

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: CPS Advisory Limited

Of: 43 Brynymor Road, Gowerton, Swansea, United Kingdom, SA4 3EY

1. The Information Commissioner ("Commissioner") has decided to issue CPS Advisory Limited ("CPSAL") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty 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. CPSAL, whose registered office address is given above (Companies House Registration Number: 10683273) is the organisation stated in this notice to have used a public electronic communications service to make 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. Under section 55A (1) of the DPA (as amended by PECR 2011 and the Privacy and Electronic Communications (Amendment) Regulations 2015) the Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that –

"(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person, and

(b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person –

(a) knew or ought to have known that there was a risk that the contravention would occur, but

(b) failed to take reasonable steps to prevent the contravention."

8. The Commissioner has issued statutory guidance under section 55C (1) of the DPA about the issuing of monetary penalties that has been published on the ICO's website. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.
9. PECR implemented European legislation (Directive 2002/58/EC) aimed at the protection of the individual's fundamental right to privacy in the electronic communications sector. PECR were amended for the purpose of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches the PECR regulations so as to give effect to the Directives.
10. 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).

Background to the case

11. CPS Advisory Limited first came to the attention of the Commissioner following a report from Aviva relating to an unsolicited live pension call from a specific Calling Line Identity ("CLI").
12. The Commissioner, through enquiries with the relevant Communications Service Provider ("CSP"), was able to establish that the CLI in question was one of a number shown as being allocated to an organisation called JMR Financial Limited.

13. Subsequent correspondence with the director of JMR Financial Limited revealed that the marketing calls being made were actually being made by a separate company for whom he was also a director: CPSAL.
14. This information was verified with the CSP who confirmed that the account holder for the CLIs previously provided was indeed CPSAL, and not JMR Financial Limited as first thought.
15. Having identified a number of complaints related to calls from those CLIs, the Commissioner sent an initial investigation letter to CPSAL on 23 May 2019, setting out her concerns with the organisation's compliance with PECR, and requesting information which would assist in her investigation. It is noted that this initial correspondence advised CPSAL that the Commissioner was investigating potential contraventions of regulation 21 PECR.
16. CSPAL provided within its response details of the sole trading name used in its marketing calls: 'The Advisory Network'. It also confirmed that the data used for its calls was purchased from third party data providers. In response to the Commissioner's request for evidence of consent for the complaints received, CPSAL stated that "*it is highly likely that these records have consented to receiving calls from us*" but was unable to provide evidence of the specific consent.
17. Open source research was conducted by the Commissioner on the websites from which CPSAL advised the consents would have been obtained from. On each of the three sites checked it was apparent that the means by which consent was obtained did not allow for it to be freely given, specific, or informed.
18. The complaints received by the Commissioner relating to CLIs allocated to CPSAL include:

- *"They were cold calling me about pensions. I told them it was illegal now."*
 - *[Complainant confirmed call concerned pensions] "They told me they'd got my information from a data source, probably from a survey I'd completed. I do not recall completing a survey."*
 - *"Man provided me with a website address when I asked him who the company was and where they got my information from. They were trying to get me to sign up to a pension (www.advisorynetwork.co.uk)."*
19. On 28 June 2019 the Commissioner advised CPSAL that, in light of the content of some of the complaints received which suggested that CPSAL had contacted individuals in relation to pension schemes, her investigation would now focus specifically on potential contraventions of regulation 21B PECR.
20. On 8 July 2019 the Commissioner requested that CPSAL provides Call Dialler Records ("CDRs") for calls made specifically relating to pensions.
21. On 29 July 2019 CPSAL provided a spreadsheet in response which indicated that there had been a total of 527,221 agent handled calls made between 11 January 2019 and 30 April 2019. The Commissioner independently filtered out those calls which lasted for 'zero seconds' (i.e. those which had not connected to a subscriber) and found that 106,987 calls remained.
22. The Commissioner has made the above findings of fact on the balance of probabilities.

23. The Commissioner has considered whether those facts constitute a contravention of regulation 21B PECR by CPSAL and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

24. The Commissioner finds that CPSAL has contravened regulation 21B of PECR.
25. The Commissioner finds that the contravention was as follows:
26. 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.
27. The calls made by CPSAL constitute 'direct marketing in relation to occupational pension schemes or personal pension schemes' within the definition of regulation 21B(5)(b) 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)*".
28. 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".
29. 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". CPSAL has previously advised the Commissioner that it is an 'Appointed Representative – Introducer' ("IAR"), and believes it is therefore able to make calls relating to pension schemes. IARs are not included in the list of categories of "authorised persons" at Section 31(1) FSMA.

30. Furthermore, the Commissioner notes that although there is evidence that CPSAL were engaging in direct marketing calls relating to pensions as early as 11 January 2019, it did not register as an IAR with the Financial Conduct Authority until 12 February 2019.
31. In any event, whilst it is accepted that CPSAL was previously registered as an IAR for a period (its registration apparently ending as of 19 August 2020), it did not at any time hold 'Authorised' status on the FCA Register.
32. The Commissioner is therefore satisfied that CPSAL is not, and was not at the material time, an "authorised person" for the purposes of regulation 21B PECR.
33. The Commissioner is also satisfied that CPSAL, which has no company website and presents its 'nature of business' on Companies House as 'Other service activities not elsewhere classified', is not a trustee or manager of an occupational pension scheme or a personal pension scheme.
34. Therefore, neither paragraphs 2 or 3 of regulation 21B apply, and CPSAL cannot lawfully make direct marketing calls in relation to occupational pension schemes or personal pension schemes.
35. Even if CPSAL were an 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 it neither had the consent of those who it called, nor an existing customer relationship with them, as required by regulation 21B(2)(b) or (3)(b).

36. Between 11 January 2019 and 30 April 2019, CPSAL used a public electronic communications service to make 106,987 unsolicited calls for the purposes of direct marketing in relation to occupational pension schemes or personal pension schemes contrary to regulation 21B of PECR.
37. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

38. The Commissioner is satisfied that the contravention identified above was serious. This is because between 11 January 2019 and 30 April 2019 there were 106,987 unsolicited direct marketing calls made to subscribers in relation to occupational pension schemes or personal pension schemes by an organisation not lawfully authorised to carry out such activities. This represents a significant intrusion into the privacy of the recipients of such calls.
39. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

40. The Commissioner has considered whether the contravention identified above was deliberate.

41. The Commissioner considers that, in this case, CPSAL did not deliberately contravene regulation 21B PECR.
42. The Commissioner has gone on to consider whether the contravention identified above was negligent.
43. She has considered whether CPSAL knew or ought reasonably to have known that there was a risk that these contraventions would occur. She is satisfied that this condition is met, not least because the issue of unsolicited calls in relation to occupational pension schemes or personal pension schemes has been widely publicised by the media as being a problem, so much so that it prompted recent legislative change to prohibit the making of such calls unless certain conditions are met. It is reasonable to suppose that any organisation wishing to carry out such activities should, and indeed must, be aware of its responsibilities in this area.
44. The Commissioner has published detailed guidance on her website for those carrying out direct marketing calls for the purposes of pension schemes, explaining the strict criteria under which such calls can be made. This guidance explains such calls must not be made in relation to pension schemes unless the person calling is a trustee or manager of a pension scheme or a is firm authorised by the Financial Conduct Authority, and the individual being called has specifically consented to such calls or has a defined existing client relationship.
45. Furthermore, the Commissioner notes that one of the directors of CPSAL had previously been a director of a company which had been subject to regulatory action by the Commissioner for unsolicited direct marketing activities. This further supports the Commissioner's view that CPSAL had at least one director who should have been acutely

cognisant to the need to act in compliance of the law.

46. Secondly, the Commissioner has gone on to consider whether CPSAL failed to take reasonable steps to prevent the contraventions. Again, she is satisfied that this condition is met. Despite claiming to have 'diligently tracked' all guidance on the lead up to the introduction of regulation 21B, it appears that CPSAL completely failed to recognise that not being an "authorised" entity, it could not make such calls in any event. The Commissioner is of the view that if CPSAL had familiarised itself with the relevant legislation and clear updated Government and ICO guidance it would have realised that it could not lawfully make unsolicited direct marketing calls for the purposes of pension schemes. Furthermore, there is no evidence that CPSAL sought to take independent legal advice, or to request advice from the Commissioner, prior to engaging in its direct marketing campaign. CPSAL have claimed that it became an IAR specifically to comply with regulation 21B, however the Commissioner is not persuaded by this, given that it did not become an IAR until a month after it had already started making such calls, and since an IAR is not authorised to make such calls in any event.
47. Beyond this, whilst evidence provided by CPSAL suggests that some steps were taken in an effort to ensure that its data provider obtained valid consent for the purposes of direct marketing calls, from the two websites which CPSAL now say such consents were obtained from, it is apparent to the Commissioner that those consents cannot be said to have been freely given or specific and so would not constitute valid consent in any event.

48. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met

The Commissioner's decision to issue a monetary penalty

49. The Commissioner has also taken into account the following **aggravating features** of this case:

- Pension calls, in particular, can lead to high levels of financial detriment and/or emotional stress. It is for this reason that the restriction on such calls was introduced.
- The purpose of these calls was to generate leads for a particular financial services provider / intermediary. The making of calls of this nature will always be for financial gain as the company will profit from any business resulting from the calls.

50. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. She is also satisfied that the procedural rights under section 55B have been complied with.

51. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made by CPSAL on this matter.

52. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

53. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
54. The Commissioner has considered the likely impact of a monetary penalty on CPSAL. She has decided on the information that is available to her, that CPSAL has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
55. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The making of unsolicited direct marketing calls, particularly in relation to pension schemes, is a matter of significant public and parliamentary concern. A monetary penalty in this case should act as a general encouragement towards compliance with the law, or at least as a deterrent against non-compliance, on the part of all persons running businesses currently engaging in these practices. This is an opportunity to reinforce the need for businesses to ensure that they meet the strict criteria to engage in such activities and are only telephoning consumers who want to receive these calls.
56. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

57. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£130,000 (one hundred and thirty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

58. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **7 October 2020** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.
59. If the Commissioner receives full payment of the monetary penalty by **6 October 2020** the Commissioner will reduce the monetary penalty by 20% to **£104,000 (one hundred and four thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
60. There is a right of appeal to the First-tier Tribunal (Information Rights) against:
 - (a) the imposition of the monetary penalty
and/or;
 - (b) the amount of the penalty specified in the monetary penalty notice.
61. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
62. Information about appeals is set out in Annex 1.
63. The Commissioner will not take action to enforce a monetary penalty unless:

- the period specified within the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;
- all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and
- the period for appealing against the monetary penalty and any variation of it has expired.

64. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Dated the 4th day of September 2020.

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

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty 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: 0300 123 4504

Email: grc@justice.gov.uk

- a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.
 - b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state:-
- a) your name and address/name and address of your representative (if any);
 - b) an address where documents may be sent or delivered to you;
 - c) the name and address of the Information Commissioner;
 - d) details of the decision to which the proceedings relate;
 - e) the result that you are seeking;
 - f) the grounds on which you rely;
 - g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;

- h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.
5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.
6. The statutory provisions concerning appeals to the First-tier Tribunal (Information Rights) are contained in section 55B(5) 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)).