

StepChange Debt Charity response to *Combating Nuisance Calls and Texts* report (author: Claire Milne MBE, Antelope Consulting and visiting Senior Fellow in the Department of Media and Communications, London School of Economics)

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Nuisance calls in the UK

There is an epidemic of nuisance calls and texts in the UK. Over 45 million British adults have received unsolicited marketing calls or text messages. Over 26.3 million British adults have been offered high-interest credit such as payday loans via unsolicited marketing calls or messages¹. These calls and messages can cause families serious stress and anxiety and leave those in financial difficulty vulnerable to making decisions that will make their situation worse.

Progress so far

In October 2013 StepChange Debt Charity launched its *Got Their Number* campaign on nuisance calls to address this epidemic and increase the level of protection offered to hard-pressed families. Our campaign made a series of initial recommendations to Government, including asking for a ban on the unsolicited real time promotion of high-risk credit products and increased powers for regulators (see Appendix).

Since then the UK Government has made welcome progress. It has released an *Action Plan* on nuisance calls, has passed legislation enabling Ofcom to more easily share information with the Information Commissioner's Office (ICO) and is lowering the thresholds for regulators to fine firms for breaking rules². It has asked the Financial Conduct Authority to consult on restricting unsolicited marketing³.

However, more still needs to be done. The report informing this document (*Combating Nuisance Calls and Texts*) demonstrates that the UK still trails many other developed nations in its approach to nuisance calls, and therefore is continuing to fail the families targeted by companies engaged in such activity.

International best practice

¹ Edward Ware and Joseph Surtees (2013), *Got their number: Ending the harm caused by nuisance calls and texts*

² <https://www.gov.uk/government/consultations/nuisance-calls-consultation>

³ See Hansard at http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/141126-0001.htm#stpa_68.

Combatting Nuisance Calls and Texts, commissioned by StepChange Debt Charity, draws together examples of best practice in approaches to nuisance calls from around the world.

StepChange Debt Charity believes that several policies from other countries could be transferred to the UK by decision-makers, significantly reducing the level of nuisance calls in the country. These policies, detailed below, address critical holes in the UK regulatory environment.

- They switch the UK from an opt-out to an opt-in telephone preference service (TPS)
- They further increase the powers of regulators to fine offenders and ensure fine levels are related to the seriousness of offences
- They increase the ability of the watchdog to identify wrongdoing
- They increase the security offered to consumers considering a high-risk product offered over the telephone.

The *Combatting Nuisance Calls* report also calls for a greater amount of international co-operation to tackle the growing problem of nuisance calls across international boundaries.

In the UK we have made some moves in this direction but we could move further. There should be **standardised survey techniques across relevant countries** that allows comparison between nuisance call levels, and helps regulators assess the effectiveness of measures to combat the problem. **International regulators and industry should work together to develop new technical solutions** to prevent unwanted cross-jurisdictional calls. An **appropriate venue for cross-border co-operation and sharing good practice** could move these proposals forward. In her report, Claire Milne identifies the Do Not Call Forum of the London Action Plan (an international network of anti-spam enforcement agencies) as a potential option in this regard.

Recommendations

1. *Switch the UK from an opt-out to an opt-in telephone preference service (TPS)*

The TPS is currently the main defence UK consumers have against nuisance calls. Telemarketers are forbidden from contacting anybody who is registered with the TPS; this is known as 'opting-out' of telemarketing calls.

However, the UK's 'opt-out' system is the lowest level of protection permitted by EU legislation, reducing its effectiveness as a consumer safeguard. A higher level of consumer protection is an 'opt-in' system, where people are assumed not to want telemarketing calls unless they register that they want to receive them. Germany and Austria are examples of countries at this level.

In the UK there are still only around 80 registrations to the TPS per 100 households, and the rate at which households have signed-up to the service has been levelling off since 2006. This may reflect behavioural traits towards inertia⁴ and it is also likely that those not signed up to the TPS are those who are the most vulnerable, lacking the knowledge and skills to access the service⁵.

The 2002 European Directive on Privacy and Electronic Communications gave EU member states a choice between opt-out and opt-in for live marketing calls. In order to ensure protection the greatest number of households and the most vulnerable, **the UK should switch from an opt-out do not call register to an opt-in register similar to countries such as Germany.**

In Germany, which has an opt-in system, the number of complaints to the regulator about nuisance calls is three-times lower than in the UK. Such an opt-in register would not only protect consumers to a greater degree, it would reduce pressure on the regulators.

An opt-in system would also save the cost of running the existing TPS and benefit telemarketers by enabling them to target their telemarketing efforts towards consumers who are receptive. Research in Australia indicates that reducing outbound calling will not have a significant impact on employment⁶.

An amendment to the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR), which implements the Directive into UK law, could easily switch the UK to this more effective system. A House of Lords Bill in December 2013 has already described the wording for such an amendment and could be resurrected for such a purpose⁷.

2. Increase the powers of regulators to fine offenders and ensure that the fine level is related to the seriousness of the offence

Increasing the scope and effectiveness of the TPS would help consumers greatly. However, alone, such a change would not be sufficient to move the UK to where it needs to be regarding consumer protection. Research in 2014 by Ofcom showed that signing up to the TPS led to only a 35% reduction in unwanted calls for new registrants⁸. Further research by the Canadian regulator has demonstrated the effectiveness of do-not-call registers decreasing over time⁹.

⁴ Richard H. Thaler and Shlom Benartzi (2004), *Save more tomorrow: using behavioural economics to increase employee saving*, Journal of Political Economy Volume 112, Issue 1

⁵ ACCAN (2014), *Optimal period of Registration on the Do Not Call Register*, Submission by the Australian Communications Consumer Action Network to the Department of Communications

⁶ Ibid

⁷ Unsolicited Telephone Communications Bill [HL] 2013-14

⁸ Ofcom (2014), *Research into effectiveness of the TPS*

⁹ CRTC (2013), *Report on the Operation of the National Do Not Call List for the period April 1, 2012 to March 31, 2013*

Therefore additional safeguards are needed. This includes the need to further strengthen the powers of the regulators to ensure firms adhere to rules.

Ofcom and the ICO have existing powers to fine offenders. Since 2010, Ofcom can levy a maximum fine of £2m, and since 2011 the ICO has been able to fine a maximum of £500,000 per case.

However, there are problems with the existing fining framework. Ofcom's existing penalty guidelines place significant restrictions on its ability to pursue offenders, including a consideration of whether the level of penalty is proportionate to the size and turnover of the regulated body¹⁰. Similarly, the ICO must also take into account the size, financial and other resources of an organisation before determining the amount of a monetary penalty¹¹.

These restrictions mean that fines often do not reflect the seriousness of offences, and may explain why the two regulators have only issued 12 monetary fines since 2012¹². They significantly restrict the ability of the organisations to apply regulatory judgment.

Regulators therefore could better address the nuisance calls problem through being granted greater discretion and having 'more tools in the toolkit'. Effective enforcement forestalls re-offending, and deters new offences. A realistic threat of large penalties should be an effective deterrent. Therefore, the **UK regulators should be given the power to impose fines per call made**, without the need to consider its impact on the size and turnover of the company fined. This would both link scale of offence to scale of fine, and also incentivise a rapid return to compliance. In the US, the Federal Trade Commission (FTC) and Federal Communications Committee (FCC) have the ability to fine miscreants US\$16,000 per violation. This has led to fines by the FTC in 118 cases, totalling US\$80m (averaging US\$680,000 each), and a record fine from the FCC of US\$7.5m imposed in 2014¹³.

3. Increase the ability of the watchdog to identify wrongdoing

As the *Combatting Nuisance Calls* report shows, the resources of the UK's primary regulators are insufficient relative to the scale of the nuisance call problem. Only an estimated 7% of the ICO's total annual spend currently addresses PECR concerns (our topic here), which amounts to £1.2m. Ofcom also devotes only around £1m to policing silent and abandoned calls.

It is unlikely that either regulator will see an increase in resources in the immediate future. Therefore these watchdogs should look to innovative international practices

¹⁰ <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>

¹¹ https://ico.org.uk/media/for-organisations/documents/1569/ico_guidance_on_monetary_penalties.pdf

¹² Claire Milne (2015), *Combatting Nuisance Calls and Texts*

¹³ Claire Milne (2015), *Combatting Nuisance Calls and Texts*

aimed at identifying organisations contravening existing rules to best exploit existing resource. This would help the, apply resources in the most efficient way possible. The US regulators have had success with so-called “honeypots”, banks of monitored telephone lines which attract and then detect automatic calls and patterns of calls by telemarketers, in ways that will help enforcers to trace perpetrators. **UK regulators should work alongside industry to start using such “honeypots” to successfully trap and enforce against organisations engaged in illegal nuisance calling.**

4. Increase the security offered to consumers considering a high-risk product offered over the telephone

We have previously recommended the Government move to ban the sale of high-cost credit products over the telephone, including fee-charging debt management services and payday loans, and it is still crucial that the Government does so via the FCA.

However, other financial products will still be sold via unsolicited telephone calls and there will remain a problem with so-called ‘warm-calling’, where high-risk products are sold over the telephone to families that are in financial difficulty but have given their consent to be contacted by ticking a form, or failing to un-tick a box, or indicating consent during a previous sales call. For example, payday loans are a classic distress purchase. Higher distress leads to higher purchase intentions and consumers in an adverse financial situation make poor decisions that negatively affect their long term prospects¹⁴.

FCA rules on distance marketing¹⁵ provide some protection to consumers, distressed or otherwise, tempted to enter a contract over the telephone. Firms must provide a consumer with relevant information in good time before the consumer is bound by a distance contract and the performance of the distance contract may only begin after the consumer has given approval. This is a good example of a sectoral regulator integrating consumer protection against nuisance calls into its rules. Other regulators could follow this example.

However, distance sales rules in some international jurisdictions are much tighter, in order to better protect vulnerable consumers. In Norway, under the ‘Cancellation Act’, if a contract is concluded as a result of the trader making an unsolicited offer in a telephone call the consumer is not bound until the offer has been accepted in writing. Similarly, in Germany contracts on lottery games that are agreed upon on the telephone need written confirmation¹⁶. The FCA has already indicated it acknowledges the problems inherent in distressed families making snap distance purchases, by bringing in new rules on credit broking. Namely, tightening regulations

¹⁴ Haim Mano (1999), *The influence of pre-existing negative affect on store purchase intentions*, The Journal of Retailing Volume 75, Issue 2

¹⁵ CONC 2.7

¹⁶ Claire Milne (2015), *Combatting Nuisance Calls and Texts: Appendix*

governing the information broking firms must provide consumers with regarding a purchase¹⁷.

The UK could be brought up to a higher consumer protection standard by regulations mandating that **certain products sold via direct marketing must have contracts accepted in writing before they commence**. This could include high-risk credit products and products which will lead to a long-term regular payment commitment. Such a change could be made relatively easily through an addition to CONC 2.7.8R. This would be a strong additional protection on top of our previous recommendation seeking a ban on the unsolicited marketing of high-risk credit products (see below).

5. “Frank geht ran” (“Frank is answering”)

“Frank geht ran” (“Frank is answering”) is a system which operates in Germany. It allows consumers who are worried about getting nuisance calls if they state their own phone number when filling out a form to instead fill in a number that belongs to an independent answering machine (“Frank”). The machine then answers unwanted calls with a recorded message saying that the customer does not wish to receive marketing calls.

UK regulators could consider introducing a “Frank for the UK”.

Appendix

StepChange Debt Charity previous recommendations

- Currently the threshold for issuing monetary penalties to firms misusing consumer data or breaking rules on electronic communication is too high. We believe this should be lowered so that firms can be fined for breaching the data protection act (DPA) or PECR without the ICO having to demonstrate substantial damage or substantial distress¹⁸.
- At the moment the ICO cannot order firms to compensate individuals for the harm caused by data protection breaches. This power is reserved for the Courts. We believe the ICO should not only have this power but that compensation should be available for psychological harm caused.
- The ICO, Ofcom, the FCA, the Claims Management Regulator and Financial Ombudsman Service should enter into a MoU which agrees to take a unified approach to the problem of nuisance calls and text messages. This approach should lead to a joint portal for complaints and a consistent enforcement strategy.
- Consent should be bounded so that consumers know when they are consenting to sharing personal data, whom they are sharing data with and

¹⁷ <http://www.fca.org.uk/news/ps14-18-credit-broking-and-fees>

¹⁸ The Department of Culture, Media and Sport is currently consulting on this proposal

what will happen to that data once shared. To achieve this, government should amend legislation so that:

- When requesting consent to share data for marketing purposes firms must list each organisation separately, so consumers can then give or withhold individual consent to each third party.
- Third parties receiving consent should then not be able to share it with any additional firms for marketing purposes.
- The ICO Guidance on DPA and PECR should be made mandatory.
- Rules surrounding Subject Access Requests (SARs) must be improved. Firms should be obligated to tell you to which third parties they have passed your personal information.
- The Financial Conduct Authority (FCA) should consider a ban on the “unsolicited real time promotion” of high-risk credit products and fee-charging debt management services.
- The FCA should strengthen existing provisions so taking employer contact details is prohibited unless creditors can demonstrate a justifiable reason for taking such details.
- Nuisance calls from overseas should be blocked by a system operated by the TPS

If any organisation or individual would like to lend us their support in this, or would like further information please feel free to contact Joseph Surtees at joseph.surtees@stepchange.org or on 0207 391 4582.