

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

To: Boiler Breakdown Limited

Of: 41 Oldfields Road, Sutton, Surrey, SM1 2NB

1. The Information Commissioner ("the Commissioner") has decided to issue Boiler Breakdown Limited ("BBL") 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 regulations 21 and 24 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. BBL, whose registered office is given above (Companies House Registration Number: 08649752) 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 contrary to regulation 21 of PECR.
4. Regulation 21 applies to the making of unsolicited calls for direct marketing purposes. It means that if a company wants to make calls promoting a product or service to an individual who has a telephone

number which is registered with the Telephone Preference Service Ltd ("TPS"), then that individual must have notified the company that they do not object to receiving such calls from it.

5. Regulation 21 paragraph (1) of PECR provides that:

"(1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where-

- (a) the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or*
- (b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26."*

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

- "(2) A subscriber shall not permit his line to be used in contravention of paragraph (1).*
- (3) A person shall not be held to have contravened paragraph (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.*
- (4) Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such calls being made on that line by that caller, such calls may be made by*

that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.

(5) Where a subscriber has given a caller notification pursuant to paragraph (4) in relation to a line of his—

(a) the subscriber shall be free to withdraw that notification at any time, and

(b) where such notification is withdrawn, the caller shall not make such calls on that line.”

7. Regulation 24 of PECR provides:

“(1) Where a public electronic communications service is used for the transmission of a communication for direct marketing purposes the person using, or instigating the use of, the service shall ensure that the following information is provided with that communication –

...

(b) in relation to a communication to which regulation 21 [or 21A] (telephone calls) applies, the particulars mentioned in paragraph (2)(a) and, if the recipient of the call so requests, those mentioned in paragraph (2)(b).

(2) The particulars referred to in paragraph (1) are –

(a) the name of the person;

(b) either the address of the person or a telephone number on which he can be reached free of charge.”

8. Under regulation 26 of PECR, the Commissioner is required to maintain a register of numbers allocated to subscribers who have notified them that they do not wish, for the time being, to receive unsolicited calls for direct marketing purposes on those lines. The Telephone Preference Service Limited ("TPS") is a limited company which operates the register on the Commissioner's behalf. Businesses who wish to carry out direct marketing by telephone can subscribe to the TPS for a fee and receive from them monthly a list of numbers on that register.
9. Section 122(5) of the Data Protection Act 2018 ("DPA18") defines direct marketing as "*the communication (by whatever means) of advertising or marketing 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).
10. From 1 January 2021, consent in PECR has been defined by reference to the concept of consent in the UK GDPR as defined in section 3(10) of the DPA 2018^[1]: see regulation 2(1) of PECR, as amended by Part 3 of Schedule 3, paragraph 44 of The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019/419. Article 4(11) of the UK 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*".

^[1] The UK GDPR is therein defined as Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 ("GDPR") as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018.

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, he 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 BBL contravened regulations 21 and 24 of PECR.
18. The Commissioner finds that the contravention was as follows:
19. Between 1 January 2020 and 31 August 2020, using CLIs allocated to BCBL (specifically [REDACTED]), BBL used a public telecommunications service for the purposes of making 348,724 unsolicited calls for direct marketing purposes to subscribers where the number allocated to the subscriber in respect of the called line was a number listed on the register of numbers kept by the Commissioner in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR.
20. The Commissioner is satisfied for the purposes of regulation 21 that these 348,724 unsolicited direct marketing calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls, and who for the purposes of regulation 21(4) had not notified BBL that they did not for the time being object to receiving such calls.
21. For such notification to be valid under regulation 21(4), the individual must have taken a clear and positive action to override their TPS registration and indicate their willingness to receive marketing calls from the company. The notification should reflect the individual's choice about whether or not they are willing to receive marketing calls. Therefore, where signing up to use a product or service is conditional upon receiving marketing calls, companies will need to demonstrate how this constitutes a clear and positive notification of the individual's willingness to receive such calls.

22. The notification must clearly indicate the individual's willingness to receive marketing calls specifically. Companies cannot rely on individuals opting in to marketing communications generally, unless it is clear that this will include telephone calls.
23. Further, the notification must demonstrate the individual's willingness to receive marketing calls from that company specifically. Notifications will not be valid for the purposes of regulation 21(4) if individuals are asked to agree to receive marketing from "similar organisations", "partners", "selected third parties" or other similar generic descriptions.
24. The Commissioner's Direct Marketing Guidance is clear regarding organisational responsibilities regarding consent and states:
"Organisations should keep clear records of what an individual has consented to, and when and how this consent was obtained, so that they can demonstrate compliance in the event of a complaint."
25. The Guidance goes on to state with regard to indirect (third party) consent: "Any third party controllers who will be relying on the consent must be named – precisely defined categories of third parties will not be acceptable under the GDPR definition." The Guidance goes on to state: "Consent is not likely to be valid where an individual is presented with a long, seemingly exhaustive list, of general categories of organisations. The names of the categories used must be tightly defined and understandable to individuals."
26. In the Marketing Questionnaire Script from [REDACTED] the list of sectors is provided in a recorded message at the end of the call. Individuals have already been asked to consent to contact by third parties without having the information about which sectors or

organisations that could be from. Also, the recorded message list of sectors is too general and not tightly defined.

27. Furthermore, the script also states: "Save Today and its trusted partners may contact you for up to 12 months via telephone to offer promotions, market their products or services or to update your preferences." The Direct Marketing Guidance, under Time Limits, states "As a general rule of thumb, if an organisation is making contact by phone, text or email for the first time, we recommend that it does not rely on any indirect consent given more than six months ago – even if the consent did clearly cover that organisation."
28. The Commissioner considers it is spurious reasoning for BBL to consider processing under legitimate interests; in this instance PECR applies and it is clear that, unless BBL had specific consent, it should not have made direct marketing calls to TPS registered individuals.
29. BBL provided conflicting accounts as to whether it TPS screened data, and there is no evidence to suggest that BBL, or any other separate legal entities which held BBL's registered office address as its own at the time, were carrying out TPS checks on data. Indeed, the TPS have no record of a licence being held in the name of either BBL, BCBL or Boiler Cover UK. BBL appear to be solely reliant on assurances from its data supplier that the data was TPS screened. Nor is there any explanation provided for why CLIs which were in use by BBL at the material time were used to make 348,724 unsolicited calls to individuals who had been registered with the TPS for not less than 28 days.

30. BBL has been unable to provide any evidence that the subscribers who received these calls had notified BBL that they did not, for the time being, object to such calls.
31. The Commissioner is therefore satisfied that there is evidence of 348,724 unsolicited direct marketing calls being made by BBL to subscribers who had been registered with the TPS for not less than 28 days, and who had not previously notified BBL that they did not object to receiving such calls.
32. In addition, BBL permitted its lines (specifically CLI [REDACTED]) to be used by BCBL contrary to regulation 21(2) of PECR, resulting in 9,075 connected calls to TPS registered individuals between 1 January and 31 August 2020.
33. Further and in relation to calls made by BBL, as the complaints indicate, BBL failed, as required by regulation 24 of PECR, to provide the recipient of the calls from CLI [REDACTED] the particulars specified at regulation 24(2) of PECR in that there is evidence that the calls and automated message from that CLI identified the caller as "Boiler Breakdown". Contrary to information provided to the Commissioner by BCBL with regard to which CLIs were allocated to which companies, BBL is actually the subscriber of this CLI, which creates a confusing picture of which organisation is using which lines to call individuals and makes it difficult for individuals to be clear about who is calling them. The name used is sufficiently generic that it could apply to both companies, and searches for a website demonstrate that it is difficult for individuals to locate the correct organisation without knowing the exact http address.

34. The Commissioner has considered, as he 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.
35. **In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of his powers under section 40 of the DPA, he requires BBL to take the steps specified in Annex 1 of the Notice.**

Right of Appeal

36. 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 **24th** day **August** of 2022.

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

ANNEX 1

TERMS OF THE ENFORCEMENT NOTICE

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

1. Neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where the called line is that of:
 - (a) a subscriber who has previously notified BBL that such calls should not be made on that line; or
 - (b) a subscriber who has registered their number with the TPS at least 28 days previously and who has not notified BBL that they do not object to such calls being made.
2. Not permit its line/s to be used in contravention of paragraph (1) above.
3. Furthermore, where a public electronic communications service is used for the transmission of a communication for direct marketing purposes, BBL shall ensure that the recipient of the communication is provided with:
 - (a) the name of the person; and if the recipient so requests,
 - (b) either the address of the person or a telephone number on which he can be reached free of charge.

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 he ought to have exercised his 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)).