

Consultation Response



Which? task force on consent and lead generation in the direct marketing industry

Comments from StepChange Debt Charity

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We are an independent charity dedicated to overcoming problem debt. Our advice and solutions are effective, tailored and importantly, free. Foundation for Credit Counselling. Wade House, Merrion Centre, Leeds LS2 8NG. Company No 2757055. Charity No 1016630. www.stepchange.org

Introduction

StepChange Debt Charity is the UK's largest specialist provider of free, independent debt advice. In 2013, we helped over 500,000 people with problem debts.

In October 2013, the Charity launched its *Got their number* campaign in response to epidemic of nuisance calls and messages in the UK. These types of calls and messages can create serious stress and anxiety related problems and have left millions of people afraid to answer the phone. For those in financial difficulty, such as our clients, these types of calls and messages may leave them vulnerable to making financial decisions that worsen their situation. For example, many are tempted to take out high-interest payday loans, despite the fact this will often make their situation worse.

People have lost control of their personal data and no longer know if or when they may be subjected to such intrusive calls and messages. A key reason for this is problems with the way in which marketing companies gain 'consent' from consumers. In responding to this consultation we will emphasise:

- The harm consumers suffer due to the loss of their personal data
- The ease with which firms can collect, use and share peoples' personal data for marketing purposes
- The impossibility consumers face in knowing when they have given consent for direct marketing
- A weak regulatory regime that allows firms to claim consent without challenge
- The related issue of a flawed Subject Access Request process

We will also recommend solutions that the taskforce should consider before finalising its report.

Our response is based on:

- A national representative poll of 2,017 GB adults (aged 18 and over) commissioned from YouGov
- A poll of 465 StepChange Debt Charity clients
- The results of Subject Access Requests on behalf of a number of clients

The problem

Stress and anxiety

Nuisance calls and messages can cause serious harm in the form of stress and anxiety – 8.8 million people said that unsolicited marketing calls and texts made them feel anxious or stressed, while 3.2 million people said they were afraid to

answer the phone as a result of unsolicited calls or text messages¹. For indebted consumers the problem is even more acute, 65 percent of respondents to a stepchange.org website poll said they were afraid to answer the phone as a result of nuisance calls or texts².

Financial vulnerability

The promotion of high-interest credit such as payday loans via unsolicited marketing calls or texts messages is taking place on an enormous scale – over 26.3 million (58%) British adults say they have been offered high-interest credit (e.g. payday loan) via unsolicited marketing call or text message, while over 4.5 million (10%) British adults who have received them say they get such offers “very often”³.

For those people struggling financially these offers may seemingly provide temporary financial relief - 1.2 million (3%) British adults who have received such calls said they had been tempted to take out high-interest credit such as payday loans as a result of an unsolicited marketing call or text⁴.

A recent survey of 1,000 people contacting the Charity via its helpline found a third (32.4 percent) of StepChange Debt Charity clients (individuals in severe financial difficulty) have received an unsolicited marketing call (also known as an ‘unsolicited real-time promotion’) offering them a payday loan. Those receiving calls received an average of 10 calls per week.

Almost 15 percent of clients offered a loan (five percent of all those surveyed) had taken out high cost credit as a result of one of these unsolicited telephone calls. The additional high-cost credit taken out by these clients averaged £980, further exacerbating their financial difficulties

Consent

One of the root causes of the problem of nuisance calls and messages is the ease with which firms can collect, use and share peoples’ personal data for marketing purposes.

Consumers have lost control of their personal information; Privacy International estimates that each individual’s personal information is held on hundreds of databases, a 2004 estimate put this at 700⁵

¹ All figures, unless otherwise stated, are from YouGov Plc. Total sample size was 2,017 adults. Fieldwork was undertaken between 20th - 23rd September 2013. The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+)

² Stepchange.org website poll (464 respondents - September 2013)

³ YouGov poll for StepChange Debt Charity

⁴ Ibid

⁵ See Lisa Kelly, ‘Data protection – who’s watching you?’, Accountancy Age, 20 August 2004, online edition

The definition of consent (according to European Directive 95/46/EC - the data protection directive on which the Data Protection Act (DPA) is based) is:

“any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed”.

The ICO’s Direct Marketing Guidance emphasises that for consent to be valid it must be, a) freely given, b) specific, c) informed, and d) a positive expression of choice.

Yet our evidence shows that in the vast majority of cases people have no idea when they have given consent for marketing or not. Eight out of 10 respondents to the stepchange.org website poll said that they did not always know when they’d given consent to share their personal details⁶.

Bearing this in mind, rules surrounding consent as they currently exist are essentially worthless. Firms are certainly not ensuring that people have given “informed” or “positive expression or choice”.

In part they are encouraged to do so by a regulatory regime that does not have the power to effectively oblige compliance with existing rules. Enforcement is made difficult under the DPA and PECR. The threshold for monetary penalties against firms is too high. The ICO can only issue fines where “substantial damage or substantial distress” to the consumer has been demonstrated. We note at the time of writing that the Department for Culture, Media and Sport has still failed to publish a consultation on this issue, despite promising to do so in its Nuisance Calls Action Plan published back in February.

It is essential consumers are given back control over their personal information and stricter guidelines on what constitutes consent would be a welcome step towards this.

Subject Access Requests

One way in which consumers can, theoretically, find who has their data for marketing purposes is via a ‘Subject Access Request’ (SAR). However, research with our clients found that the SAR system is seriously flawed, resulting in a situation where consumers cannot trace who has their data. Therefore we would strongly recommend the taskforce expands its remit to address this problem, which addresses the same fundamental issue as consent – the loss of control of personal data.

A Subject Access Request is a fundamental right under DPA. It entitles consumers to ask a firm:

- whether it is processing their personal data;
- for a description of the personal data and the reasons it is being processed;

⁶ Stepchange.org website poll (464 respondents - September 2013)

- for a copy of the personal data; and
- for details of the source of the data.

Firms must respond to a SAR within 40 calendar days of receiving it.

Our research found serious problems with how firms respond to SARs:

- Customer service departments often have a very poor understanding of what firm's SAR requirements are under the DPA. Of more concern, some high-interest lenders' customer service departments are based outside the UK and agents had no knowledge of UK data protection law. In most cases it seems it is up to the consumer to ensure firms respond to an SAR appropriately.
- We found following a SAR firms do not confirm: a) that it has been received; and b) when the 40 period for response is deemed to have started.
- Many firms, particularly high-interest lenders, do not provide reliable contact information to allow consumers to check on the progress of a SAR. This makes it difficult for consumers to guarantee firms are pursuing their request and following best practice as they do so.

However, most seriously, there is a fundamental flaw with the whole SAR process. Under current legislation people making a request have no right to know which third parties their data has been shared with. Firms are only obliged to provide data on the categories of third party data has been shared with. Therefore there is no real way to find out what a company does with your personal details.

Recommendations

This response has identified fundamental weaknesses with the way in which consent is collected, and the way in which firms handle personal data.

We believe nuisance calls are placing millions of consumers in a vulnerable position. Regulators do not have sufficient powers or resource to protect them. Enforcement is not carried out in an effective or joined-up manner. Legislation is fractured and insufficient. It is crucial the taskforce considers a comprehensive package of reforms to remedy this situation.

Consent

We believe consent should be bounded so that consumers know when they are consenting to sharing personal data, whom they are sharing data with and 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. So the regulator can take enforcement action against firms that do not follow best practice when handling data and contacting consumers

Personal data

Actions need to be taken to ensure that consumers are able to establish which firms currently hold their personal information. StepChange believes rules surrounding SARs must be improved

- Firms should be obligated to tell consumer which third parties they have passed personal information to. This could be changed by amending section 7.1(b) of the DPA
- Firms should be able to demonstrate they have systems in place to adequately respond to a SAR, if they do not the ICO should have the power to issue a monetary fine without having to demonstrate substantial damage or distress to the individual
- Regular contact should be made by companies to inform the customer of the receipt and progress of a SAR - we recommend the ICO Guidance should be updated to advise firms to update their customers on the progress of their SAR on a weekly basis until completion

Regulators

- Currently the threshold for issuing monetary penalties to firms misusing consumer data or breaking rules on electronic communication is too high. At the moment the ICO can only do so if, “substantial damage or substantial distress” to the consumer is demonstrated. We believe this should be lowered so that firms can be fined for breaching the DPA or PECR without the ICO having to demonstrate substantial damage or substantial distress
- 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.

Further action

If the taskforce or would like further information please feel free to contact Joseph Surtees at joseph.surtees@stepchange.org (0207 391 4582).