

## **DATA PROTECTION ACT 1998**

### **SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

#### **ENFORCEMENT NOTICE**

To: MCP Online Ltd

Of: 20-22 Wenlock Road, London, N1 7GU

1. The Information Commissioner ("the Commissioner") has decided to issue MCP Online Ltd ("MCP") 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 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. MCP, whose registered office is given above (Companies House Registration Number: 12571050) 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 and to have transmitted unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to Regulation 22 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. 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)."*

10. Regulation 23 of PECR states:

*"A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail –*

*(a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed;*

*(b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided;*

*(c) where that electronic mail would contravene regulation 7 of the Electronic Commerce (EC Directive) Regulations 2002; or*

*(d) where that electronic mail encourages recipients to visit websites which contravene that regulation."*

11. Section 122(5) of the 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 & Schedule 19 paragraphs 430 & 432(6) DPA18).
12. 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"*.
13. Recital 32 of the UK 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"*.
14. "Individual" is defined in regulation 2(1) of PECR as *"a living individual and includes an unincorporated body of such individuals"*.

15. 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"*.
16. "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"*.
17. The term "soft opt-in" is used to describe the rule set out in in Regulation 22(3) of PECR. In essence, an organisation may be able to e-mail its existing customers even if they haven't specifically consented to electronic mail. The soft opt-in rule can only be relied upon by the organisation that collected the contact details.
18. 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.
19. 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.
20. 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.

21. 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**

22. The Commissioner finds that MCP contravened Regulations 21, 22, 23 and 24 of PECR.
23. The Commissioner finds that the contravention was as follows:
24. Between 1 January 2022 and 28 September 2022, MCP used a public telecommunications service for the purposes of making 20,939 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. This resulted in five complaints being made to the TPS and the Commissioner.
25. The Commissioner is also satisfied for the purposes of Regulation 21 that these 20,939 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 MCP that they did not object to receiving such calls.



26. 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.
27. 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.
28. 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 calls from "similar organisations", "partners", "selected third parties" or other similar generic descriptions.
29. MCP has provided no evidence to the Commissioner that it had obtained notifications from subscribers who were registered with TPS/CTPS that they did not object to receiving unsolicited direct marketing calls.
30. Further, MCP failed, as required by Regulation 24 of PECR, to provide the recipient of the calls with the particulars specified at Regulation 24(2) of PECR.

31. The Commissioner also finds that between 1 January 2022 and 28 September 2022 there were 92,265 direct marketing SMS messages received by subscribers. The Commissioner finds that MCP transmitted the direct marketing messages sent, contrary to Regulation 22 of PECR.
32. MCP, as the sender 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.
33. The Commissioner's investigation has not found any evidence to indicate that MCP had prior consent or could satisfy the soft opt in criteria when sending marketing messages, which resulted in 386 spam text complaints being generated via the spam text reporting tool. The URLs provided in the marketing messages linked to websites that did not clearly explain who the data controller was.
34. The Commissioner has considered, as he is required to do under section 40(2) of the DPA 1998 (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. The Commissioner has decided that it is unlikely that damage 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 MCP to take the steps specified in Annex 1 of this 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 28<sup>th</sup> day of September 2023.

Signed .



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

## **ANNEX 1**

### **TERMS OF THE ENFORCEMENT NOTICE**

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

- 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 MCP that such calls should not be made on that line; or
  - (b) a subscriber who has registered their number with the TPS or CTPS at least 28 days previously and who has not notified MCP that they do not object to such calls being made.
- Furthermore, where a public electronic communications service is used for the transmission of a communication for direct marketing purposes, MCP 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.
- Except in the circumstances referred to in paragraph (3) of Regulation 22 of PECCR, 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 MCP that he clearly and specifically consents for the time being to such communications being sent by, or at the instigation of, MCP.

## 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](mailto: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)).