmissbrauch/Massnahmenliste/Massnahmenliste-node.html)

<sup>101</sup> BNetzA 2013c: Bundesnetzagentur geht gegen angebliche Verbraucherschutzorganisation vor <http://www.bundesnetzagentur.de/DE/Sachgebiete/Telekommunikation/Verbraucher/UnerlaubteTelefonwerbung/Entscheidungen/131202Verbraucher.htm>

<sup>102</sup> In this case the old UWG law was still applicable which set the limit for fines to €50,000.

## Telephone spam<sup>103</sup>

Since 2014, the company Telecom Billing Ltd. has been trying to provoke call-backs using SMS and ping calls. Consumers who called back were said to have entered a contract for a phone “Flirt and Party Flatrate”. After that, consumers received 90 Euro bills for the service.

BNetzA obliged telephone providers to disconnect several hundred numbers. Also, invoicing and payment collection by the company itself and an invoicing company working for it were banned. BNetzA advises consumers not to react to SMS from senders that they cannot identify.

## Fax spam case<sup>104</sup>

In 2011, consumers received fax newsletters containing stock exchange information (“Swiss Money Report”). The faxes always included a recommendation to buy particular shares whose value, allegedly, would soon rise. According to the complaints received by the BNetzA, these fax newsletters were sent out several times a week. Foreign phone numbers were always given as contact numbers. As the sending often happened during the night, consumers with one line only for telephone and fax were particularly disturbed by the ringing.

The TKG allows the BNetzA to intervene first and foremost when national numbers are unlawfully used. In such cases it can order the network operator in whose network the number is activated to deactivate the number. This is not possible, however, in relation to foreign network operators.

Even in conjunction with various foreign regulatory authorities it had not been possible to identify the originator or to prevent the unsolicited faxes from being sent out on such a large scale.

The BNetzA, in a test case, ordered connections to and from these numbers to be blocked. The technological feasibility of this had been examined beforehand. The majority of network operators took then steps to prevent incoming connections from the foreign numbers in question.

## What the BNetzA cannot do

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<sup>103</sup> BNetzA (2014e): Rufnummernmissbrauch - Aktuelle Hinweise - Bundesnetzagentur geht weiter gegen „Flirt und Party Flatrate“ der Telecom Billing Ltd vor.  
<http://www.bundesnetzagentur.de/DE/Sachgebiete/Telekommunikation/Verbraucher/Rufnummernmissbrauch/AktuelleHinweise/AktHinw2014/Untersag2TelecomBill.html>; BNetzA (2014c): press release - Bundesnetzagentur geht gegen SMS-Fallen vor.  
[http://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2014/140919\\_MassnahmeTelecom.html](http://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2014/140919_MassnahmeTelecom.html)

<sup>104</sup> BNetzA 2011: BNetzA takes action against fax spam.  
[http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/PressReleases/2011/11\\_1025FaxSpamSwissMoneyReport.pdf?\\_\\_blob=publicationFile&v=3](http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/PressReleases/2011/11_1025FaxSpamSwissMoneyReport.pdf?__blob=publicationFile&v=3)

The BNetzA is limited by both practical and legal factors. On the practical side, it can only act in cases of phone number misuse if it identifies a phone number and the person using the number. If no number was given, for example in the case of email spam or in cases where the line identification is successfully restricted,<sup>105</sup> the BNetzA cannot become active.

On the legal side, the BNetzA can only become active in relation to some form of phone number misuse, e.g. in non-electronic marketing letters, wrong information on calling prices.<sup>106</sup>

Furthermore, the BNetzA is only responsible for administrative proceedings, not for criminal procedures. If both an administrative offence and a criminal offence are being suspected, the latter has priority.<sup>107</sup> The Agency is not responsible for the acceptance of criminal complaints. This is especially relevant for scam cases like Phishing, where the BNetzA is not able to become active.<sup>108</sup>

Also, the BNetzA cannot represent consumers in civil law cases in court or give any legal advice. Consumers should seek help from a lawyer or consumer protection agencies.<sup>109</sup>

Internationally, both practical and legal factors lead to limits. The BNetzA has no access to information on phone numbers that were distributed from outside Germany, and it is not allowed to order their deactivation.<sup>110</sup>

## Advice and technical support for consumers

### *Information on calling numbers*

Everyone with a rightful interest has the right to ask the BNetzA in written form for the name and the address of a person who received a phone number from the BNetzA.<sup>111</sup> The BNetzA distributes numbers for premium services (0)900, mass traffic services (0)137, service numbers (0)180 and information services 118.<sup>112</sup>

BNetzA is not able to identify restricted phone numbers. The consumer has the right to get a trap and trace device installed by their network provider, if she is a victim of

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<sup>105</sup> The BNetzA has no right to get information on call detail records from network providers and is therefore not able to identify the number or the caller if the line identification is restricted (BNetzA 2013e: Themenblatt unerlaubte Telefonwerbung, *ibid*).

<sup>106</sup> BNetzA 2014e: Themenblatt unerlaubte Telefonwerbung, *ibid*.

<sup>107</sup> § 21 Gesetz über Ordnungswidrigkeiten (OWiG), see also BNetzA 2013: Informationsblatt Rufnummernmissbrauch

<sup>108</sup> BNetzA 2013e: Themenblatt unerlaubte Telefonwerbung, *ibid*.

<sup>109</sup> *ibid*.

<sup>110</sup> BNetzA 2013: Informationsblatt Rufnummernmissbrauch

<sup>111</sup> § 66i I TKG

<sup>112</sup> BNetzA 2014g – Service – Ankunftsansprüche zu Rufnummern.

[http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Unternehm\\_en\\_Institutionen/Nummerierung/Rufnummern/Serviceheft.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Unternehm_en_Institutionen/Nummerierung/Rufnummern/Serviceheft.pdf?__blob=publicationFile&v=2)

threatening or nuisance calls.<sup>113</sup> The service will be charged though and can only be used for future calls.

A person who is receiving unsolicited goods or services or marketing information and has the right to cessation<sup>114</sup>, may have under certain circumstances the right to get information about the name and the address of the responsible sender from the involved service provider<sup>115</sup>. The provider can charge the customer for this service<sup>116</sup>.

### **Information on current cases**

On the website of the BNetzA, customers can find information on current cases of phone number misuse and unlawful marketing calls.

In September 2014, for example, the BNetzA warned about calls that show on the display the number 110 (number for emergency calls in Germany). The BNetzA states that the police never uses the number 110 when calling and advises consumers not to give any information to the callers. The callers identified themselves as policemen and the calls supposedly had a fraudulent background<sup>117</sup>.

### **Robinson List**

The Robinson List collects data on consumers who do not wish to receive marketing information. At least respectable companies compare their lists for marketing campaigns with the Robinson List and remove customers who are on the latter from their list<sup>118</sup>. This is an additional protection on top of the opt-in arrangements discussed above.

### **Help from Consumer Advice Centres**

Consumer Advice Centres provide information on how consumers can protect themselves against unwanted calls and how to fight the consequences of such calls. They among other things provide sample letters for expressing disagreement with the use of personal data for marketing purposes or for the defence of unjustified claims and give advice with regard to the cancellation right<sup>119</sup>. They also provide legal advice, but only against the payment of a fee<sup>120</sup>. They also accept consumer

<sup>113</sup> § 101 TKG

<sup>114</sup> § 1004 I 2 BGB (Civil Law Code) [https://www.juris.de/purl/gesetze/\\_ges/BGB](https://www.juris.de/purl/gesetze/_ges/BGB), §§ 3 and 7 UWG

<sup>115</sup> § 13a Unterlassungsklagengesetz <http://www.gesetze-im-internet.de/uklag/>; BNetzA 2014g – Service – Ankunftsansprüche zu Rufnummern *ibid.*

<sup>116</sup> § 13a Unterlassungsklagengesetz; [BNetzA 2014g – Service – Ankunftsansprüche zu Rufnummern](#)

<sup>117</sup> BNetzA 2014f: Rufnummernmissbrauch – Aktuelle Hinweise - Bundesnetzagentur warnt vor betrügerischen Anrufen unter Übermittlung der Notrufnummer 110

<http://www.bundesnetzagentur.de/DE/Sachgebiete/Telekommunikation/Verbraucher/Rufnummernmissbrauch/AktuelleHinweise/AktHinw2014/NotRufnr110.html>

<sup>118</sup> Ssee <https://www.robinsonliste.de/>

<sup>119</sup> *ibid.*

<sup>120</sup> For example in Hessen the fee is 20 Euro for 15 minutes.

complaints<sup>121</sup> and conduct surveys with the aim of identifying shortcomings in the legislature and advocating improvements. If complaints about marketing calls accumulate, they might also sue the responsible companies.<sup>122</sup>

### ***Going to Court***

As already mentioned, recipients of nuisance calls (or faxes/emails/ SMS) that represent an unlawful act in the sense of §3 UWG and §7 UWG have the right to correction and, if there is a risk of repetition, to cessation.<sup>123</sup> They also have the right to financial compensation in accordance with § 823 BGB. Individuals can get support for civil law cases from attorneys and consumer protection agencies.

### ***Technical Means***

#### **Terminal Device and Telephone Provider**

Outgoing calls: It is possible to block outgoing calls to certain numbers or number blocks manually on the telephone system (information on how to do this can be found in the instruction manuals).<sup>124</sup> Customers have also the right to ask their network providers to block the selection of certain numbers, for example high priced (0)900 premium services.<sup>125</sup>

Incoming calls: For some terminal devices it is possible to block incoming calls from personally selected numbers.

Furthermore, Deutsche Telekom, the biggest telecommunications company in Germany, offers two kinds of security packages which make it possible to block unwanted incoming calls (even if the line identification is restricted). With the **Security Package Plus** (Sicherheitspaket Plus)<sup>126</sup>, currently priced from € 2.99 per month, it is possible to block up to 20 numbers or alternatively to select up to 30 numbers that are allowed to call (any other number will be blocked). It is also possible to reject incoming calls using a certain key combination. The rejected number will then be unable to call a second time. The **Security Package Complete S** (Sicherheitspaket Komplett S<sup>127</sup>, currently priced from € 1.95 per month and also available in M and L for more devices) provides customers with the possibility to block unwanted calls and SMS on their smartphones (among many other protective measures for mobile devices such as anti-virus software).

<sup>121</sup> see <https://www.vz-nrw.de/SES17790973/doc35746941A.html?papalinkunid=661571A> [13.11.14]

<sup>122</sup> Verbraucherzentrale Nordrhein-Westfalen 2014

<sup>123</sup> § 1004 BGB (Bürgerliches Gesetzbuch, German Civil Code).

[https://www.juris.de/purl/gesetze/\\_ges/BGB](https://www.juris.de/purl/gesetze/_ges/BGB)

<sup>124</sup> BNetzA 2013d: Themenblatt Rufnummernmissbrauch, ibid.

<sup>125</sup> § 45d II TKG

<sup>126</sup> <http://www.telekom.de/privatkunden/zuhause/zubuchoptionen/telefonie-optionen/-/sicherheitspaket-plus>

<sup>127</sup> <http://www.telekom.de/privatkunden/zuhause/zubuchoptionen/internet-optionen/sicherheit/sicherheitspaket-komplett-s>



### **Recorded Message “Frank geht ran”**

The idea behind “Frank geht ran” (“Frank is answering”) is that consumers who are worried that they will get nuisance calls if they state their own phone number when filling out a form can instead fill in a number that belongs to an answering machine (Frank). The machine will then answer unwanted calls with a recorded message saying that the customer does not wish to receive marketing calls.<sup>128</sup>

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<sup>128</sup> <http://www.frank-geht-ran.de/>

## India and Pakistan

By Ms. Nabiha Mahmood, Director (Consumer Protection Directorate), Pakistan Telecommunications Authority (PTA).

### The situation in India and Pakistan

These neighbouring countries are covered jointly because their situations have much in common, although also some significant differences. Common features of their situations include:

- In both countries, nuisance calls and texts are termed *unsolicited (commercial) communication (UCC)* and are predominantly texts rather than calls (mobiles are widespread, with fixed lines under 4% of total telephone connections).
- The regulatory regimes of both the countries rely on an opt-out approach for receipt of telemarketing communication, through explicit consumer request for the Do Not Call Register/420 call blocking services (in Pakistan) and the National Commercial Communications Customer Preference Registry<sup>129</sup> (NCCCP, in India).
- Technical measures to control unsolicited texts in both the countries include (either implemented already or in prospect):
  - a. Frequency based filtering to combat generation of bulk SMS
  - b. Dedicated short codes to report UCC, and also for inclusion in the registers (1909 for India; 9000 and 3647 (“DNCR”) for Pakistan respectively)
  - c. Blocking of bulk SMS routed outside the country and then back in again (with the aim of bypassing the rules).
- Both countries have telemarketer registration schemes, but the majority of UCC is from unregistered telemarketers, who exploit SMS aggregator/bundle SMS packages.

In 2007, the Telecom Regulatory Authority of India (TRAI) estimated that telemarketers made more than 10 billion calls in India every year, many of which are unsolicited and seen as a nuisance. India has experienced far more consumer complaints, and accordingly regulations and their enforcement have been more developed there to date, than in Pakistan. Accordingly, this overview focuses on India, noting features from Pakistan of particular interest.

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<sup>129</sup> The National CCCPR Portal is at <http://www.nccptrai.gov.in/nccpreistry>.

Figure 7 summarises registrations to the Indian National Do Not Call Register (NDNCR) and its successor the NCCCP, and also telemarketer registrations. Complaints about UCC in India to date are summarised in Figure 8. In a TRAI survey, 87% of consumers stated that they had received UCC but had not complained about them to their service providers, even though complaining has been made quite convenient both online and through a dedicated short code 1909.

	2007	2008	March 2010	March 2012	October 2014
Subscribers registered to NDNCR/NCCCP		18 million	66 million	162 million	222 million
Percentage of total telecom subscriber base Registered		5%	10.6%		17.5%
Number of registered telemarketers	19,163		27,292		8,190

**Figure 7 Consumer and telemarketer registrations in India<sup>130</sup>**

Of the 18 million registered subscribers after one year of operation of the NDNCR, around 40% were from the metropolitan areas of Delhi and Mumbai. Significant numbers of registered subscribers also came from Maharashtra, Gujarat, Karnataka, Andhra Pradesh and Punjab.

Period	No. of complaints	Average complaints per month
To March 2010	340,231	About 56,000
April 2010-March 2011	569,448	47,454
2011-12 (27.09.2011 to 31.03.2012)	83,003	13,833
2012-13	427,041	35,588
2013-14	397,772	33,147
2014-15 (to 31.10.2014)	58,446	8,349

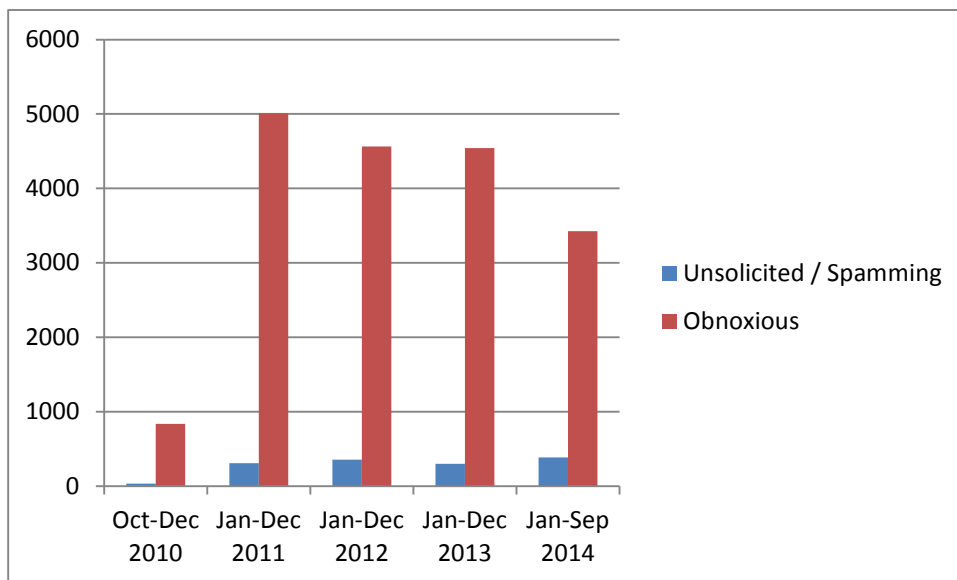
**Figure 8 Consumer complaints about UCC in India<sup>131</sup>**

In the Pakistan Telecommunications Authority (PTA), a complaints handling function was established in 2008. Obnoxious, unsolicited/nuisance/spamming and fraudulent

<sup>130</sup> Most Indian statistics quoted in this paper were first published in responses to Parliamentary Questions recorded on the Lok Sabha website [www.loksabha.nic.in](http://www.loksabha.nic.in), and can be found through search on “unsolicited” in Lok Sabha XV and Lok Sabha XVI at <http://164.100.47.132/LssNew/psearch/qsearch16.aspx>.

<sup>131</sup> See previous footnote.

calls or SMS formed a significant part of complaints. “Obnoxious” meant communications that were harassing but not commercial or promotional. Obnoxious calls to mobile phones were the most troublesome, as can be seen in Figure 9. They remained fairly stable over a period in which teledensity increased from 60 to 76 per 100, suggesting that PTA’s regulatory initiatives had useful effects. In fact, in April 2013 PTA led ITU Asia-Pacific Centres of Excellence Online Training on *Consumer Protection & Protection from Spamming, Obnoxious, Fraudulent & Unsolicited Communication*, sharing its experiences described below with 70 participants from 19 countries.



**Figure 9 Complaints to PTA about unwanted calls to mobiles**

In Pakistan, for the time being, the role of the Do Not Call Register is being filled by the operators’ blocking services (as explained below, accessed through code 420). At October 2014, there was a total of well over 800,000 active subscribers for 420 across the five cellular networks. There are 805 registered call centres in Pakistan (mainly in the largest cities), plus an unknown number of unregistered call centres.

## Rules in India and Pakistan

### India

Following persistent complaints, TRAI responded to consumers’ concerns through a series of regulations and directions, the first in 2007 and amended in 2008, while the second<sup>132</sup> was promulgated in 2010, followed by fifteen amendments over

<sup>132</sup> TRAI (2010), *Telecom Commercial Communications Customer Preference Regulations*. Includes Explanatory Memorandum. [http://www.trai.gov.in/content/VerReg/42\\_0\\_7.aspx](http://www.trai.gov.in/content/VerReg/42_0_7.aspx)

approximately 20 months<sup>133</sup>. Technical measures were also adopted together with enforcement action.

The *Telecom Unsolicited Commercial Communications Regulations of 2007* and its 2008 amendment introduced:

- Registration of telemarketers.
- A National Do Not Call Registry (NDNCR), with enrolment procedures.
- Private Do Not Call Lists.
- Reporting requirements on access providers and telemarketers, and subsequent penalization of telemarketers found to be violating the regulations.
- Financial disincentives for non-compliance with regulations by the telecom service providers.

Following parliamentary questions and public debate and consultation, the *Telecom Commercial Communications Customer Preference Regulations, 2010*:

- Replaced previous Do Not Call registers (both private and national) by Customer Preference Registers, offering (a) a fully blocked category (including all previous Do Not Call registrations); and (b) partially blocked categories (offering choices to receive messages from 7 separate market sectors), with the dedicated short code 1909 for registration.
- Introduced blacklisting of telemarketers for violations, with disconnection of services by all networks of individual subscribers using telecom services for promotional purposes.
- Dedicated number ranges for telemarketing (140 series to be allocated to mobile telemarketers; the Department of Telecommunications (DoT) has yet to allocate a series for fixed line), with a separate number series for telemarketers for voice calls (to facilitate identification of telemarketing voice calls made by unregistered telemarketers).
- Restricted sending more than 200 SMS per SIM Per Day, 6000 SMS per SIM per Month<sup>134</sup> (but the restrictions are lifted for registered telemarketers).
- Imposed a mobile termination charge of Rs. 0.05 per promotional SMS sent by telemarketers.

Other significant measures taken by TRAI in the form of directives include:

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<sup>133</sup> See 2012 Consultation paper on *Review of Telecom Unsolicited Commercial Communications Regulations, 2010* at [http://www.trai.gov.in/WriteReaddata/ConsultationPaper/Document/Consultation%20Paper%20on%20UCC3\\_8\\_12.pdf](http://www.trai.gov.in/WriteReaddata/ConsultationPaper/Document/Consultation%20Paper%20on%20UCC3_8_12.pdf) and stakeholder comments (especially those by AUSPI, Bharti Airtel, Aircel and Meru Consultants) at [http://www.trai.gov.in/Content/Consultation\\_ViewCommentDescription/660\\_23\\_ViewCommentDescription.aspx](http://www.trai.gov.in/Content/Consultation_ViewCommentDescription/660_23_ViewCommentDescription.aspx).

<sup>134</sup> The Honourable High Court of Delhi in the case of *Telecom Watchdog Vs Union of India & Another* in a judgment dated 13 July 2012, quashed the directions of the Authority fixing the ceiling of 200 SMSs per SIM per day, on the premise of violating the freedom of speech and expression.

- Stopping UCC sent through international routes.
- Economic deterrents to sending more than 100 SMSs per SIM per day<sup>135</sup>.
- Mandating signature verification of bulk SMSs.
- Enhancing consumer awareness.
- Obtaining an undertaking from subscribers against sending commercial SMSs.

These regulatory interventions have helped but not solved the problem.

## Pakistan

Following a consultation<sup>136</sup>, the *Protection from Spamming, Unsolicited, Fraudulent and Obnoxious Communications Regulations 2009*<sup>137</sup> placed obligations on service providers to take measures against unwanted communication to telecom consumers, leading to standard operating procedures (SOPs) specifying technical control arrangements in service providers' networks. SOPs were formulated in 2010 (and amended in 2011) in the following areas:

- Anti-spam filters at mobile operators' networks to check generation of bulk SMS (the current filter is placed at 200 SMS/15 minutes in real time and 3000 SMS/24 hours (based on mobile operator activity) in offline analysis).
- Do Not Call Registers (DNCR), currently run by each cellular mobile operator. Operators were asked to actively canvass all customers (by SMS) inviting them to join the DNCR by replying "reg" (or, if already on the register, to leave it by sending the SMS message "unreg").
- Regularizing content based services, with penalties for violating DNCR guidelines.
- Complaint handling procedures to report on net/off net nuisance calls/SMS, with reporting mechanism through the dedicated short code 9000.

In response to the Regulations and SOPs, cellular mobile telecom operators have also:

- Set up a **common short code 3627** (DNCR) for opting in to/out of the DNCR.

<sup>135</sup> Service providers may only offer discounted rates for the first 100 SMS in a given day/time. Any SMS that is generated above this 100 shall be charged at normal/default rates. This is intended to discourage bundle packages that were earlier offering 500, 1000 and even in some cases 5000 SMS at discounted rates. Unregistered telemarketers make use of such bundle packages to generate thousands of SMS in a given day/time at discounted rates.

<sup>136</sup> PTA (2008). *Consultation Paper on spam, unsolicited and obnoxious calls*.  
[http://www.pta.gov.pk/media/paper\\_spam\\_090508\\_1.pdf](http://www.pta.gov.pk/media/paper_spam_090508_1.pdf)

<sup>137</sup> *Protection from SPAM, Unsolicited Fraudulent and Obnoxious Communication Regulations at*  
[http://www.pta.gov.pk/media/pro\\_spam\\_reg\\_09.pdf](http://www.pta.gov.pk/media/pro_spam_reg_09.pdf). See also the relevant press release *PTA Issues Regulations for Unsolicited and Obnoxious Communications at*  
[http://www.pta.gov.pk/index.php?option=com\\_content&task=view&id=1300&catid=92&Itemid=739](http://www.pta.gov.pk/index.php?option=com_content&task=view&id=1300&catid=92&Itemid=739)

- Provided **call/SMS blocking facility** at subscriber as well as network level at a clearly defined cost. The facility was originally offered to control obnoxious communication, but in practice, any subscriber opting for it can manage his or her own Black List / White List for all purposes, using the common short code 420.
- Established a **white list** of short codes approved by the Authority; any short code outside the white list is blocked at the cellular operator's network. The aim is to restrict communication from unauthorized short codes that may be used for promotional activities.
- Blocked any SMS communication containing fraudulent strings (e.g. \*\*\*, ###), which had led to any key push resulting in loss/transfer of credit from complainants' accounts. A Peer to Peer Handshake facility before Balance Transfer, requiring positive user confirmation of transactions by pressing specific keys in sequence, was implemented in order to curb illegal transfer of money.

Recently, complaints have been trickling in about Interactive Voice Response messages when the consumer responds to an incoming call from an unknown telephone number. The situation is further complicated when incoming caller identification is masked or altered, particularly when such activity is being conducted through Internet Protocol (IP) platforms. The current regulatory regime offers no protection against such an activity.

Regulations on the issue are under review<sup>138</sup>, looking among other things at (i) web generated nuisance calls/SMS, (ii) obligations towards white listing of IP addresses which could alone be accorded access to service providers' networks in order to curb nuisance communication, (iii) obligations towards "Caller ID Restrict" and, (iv) review of value added services, particularly the bulk packages being offered by the telecommunication companies with potential to be misused for generation of nuisance communication.

## Enforcement

Despite the unfavourable balance of unregistered to registered telemarketers, the level of complaints to TRAI has fallen. Figure 10 shows statistics of TRAI's enforcement measures aiming to control UCC.

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<sup>138</sup> PTA (2012). *Draft - Protection from Spam, Unsolicited, Fraudulent and Obnoxious Communication Regulations*. [http://www.pta.gov.pk/media/pro\\_spam\\_fraud\\_obnx\\_reg\\_070512.pdf](http://www.pta.gov.pk/media/pro_spam_fraud_obnx_reg_070512.pdf)

Enforcement action	Number
Telephone disconnections of unregistered telemarketers	525,104
Additional disconnections on account of UCC sent (proactive/call back numbers/entities)	735,803
Notices sent to telemarketers	413
Total financial deduction from security deposits (equivalent to £183,673)	Rs Crore 1.8
Telemarketers blacklisted	19
Service providers on which financial disincentive imposed	13
Amount collected from service providers (equivalent to £727,475)	Rs Crore 7.1
Unregistered telemarketers blacklisted for 2 years	240,222

**Figure 10 TRAI enforcement actions, 27/09/2011 to 31/10/2014**

In 2010, the NDNC Registry was being accessed daily by around 2000 telemarketers for scrubbing their calling list. However, a very large number of telemarketers still had not registered with DoT, including direct sales agents (DSAs), leading to unsolicited SMSs being received with sender identification not proper to registered telemarketers. This is not surprising in view of the cost of telemarketer registration, which also leads to termination charges on promotional SMS and the need to observe the National Customer Preference Register; while unregistered telemarketers are still welcomed by access providers, and can undercut registered entities when offering services to agencies.

By 2010, financial disincentives of Rs. 49,000 (£500) had been imposed on eight service providers for violation of the regulations. From 2011 to October 2014, as shown in Figure 10, this figure jumped to thirteen service providers being penalized with imposition of financial disincentives of approximately Rs. 7,12,92500 (£727,475). But TRAI points out that this is still very low compared with the revenues that telemarketers pay to service providers, and therefore service providers avoid disconnecting telemarketers even in violation of UCC regulations.

Service providers also claim that SMS are sent through Short Message Service Centres which do not generate Call Detail Records, making monitoring impossible. Even where service providers clamp down on telemarketers for violation of regulations, with a financial penalty, they are still most likely profiting unduly from UCC. No advantage is passed on to the consumer who is actually suffering from UCC.

After termination charges were set at five paisas per promotional SMS<sup>139</sup>, it was noticed that UCC SMS were getting delivered to consumers through international routes with alphabetic headers, and the Indian country code +91 as prefix of the incoming SMS. TRAI issued a directive on 20 January 2012, under which all access

<sup>139</sup> The case for this, including commercial implications for different players, is discussed in the industry responses to TRAI's 2012 consultation.



providers and International Long Distance (ILD) operators were obliged to block all international SMS incoming with alphabetic identifiers or with the +91 prefix. International traffic was allowed only from carriers with whom the ILD and access providers had a valid Service Level Agreement (SLA). Subsequently, the SMS Aggregator Association formulated a Code of Conduct according to which bulk SMS over international routes was not allowed<sup>140</sup>. Data from January 2012 (when the directive was issued) to February 2013 reflects a considerable fall in incoming SMS to consumers in India through international routes, as shown in figure 11.

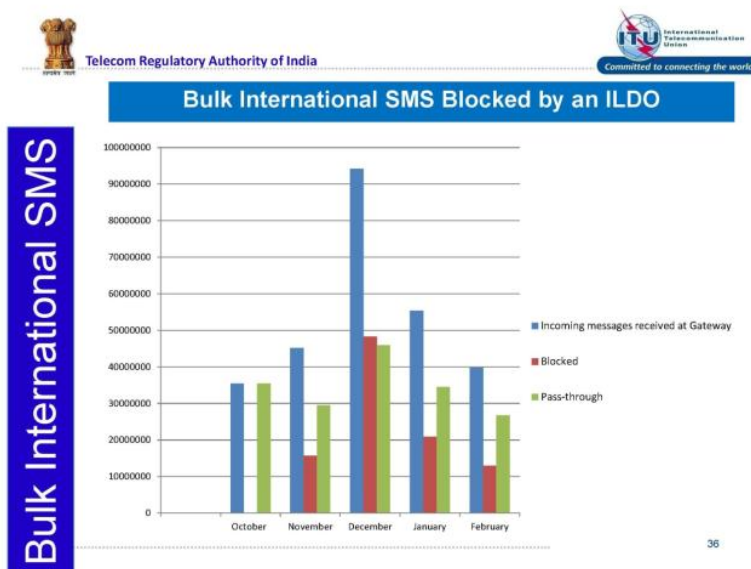


Figure 11 Reduction in bulk international SMS<sup>141</sup>

Another initiative worth mentioning here is regulator engagement with industry to tackle unregistered telemarketers sending UCC through “modem farming”. The technique is a GSM messaging solution allowing users to host multiple SIM cards in a single modem. By identifying the numbering series through consumer complaints, TRAI was able to isolate the operator and network source of UCC. This led to a large number of calling lines being disconnected and in turn to a fall in complaints from mobile subscribers about UCC from unregistered telemarketers, as shown in Figure 12.

<sup>140</sup> [http://www.iamai.in/PRelease\\_Detail.aspx?nid=2440&NMonth=1&NYear=2012](http://www.iamai.in/PRelease_Detail.aspx?nid=2440&NMonth=1&NYear=2012) Last Accessed on October 20, 2014.

<sup>141</sup> Source: Ravi, A Robert J, Advisor (QoS), TRAI (2012), *Efforts in Protection of Consumers interest*. Presentation. [http://www.itu.int/ITU-D/asp/CMS/Events/2012/ITP2012/Rober\\_Ravi\\_Commercial\\_Communication.pdf](http://www.itu.int/ITU-D/asp/CMS/Events/2012/ITP2012/Rober_Ravi_Commercial_Communication.pdf)

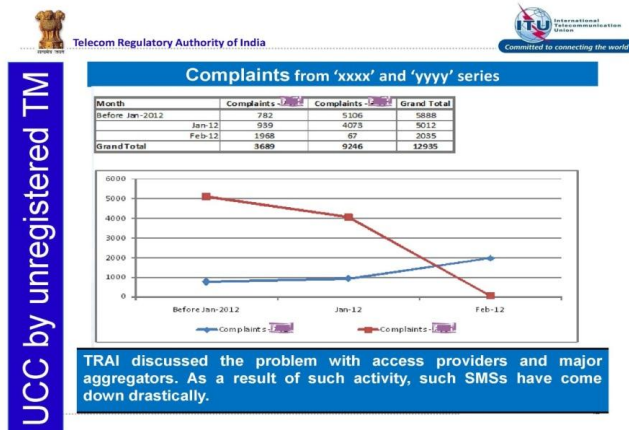


Figure 12 Fall in complaints about SMS from unregistered telemarketers<sup>142</sup>

In Pakistan, a total of 625,606 mobile subscriptions have been blocked by anti-spam filters (across the five cellular networks).

## Advice and technical support for consumers

TRAI ensured that the dedicated short code 1909 for NDNC Registry would be publicised on a large scale. All Service Providers were obliged to:

- Include the option of registering with the NDNC Registry in the application form at the time of sale of new telephone/ mobile connections.
- ensure that all telephone bills, Customer Service Centres, authorised recharge centres, hoardings and websites have the following slogan prominently displayed: "To avoid unwanted telemarketing calls, register your telephone number in NDNC Registry – Call 1909 or Send SMS "START DNC" on 1909". A similar though shorter message was to be included in every recharge confirmation.

PTA ran a media campaign to make the public aware of the new arrangements. Industry also gave financial support to publication of advertisements on misuse of telecom services. Some samples of published print advertisements are provided. These advertisements were published both in English and in the national Urdu language. Complaints may be made through a form on the regulator's website<sup>143</sup>, or if preferred, by telephone or post.

<sup>142</sup> Source: Robert Ravi, *ibid*.

<sup>143</sup> Complaints form:

[http://www.pta.gov.pk/index.php?option=com\\_content&view=article&id=1590&Itemid=760](http://www.pta.gov.pk/index.php?option=com_content&view=article&id=1590&Itemid=760)

## Norway

Already in 2007, there was unease in Norway about telemarketing calls. In a survey report that year for Norway's National Institute for Consumer Research<sup>144</sup>, 92% of Norwegians expressed negative attitudes towards telemarketing - higher than ever before. One reason for this may be the fact that 84% of the 1.5 million Norwegians who had asked to be put on the (then voluntary) do-not-call list had received calls anyway – a high figure given that Norway is a small economy, and Norwegian is not widely spoken around the world.

Following complaints about unwanted marketing calls, aggressive telephone sales techniques and scams, the Norwegian parliament passed the Marketing Control Act of 2009<sup>145</sup>. This gave consumers the right to opt out of telemarketing by registering on the Central Marketing Exclusion Register (which already existed). Opting out can apply to all marketing calls, or only to calls for commercial purposes, while permitting charitable fund-raising calls. There are exceptions for existing business relationships. Telemarketing calls are allowed only between 9am and 9pm, Mondays to Fridays.

- Under another law<sup>146</sup>, a sales offer made over the phone must be confirmed in writing, and accepted in writing by the consumer, to make a binding agreement. These requirements do not apply if the phone call is from a charitable organisation, or if the phone call concerns the sale of newspaper subscriptions.

Research by the National Institute of Consumer Research<sup>147</sup> has found, looking at consumers' experiences:

- Telemarketing and phone calls are unpopular - telemarketing still tops complaints statistics to the Consumer Ombudsman (although they are very low by the standards of other countries studied, at around 1000 a year for 2.3m households, or 0.04 per 100 households<sup>148</sup>).

<sup>144</sup> Lavik, Randi and Brusdahl, Ragnhild (2007), *Telefonsalg og reklame - til nytte for forbrukeren?* SIFO, Oslo. [http://www.sifo.no/files/file71021\\_prosjektnotat\\_2007\\_-\\_2\\_-\\_telefonsalg\\_og\\_reklame\\_-\\_web.pdf](http://www.sifo.no/files/file71021_prosjektnotat_2007_-_2_-_telefonsalg_og_reklame_-_web.pdf)

<sup>145</sup> The Marketing Control Act 2009 is available in English at <http://www.forbrukerombudet.no/id/11039810.0>

<sup>146</sup> The Act relating to the duty of disclosure regarding and right to cancel distance contracts and off-premises sales (the Cancellation Act) (Section 10) – in force from June 2014. (Implementation of Directive 2011/83/EU relating to consumer rights). Available In Norwegian at <https://www.regjeringen.no/globalassets/upload/bld/frl/angrerettloven/lov.pdf>

<sup>147</sup> SIFO, the National Institute for Consumer Research, has carried out a five-year project evaluating telephone sales. Its published reports are available at: <http://www.sifo.no/page/preview/preview/10060/76966.html>

<sup>148</sup> Figure 5.1 in the most recent SIFO report.

- In 2014, 58% of consumers who had registered not to receive telemarketing calls had still received calls from companies of which they were not customers, during the last 12 months, while 29% said they had had calls from charities although they had registered not to get such calls.
- The requirement of written acceptance is largely met, while submission of a withdrawal form did not seem to occur to the same extent.
- In June 2013, 99% of people on the register had opted out of calls from businesses and 90% from calls from charities.
- People prefer getting inquiries from companies they are customers of, to getting calls from charities they already contribute to.
- There is a lack of knowledge about how to opt out, and who to complain to.

The National Institute of Consumer Research also talked to call centre employees and found: call centres:

- Call centres are diverse workplaces, with 45% of employees working part-time, and roughly half of employees being women. Employees are predominantly young.
- Call centres provide a variety of work, including telesales, support, technical solutions for enterprises, etc. There is also a great variety of products sold, requiring varying degrees of expertise.
- Call centres which are located in rural areas can be an important workplace for the municipality.
- Call centres like the requirement of written acceptance, claiming this was a blessing for the industry.

By May 2014, there were over 2m registrations opting out of telemarketing by fixed or mobile phones, with 51% of adults having registered numbers.

In the 2013 consumer survey, people who had not registered were asked why. They answered:

- I get few telemarketing calls – 58%
- I don't know how to register – 40%
- I haven't got around to it – 25%
- I welcome telemarketing calls because of the great deals – 6%
- I welcome telemarketing calls so I can get things that are otherwise difficult to get where I live – 4%

The Ministry of Children, Equality and Social Inclusion will review the requirements of telemarketing, probably in spring 2015, raising the following questions<sup>149</sup>:

- 1) How to design the system for avoidance of telemarketing – for example, whether to keep the existing opt-out system, and if so, whether to keep its existing exceptions.
- 2) Whether to keep the requirement of a written confirmation to complete a contract after telemarketing, and if so, whether to keep the exceptions.

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<sup>149</sup> Email dated 15.12.2014 to the author from Hilde Merethe Berg, Deputy Director General, Norwegian Ministry of Children, Equality and Social Inclusion.

## United States of America

### Situation in the USA

The USA appears to have led the world in the appearance of the nuisance call problem, and also to be ahead in various approaches to combating the problem. Reasons for this may include:

- A large population of consumers with telephones and disposable income, leading to economies of scale and scope for telemarketers (and also for enforcement agencies).
- A nationwide network of enforcement agencies, including “boots on the ground” in every state as well as significant lawyer-power at the Federal level.
- A large technical community which can be incentivised to help.

Early history is summarised by the National Consumer Law Center<sup>150</sup> as follows:

The TCPA [Telephone Consumer Protection Act 1991] was passed as a direct response to the explosion of abuses of telephone and facsimile technology in the 1980s and 90s. These abuses included the use of autodialers to clog telephone lines with unwanted calls, “robocalls” that leave unsolicited or unwanted, pre-recorded messages, and “junk faxes” that consume the recipients’ paper and ink and interfere with the transmission of legitimate messages. As the Supreme Court explained it: “[v]oluminous consumer complaints about abuses of telephone technology – for example, computerized calls dispatched to private homes – prompted Congress to pass the TCPA.”

Complaints relating to the TCPA, predominantly to do with telemarketing, account for a high proportion of consumer complaints processed by the Federal Communications Commission (FCC) – for example, in April to June 2014, nearly 80% of around 75,000 complaints received in the FCC’s “top six informal consumer complaints topics”<sup>151</sup>. But complaints to the FCC pale by comparison with those to the Federal Trade Commission (FTC), illustrated in Figure 13, which shows annual complaints of almost 4m in 2012 (note that the 2013 figures were only for the first half year).

It is noteworthy that complaints exceed 1% of registrations, much higher than in the UK, though we do not know how far this reflects a higher willingness to complain and how far the size of the problem, since data on the actual incidence of nuisance calls

<sup>150</sup> National Consumer Law Center (2014). *Re: Notice of Ex Parte Presentation, CG Docket No. 02-278*. Letter to FCC. <http://apps.fcc.gov/ecfs/document/view?id=7521254507>

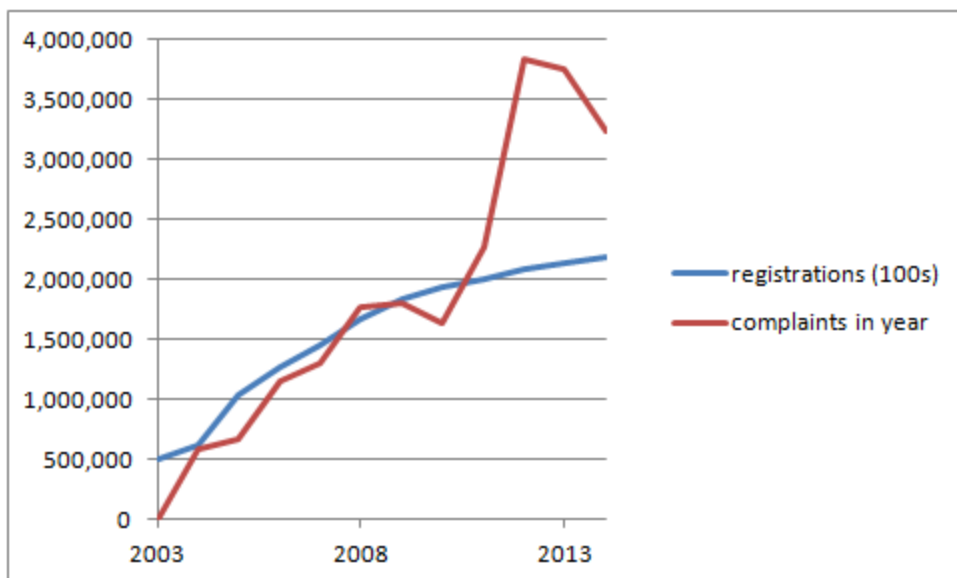
<sup>151</sup> FCC. *Summary of Top Six Consumer Informal Complaint Subjects Processed by the FCC's Consumer and Governmental Affairs Bureau, Second Quarter - Calendar Year 2014*. <http://transition.fcc.gov/cgb/quarter/complaints-report-Q2-2014.pdf>

in the USA are not systematically available. Those familiar with complaints patterns feel that older consumers may be systematically targeted, and that younger consumers are abandoning traditional landlines. This is consistent with a survey<sup>152</sup> which showed that 68% of respondents aged 55+ had signed up to the DNCR compared to only 30% of those aged 18-34. Registration was also higher than average among higher income groups.

However a Pew survey in 2012<sup>153</sup> found significant incidence of nuisance calls among mobile phone users:

- 68% of cell owners received unwanted sales or marketing calls at one time or another; 25% of cell owners encountered this problem at least a few times a week or more frequently.
- Some 79% of cell phone owners said they used text messaging on their cells, and 69% of texters said they got unwanted spam or text messages, 25% of them at least weekly.

Many US cellphone users pay to receive calls, adding insult to injury.



**Figure 13 US Do Not Call registrations and complaints 2003-2014<sup>154</sup>**

In 2013, telemarketing emerged also as one of the fastest-growing areas for complaint from an annual survey of 40 consumer-facing agencies, covering all

<sup>152</sup> Consumer Federation of America (2013). *Consumers Very Confused About Their Rights with Telemarketers*. [http://www.consumerfed.org/pdfs/Consumer\\_Telemarketing\\_Rights.pdf](http://www.consumerfed.org/pdfs/Consumer_Telemarketing_Rights.pdf)

<sup>153</sup> Pew Research Center (2012). *Mobile Phone Problems*. <http://pewinternet.org/Reports/2012/Mobile-phone-problems.aspx>

<sup>154</sup> Source: *National Do Not Call Registry Data Book FY 2014*. <http://www.ftc.gov/reports/national-do-not-call-registry-data-book-fiscal-year-2014>

causes for complaint, carried out through the Consumer Federation of America<sup>155</sup>. The report comments:

- **A theme that emerged from the survey responses is the persistence of telemarketing abuses, despite the implementation of the national do-not-call registry, strict rules concerning robocalls, and other consumer protections.** We followed up with agencies to ask why, in the age of the Internet, telemarketing continues to be such a big problem.
- **Technology was cited as a major factor in telemarketing abuses.** Calls placed over the Internet (VoIP), often through proxy servers, can be made very inexpensively from anywhere in the world and are hard to trace; Caller ID spoofing software masks callers' names and numbers and enable them to pose as legitimate companies or agencies; prepaid cell phones are purchased anonymously to make calls and then disposed of; auto-dialers make it easy and efficient to reach millions of potential victims; and fraudsters use credit card account information stolen by hackers and other identity thieves to purchase toll-free numbers and other services they need.
- **Stepped-up telemarketing enforcement by the Federal Trade Commission, the Federal Communications Commission and the FBI is clearly needed.** That would probably require more resources given agencies' limited budgets and competing priorities. Close cooperation between federal, state and local agencies is also essential to investigate and prosecute these cases.

Marchex, a mobile advertising company, on the basis of 40 million calls worth of aggregated data from its Clean Call™ blocking technology for small businesses, claims<sup>156</sup> that “spam calls are growing – fast. The volume of detected and blocked calls jumped 162% from January 2013 to January 2014 and is on track to keep rising with the mass adoption of mobile phones”.

The problem has generated a great deal of interest among consumers and politicians. For example, the organisation *Californians against Telephone Solicitation*<sup>157</sup> has been publishing relevant “quotes of the week” since 1998. In Congress, the proposed Phone Scam Prevention Act of 2014<sup>158</sup>, whose provisions (targeting phone networks) are summarised in Figure , is the most recent of several pieces of legislation that have been introduced in attempts to combat it. Changes to

<sup>155</sup> *Consumer Federation of America & North American Consumer Protection Investigators 2013 Consumer Complaint Survey Report.*

<sup>156</sup> Marchex (2014). *Spam Phone Calls Cost U.S. Small Businesses Half-Billion Dollars in Lost Productivity, Marchex Study Finds.*

<http://investors.marchex.com/mobile.view?c=175199&v=203&d=1&id=1900647>

<sup>157</sup> Or CATS, whose website is at <http://www.stopjunkcalls.com/index.html>

<sup>158</sup> <https://www.congress.gov/bill/113th-congress/senate-bill/2956>



secondary legislation are more easily achieved, and over the years these have led to a modest strengthening of the level of consumer protection<sup>159</sup>.

**Phone Scam Prevention Act of 2014** - Amends the Communications Act of 1934 to require voice communications service providers to offer subscribers the option to designate a list of approved telephone numbers for which calls originating from those numbers are permitted to connect directly with the subscriber's telephone and other customer premises equipment.

Requires providers to ensure that any call for termination that is not from a number on the subscriber's list is processed according to the subscriber's preferences, including by limiting or disabling the ability of an incoming call to connect with the subscriber's equipment.

Exempts government and public interest calls from being subject to a subscriber's preferences.

Requires the Federal Communications Commission (FCC) to develop authentication standards for providers to validate caller information so that subscribers may obtain secure assurances of a call's origin, including the calling party's number and identification.

Extends the prohibition on the provision of inaccurate caller identification information to persons outside the United States if the recipient is within the United States.

Expands the definition "caller identification information" to include text messages.

Revises caller identification requirements to make standards applicable to voice communications using resources from the North American Numbering Plan (currently, the requirements apply to telecommunications or IP-enabled voice services).

**Figure 14 Summary of the proposed Phone Scam Prevention Act**

## Rules in the USA

Generally, telemarketers are forbidden to call numbers on the Do Not Call registry. Telemarketing calls to numbers on the Do Not Call registry are legal if the caller has the consumer's written permission to call or has recently done business with the consumer, but such calls must stop if the consumer asks not to be called again. Calls for research, political and charitable solicitation are not telemarketing calls and are therefore exempt; accordingly, those types of calls can be legally placed to numbers on the Do Not Call Registry. Robocalls (with recorded announcements) for marketing purposes are also forbidden without explicit written prior consent. The full

<sup>159</sup> See for example FCC Proceeding 02-278, and the example the consumer-oriented comment at <http://www.consumerfed.org/pdfs/TSR-comments-to-FTC-11-13-2014.pdf>.

position is complex. Three sets of US authorities are involved in setting and enforcing telemarketing rules:

- The Federal Communications Commission (FCC), whose main mission is to promote and keep order in the communications industry. The FCC supervises the Telephone Consumer Protection Act (TCPA) of 1991. This among other things enables individuals or groups to sue violating telemarketers directly, for \$500 (or in some circumstances \$1,500) per offending call. It also outlaws the provision of inaccurate Caller ID information. Thousands of cases have been brought under the TCPA, which has spawned a whole sector of legal professionals bringing mainly class actions.
- The Federal Trade Commission (FTC), an important part of whose mission is consumer protection. The FTC enforces the Telemarketing Sales Rule (TSR), whose provisions are summarised in the FTC Consumer Guide<sup>160</sup> and given in full (amounting to 16 pages) in the Electronic Code of Federal Regulations<sup>161</sup>. The TSR among other things sets up the Do Not Call register.
- Individual States<sup>162</sup>, which often have additional rules, as well as their own Attorneys General who enforce in-state violations and co-operate with other state and federal authorities. 32 of the 50 states have their own telemarketing licensing requirements, which may apply to call centres within the state or making calls into that state. 19 of these states also require initial bonds from call centres of up to \$100,000 (\$100,000 per location in West Virginia), and 12 states have their own Do Not Call lists. To give just one example, in 2013 the State of Florida received 47,000 consumer complaints (on all subjects) and filed 50 actions against Do Not Call violators. States have the advantage over federal agencies of being able to move more quickly, with less red tape; however Federal authority is needed to pursue violations which cross state boundaries.

The TSR includes special provisions relating to telemarketing of debt relief services, which:

- Require detailed disclosure (310.3(a) (1) (viii), (2) (x)) of how the service works and how long it will take to produce results.
- Severely restrict the amounts and timing of fees (310.4 (5), together with 310.4 (4) in relation to loan services).

Banks are, however, outside FTC's jurisdiction (though within FCC's).

<sup>160</sup> *Unwanted Telephone Marketing Calls*. Consumer Guide. <http://www.fcc.gov/guides/unwanted-telephone-marketing-calls>

<sup>161</sup> Telemarketing Sales Rule. *Electronic Code Of Federal Regulations Title 16 part 310*. <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&rgn=div5&view=text&node=16:1.0.1.3.34&idno=16>

<sup>162</sup> Information in this section is drawn from <http://telemarketinglawyer.com/> and linked websites provided by Allen Legal Services PLLC, a private law firm serving the telemarketing industry.

## Enforcement

The three sets of authorities mentioned above between them can access a considerable enforcement resource, with strong penalties available (fines of up to \$16,000 per offending call; ability to shut down operations where necessary to protect consumers; and in states where telemarketing requires licensing, unlicensed activity is a criminal offence). They aim to deploy this resource in a co-ordinated and strategic manner, so as to achieve maximum impact. One way to do this seems to be clamping down early (and hard) on offenders within a sector where telemarketing abuses are just emerging. Other players in that sector are then likely to notice and change their behaviour accordingly.

Of course, illegal telemarketing activity is often fraudulent, entailing far greater potential consumer harm than the mere nuisance of receiving unwanted calls. The authorities prioritise alerting consumers to, and stopping, frauds and scams. The FTC's website lists enforcement actions – 118 cases at last count, with over \$80 million recovered so far in fines or redress. Overall, it seems that these enforcement efforts were proving reasonably effective until early 2011, when illegal robocalls got under way and complaints about them rose four-fold within the year<sup>163</sup>. The FTC recognises that traditional enforcement will not be able to deal with the new levels of nuisance and harm made possible by new technology, and is encouraging new technical approaches – see below.

There have also been many individual and class actions<sup>164</sup> under the TCPA, a piece of legislation which dates from 1991. It has both supporters and detractors, who agree it is in need of modernisation. Wahlquist (2013)<sup>165</sup> argues that “the TCPA over-incentivizes individual plaintiffs and class counsel alike with the allure of a \$500 penalty per call, text, or fax (or \$1,500 if willfulness can be proven).” This paper gives examples of 11 out-of-court settlements in 2012-3 averaging around \$15m. High damages threaten to shut down small businesses, for behaviour which may simply

<sup>163</sup> FTC (2013). *Stopping Fraudulent Robocall Scams: Can More Be Done?*  
[http://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-entitled-%E2%80%9Cstopping-fraudulent-robocall-scams-can-more-be/130710robocallstatement.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-entitled-%E2%80%9Cstopping-fraudulent-robocall-scams-can-more-be/130710robocallstatement.pdf)

<sup>164</sup> According to Gajewski and Zetoony (2014), 92 TCPA actions were filed in the last quarter of 2013 alone, a much higher rate than earlier in the same year, following tighter provisions requiring express written consent for telemarketing to cellphones. See Gajewski, Megan and Zetoony, David (2014). *Managing Legal Risks: Trends in Mobile, Text Message, Fax, and Telephone TCPA Class Action Litigation*. <http://www.bryancave.com/files/Publication/1933a0d1-15fb-4c25-acc-d4c6c9bd54a7/Presentation/PublicationAttachment/4bde8e9f-86fc-4965-a512-d576c1798ec1/Q4%20Telemarketing%20Report.pdf>

<sup>165</sup> Wahlquist, Becca J. (2013). *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages*.  
[http://www.instituteoflegalreform.com/uploads/sites/1/TheJuggernautofTCPALit\\_WEB.PDF](http://www.instituteoflegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF)

be inadvertent errors in contacting their own customers. Waller et al (2014)<sup>166</sup>, writing from a consumer viewpoint, make seven recommendations including: empowering the FTC to bring suit under the TCPA; and encouraging more frequent and quicker FCC rulemaking procedures.

## Advice and technical support for consumers

All the authorities mentioned above<sup>167</sup>, and various consumer groups, provide advice guides for consumers<sup>168</sup>. The guides explain the rules, how to get on the Do Not Call register, how to complain and how to handle unsolicited calls, including potential fraud. They say frankly that registering won't stop all unsolicited calls.

Most US network operators offer services to help consumers who don't want to answer the phone to telemarketers. AT&T's Privacy Manager, for example, seems to be very similar to the Stop Secret service offered in France and described in the main report, though at \$7 a month considerably more expensive. It has also attracted complaints because its manner of operation has changed without customers being informed. Verizon's similar "Call Intercept" service is also less widely available than it was, to some customers' displeasure.

The FTC's Robocall Challenge last year offered prizes for technical solutions to stop robocalls. One of the winners, Nomorobo<sup>169</sup>, applies whitelists and blacklists within the network to block caller IDs that have received a high volume of complaints or are otherwise associated with nuisance calling. It is now available free to consumers on nearly all of the major VoIP phone carriers operating in the US. The FTC also made a short video<sup>170</sup> of various tips and tricks for handling unwanted calls that it collected through the competition. This year's competition is for the design of "honeypots" which attract and then detect robocalling, in ways that will help enforcers to trace perpetrators.

Various consumer groups<sup>171</sup> and law firms<sup>172</sup> aim to support individuals in group actions under the TCPA and more generally in reducing telemarketing nuisance. There are several websites like <http://www.callercomplaints.com/> where people can

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<sup>166</sup> Waller, S., Heidtke, D. & Stewart, J. (2014), *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*. A study by the Institute for Consumer Antitrust Studies. 26 Loy. Consumer L. Rev. 343.  
[http://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/publications/tcpa\\_report.pdf](http://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/publications/tcpa_report.pdf)

<sup>167</sup> The main FTC consumer information page is at <http://www.consumer.ftc.gov/articles/0108-national-do-not-call-registry>

<sup>168</sup> See, for example, <http://www.consumer.ftc.gov/articles/0052-stopping-unwanted-sales-calls>

<sup>169</sup> [www.nomorobo.com](http://www.nomorobo.com)

<sup>170</sup> <http://www.consumer.ftc.gov/media/video-0086-robocall-challenge-consumer-tips-tricks>

<sup>171</sup> See for example <http://www.privatecitizen.com/> and <http://www.stopjunkcalls.com/>.

<sup>172</sup> For example <http://www.tcpalaw.com/> and linked websites provided by Margulis Law Group.

check numbers from which they have had calls, to see if other people have had similar experiences

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Twitter: @stepchange

For help and advice with problem debts call  
0800 138 1111 Monday to Friday 8am to 8pm  
and Saturday 9am to 4pm

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