

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

To: EB Associates Group Limited

Of: 585a Fulham Road,
London
SW6 5UA

1. The Information Commissioner ("the Commissioner") has decided to issue EB Associates Group Limited ("EBAG") 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. EBAG, whose registered office is given above (Companies House Registration Number: 08093318) is the organisation stated in this notice to have instigated the use of 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 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).
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. From 29 March 2019 until 1 January 2021, consent in PECR was defined 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 EBAG has contravened regulation 21B of PECR.
18. The Commissioner finds that the contravention was as follows:
19. 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.
20. The Commissioner is satisfied that EBAG positively encouraged its IARs to make calls on its behalf as evidenced by them being paid a fixed fee of between £300.00 and £750.00 for each referral made to it. The marketing campaign was initiated by EBAG; [REDACTED] and [REDACTED] were commissioned by EBAG to engage in direct marketing in order to generate leads. The very fact that EBAG conducted (on its case) some due diligence on the IARs and insisted on high standards of regulatory compliance shows that it was consciously engaging the IARs to carry

out direct marketing – this is also borne out by EBAG’s disclosed communications with [REDACTED] and [REDACTED] expressly about direct marketing and the (then impending) cold-calling ban. Accordingly, the Commissioner takes the view that the calls made by the IARs over the period of contravention were made at the instigation of EBAG.

21. The calls instigated by EBAG 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)*”.
22. 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’.
23. 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”.
24. The calls carried out on EBAG’s behalf were carried out by IARs which are not included in the list of categories of ‘authorised persons’ at Section 31(1) FSMA..
25. However, the Commissioner accepts that EBAG would meet the necessary criteria to be considered an ‘authorised person’ as defined by section 31(1) FSMA, and that in the circumstances, whilst it instigated calls to be carried out by non-authorised entities, it would be capable

of satisfying the requirement of Regulation 21B(2)(a) and/or 21B(3)(a).

26. The Commissioner is not however satisfied that EBAG or the IARs making the calls had the valid consent of those who were called, or that they had an existing customer relationship with them, as required by regulation 21B(2)(b) and 21B(3)(b).
27. During the course of the Commissioner's parallel investigations into EBAG's IARs it was discovered that PB would obtain data from [REDACTED] – matching the information provided by EBAG - which used three sites to collect the data used for its calls: [REDACTED] [REDACTED] and [REDACTED]. The investigation into [REDACTED] discovered that it too obtained data via websites, specifically: [REDACTED] and [REDACTED]. The Commissioner notes a discrepancy in that EBAG stated that [REDACTED] obtained its data via [REDACTED], whereas the Commissioner's investigation into [REDACTED] found that it obtained data via [REDACTED]. In any event, the Commissioner notes from the 'due diligence' form which EBAG provided in relation to [REDACTED] that its 'example of website used to get opt in data' cites [REDACTED] as a source website and so is satisfied that the data is likely to have originated from the same sources as disclosed to the Commissioner by [REDACTED].
28. 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

¹ Although it is understood that data obtained via this website was not used by [REDACTED] following the introduction of Regulation 21B PECR.

service, the organisation will have to demonstrate how the consent can be said to have been given freely.

29. 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.
30. 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.
31. In this instance, EBAG instigated direct marketing calls to individuals who had provided their details via six competition/offer websites.
32. EBAG has not provided evidence of specific consent for the calls that it instigated. The Commissioner has however sought to review the sites from which consent would have been obtained by its IARs. She takes the view that the point at which consent was obtained via [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 relevant 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, any consent relied upon by EBAG for the calls made by ■■■ cannot be said to have been appropriately specific or freely given.

33. Looking at the competitions websites used by ■■■, it is apparent that an individual cannot enter a competition without providing consent to marketing. There is no way for an individual to freely consent to receive a specific method of marketing or to receive marketing from individual third parties as listed. Accordingly, EBAG would be unable to evidence valid consent for the calls made to these individuals by its IAR in relation to pension schemes.
34. The Commissioner has established that between 11 January 2019 and 30 April 2019 there were 106,987 connected calls made by ■■■ at the instigation of EBAG; with a further 16 calls being made (capable of being evidenced by complaints) between 2 February 2019 and 30 September 2019 by PB at the instigation of EBAG.
35. The Commissioner is therefore satisfied that, between 11 January 2019 and 30 September 2019, EBAG instigated the use of a public electronic communications service for the purpose of making 107,003 unsolicited calls for the purposes of direct marketing in relation to occupational pension schemes or personal pension schemes contrary to regulation 21B of PECR.
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 since 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.

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 EBAG 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 29th day of November 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

EBAG 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) 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.

Or 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 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)).