

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

To: Parkin Beacher Ltd

Of: 20 Cow Green, Halifax, West Yorkshire, United Kingdom HX1 1HX

1. The Information Commissioner ("Commissioner") has decided to issue Parkin Beacher Ltd ("PB Ltd") with an enforcement notice under section 40 of the Data Protection Act 1998 ("DPA"). The notice is being issued because of a serious contravention of regulation 21B of the Privacy and Electronic Communications (EC Directive) Regulations 2003.
2. This notice explains the Commissioner's decision.

Legal framework

3. PB Ltd, whose registered office is given above (Companies House Registration Number: 11592415) is the organisation stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for the purposes of direct marketing in relation to occupational pension schemes or personal pension schemes contrary to regulation 21B of PECR.
4. Regulation 21B paragraph (1) of PECR provides that:

"(1) A person must not use, or instigate the use of, a public electronic communications service to make unsolicited calls to an individual for the purpose of direct marketing in relation to occupational pension schemes or personal pension schemes, except where paragraph (2) or (3) applies."

5. Regulation 21B paragraphs (2), (3), and (4) provide that:

"(2) This paragraph applies where—

- (a) the caller is an authorised person or a person who is the trustee or manager of an occupational pension scheme or a personal pension scheme; and*
- (b) the called line is that of an individual who has previously notified the caller that for the time being the individual consents to such calls being made by the caller on that line.*

(3) This paragraph applies where—

- (a) the caller is an authorised person or a person who is the trustee or manager of an occupational pension scheme or a personal pension scheme;*
- (b) the recipient of the call has an existing client relationship with the caller on the line and the relationship is such that the recipient might reasonably envisage receiving unsolicited calls for the purpose of direct marketing in relation to occupational pension schemes or personal pension schemes; and*
- (c) the recipient of the call has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of the recipient's*

contact details for the purpose of such direct marketing, at the time that the details were initially collected and, where the recipient did not initially refuse the use of the details, at the time of each subsequent communication.

(4) A subscriber must not permit the subscriber's line to be used in contravention of paragraph (1)".

6. Regulation 21B paragraph 5 materially states that:

"(5) In this regulation—

(a) "authorised person" has the meaning given in section 31 of the Financial Services and Markets Act 2000;

(b) "direct marketing in relation to occupational pension schemes or personal pension schemes" includes—

(i) the marketing of a product or service to be acquired using funds held, or previously held, in an occupational pension scheme or a personal pension scheme,

(ii) the offer of any advice or other service that promotes, or promotes the consideration of, the withdrawal or transfer of funds from an occupational pension scheme or a personal pension scheme, and

(iii) the offer of any advice or other service to enable the assessment of the performance of an occupational pension scheme or a personal pension scheme (including its performance in comparison with other forms of investment);

- (c) *"existing client relationship" does not include a relationship established at the instigation of the caller primarily for the purpose of avoiding the restriction in paragraph (1); and*
- (d) *"occupational pension scheme" and "personal pension scheme" have the meanings given in section 1(1) of the Pension Schemes Act 1993."*

7. Section 122(5) of the Data Protection Act 2018 "DPA18" defines direct marketing as *"the communication (by whatever means) of any advertising material which is directed to particular individuals"*. This definition also applies for the purposes of PECR (see regulation 2(2) PECR and paragraphs 430 & 432(6) to Schedule 19 of the DPA18).
8. Prior to 29 March 2019, the European Directive 95/46/EC defined 'consent' as *"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"*.
9. Consent in PECR is now defined, from 29 March 2019, by reference to the concept of consent in Regulation 2016/679 ("the GDPR"): regulation 8(2) of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019. Article 4(11) of the GDPR sets out the following definition: *"'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her"*.
10. Recital 32 of the GDPR materially states that *"When the processing has multiple purposes, consent should be given for all of them"*. Recital 42 materially provides that *"For consent to be informed, the data subject*

should be aware at least of the identity of the controller". Recital 43 materially states that *"Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case"*.

11. "Individual" is defined in regulation 2(1) of PECR as *"a living individual and includes an unincorporated body of such individuals"*.
12. A "subscriber" is defined in regulation 2(1) of PECR as *"a person who is a party to a contract with a provider of public electronic communications services for the supply of such services."*
13. The DPA contains enforcement provisions at Part V which are exercisable by the Commissioner. Those provisions are modified and extended for the purposes of PECR by Schedule 1 PECR.
14. Section 40(1)(a) of the DPA (as extended and modified by PECR) provides that if the Commissioner is satisfied that a person has contravened or is contravening any of the requirements of the Regulations, she may serve him with an Enforcement Notice requiring him to take within such time as may be specified in the Notice, or to refrain from taking after such time as may be so specified, such steps as are so specified.
15. PECR were enacted to protect the individual's fundamental right to privacy in the electronic communications sector. PECR were subsequently amended and strengthened. The Commissioner will interpret PECR in a way which is consistent with the Regulations' overall aim of ensuring high levels of protection for individuals' privacy rights.

16. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the DPA18: see paragraph 58(1) of Schedule 20 to the DPA18.

The contravention

17. The Commissioner finds that PB Ltd has contravened regulation 21B of PECR.
18. The Commissioner finds that the contravention was as follows:
19. Between 1 February 2019 and 30 September 2019 PB Ltd made 16 unsolicited calls for the purposes of direct marketing in relation to occupational pension schemes or personal pension schemes contrary to regulation 21B of PECR, with those individuals then proceeding to make complaints.
20. The Commissioner is satisfied that the contravention could have been far higher, since over the relevant period PB Ltd has admitted to making 96,817 direct marketing calls for the purposes of direct marketing in relation to occupational pension schemes or personal pension schemes. Despite being asked to do so, PB Ltd has failed to provide details of how many of these 96,817 calls were connected, and so the full extent of the contravention, and the true impact on individuals' privacy, is not possible to determine.
21. The Privacy and Electronic Communications (Amendment) (No. 2) Regulations 2018, which came into force on 9 January 2019, amended PECR to insert Regulation 21B which restricts calls made for the purposes of direct marketing in relation to occupational pension schemes or personal pension schemes.

22. PB Ltd would contact individuals, whose information they had obtained via a third party, with a view to arranging pension review appointments for them with its Principle. The calls made by PB Ltd clearly constitute 'direct marketing in relation to occupational pension schemes or personal pension schemes' within the definition of regulation 21B(5)(b)[iii] PECR. Specifically, Regulation 21B(5)(b)[iii] includes *"the offer of any advice or other service to enable the assessment of the performance of an occupational pension scheme or a personal pension scheme (including its performance in comparison with other forms of investment)"*.
23. To engage in such calls it is a requirement of regulation 21B PECR that the caller be an 'authorised person or a person who is the trustee or manager of an occupational pension scheme or a personal pension scheme'.
24. Regulation 21B(5)(a) PECR states that "authorised person" has the meaning given in Section 31 of the Financial Services and Markets Act 2000 ("FSMA"). Section 31(1) FSMA lists the categories of persons who would constitute "authorised persons". IARs are not named on this list.
25. PB Ltd, is listed on the FCA website as being effective as an IAR between 18 January 2019 and 14 August 2020. As an IAR, PB Ltd believed that it was an exempt person for the purposes of carrying out regulated activities relating to effecting introductions [to its Principle], although it disputes the Commissioner's suggestion that the calls it made constituted direct marketing calls relating to pension schemes.
26. The Commissioner's stance is that the calls clearly constituted direct marketing calls within the scope of the legislation. Furthermore, IARs are not included in the list of categories of "authorised persons" at

Section 31(1) FSMA. The legislation is clear, that only “authorised persons” may engage in unsolicited direct marketing calls relating to pension schemes. It may be that PB Ltd, as an IAR, would have been exempt in some respects from the general prohibition in relation to some regulated activities, however there is a clear distinction between being *exempt* to some limited degree, and being an “authorised person” within the meaning of section 31 FSMA 2000.

27. This stance has been supported by the FCA which has previously advised that Commissioner that an IAR is not an “authorised person”.
28. The Commissioner is therefore satisfied that PB Ltd is not an authorised person for the purposes of regulation 21B PECR.
29. The Commissioner also notes that ‘Your Pension Options’, i.e. the trading named used by PB Ltd, does not appear as a registered trading name of the company, which is further compounded by the fact that there is no existing website under either the name of PB Ltd or ‘Your Pension Options’. PB Ltd’s listed ‘Nature of business’ on Companies House simply refers to it as being involved with “Market research and public opinion polling”. There is no mention of it as being active in the pensions sector.
30. The Commissioner is satisfied that PB Ltd is not a trustee or manager of an occupational pension scheme or a personal pension scheme for the purposes of regulation 21B PECR.
31. Therefore, since neither paragraphs 2 or 3 of regulation 21B apply, it is the Commissioner’s finding that PB Ltd cannot lawfully make direct marketing calls in relation to occupational pension schemes or personal pension schemes.

32. Even if PB Ltd were an authorised person or a person who is the trustee or manager of an occupational pension scheme or a personal pension scheme, the Commissioner is satisfied that PB Ltd had neither the consent of those who it called, nor an existing customer relationship with them, as required by regulation 21B(2)(b) or (3)(b).
33. At the point at which consent was obtained via [REDACTED], [REDACTED] and [REDACTED], it is clear that there is an apparent option for individuals to select the means by which they may wish to receive direct marketing. However, before being able to proceed, individuals are required to agree to the website's privacy policy, with the privacy policies themselves dictating the way marketing will be sent, apparently regardless of any preferences selected by the individual. Furthermore, individuals are denied the ability to select which of the listed sectors or organisations they may wish to receive that marketing from, which implies that the individual must agree to receive marketing from all. In this way, the consents relied upon by PB Ltd cannot be said to have been appropriately specific or freely given.
34. The Commissioner is satisfied that, between 1 February 2019 and 30 September 2019, PB Ltd used a public electronic communications service to make 16 unsolicited calls for the purposes of direct marketing in relation to occupational pension schemes or personal pension schemes contrary to regulation 21B of PECR.
35. The Commissioner is concerned that PB Ltd remains a risk given the existence of complaints from individuals which evidence that it continued to make unsolicited direct marketing calls in relation to pensions into 2020 and 2021 (i.e. beyond the cited contravention

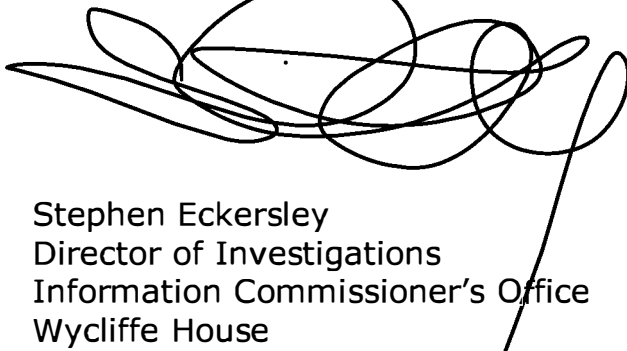
period).

36. The Commissioner has considered, as she is required to do under section 40(2) of the DPA (as extended and modified by PECR) when deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage or distress. The Commissioner has decided that it is likely that damage or distress has been caused in this instance, not least because of the nature of the calls being made.
37. **In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of her powers under section 40 of the DPA, she requires PB Ltd to take the steps specified in Annex 1 of this Notice.**

Right of Appeal

38. There is a right of appeal against this Notice to the First-tier Tribunal (Information Rights), part of the General Regulatory Chamber. Information about appeals is set out in the attached Annex 2.

Dated the 16th day of August 2021.



Stephen Eckersley
Director of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

TERMS OF THE ENFORCEMENT NOTICE

PB Ltd shall within 30 days of the date of this notice:

- Neither use, nor instigate the use of, a public electronic communications service to make unsolicited calls to an individual for the purpose of direct marketing in relation to occupational pension schemes or personal pension schemes, except where:
 - (a) PB Ltd is an authorised person or a person who is the trustee or manager of an occupational pension scheme or a personal pension scheme; and
 - (b) the called line is that of an individual who has previously notified PB Ltd that for the time being the individual consents to such calls being made by PB Ltd on that line.

Or where:

- (a) PB Ltd is an authorised person or a person who is the trustee or manager of an occupational pension scheme or a personal pension scheme
- (b) the recipient of the call has an existing client relationship with PB Ltd and the relationship is such that the recipient might reasonably envisage receiving unsolicited calls for the purpose of direct marketing in relation to occupational pension schemes or personal pension schemes; and

- (c) the recipient of the call has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of the recipient's contact details for the purpose of such direct marketing, at the time that the details were initially collected and, where the recipient did not initially refuse the use of the details, at the time of each subsequent communication.

ANNEX 2

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom an enforcement notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the "Tribunal") against the notice.

2. If you decide to appeal and if the Tribunal considers:-
 - a) that the notice against which the appeal is brought is not in accordance with the law; or

 - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester
LE1 8DJ

Telephone: 0203 936 8963

Email: grc@justice.gov.uk

- The notice of appeal should be served on the Tribunal within 28 days of the date on which the enforcement notice was sent
4. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).