

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

To: Saga Personal Finance Limited

Of: Enbrook Park, Sandgate, Folkestone, Kent CT20 3SE

1. The Information Commissioner ("the Commissioner") has decided to issue Saga Personal Finance Limited ("SPF") with an enforcement notice under section 40 of the Data Protection Act 1998 ("DPA"). The notice is in relation to a serious contravention of Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. SPF, whose registered office is given above (Companies House Registration Number: 03023493) is the organisation stated in this notice to have instigated the transmission of unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
4. Regulation 22 of PECR states:

- "(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.*
- (2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.*
- (3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—*
- (a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;*
 - (b) the direct marketing is in respect of that person's similar products and services only; and*
 - (c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.*
- (4) A subscriber shall not permit his line to be used in contravention of paragraph (2)."*

5. Section 122(5) of the DPA 2018 defines direct marketing as *“the communication (by whatever means) of advertising material which is directed to particular individuals”*. This definition also applies for the purposes of PECR (see regulation 2(2) PECR; and Schedule 19, paragraph 430 and 432(6) DPA18).
6. 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”*.
7. 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”*.
8. “Individual” is defined in regulation 2(1) of PECR as *“a living individual and includes an unincorporated body of such individuals”*.
9. 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”*.
10. “Electronic mail” is defined in regulation 2(1) of PECR as *“any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the*

recipient's terminal equipment until it is collected by the recipient and includes messages sent using a short message service".

11. 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.
12. 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.
13. 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.
14. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of Part 9, Schedule 20 of that Act).

The contravention

15. The Commissioner finds that SPF contravened regulation 22 of PECR.
16. The Commissioner finds that the contravention was as follows:

17. The Commissioner finds that between 14 December 2018 and 2 May 2019 there were 2,745,777 direct marketing emails sent to subscribers on behalf of SPF by its Partner ██████, and ██████ Affiliates. Of those, it has been confirmed that 2,714,872 direct marketing emails were received by subscribers.
18. Furthermore, between 29 November 2018 and 2 May 2019 there were 28,676,526 direct marketing emails sent to subscribers on behalf of SPF by its Partner ██████, and ██████ Affiliates. SPF was unable to confirm how many of those direct marketing emails were received, however its Partner ██████ estimated that between 2 – 10% of 'sent' messages could be expected to be 'undelivered'. The Commissioner therefore believes it is reasonable to suggest that 25,808,873 (i.e., 90% of the total number of messages sent by ██████ and its Affiliates) could be expected to have been received by subscribers.
19. The Commissioner finds that SPF instigated the transmission of the direct marketing messages sent, contrary to regulation 22 of PECR.
20. SPF, as the instigator of the direct marketing, is required to ensure that it is acting in compliance with the requirements of regulation 22 of PECR, and to ensure that valid consent to send those messages had been acquired.
21. During this investigation it has been proposed that the Partners/Affiliates would be the instigators of the direct marketing rather than SPF itself. The Commissioner does not agree with this interpretation of the situation. Whilst the Partners/Affiliates clearly 'sent' the direct marketing communications under contract, those communications included content drafted by SPF. Without SPF's involvement and positive encouragement, those communications would not have been sent.

22. In any event, even if SPF were to maintain that its partners were the instigators of this direct marketing, it is clear that the legislation is worded in such a way that regulation 22 PECR is capable of covering more than one person/organisation involved in either the transmission or the instigation of that transmission.
23. It is noted that SPF relied on 'indirect consent' for its direct marketing, i.e., where the intended recipient had told one organisation that he/she consents to receiving marketing from other organisations. The Commissioner's direct marketing guidance says "organisations need to be aware that indirect consent will not be enough for texts, emails or automated calls. This is because the rules on electronic marketing are stricter, to reflect the more intrusive nature of electronic messages."
24. However, it does go on to say that indirect consent may be valid, but only if it is clear and specific enough. Consent is not likely to be valid where an individual is presented with a long, seemingly exhaustive list of categories of organisations; indeed, under the GDPR this requirement goes further and states that even precisely named categories of third parties will not be acceptable.
25. Furthermore, for consent to be valid it is required to be "freely given", by which it follows that if consent to marketing is a condition of subscribing to a service, the organisation will have to demonstrate how the consent can be said to have been given freely.
26. Consent is also required to be "specific" as to the type of marketing communication to be received, and the organisation, or specific type of organisation, that will be sending it.
27. Consent will not be "informed" if individuals do not understand what they are consenting to. Organisations should therefore always ensure

that the language used is clear, easy to understand, and not hidden away in a privacy policy or small print. Consent will not be valid if individuals are asked to agree to receive marketing from "similar organisations", "partners", "selected third parties" or other similar generic description.

28. The Commissioner is therefore satisfied from the evidence she has seen that SPF did not have the necessary valid consent for the 28,523,745 direct marketing messages received by subscribers.
29. 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 unlikely that damage or distress has been caused in this instance.
30. **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 SPF to take the steps specified in Annex 1 of this Notice**

Right of Appeal

31. 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 13th day of September 2021

Andy Curry
Head of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

TERMS OF THE ENFORCEMENT NOTICE

SPF shall within 30 days of the date of this notice:

- Except in the circumstances referred to in paragraph (3) of regulation 22 of PECR, neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified SPF that he clearly and specifically consents for the time being to such communications being sent by, or at the instigation of, SPF.

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)).