Appeal numbers: EA/2019/ 0054-0059

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

LEAVE.EU GROUP LIMITED **Appellants**
ELDON INSURANCE SERVICES LIMITED

- and -

THE INFORMATION COMMISSIONER **Respondent**

TRIBUNAL: JUDGE ALISON MCKENNA
ROSALIND TATAM
NIGEL WATSON

Determined in public, the Tribunal sitting at Field House London on 9, 10 and 11 December 2019

For the Appellants: Gerry Facenna QC instructed by Kingsley Napley LLP

For the Respondent, Christopher Knight of counsel, instructed by the Information Commissioner's Office

© CROWN COPYRIGHT 2020

DECISION

1. (i) Appeal number EA/ 2019/0054 (Assessment Notice, Leave EU)) is dismissed.

(ii) Appeal number EA/ 2019/0056 (Monetary Penalty Notice, £45,000 Leave.EU) is dismissed.

(iii) Appeal number EA/ 2019/0057 (Monetary Penalty Notice, £60,000 Eldon) is dismissed.

(iv) Appeal number EA/ 2019/0058 (Enforcement Notice, Eldon) is dismissed.

(v) Appeal Number EA/2019/0059 (Assessment Notice, Eldon) is dismissed.

(vi) (Appeal number EA/ 2019/0055 (Monetary Penalty Notice, Leave.EU £15,000) - withdrawn by the Appellant).

REASONS

A: Introduction

2. These appeals concern a number of statutory notices served on Leave.EU Group Limited ("Leave.EU") and Eldon Insurance Services Limited ("Eldon") by the Information Commissioner on 1 February 2019.

3. Both Leave.EU and Eldon lodged Notices of Appeal with the Tribunal. The appeals were directed to be heard together.

4. The Tribunal held an oral hearing on 9, 10 and 11 December 2019 and reserved its Decision, which we now provide. We considered a hearing bundle of 1400 pages, two volumes of legal materials, heard oral evidence and legal submissions. We are grateful to both counsel for their clear written and oral submissions.

B: Factual Background

5. Leave.EU is a limited company established for cross-party political purposes, created to campaign in support of the UK exiting the European Union. Eldon is a limited company providing insurance services, regulated by the Financial Conduct Authority. It provides some insurance products under the brand name of "GoSkippy". These two companies are distinct legal entities but also both members of a corporate group. The majority shareholder of the group's parent company is Mr Arron Banks, who is also the sole subscriber of Leave.EU. The companies have some directors in common. Ms. Elizabeth Bilney is the Chief Executive Officer of both companies. Some members of Eldon staff were seconded to work for Leave.EU during the referendum campaign. At the time of the events giving rise to these appeals, the two companies were physically located in the same premises, although this is no longer the case. Another group company known as Rock Services Limited provided

centralised management support services to both companies when they were based at the shared premises.

6. Leave.EU was incorporated in 2015, originally under the name of "TheKnow.EU". Another company within the corporate group, "Better for the Country Limited", provided advice to Leave.EU in connection with the EU referendum. Its directors include Mr Banks, Ms Bilney and Mr Andrew Wigmore. The Information Commissioner served a £50,000 Monetary Penalty Notice ("MPN") on Better for the Country Limited in June 2016 in relation to its transmission of 500,000 unsolicited text messages during the referendum campaign.

7. The Information Commissioner commenced a large-scale investigation into the use of data analytics for political purposes, known as Operation Cederberg, in May 2017[1]. That investigation is of significant public interest. The Commissioner has published reports to inform the public and Parliament of the progress of her investigation, which is on-going. During the course of that investigation, concerns relating to Leave.EU and Eldon came to the Information Commissioner's attention. In particular, the Commissioner was concerned to establish whether the personal data of Eldon's insurance customers had been used in connection with political campaigning by Leave.EU. She also wanted to know about the nature of any work which Leave.EU had undertaken with the now notorious entity, Cambridge Analytica. Many of these concerns arose from public statements made by Mr Banks and his associates, as follows:

(i)Mr Banks issued a press release in response to the Better for the Country MPN in June 2016 which was headed "*a heartfelt apology*" but the body of the document as it concerned the Information Commissioner was the single word "*Whatever"*;

(ii) Leave.EU and Cambridge Analytica held a joint press conference in November 2015;

(iii) Mr Banks wrote in his book "*The Bad Boys of Brexit"* that he had hired Cambridge Analytica in October 2015; that another company called Goddard Gunster had been able to "*mine"* a database; that he had used telephone polling and targeting; and that *"Big Data"* had given Leave.EU an advantage in the referendum campaign;

(iv) Mr Banks tweeted *"AI won it for leave"* in January 2017;

(v) Mr Wigmore tweeted that Leave.EU had used *"bots"* and *"AI"* to target specific groups;

(vi) Mr Wigmore commented in an interview in October 2017 that he was working with a University in Mississippi, which was the world-wide centre for artificial intelligence.

[1] Operation Cederberg was described by the Upper Tribunal in *UKIP v The Information Commissioner (Information Notice)* [2019] UKUT 62 (AAC).

8. The Information Commissioner asked Leave.EU a series of questions about these statements and also about e-mail exchanges between Leave.EU and Cambridge Analytica which she had obtained during the investigation. She served a number of Information Notices on Leave.EU and Eldon.

9. Leave.EU has consistently denied any wrongdoing in relation to its processing of personal data. It told the Information Commissioner that it had not in fact hired Cambridge Analytica (contrary to the public statement made to that effect), and that it had not used Eldon's customer data for political purposes. The Commissioner made inquiries, but ultimately found no evidence that the personal data of UK citizens had been transferred to the University in Mississippi. Her involvement in legal proceedings relating to the University was the subject of threatened judicial review by Mr Banks, however the application was not pursued.

10. On 14 June 2018, Mr Banks wrote directly to the Information Commissioner. He said that the purpose of his letter was to summarise for her the evidence he had that week given to the Digital Culture Media and Sport Select Committee hearing. Much of that letter relates to litigation in Mississippi, in relation to which he asked the Information Commissioner to disclose to him documents that she had received. He stated that:

> *"It will have been clear from our oral evidence given at the hearing that some of the statements made by myself and Andy Wigmore in promoting the campaign were prone to exaggeration and attention seeking in order to drive publicity for the Leave.EU campaign. This boastfulness and overstatement was driven and accentuated in part by the increased media focus surrounding the leave campaign and the competition to outdo the Vote Leave and Remain campaigns."*

11. There followed an exchange of correspondence in which the Information Commissioner described her investigations as on-going and Mr Bank accused her of undertaking "politically motivated" actions. He concluded "*We will therefore now have to take steps outside of our correspondence with you, which has to date been private, to ascertain the true facts surrounding the ICO's behaviour and to establish what remedies are open to us. I would, however, make the point that both I and the companies associated with me have and will continue to co-operate with your investigations, to the extent that they are carried out in accordance with due process. As ever, we fully reserve our rights in relation to this matter".*

12. On 5 November 2018, the Information Commissioner served a statutory Notice of Intent to serve a Monetary Penalty on GoSkippy/Eldon (bundle p.238). This Notice explains that she considered that Eldon had breached Regulation 22 of The Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR")[2] by instigating the transmission of 1,069,852 unsolicited direct marketing communications, transmitted by Leave.EU, which advertised GoSkippy Insurance.

[2] http://www.legislation.gov.uk/uksi/2003/2426/contents/made

The Information Commissioner had concluded that GoSkippy did not have the necessary valid consent from recipients to receive this information. The contravention was found to have been serious in view of the high number of emails sent and the Information Commissioner found that GoSkippy knew or ought to have known that the communications breached PECR but had failed to take reasonable steps to prevent the breach. The MPN which she was minded to serve was £60,000.

13. On the same date, the Information Commissioner served a Preliminary Enforcement Notice on Eldon (bundle p. 251). This states that the Information Commissioner was satisfied there had been a breach of PECR (as set out in the Notice of Intent to serve the MPN) and that she was minded to serve an Enforcement Notice requiring Eldon/GoSkippy to take specified steps to comply with Regulation 22 of PECR.

14. Also on 5 November 2018, the Information Commissioner served on Leave.EU a Notice of Intent to serve a Monetary Penalty (bundle p.261). She specified the reason for this as having found a contravention of PECR Regulation 22 by Leave.EU in transmitting 1,069,852 direct marketing emails containing advertising for GoSkippy. These communications were unsolicited and lacked the requisite consent. The contravention was found to have been serious in view of the high number of emails sent and the Information Commissioner found that Leave.EU knew or ought to have known that the communications breached PECR but had failed to take reasonable steps to prevent the breach. The MPN which she was minded to serve was £60,000.

15. Eldon and Leave.EU both made representations in response to the "minded to" letters. Eldon complained that the Information Commissioner had publicised the serving of the Notice of Intent and Preliminary Enforcement Notice before receiving its representations. Eldon suggested, *inter alia*, that it was Leave.EU which had both instigated the transmission of and transmitted the offending electronic communications. Leave.EU's representations also asserted that Eldon had not instigated the transmission of the emails.

16. The Information Commissioner subsequently decided to serve the MPNs that we are considering in these appeals[3] (bundle p.410 Eldon, p. 447 Leave.EU) on the basis that Leave.EU and Eldon had both breached the requirements of Regulation 22 PECR by including in 1,069,852 emails (consisting of 21 separate newsletters sent between August 2016 and July 2017), sent to Leave.EU subscribers, a promotional discount for GoSkippy insurance. The MPNs stated the Information Commissioner's conclusion that Leave.EU was the transmitter of the emails and Eldon/GoSkippy was the instigator of that transmission. She confirmed the level of penalty as £60,000 for Eldon but reduced it to £45,000 for Leave.EU having reviewed its accounts.

17. The Information Commissioner also on 1 February 2019 served Assessment Notices[4] requiring both Eldon and Leave.EU to permit the Information Commissioner

[3] ENF0784640 – appeal EA/2019/0056 and ENF0784731 – appeal EA/2019/0057

[4] Appeals EA/2019/0054 and 0059

to carry out an assessment of whether they have complied or are complying with the data protection legislation (bundle page 440 Eldon, p.468 Leave.EU). The scope of the assessments differ in that Eldon's Assessment Notice refers to personal data held for (a) the provision of insurance services, (b) direct marketing and (c) lead generation whereas Leave.EU's Assessment Notice refers to personal data held for (a) direct marketing and (b) lead generation. The Assessment Notices had not been presaged by "minded to" letters, as this is not required under DPA 2018.

18. The Information Commissioner also on that date served an Enforcement Notice[5] on Eldon only (bundle p. 429) for the stated purpose of requiring Eldon to refrain from sending unsolicited direct marketing communications without consent. The Enforcement Notice was served under s.40 DPA1998[6].

19. A further MPN was served on Leave.EU (item (vi) in paragraph 1 above). This was the subject of an appeal which was withdrawn by Leave.EU[7], so we do not need to consider that appeal in this Decision and the MPN stands. However, we note that this MPN related to the transmission by Leave.EU of 296,522 emails in September 2015. These emails were sent to a mailing list which included Eldon customers who had not subscribed to Leave.EU. This event was described by Leave.EU as a one-off administrative error involving s shared Mailchimp account. Leave.EU initially asserted that it had reported this data breach to the Information Commissioner's Office at the time of the data breach, but it later transpired that this had not been the case.

20. Eldon and Leave.EU both lodged Notices of Appeal with the Tribunal, in which they relied on grounds of appeal that the Information Commissioner had made errors of law in issuing all the statutory notices. Alternatively, that her discretion ought to have been exercised differently. They also relied on grounds of procedural unfairness and apparent bias, including the making of an inaccurate statement to a Parliamentary Select Committee (which the Information Commissioner accepts to have been the case), and the allegedly unwarranted publication by the Information Commissioner's Office of statements about the Notices of Intent. Later, the disclosure of an exchange of emails between the Information Commissioner and the Deputy Information Commissioner prompted an (unopposed) application by the Appellants to amend their grounds of appeal to include an allegation of bias by the Information Commissioner. Mr Stephen Eckersley, the Information Commissioner's Director of Investigations, commented on these complaints in his second witness statement, referred to below.

21. Elizabeth Bilney's evidence to the Tribunal was that the public statements from Mr Banks and Mr Wigmore about artificial intelligence, Cambridge Analytica, and the disrespectful "*Whatever"* statement could not be relied upon as factually correct. She asked the Tribunal to rely instead on her own role in co-operating fully with the

---

[5] Appeal EA/2019/0058

[6] Section 40 DPA 1998 continued in effect for the purposes of enforcing PECR following the enactment of DPA 2018 – see paragraph 28 (1), schedule 20 to DPA 2018.

[7] Appeal EA/2019/0055

Information Commissioner's investigation and providing it with evidence of both companies' compliance with data protection legislation. She repeatedly expressed the view that Eldon does not use direct marketing and that it had not therefore needed to consider its compliance with PECR. We note that the absence of complaints about the emails was a mitigating factor expressly taken into account by the Information Commissioner in determining the appropriate level of financial penalty, but that Ms Bilney, having initially told the Information Commissioner that there had been no complaints, later accepted that she had received two "grumbles" about the e mails (considered below at paragraph 47).

22. Prior to the hearing, the parties' counsel agreed between them a list of issues which they suggested the Tribunal should decide in these appeals. We have addressed them to the extent we considered them relevant, having considered all the evidence. The list included questions of whether the emails to Leave.EU subscribers containing the GoSkippy discount information as a matter of law constituted unsolicited direct marketing which contravened PECR, and the extent to which the alleged procedural unfairness by the Information Commissioner's Office could be cured by a "full merits" appeal hearing before this Tribunal.

C: The Law

(i)Monetary Penalty Notices

23. The MPNs in this case were issued pursuant to s. 55A of the Data Protection Act 1998 ("DPA")[8]. S.55B(5) DPA 1998 confers a right of appeal to this Tribunal on a person upon whom such an MPN is served. The appeal may be against (a) the decision to issue the MPN and/or (b) the amount of the penalty. The Appellants' Grounds of Appeal in this case engage both limbs (a) and (b).

24. By virtue of article 7 of the Data Protection Act (Monetary Penalties) Order 2010[9], the s. 55B(5) right of appeal is to be determined in accordance with s. 49 DPA 1998. This provides that the Tribunal shall allow the appeal and ("or") substitute another Notice if the Notice is "not in accordance with the law" or to the extent that the Commissioner exercised her discretion, it should have been exercised differently.

25. The MPNs were issued on the basis that both companies had breached regulation 22 of PECR, which provides as follows:

> *"22 (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*

[8] S. 55A DPA 1998 as amended by schedule 1 PECR
http://www.legislation.gov.uk/ukpga/1998/29/part/VI/crossheading/monetary-penalties

[9] http://www.legislation.gov.uk/ukdsi/2010/9780111490723

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)."

26. In *Microsoft Corporation v McDonald (trading as Bizads)* [2006] EWHC 3410 (Ch)[10], Lewison J (as he then was) considered the meaning of *instigation* for the purposes of regulation 22 PECR. He concluded at [13] that:

> *"The Regulations apply to prevent not only the transmission of electronic mail but also the instigation of such transmission. What is the meaning of the word 'instigate'? Mr Vanhegan, who appears on behalf of Microsoft, submits that it has its ordinary dictionary definition which includes urging or inciting somebody to do something. I accept that submission. I do, however, consider that to urge or incite somebody to do something requires something more than the mere facilitation of the action concerned; it requires, in my judgment, some form of positive encouragement".*

27. PECR regulation 2 provides that expressions used in PECR which are not defined in regulation 2 (1) have the meaning given to them in DPA 1998 or, if not there defined, in Directive 2002/58/EC (the E-Privacy Directive)[11]. Section 11(3) DPA 1998 defines *"direct marketing"* as *"the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals".* Article 2 (f) of the E-Privacy Directive provides that *"consent"* by a user or subscriber corresponds to the data subject's consent in Directive 95/46/EC (the Data Protection Directive)[12]. The Data Protection Directive provides at Article 2 (h) that:

---

[10] http://juriscom.net/wp-content/documents/highcourtjce20061212.pdf

[11] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0058:en:HTML

[12] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046

"'the data subject's consent' shall mean 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".

28. Section 160 DPA 2018 requires the Information Commissioner to publish a Regulatory Action Policy giving guidance about how she proposes to exercise her functions under the DPA 2018. This was published in November 2018[13]. It was disputed before us whether it applies to Notices served under the auspices of DPA 1998.

29. Section 55A DPA 1998, as amended, provides that the Information Commissioner has discretion to issue an MPN where she:

"…is satisfied that—

(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communication (EC Directive) Regulations 2003; 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."

(ii)Assessment Notices

30. The two Assessment Notices before us were issued pursuant to s. 146 DPA 2018[14]. This provision empowers the Information Commissioner as follows:

"*(1) The Commissioner may by written notice (an "assessment notice") require a controller or processor to permit the Commissioner to carry out an assessment of whether the controller or processor has complied or is complying with the data protection legislation.*

(2) An assessment notice may require the controller or processor to do any of the following—

(a)permit the Commissioner to enter specified premises;

(b)direct the Commissioner to documents on the premises that are of a specified description;

(c)assist the Commissioner to view information of a specified description that is capable of being viewed using equipment on the premises;

(d)comply with a request from the Commissioner for a copy (in such form as may be requested) of—

(i)the documents to which the Commissioner is directed;

(ii)the information which the Commissioner is assisted to view;

[13] https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf

[14] http://www.legislation.gov.uk/ukpga/2018/12/section/146

(e)direct the Commissioner to equipment or other material on the premises which is of a specified description;

(f)permit the Commissioner to inspect or examine the documents, information, equipment or material to which the Commissioner is directed or which the Commissioner is assisted to view;

(g)provide the Commissioner with an explanation of such documents, information, equipment or material;

(h)permit the Commissioner to observe the processing of personal data that takes place on the premises;

(i)make available for interview by the Commissioner a specified number of people of a specified description who process personal data on behalf of the controller, not exceeding the number who are willing to be interviewed".

31. An Assessment Notice carries a right of appeal, in identical terms to s. 49 DPA 1998, pursuant to ss. 162 and 163 DPA 2018.[15] There is no statutory threshold for the service of an Assessment Notice, so the decision to issue such a notice lies within the Information Commissioner's general discretion. As noted above, there is no requirement to serve a Notice of Intent prior to serving an Assessment Notice.

(iii)Enforcement Notices

32. The Enforcement Notice, served on Eldon only, was issued pursuant to s. 40 DPA 1998[16]. Such Enforcement Notices carry a right of appeal under s. 49 DPA 1998.

33. Section 40 DPA 1998 (as amended by PECR) empowers the Information Commissioner as follows:

"(1) If the Commissioner is satisfied that a data controller has contravened or is contravening any of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003…. , the Commissioner may serve him with a notice (in this Act referred to as "an enforcement notice") requiring him, for complying with the …requirements in question, to do either or both of the following—

(a) 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, or

(b) to refrain from processing any personal data, or any personal data of a description specified in the notice, or to refrain from processing them for a purpose so specified or in a manner so specified, after such time as may be so specified.

[15] http://www.legislation.gov.uk/ukpga/2018/12/section/162

[16] http://www.legislation.gov.uk/ukpga/1998/29/section/40/2016-07-22

(2) In deciding whether to serve an enforcement notice, the Commissioner shall consider whether the contravention has caused or is likely to cause any person damage".

34. The Enforcement Notice in this case was served on the basis that the Information Commissioner was satisfied there had been a breach of regulation 22 of PECR by Eldon.

(iv)The role of the Tribunal

35. As noted above, the role of the Tribunal in hearing an appeal against an MPN, Enforcement or Assessment Notice is as described in s. 49 DPA 1998. The statutory wording used in s. 49 DPA 1998 also describes the Tribunal's jurisdiction in relation to appeals against Decision Notices issued by the Information Commissioner under the Freedom of Information Act 2000 ("FOIA") and the Environmental Information Regulations 2004 ("EIRs"). The Upper Tribunal has confirmed that an appeal against a Decision Notice made under FOIA or EIRs is to be regarded as an appeal by way of re-hearing. The most recent and authoritative support for that approach may be found in the Decision of a three-judge panel of the Upper Tribunal (AAC) in *Malnick v IC and ACOBA* [2018] UKUT 72 (AAC)[17].

36. In *Central London Community Healthcare NHS Trust v Information Commissioner* [2013] UKUT 0551 (AAC)[18], UTJ Wikeley described the FTT's jurisdiction in considering MPN appeals as a "*an appeal by way of a full merits review".* At [56] he advised the First-tier Tribunal to focus on whether the statutory conditions for issuing an MPN have been met and not to "*painstakingly [follow] all the twists and turns of the Commissioner's internal decision-making process".*

37. *In UKIP v Information Commissioner (information notice)* [2019] UKUT 62 (AAC)[19] the Upper Tribunal considered the application of this *"two-pronged"* right of appeal in relation to the service of an Information Notice under s. 43 DPA1998 and applied the approach taken in *Malnick.*

38. The Tribunal's approach to an appeal by way of a full-merits review is generally to follow *R (Hope and Glory Public House Limited) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31[20], which was approved by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60 at [45][21]. Such an approach requires the Tribunal to consider what weight

---

[17] https://assets.publishing.service.gov.uk/media/5ac3336440f0b60a4be86c2f/GIA_0447_2017-02.pdf

[18] https://www.bailii.org/uk/cases/UKUT/AAC/2013/551.html

[19] https://assets.publishing.service.gov.uk/media/5c88fda2ed915d50a9d5169d/GIA_2069_2018-00.pdf

[20] http://www.bailii.org/ew/cases/EWCA/Civ/2011/31.html

[21] https://www.supremecourt.uk/cases/docs/uksc-2015-0126-judgment.pdf.

to attach to the Respondent's reasons for making the decision under appeal and, if the appeal is to be allowed, substituting a fresh decision. This avoids the Tribunal determining such appeals on the basis of a review of the procedure adopted in making the Respondent's own decision, as the ability for an independent judicial body such as this Tribunal to take a fresh decision is generally understood to be curative of procedural shortcomings by the administrative decision-maker.

39. However, the Appellants in this case relied on a (non-binding) first-tier preliminary issue ruling by Judge McKenna in *Facebook Ireland Ltd and Facebook Inc v Information Commissioner* EA/2018/0256[22]. Judge McKenna there took the view at [19] to [21] that:

> *"...having considered the issues most carefully, I am persuaded that in the particular circumstances of this case it would be fair and just for the Appellants' Grounds of Appeal relating to procedural unfairness to be considered by the Tribunal. That is not to say that every information rights case before this Tribunal in which procedural impropriety is alleged should be permitted to take up the Tribunal's time and increase the Information Commissioner's costs in undertaking a procedural review. In the majority of cases the Tribunal may well take the view that its discretion should be exercised to exclude evidence and argument related to alleged procedural failings which can adequately be cured by the Tribunal in undertaking a "full merits review.*
>
> *…in this case I am satisfied that I should distinguish the operation of a monetary penalty regime and the imposition of a very substantial financial penalty from the FOIA and EIR cases relied on by Mr Pitt-Payne, where different issues were at stake. I accept that Central London Community Health Trust took a different approach in the context of an MPN, but it seems to me that UTJ Wikeley was there considering a more familiar type of procedural challenge and arguably a much less serious complaint than is made in this case.*
>
> *I consider that the authorities relied on by Ms Proops support the approach of agreeing to consider the most serious allegations of procedural unfairness even in the context of an appeal by way of rehearing. I am satisfied that the alleged bias and predetermination pleaded by counsel in this case falls into the most serious of categories. I conclude that fairness and justice require the Tribunal to consider whether the Appellants' challenge strikes at the heart of the decision to issue the MPN so that that decision is not in accordance with the law or the discretion to issue it should have been exercised differently…"*

---

[22] Not published by the Tribunal but placed into the public domain here: https://panopticonblog.com/2019/07/10/the-facebook-appeal-and-procedural-grounds/

40. Judge McKenna granted Facebook permission to appeal in respect of that ruling, but the appeal was never heard by the Upper Tribunal because the parties entered into a consent order which disposed of the appeal. Meanwhile, UTJ Markus took the unusual step of publishing her refusal of permission to appeal in *Our Vault Limited v Information Commissioner* [2019] UKUT 369 (AAC)[23] in which she stated at [14]:

> *"Although I heard no submissions on the point, I acknowledge that the reasoning in Malnick of the powers of the First-tier Tribunal on allowing an appeal in a FOIA case (at [103]-[104]) may require some modification in a DPA case. This is because under FOIA the IC is obliged by law to issue a decision notice, but the same cannot be said of enforcement or monetary penalty notices under the DPA. However, that does not matter for present purposes. The unarguable position is that the First-tier Tribunal is required to stand in the shoes of the IC and it would be inconsistent with the wide scope of the tribunal's duties and powers to conclude that, if the tribunal finds that there has been a procedural error by the IC, it must stop the appeal at that point. Section 49 enables the First-tier Tribunal to substitute a notice or decision. This shows that Parliament intended that, where there was a mistake by the IC (whatever the nature of that mistake – law, fact or procedure), the tribunal is to make the decision that the IC could have made".*

41. Mr Facenna, on behalf of the Appellants, sought to cast doubt on UTJ Markus' categoric approach by drawing the Tribunal's attention to the administrative law text book *De Smith* (8th Edition) at 8-045, where it is stated that *"The question whether a decision vitiated by breach of the rules of fairness can be made good by a subsequent hearing does not admit of a single answer applicable to all situations in which the issue may arise. Whilst it is difficult to reconcile all the relevant cases, case law indicates that the courts are increasingly favouring an approach based in large part upon an assessment of whether, in all the circumstances of the hearing and the appeal, the procedure as a whole satisfied the requirement of fairness".*

42. He referred us to *TalkTalk Telecom Group plc v Office of Communications* [2012] CAT 1[24] at [131], in submitting that there is a category of cases in relation to which a fresh decision by the Tribunal on appeal could not cure a procedural deficiency by the original decision-maker, where that procedural deficiency was so serious as to render it unsafe for the Tribunal to conclude 'on the merits' that the right decision had been made. He also drew support for this approach from the Privy Council's judgment in *Calvin v Carr* [1980] A C 574, in which Lord Wilberforce concluded at 593D that:

---

[23] https://www.gov.uk/administrative-appeals-tribunal-decisions/our-vault-limited-v-information-commissioner-gia-2019-ukut-369-aac

[24] https://www.catribunal.org.uk/sites/default/files/1.1186_TalkTalk_Judgment_CAT_1_100112.pdf

"…there may be instances where the defect is so flagrant, the consequences so severe, that the most perfect of appeals or re-hearings will not be sufficient to produce a just result. Many rules (including those now in question) anticipate that such a situation may arise by giving power to remit for a new hearing. There may also be cases where the appeal process itself is less than perfect: it may be vitiated by the same defect as the original proceedings: or short of that there may be doubts whether the appeal body embarked on its task without predisposition or whether it had the means to make a full and fair inquiry, for example where it had no material but a transcript of what was before the original body. These are all matters (and no doubt there are others) which the court must consider".

43. Mr Facenna referred us to Saini J's judgment in *R (Karagul) v Secretary of State for the Home Department* [2019] EWHC 3208 (Admin)[25] where the court reviewed the principles of administrative fairness to be applied in cases where a public authority exercising a statutory power suspected that misrepresentations had been made to it during the course of its inquiries. Citing the Court of Appeal's judgment in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 693[26], Saini J concluded at [103] that there is a well-established principle requiring there to be an opportunity to address the alleged misrepresentation prior to a final decision being taken.

D: Evidence

(i)documentary evidence

44. We had in our hearing bundle the 21 emailed newsletters (bundle p.604-698). They each contain a GoSkippy promotional banner (in three differing styles) containing a hyperlink to the GoSkippy website and a clear offer of a 10% discount on GoSkippy products to Leave.EU supporters. We note that the text of the newsletters makes a humorous association between Skippy the kangaroo from the 1960s television show and the Leave.EU campaign, so that a kangaroo is depicted winning a boxing match by knocking out a cartoon Angela Merkel. The promotional offer builds on this link by describing itself as a "*Brexit Skippy giveaway for Article 50 day*". Skippy is shown holding up his boxing medals under the banner *"Skippy says an Aussie style points system is a winner"*, and his medals have "GoSkippy Insurance" printed on them. The newsletters refer to the weekly news round-up being *"brought to you by GoSkippy.com"*. The initial August 2016 newsletter states "*We are pleased to announce a sponsorship deal with GoSkippy Insurance to help fund our activities…"* The 10% discount is described as a *"Brexit Independence Policy".* Readers are also informed that Mr Banks is the co-founder of GoSkippy and invited to purchase his book.

---

[25] https://www.bailii.org/ew/cases/EWHC/Admin/2019/3208.html

[26] https://www.bailii.org/ew/cases/EWCA/Civ/2019/673.html

45. Apart from the Skippy-related material, the newsletters contain pro-EU exit news and views presented in a tabloid style, plus opinion pieces from Mr Banks himself and some text and graphics devoted to other subjects, such as criticising the BBC and the Islamic religion.

46. Each newsletter contained a link to an "*unsubscribe from this list"* button. Each also included a statement on the last page as follows:

> *"How we use your information: the information you provide will be used by Better for the Country Limited for the purposes of keeping you updated about our campaigns. The data controller for this information is Elizabeth Bilney. This information will be processed in accordance with ...[DPA] by the company's staff and may be passed to any of the other EU referendum 'Leave' campaigns. If you do not want the information you give to us to be passed to other 'Leave' campaign organisations, or for us to contact you, please indicate: I would not like to receive more information from Better for the Country Limited, I would not like to receive more information from other Leave campaign organisations. If you have any questions about how your information will be processed or about your rights under the DPA, please contact Elizabeth Bilney at Better for the Country Ltd ...".*

47. In answer to the Information Commissioner's statutory Information Notice, Elizabeth Bilney had stated that no recipients of the emailed newsletters had complained about the GoSkippy offer being sent to them. By the time of the hearing this was accepted to have been incorrect and that two subscribers had complained to Leave.EU. One had stated that they had "s*ubscribed for Brexit reasons, not for advertising insurance companies, now unsubscribed".* The other said "*who gave leave.eu authority to use its supporters private personal details to be used as a mailing database for Go Skippy insurance. The use of this list in this way is both unethical and wholly inappropriate".*

48. Our bundle included several versions of a Privacy Policy relied on by Leave.EU. This was available to subscribers via a link on the Leave.EU web page. It stated that:

> *"We use information held about you in the following ways…to provide you with information, products or services that you request from us or which we feel may interest you, where you have consented to be contacted for such purposes…*
>
> *We may also use your data, or permit selected third parties to use your data, to provide you with information about goods and services which may be of interest to you and we or they may contact you about these by post or telephone.*
>
> *If you are a new registered supporter, and where we permit selected third parties to use your data, we (or they) will contact you by electronic means only if you have consented to this.*
>
> *…We may disclose your personal information to any member of our group…*

…You have the right to ask us not to process your personal data for marketing purposes. We will usually inform you (before collecting your data) if we intend to use your data for such purposes or if we intend to disclose your information to any third party for such purposes. You can exercise your right to prevent such processing by checking certain boxes on the forms we use to collect your data. You can also exercise the right at any time by contacting us".

49. It was common ground before us that Leave.EU had transmitted the newsletters containing the GoSkippy discount information. However, it was disputed whether Eldon had *"instigated"* that transmission for the purposes of regulation 22 PECR. The documentary evidence relied on by the Information Commissioner in that regard was a series of email exchanges between group company employees (bundle p.715 - 731). We note that they use either Leave.EU email addresses or Rock Services email addresses (sometimes both, interchangeably). These exchanges were with people using GoSkippy email addresses in August 2016. Ms Bilney was involved in some of them (using her Rock-Services and her Leave.EU email addresses). The exchanges included the following comments: "*Arron would like the policy to say, 'Brexit independence policy' on it"* and "*Arron is reviewing the letter"* and "*Arron wants the discount on all skippy products not just car and home".* Later that month there is a further e mail exchange reporting that "*Arron has told us to hold off sharing the Brexit deal via Leave.EU until further notice".*

50. The documentary evidence included internal documents from the ICO investigation. These included the notes of a meeting between ICO officers and Ms Bilney in April 2017 (bundle p.1168) at which she confirmed that Leave.EU had never in fact worked with Cambridge Analytica, despite the "*spin and exaggeration"* suggesting otherwise. We also have in our bundle the email exchanges between Cambridge Analytica and Leave. EU which prompted the ICO's concerns (bundle p. 1177 – 1181).

51. We also have before us an email correspondence between the Information Commissioner and the Deputy Information Commissioner, referred to by Mr Eckersley in his first witness statement (bundle p.1192-1193). This exchange took place on the afternoon of Sunday 4 November 2018, the day before the service of the Notices of Intent. The Information Commissioner expresses her continuing concern about the relationship between Leave.EU and Eldon, as follows:

"*I think there is much more to see here. One of the issues I think we need to look at through our continuing investigation and an audit is how insurance data may have been used in modelling for the polling done by Leave.EU. I have problems believing what we have been told. There was talk way back from Andy Wigmore about insurance actuaries being involved. We could try to talk to Eldon employees as well as they are now coming forward. James, has the FCA announced that they are going in to look at Eldon? Wonder if there would be any appetite for a joint or parallel audit which could be very powerful."*

52. The Deputy Information Commissioner replied:

"*Yes, we can factor that into the ongoing enquiries; with the audit the intention would be to see if FCA would be interested in being involved to ensure the finance conduct and DPA issues are all tied together (I think they will – they have been looking on and off at various entities for a while we understand); the advantage of the PECR fines now is that they also allow the FCA to look at issues by virtue of a regulatory outcome already having been achieved. We can pick that up with the FCA as part of the follow up to the report."*

53. The most significant body of documentary evidence before us was the correspondence between the Information Commissioner's Office and Ms Bilney in response to a series of Information Notices. (As noted above, this included two responses which are now accepted to have been inaccurate, in respect of the claimed reporting of a previous data breach and in respect of complaints received about the GoSkippy e mails).

54. We also had before us the internal Data Protection Policy adopted by Leave.EU. We note that this policy provides staff with guidance on DPA but not on PECR.

55. Mr Facenna told the Tribunal that there was much additional documentary evidence which had been supplied to the ICO by his clients in response to numerous Information Notices, and complained that this evidence was not before us because the Information Commissioner did not include it in our bundle. He did not point to any particular piece of missing evidence or to any specific prejudice to his client from the exclusion of any evidence from the bundle. We take the view that it was open to the Appellants to supply us with any additional materials which they felt we should see before we made our decision on their appeals but that, with the benefit of legal advice, they decided to proceed with the hearing bundle prepared by the Information Commissioner. We do have power to direct the filing of additional evidence on our own initiative if we consider that it would be fair and just to do so, however we have not identified any particular additional evidence which we would like to direct to be filed before deciding these appeals.

(ii)witness evidence

56. Elizabeth Bilney's witness statement records that Arron Banks is not a director of Eldon and has no role in its day to day operations. She describes the decision to found Leave.EU and to locate it in the building in Bristol where several other of Mr Banks' companies were located and where groups support services such as finance, IT, HR and marketing were provided centrally. She describes taking steps to ensure that Leave.EU operated separately from the other companies as follows: by using Gmail rather than Outlook, separate operating platforms (Eldon uses a specialist insurance platform whereas Leave.EU operated on an off-the-shelf electoral campaign platform), a shared server with segregated network drives which were "locked down and partitioned" with access only granted to limited authorised personnel. She said that when a new member of staff started work, their manager authorised the levels of access that they required for their role. She explained that Leave.EU's call centre was based in Bristol, managed by an Eldon employee who was seconded to that role by a variation of their employment contract. GoSkippy's call centre is based in South

Africa. She describes both Eldon and Leave.EU as having robust data protection policies and practices, including a Data Protection Officer and access to external advice.

57. Ms Bilney describes in her witness statement the purpose of the Leave.EU newsletters as highlighting and promoting upcoming referendum-related events, fundraising activities and specific political issues. The newsletters were sent out using a distribution tool called Mailchimp. In September 2015, the shared use of Mailchimp by both companies led to an administrative error by a member of staff so that a Leave.EU newsletter was sent to some Eldon customers who had not subscribed to Leave.EU. This error was the subject of the £15,000 penalty referred to at paragraph 1 (vi) above. Ms Bilney confirmed that after that incident, Leave.EU and Eldon decided to operate separate Mailchimp accounts.

58. Ms Bilney describes the process for Leave.EU supporters to become subscribers to its newsletters as follows. They must click on a 'newsletter sign-up' button on the Leave.EU website and enter their contact details (bundle p. 710). They would then receive an email with a further link by which they could sign up to the newsletter (bundle p.711). They would not receive the newsletter unless they clicked the button indicating they wished to subscribe. In the period prior to the website going live in September 2015, she said that the website displayed a holding message so that people could leave their contact details there for Leave.EU to contact them once the campaign had launched. She exhibits to her witness statement screen-shots of the subscription journey, which we have described above.

59. Ms Bilney states in her witness statement that she discussed with Mr Banks the possibility of Leave.EU raising funds for its work by selling advertising space in its newsletters, offering products and services which may be of interest to Leave.EU subscribers. They decided to start with Eldon, to see if this approach would prove successful, by offering a 10% discount on GoSkippy insurance and monitoring the customer response. She stated that she had no commercial expectations of the promotion as it differed from the Eldon's usual business model, and in the end a total of 788 policies were sold with the 10% discount, representing 0.4% of sales during the relevant period. Leave.EU then decided not to pursue the approach of selling advertising in its newsletters.

60. Ms Bilney told the Tribunal that she instructed a colleague called Pam Palmer, who had been seconded from Eldon to Leave.EU, to set up the discount code. The first newsletter containing the promotion was in August 2016 and the next one was in February 2017. Ms Bilney's witness statement said that she does not recall the reason for the hiatus (although we note she was copied into the final email stating that Arron had asked for the Brexit deal to stop, referred to at paragraph 49 above). Her witness statement stated that there had been no formal contract between the two companies and no financial arrangement between them other than the discount code. However, in cross-examination she said that she thought there might have been a plan to impose an inter-company re-charge at the end of the financial year, but it was a pilot scheme only, aimed at investigating whether there was an income stream. Mr Knight put to her that the statement made to Leave.EU subscribers in the newsletter about the

GoSkippy sponsorship "funding Leave.EU activities" was therefore untrue. She denied this, saying that if the pilot had been successful then there would have been a retrospective re-charge.

61. Ms Bilney's evidence was that Eldon had no role in deciding when the GoSkippy promotion would be included in Leave.EU's newsletters or how often it would be offered. Mr Knight put to her in cross examination that Mr Banks was driving force behind the policy, as the ultimate owner of Eldon. She replied that he was also the ultimate owner of Leave.EU. Asked by Mr Knight how staff knew which hat Mr Banks was wearing at any one time, she replied that they themselves differentiate which role they are in and fight for their own area. She added that the staff know which hat he is wearing. Ms Bilney accepted that the same member of staff had been shown to use different email accounts in the same correspondence. She did not think that the staff's use of particular email accounts reflected who they were working for at any time, and they probably just used the email closest to hand. Mr Knight put to her that this reflected a lack of clarity as to roles within the group structure. Ms Bilney replied that the content was more important than the e mail address. She said that individual staff members had an authorised level of access to databases consistent with the needs of their role. This involved making changes in access rights when they were on secondment from one company to another.

62. Ms Bilney's evidence was that the twenty-one newsletters in which the GoSkippy offer was included represented only a small proportion of the total number of Leave.EU newsletters sent. She said that, apart from the August 2016 newsletter, the other newsletters would have been sent even without the GoSkippy promotion. When asked by Mr Knight why none of the internal email exchanges mentioned the need to comply with PECR, she said they did not think it was relevant because they were not engaged in direct marketing. The audience for the emails were members of Leave.EU who had consented to be contacted, so she did not think the GoSkippy e mails were direct marketing. She accepted that staff had not been trained on the requirements of PECR, because they don't do direct marketing, but her evidence was that the privacy policy was sufficient and had been drafted with the benefit of external advice. Asked by Mr Knight whether Mr Banks' public statement of "*Whatever"* indicated that he did not care about regulatory compliance, she replied that *"There was a lot of testosterone at the time".*

63. Ms Bilney's witness statement explained at some length why she considered that reputational damage had been caused to Eldon as a result of the Information Commissioner's actions. In cross examination, she accepted that she had presumed that Eldon's loss of work from certain aggregators had been due to the ICO's investigation. She said she did not know if Mr Banks' public statements had been a factor in the loss of work. She feared that the audit required by the Assessment Notice would impact adversely on Eldon's business and asserted that there had been a "*disproportionate and politically-motivated approach to the use of the ICO's auditing powers without any proper evidence base*". Cross examined about this statement, she said that she had said in her witness statement that the ICO was politically motivated because its actions felt unjust and they stemmed from Brexit.

64. Ms Bilney included in her witness statement a number of her own opinions about the Information Commissioner's investigation which might have been more appropriately addressed in legal submissions. Asked by Mr Knight why she had told the Information Commissioner that there had been no complaints about the GoSkippy emails, she said that she had categorised the responses (set out at paragraph 47 above) as "grumbles" rather than "complaints" and that she had been unaware of them when she gave her response to the Information Commissioner. Asked why she had said that the Mailchimp data breach had been reported to the ICO when it had not, she said she had made an error in that response but that there had been no attempt to mislead the ICO.

65. Stephen Eckersley, the Information Commissioner's Director of Investigations, filed two witness statements for these appeals. In the first, he described the ICO's statutory remit and the purpose and conduct of Operation Cederberg. He explains that he holds the "silver" lead role in that operation, reporting directly to the "gold" role held by the Deputy Information Commissioner.

66. Mr Eckersley's witness statement describes the ICO's engagement with Leave.EU and the service of a number of Information Notices. He states that the relationship between Better for the Country Limited and The Know and Leave.EU is still unclear, and that this had not been helpful in establishing regulatory compliance. He comments that:

> "*The confusing picture presented by the responsible persons at Leave.EU and Eldon Insurance Services Limited was not helpful. Whilst the organisations sought to demonstrate compliance this was certainly not obvious – a situation…further exacerbated by media comments made by Arron Banks. I formed the view that the confusion may have been caused deliberately as it appeared indicative of Mr Banks' lack of regard for the ICO's regulatory action in light of the…fine recently issued to Better for the Country for breaches of PECR."*

67. Mr Eckersley refers in his witness statement to some internal ICO documents and to an email exchange between the Deputy Commissioner and the Information Commissioner about the proposal to issue the Assessment Notices. These emails were disclosed to the Appellants and contained in our hearing bundle. We have referred to them above.

68. Cross examined by Mr Facenna, Mr Eckersley described the unprecedented breadth of Operation Cederberg, involving 40 officers investigating 172 different organisations and engaging with the relevant authorities in other countries. He accepted that it was a high-profile investigation about data analytics for political purposes but that details of the Mailchimp incident for which Eldon had received a penalty had been included as an annexe to the ICO's public report, despite there being no concerns about data sharing in the circumstances pertaining to that penalty. Mr Facenna took Mr Eckersley to internal ICO e mails (disclosed to the Appellants pursuant to a FOIA request) in which that publication decision had been queried by colleagues. Mr Eckersley replied that he had not been included in those exchanges

and he had no role in the decisions about the press release of the report. In cross examination, Mr Eckersley said he thought there might be a further internal decision-making record that the Tribunal did not have before it. Mr Knight took instructions on that issue and told the Tribunal there was no such document.

69. Mr Eckersley accepted Mr Facenna's suggestion that Ms Bilney had been co-operative during the ICO's investigation. He added that the data compliance picture at Eldon and Leave.EU was somewhat confused but agreed that the investigation conducted for over a year had not found evidence to support the particular concerns expressed by the Information Commissioner in her email of 4 November. He confirmed he had not been a party to that e mail exchange.

70. In considering the GoSkippy emails, Mr Eckersley accepted that recipients had signed up to receive newsletters and always had the ability to unsubscribe from them. He accepted that no recipient would have been surprised to receive such a newsletter or indeed a special offer, as they had confirmed their willingness to receive these. However, Mr Eckersley explained that the ICO did not think the wording of the privacy notice was sufficiently precise to provide consent to the emails which were actually sent. He accepted that the ICO's view about whether Eldon or Leave.EU had "instigated" the GoSkippy emails had changed over the course of the investigation. It was put to Mr Eckersley that a fuller explanation of the ICO's thinking had been put to the Tribunal than had been set out for the Appellants at the time of the decision to serve the MPNs. Mr Eckersley said he did not think they had got to the bottom of the issues yet.

71. In his second witness statement, Mr Eckersley confirmed that he personally had made the decision to issue the Assessment Notices to Eldon and Leave.EU in his "silver investigations" role in Operation Cederberg, and that the decision to do so had not been taken by the Information Commissioner or the Deputy Information Commissioner. He stated that, in taking this decision, he was aware of a FCA's regulatory interest but unaware of any proposal to conduct a joint audit so that this played no part in his decision-making. He refuted the allegation of bias made against the Information Commissioner personally and noted that she had not herself taken the decisions said to have been infected by bias.

E: Submissions

72. Mr Facenna, on behalf of the Appellants, submitted that the Information Commissioner's case was based on errors of law and/or the inappropriate exercise of discretion in the following respects:

> (i)Firstly, and most fundamentally, that the GoSkippy emails did not engage PECR at all, because they did not constitute *unsolicited communications for the purposes of direct marketing* and that the Information Commissioner's approach to the relevant law was wrong and without precedent. He submitted that the subscribers had signed up to receive newsletters, and indeed confirmed their consent to receive newsletters. They were told in every newsletter that they could unsubscribe and how their information would be used *to provide you with*

information, products or services that you request from us or which we feel may interest you, where you have consented to be contacted for such purposes… (see paragraph 48 above). He submitted that all other PECR enforcement cases had involved 'spam' so that the Information Commissioner's approach to these cases was uncharted territory. He referred the Tribunal to Article 13 of the E-Privacy Directive and suggested that its purpose was to prevent nuisance communications, rather than expected communications.

(ii) If the GoSkippy emails did engage PECR, then he submitted that Eldon did not *instigate* their transmission by Leave.EU. He submitted that there was no evidence that Eldon had gone beyond mere facilitation, as required by the *Microsoft* judgment. He submitted that Eldon had no role in deciding whether when or how the emails would be sent and that Arron Banks had no authority to direct how that business was conducted.

(iii) He submitted that Leave.EU subscribers had *consented* to receive the communications about GoSkippy. The Information Commissioner had accepted that the Privacy Policy in operation was the one understood to apply by subscribers (although in fact in the name of the wrong company). This told them that their data may be used to provide them with information about services which may be of interest to them. He submitted that whilst the MPNs had been served on basis that the Privacy Policy was not precise enough, the level of precision said by the ICO to be necessary was not in fact what the law required. He referred us to the First-tier Tribunal Decision in *Xerpla Ltd v The Information Commissioner*, in which the Tribunal had allowed an appeal against a MPN on the basis that the Appellant's subscribers had consented to receive a wide range of information about discounts, deals, special offers and competitions. This Decision, of course, has no precedent value.

(iv) That the sending of the GoSkippy emails was not a *serious contravention* of PECR and it is not the case that either Appellant *ought to have known* they would be in contravention of PECR, so as to satisfy the requirements for serving a MPN under s.55A DPA 1998. He submitted that, if there was a breach at all it was not serious in all the circumstances. The Information Commissioner had taken the wrong approach in considering the number of emails sent as the only factor in determining seriousness. It had been shown that not all of them had been opened in any event, and there was no evidence of damage or distress, so this was a *de minimis* intrusion of privacy. He submitted that the number of e mails sent gives a misleading impression of the seriousness of the contravention and suggested that if another data controller had acted this way, no regulatory action would have been pursued. Mr Facenna submitted that the Information Commissioner's approach to this case represented a significant and novel extension of her powers. As these cases are unlike any other, he asked how it can be said that the Appellants knew or ought to have known that they had breached PECR? He submitted that they were entitled to believe they were acting within the law at the relevant time. He asked how Eldon could have known of the risk of contravention? It was reasonable for it to have proceeded on the basis that Leave EU was compliant with the law.

(v) Mr Facenna submitted that the Information Commissioner ought to have exercised her discretion differently in respect of the MPNs because the imposition of the penalties, and the amount of the penalties, were disproportionate, inconsistent with her own published Regulatory Action Policy and with the decisions she had made in previous cases. Further, that the imposition of two MPNs in respect of the same conduct was irrational, as was the imposition of the larger penalty on Eldon who had engaged in no data processing at all. He complained of an absence of internal reasoning by the ICO as to the appropriate level of penalty and handed up a table comparing salient factors and level of penalty imposed in other cases. Mr Facenna asked the Tribunal, if it was satisfied that there should be a MPN on Leave EU at all, to find that it was too high. He submitted that there was no case for imposing a penalty on Eldon. Finally, he submitted that both Appellants had lost the opportunity of a discount for early payment as a result of bringing these appeals and that this was unfair.

(vi) As to the Assessment Notices, Mr Facenna submitted that they are disproportionate, unprecedented, unfair and inconsistent with published guidance. He complained that there is no internal documentation recording the basis for serving the Assessment Notices. The historic concerns which had been identified (in fact, volunteered by the Appellants) had long ago been addressed. He submitted that the proposed audit of Eldon would cover its entire business, which went beyond the scope of the concerns which had been identified. He asked the Tribunal to limit the scope of Eldon's audit to personal data concerned with direct marketing and lead generation only. He said he did not wish to criticise the Information Commissioner, who had clearly been unaware on 4 November that the concerns she retained had already been addressed. Her "more to see" approach was, in his submission, an inadequate basis for an audit and inconsistent with her own Regulatory Action Policy. He said she should be looking at the evidence rather than at Mr Bank's "childish" statements.

(vii) As to the Eldon Enforcement Notice, Mr Facenna submitted that this was disproportionate, inconsistent with published guidance and did not meet the requirements of s. 40 DPA 1998. He submitted that it merely required compliance with the law, so it was difficult to see the rationale for it.

(viii) Finally, he submitted that the Information Commissioner had demonstrated the exercise of her discretionary powers for an extraneous purpose (namely the wish to involve the FCA), had taken into account irrelevant considerations about the Appellants' involvement in the investigation into the use of data for political purposes, had failed to disclose her concerns to the Appellants so that they could fairly comment on them, and consequently that a fair-minded observer would conclude there was a real risk of bias in this investigation. Mr Facenna submitted that all these appeals should be allowed on the basis that the decisions taken were not in accordance with the law due to their procedural unfairness. Further, that in respect of the MPNs, it would be open to the Tribunal to make a fresh decision and substitute its own MPNs if it were satisfied that all the legal tests for doing so were met. However, in respect

of the Assessment Notices and the Enforcement Notice, that the Information Commissioner's investigation was so procedurally flawed that it would be inappropriate for the Tribunal to make a fresh decision itself which involved relying on the Information Commissioner's unfair process.

73. Mr Knight, on behalf of the Information Commissioner, asked the Tribunal to consider the context in which the Information Commissioner had decided to take regulatory action. This context included in his submission: more than one occasion on which Ms Bilney's responses to Information Notices had been incorrect, suggesting a culture of non-compliance; a corporate group taking a two-faced approach to regulation so that Ms Bilney presented a compliant approach while Mr Banks took the "whatever" approach; a group in which senior figures admitted that they have lied to get attention; a history of non-compliance as demonstrated by the previous MPNs; a privacy policy in the name of the wrong company naming the wrong person as data controller; an accepted lack of training and procedures in relation to PECR; inadequate delineation of staff and director roles within the companies of the group; shared management services and secondments of staff between companies thus increasing risk of inappropriate access to customer data.

74. Responding to Mr Facenna's submissions, he submitted as follows:

(i)That the sending of the GoSkippy emails falls within regulation 22 of PECR because, as one email can contain different types of content, the focus of scrutiny must be on whether all of the content has been solicited. Taking into account the purpose of the E-Privacy Directive to prevent intrusion into citizens' privacy, he submitted that there is an intrusion where they receive an email containing material which they did not consent to receive. He described the Appellants' case as being that if you sign up to receive one type of e mail then that can be filled up with other material which you did not consent to receive. That approach, in his submission, drives a coach and horses through the PECR protections. He submitted that a spam sandwich nevertheless contains spam. He referred us to the ICO's Direct Marketing Guidance[27] at paras 95 and 96 which makes clear that an organisation passing on a third party's material needs consent to do so. He suggested that the Appellants' attempt to insert a primary purpose test into the direct marketing provisions of PECR is inconsistent with the law.

(ii)Mr Knight submitted that the contemporaneous evidence referred to at paragraph 49 above shows that Leave.EU transmitted the emails at Mr Banks' instigation. He submitted that *Microsoft* was the only authority which the Tribunal must apply in considering the question of instigation. He acknowledged that more evidence on this point was available to Tribunal than had been available to the Information Commissioner. He suggested that there were classic examples of instigation in the announcement of a "sponsorship deal", and in Ms Bilney's oral evidence that there would have been a re-charge

[27] https://ico.org.uk/media/for-organisations/documents/1555/direct-marketing-guidance.pdf

if the discount had produced an income stream. He submitted that it was clear that Mr Banks and Ms Bilney were both decision makers, but that Mr Banks had issued the demands in relation to the GoSkippy deal, and he could only have controlled those events as the ultimate owner of Eldon. There are blurred roles/emails/responsibilities in the group, but Mr Knight submitted that GoSkippy emails simply could not have happened without Eldon's agreement.

(iii)Mr Knight submitted that the purported consent of subscribers was not *freely-given, specific and informed* because they had consented to a Brexit newsletter so could not have given "informed" consent to receive the GoSkippy content. He referred us to the European Court of Justice's judgment in *Planet 49 GmbH*[28], in which it was held the test for whether appropriate consent had been given was case specific but that no ambiguity could be relied upon to imply such consent. He submitted that Leave.EU's reliance on consent to receive "what we feel may interest you" was impermissibly ambiguous.

(iv) Mr Knight submitted that the high number of emails sent (1,069,852) alone justified the Information Commissioner's view that this was a *serious contravention* of PECR. It would not in his submission be appropriate to regard high-volume breaches as less serious where members of the public chose not to open their emails, as the purpose of the E-Privacy Directive is to protect them from receiving them in the first place. He submitted that the Tribunal should take the view that Leave.EU and Eldon both *ought to have known* that the emails were a breach of PECR because the Information Commissioner's Direct Marketing Guidance was clear. Further, that ignorance of the law is not an acceptable excuse and there had already been regulatory action in respect of group activities involving such breaches so they were on notice of the requirements. It was, in his submission, extraordinary that, in the light of previous regulatory action, Ms Bilney persisted with the approach of saying that PECR was irrelevant to the group's activities, so no steps had been taken to re-visit the company's policies and guidance to staff to ensure future compliance.

(v)Mr Knight submitted that both MPNs were a proportionate response to the breaches. There was a legitimate aim of promoting compliance, sanctioning breaches and having a deterrent effect. He noted that the Regulatory Action Policy had only been approved in November 2018 and that it was DPA-centric, however it contains reference to factors which are relevant here – the number of people affected, matters of public importance, a failure to take reasonable steps in connection with previous MPNs. He argued that the consistency assessment exercise contained in Mr Facenna's table was not useful.

(vi) Turning to the Assessment Notices, Mr Knight noted that there is a broad discretionary power, with no threshold for engagement. There is no requirement

[28] C-673/17 http://curia.europa.eu/juris/liste.jsf?num=C-673/17&language=EN

to seek representations in a "minded to" letter. An Assessment Notice is an investigatory tool, allowing the ICO to investigate "unknown unknowns". This was, in his submission, a long way from a *Karagul* situation, with very different statutory regimes in play. There had also been no conclusion that the Appellants had lied, just a decision to go and make further checks.

(vii)As to the Enforcement Notice, Mr Knight submitted that the threshold for making it had been met. Eldon had repeatedly asserted that it does not use direct marketing, but the Information Commissioner had concluded they needed to take steps to comply with PECR once they had decided to operate with Leave.EU in the way they had. There had been an internal recommendation to serve an Enforcement Notice on Leave.EU also, but this had not been proceeded with as Leave.EU had a more complicated picture in view of its obtaining of consent for the newsletter.

(viii) Whilst it was common ground between counsel that, in conducting a full-merits review, the Tribunal could consider whether procedural irregularity rendered the decision not in accordance with the law, Mr Knight submitted that any such finding could be cured by the Tribunal taking a fresh decision on the evidence before it. He noted that the Appellants' amended pleadings had relied on *actual* bias by the Information Commissioner but that, at the hearing, Mr Facenna had relied on *apparent* (or the appearance of) bias. He accepted that there were respects in which the Information Commissioner's Office could have paid more attention to recording its decisions and that, in the case of the Assessment Notices in particular, the paper-trail leading up to the decision was absent. However, he noted that Parliament had not set any particular 'threshold' criteria for serving an Assessment Notice. He submitted that the Information Commissioner's continuing concerns as at 4 November emails were in the context of the entire history of this investigation and these were sufficient for the Tribunal to uphold her exercise of discretion in serving the Notices.

75. Mr Knight noted that the Appellants' case on bias had been diluted during the hearing. Mr Banks and Ms Bilney had both accused the ICO of bias in the correspondence and elsewhere. However, the test was whether an impartial observer would conclude there was a risk of bias and a conspiracy theorist is not an impartial observer. Mr Knight accepted that there was room for criticism of ICO's internal processes in these appeals, but that a criticism of process is not sufficient to establish that the Information Commissioner's actions were unlawful. They could be corrected by the Tribunal taking a fresh decision.

F: Conclusions

76. We start our conclusions by considering the Appellants' case on procedural unfairness by the Information Commissioner when taking the decisions before us. The way that this was put in the List of Issues agreed by counsel was to ask *are the Notices….vitiated by procedural unfairness in the investigation…?* We find it hard to reconcile the legal concept of vitiation (meaning, to rob the decisions of legal effect) in the context of a statutory scheme which involves an appeal by way of re-hearing.

Following the wording of s. 49 DPA 1998, we note that, if the decisions are not *in accordance with the law* then our task is to re-make them on the basis of the evidence presented to us. We accept that the Tribunal should consider the procedural arguments put before us and this was not disputed by the Respondent. We also accept that *not in accordance with the law* can in principle include errors of law relating to procedural unfairness (as did Judge McKenna in *Facebook,* and Judge Markus QC in *Our Vault Limited).* However, we are mindful of Judge Wikeley's warning in *Central London* that a pleaded case of procedural unfairness amounting to an error of law cannot be established by a critique of the *twists and turns* of the investigation; as Judge McKenna said in *Facebook,* it would require the Appellant to prove its case as to the *most serious of allegations.*

77. Taking that approach, we find we are not persuaded by the Appellants' case as to procedural unfairness in these appeals. The Appellants' witness evidence alleged actual bias by the Information Commissioner. This case was put on a somewhat diluted basis by the time of the hearing, as Ms Bilney's oral evidence did not support the opinion given her witness statement. The pleaded case (in the amended grounds) was one of apparent bias. We have considered both allegations.

78. Firstly, we found no evidence which persuaded us on the balance of probabilities that there was actual bias in the making of these decisions. Ms Bilney's oral evidence was that the investigation seemed unfair and it related to Brexit, but that statement is insufficient to prove a case of politically-motivated bias. We understand from the evidence that Leave.EU and Eldon came to the Information Commissioner's attention as a result of the Cambridge Analytica furore, but that the investigation in due course revealed other concerns. We see no difficulty in principle with a regulator commencing an investigation in one context but pursuing other regulatory failings which come to their attention. As to the complaints about the exchange of emails between the Information Commissioner and the Deputy Commissioner on 4 November 2018, we heard evidence about the ICO's internal chain of command in Operation Cederberg and we accept Mr Eckersley's evidence that he himself made the decisions to issue the Notices with which we are concerned. He was not party to the e mail exchange on the 4 November. He told us he was unaware of any plan to initiate a joint investigation with the FCA. We conclude that a case as to actual bias could only be established where the evidence showed that the person alleged to have been biased made or directly influenced the decision said to have been affected by that person's bias. That has evidently not been established here.

79. The Appellants' pleaded case alleged apparent bias on the basis that a fair-minded and informed observer would conclude that there was a real possibility that bias had infected the investigation and the decisions to issue the Notices. We accept that certain decisions in the investigation could have been better documented, we understand the Appellants' frustration at the publication of regulatory action against them at such an early stage and the impression given by their inclusion in the Operation Cederberg reporting, we also appreciate their concern at the mis-description of their case to the Parliamentary Committee when (as is accepted) the Deputy Commissioner mis-spoke. However, it seems to us that the informed observer would have in mind the context in which this investigation took place: the history of

penalties for regulatory non-compliance within the group, the public statements made by Mr Banks and Mr Wigmore, and a legitimate regulatory concern in relation to the transmission of 1,069,852 emails. In this context, we are not persuaded that the Appellants' criticisms of the *twists and turns* of the ICO investigation are sufficient to establish a case of apparent bias.

80. The Appellants' case as to procedural fairness also relied on an argument that the Appellants had not had the benefit of due process during the investigation. This was directed to Mr Facenna's submission that the Tribunal ought not to proceed to make a fresh decision on the basis of the evidence before it if it allows the appeals. We note here that the Information Commissioner, in accordance with the statutory scheme, served Notices of Intent to make MPNs on Eldon and Leave.EU and that she served a Preliminary Enforcement Notice on Eldon. She considered the representations made in response to those Notices and, indeed, reduced the amount of the MPN for Leave.EU as a result of financial evidence provided. It does not seem that the Appellants' case of failure to observe due process can be established in these circumstances.

81. The Assessment Notices are in a different category to the MPNs and Enforcement Notice, because they are an investigatory tool requiring no Notice of Intent to be served. There is no statutory threshold for serving an Assessment Notice and, we conclude, no obligation to explain to the person on whom they are served the nature of the Information Commissioner's concerns which caused the decision to serve the Assessment Notice. This situation is far-removed from the *Karagul* scenario where a final decision had been made without putting regulatory concerns fairly to those affected so as to give them a chance to answer. We note that in *UKIP*, Upper Tribunal Judge Wikeley at [31] describes a situation where the answers given in response to an Information Notice were late, brief, unsatisfactory, and inconsistent with publicly available information supplied by UKIP itself so as to give the Commissioner the impression that UKIP was not taking the Notice seriously. He described the Information Commissioner's choice as to how to respond to that situation as a *classic issue of discretion* and we regard the decision to issue the Assessment Notices similarly. After a considerable period of investigation, the ICO continued to have concerns, justified in our view by the Appellants' confusingly two-faced approach to regulation. Mr Banks' letter to the Information Commissioner admitting that he had been untruthful in the past was hardy likely to assuage all regulatory concerns, especially as it was followed by his letter of bullying tone from which we quote at paragraph 11 above. Ms Bilney, whilst presenting herself as the face of compliance, had given responses to the Information Notices which had been inaccurate in important respects. There was continued confusion about the roles and responsibilities of entities within the corporate group, and Mr Eckersley's evidence was that he thought that confusion might be being caused deliberately. These factors support, in our view, an exercise of discretion by the Information Commissioner to exercise an additional investigatory tool which Parliament has placed at her disposal.

82. We have acknowledged above some difficulties in the ICO's internal procedures and we accept that the decision-making paper trail leading to the Assessment Notices is lacking. However, in the context of a discretionary decision to

issue Assessment Notices, we do not find that these inadequacies are, to use the words of Lord Wilberforce, *so flagrant, the consequences so severe, that the most perfect of appeals or re-hearings will not be sufficient to produce a just result.* We conclude that any procedural irregularities can be cured in the context of this *full merits* appeal, and that, if we allowed any of these appeals, it would be appropriate for the Tribunal to make a fresh decision and issue a substituted Notice.

83. There was a dispute before us about the applicability of the Information Commissioner's Regulatory Acton Policy[29] in relation to these Notices. The RAP was finalised in November 2018 and is clearly concerned with the ICO's new powers under the DPA 2018. However, it sets out principles of good practice which we would expect the ICO to follow in all cases. That said, the RAP is not a straight-jacket, it deals in high-level principles and cannot cater for all eventualities. If the ICO has exercised her discretion in these cases in a manner not envisaged by the RAP, that does not seem to us on its own to provide a basis for allowing the appeals.

84. We turn now to look at the Notices themselves. First, in relation to the MPNs, we note that the evidence before us includes the ICO's internal decision-making documents (p.203 -233) in which the nature and seriousness of the breach is considered, and recommendations made as to the appropriate level of penalty with reference to other cases. There is before us now a better-articulated case as to the ICO's analysis of the breaches which the MPNs are intended to penalise than is shown in those documents, but that is in the nature of a full merits appeal.

85. The key question in relation to the MPNs is whether the Information Commissioner was right in law to find that there had been a breach of PECR. Having considered the matter carefully, we conclude that the GoSkippy emails did contravene regulation 22 PECR for the following reasons. Firstly, we are satisfied that the content of the newsletters included material which constituted direct marketing material, by including the GoSkippy banner but also by associating Skippy the kangaroo with Mr Banks' business interest in GoSkippy insurance and his political views. There would be no other reason to include a kangaroo in a political newsletter other than to reinforce the association with Eldon's product.

86. Second, we agree with the Information commissioner that the GoSkippy e mails were unsolicited in the sense that they contained information which could not have been within the contemplation of subscribers who had signed up to receive a political newsletter. We agree with Mr Knight that the Appellants' approach to the question of whether the information they received was solicited or unsolicited sought to introduce a primary purpose test for which there is no legal authority. We conclude that the Tribunal should be guided by the purpose of the E Privacy Directive which PECR implements, in preventing unwarranted intrusion into citizens' privacy. It seems to us that inserting direct marketing material into a political newsletter does constitute such an intrusion. Although the complaints from subscribers were few in number, they seem to us accurately to describe the problem. We did not find it helpful to consider

[29] https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf

what other commentators have said about the E Privacy Directive in the reports to which we were referred.

87. Fourthly, we were not persuaded by the Appellants' argument that the terms of the Privacy Notice or Privacy Policy permitted the sending of direct marketing material to subscribers. We found that there was potential for considerable confusion by subscribers in consulting policies which referred to a different legal entity from the one with which they were dealing. Even if one accepts (as did the Information Commissioner) that subscribers conducted themselves in relation to the policy they were presented with, we find that their consent to receive information that Leave.EU felt might interest them was so all-encompassing as to fail to meet the necessary standard of consent being *freely-given, specific and informed.*

88. The fifth issue to consider here is the question of instigation. We are satisfied from the evidence presented to us that Leave.EU transmitted the GoSkippy communications. We are also satisfied that Eldon instigated that transmission. We have had the benefit of seeing the emails exchanges referred to at paragraph 49 above, which had not been seen by the ICO when it made its decision on this point, in addition to hearing oral evidence from Ms Bilney. We note that there was a noticeable informality between the parties to the exchanges as to which company they represented at any one time and this confusion extended to Ms Bilney and Mr Banks' roles. Nevertheless, it is clear from those e mails that "Arron" controlled the timing, content, naming, extent, and cessation of the Brexit discount message. He could only have done so in his role as the ultimate owner of Eldon/GoSkippy because Leave.EU would not have been able to make those decisions by itself. The reference to him "reviewing the [news]letter" suggests that he was also in control of the kangaroo-related content. Applying the test in *Microsoft*, this seems to us to go beyond mere facilitation and to represent a *positive form of encouragement* to transmit the offending material.

89. Having reached the conclusion that there had been a breach of PECR in the transmission and instigation of the transmission of the GoSkippy emails, we turn to consider s. 55A DPA 1998 and the Information Commissioner's power to penalise such a breach. We concur with the Information Commissioner in concluding that there was not a deliberate breach of PECR by either Leave.EU or Eldon. However, we also agree with her that both companies *knew or ought to have known that there was a risk that contravention would occur but failed to take reasonable steps to prevent the contravention.*

90. We note here that the test is for the companies to know or that they ought to have known that there was a *risk* of contravention, not that they knew or ought to have known that there would be a contravention. This is an inevitably fact specific judgement. We consider a situation in which, on the one hand, a regulated business entity decides to engage in an unprecedented course of conduct by publicising its products via a political campaign newsletter. We also consider a situation in which those involved in that business entity have recent experience of being penalised for breach of PECR, and in which its policies, procedures and staff training have not previously considered PECR compliance because its usual business model did not

contemplate its engagement. It seems to us that a prudent business entity, in embarking on the unprecedented course of conduct in these circumstances would have undertaken an appropriate due diligence exercise, especially in the context of recent regulatory contact with the ICO. That due diligence would have brought to its attention the clear guidance contained in the Information Commissioner's publicly-available Direct Marketing Guidance. There was no evidence of such an exercise before us, indeed the evidence suggested *ad hoc* and *off the cuff* decision-making, controlled by Mr Banks personally. We conclude in these circumstances that Eldon *should have known* that its involvement in promoting the Brexit discount to Leave.EU subscribers would involve a risk of contravening PECR but that Eldon failed to take appropriate steps to prevent that contravention.

91. On the other side of the transaction we consider Leave.EU, which also had recent experience of problems with PECR and could have consulted the ICO guidance thereon. It decided to embark on a pilot scheme by which it might obtain funding for its political activities by promoting the GoSkippy discount, but it did so without the benefit of any legal agreement with Eldon (contrary to what it told its subscribers) and without first considering whether there was a risk of contravening PECR by its actions. It is unfortunate that, in these circumstances, Eldon apparently relied upon Leave.EU having the necessary consents in place. We conclude in these circumstances that Leave.EU *should have known* that its involvement in promoting the Brexit discount to Leave.EU subscribers would involve a risk of contravening PECR but that it failed to take appropriate steps to prevent that contravention.

92. We do not accept that Eldon or Leave.EU is entitled to say that the Information Commissioner has not taken any decisions which precisely relate to these circumstances so that their failure to appreciate or mitigate a risk can be excused. We assess the appropriate level of awareness and assessment of risk by the standard of the reasonable person and it does not seem reasonable to us that Ms Bilney had concluded that PECR was irrelevant to Eldon's business model so she did not need to consider it. As we have noted above, the two companies decided to chart a novel course and it is to be expected that they would consider properly the implications of doing so.

93. Finally, on this point, we are satisfied that the contravention of Regulation 22 PECR was *serious* in view of the 1,069,852 million emails sent. We do not accept that a person who sends out mass communications in breach of PECR is entitled to say that the intrusion of privacy is mitigated by the number of people who did not open them or who deleted them without reading. It does not seem to us that the Information Commissioner made an error of law in concluding that the transmission of 1,069,852 GoSkippy emails represented a serious contravention of PECR so as to exercise her discretion in favour of serving an MPN. We are not persuaded by Mr Facenna's submission that it was wrong for the ICO to serve MPNs on both Eldon and Leave.EU in relation to the same conduct. It seems to us that PECR attributes liability to those who transmit and to those who instigate the transmission of offending communications and that both are capable of attracting a penalty.

94. In relation to the amount of the MPNs, the starting point for each was £60,000 but Leave.EU's penalty was reduced in consequence of its financial circumstances.

We regard this as appropriate. We also note that both penalties were expressly said to have been set by the ICO in consideration of the mitigating factor of no complaints having been received from recipients of the communications. By the time of the hearing we knew this to be incorrect and it seems to us that we would be entitled to increase the level of penalty to correct this irregularity. However, having looked at the ICO's documentation as to the consideration given to the level of penalty, we consider that there is no basis to interfere with it as we find that it is consistent with the ICO's general approach and proportionate to the circumstances pertaining to this case. We discern no error of law in this respect.

95. Turning to the Enforcement Notice served on Eldon, we find no error of law in the ICO's decision to make this decision. For the reasons we have outlined above, Eldon had decided that PECR was irrelevant to its operations despite developing new ways of working and having experience of previous breaches. The ICO found there to have been a contravention in circumstances where Eldon ought to have mitigated the risk of that eventuality, and so it seems to us that the ICO was justified in serving an Enforcement Notice to make clear that Eldon must consider PECR going forward. We are satisfied that this was a proportionate response to the on-going risk that Eldon would continue to believe that PECR was irrelevant to its operations.

96. We are satisfied, in all the circumstances of these appeals, that it was an appropriate exercise of the Information Commissioner's discretion to serve Assessment Notices on Leave.EU and Eldon. As noted above, these are an investigatory tool which she is entitled to deploy without addressing a statutory threshold or informing the recipients of her concerns. That is not to say that Assessment notices can be issued on a capricious basis, but we find for all the reasons above that the Information Commissioner here had ample grounds for deciding that a more throughgoing investigation was required in the shape of an audit of both companies. We find that the differing scope of the proposed audits reflects the differing nature of the personal data held by each company and that the Notices are both in accordance with the law and appropriately-worded.

97. For these reasons, we now dismiss all five appeals.

(Signed)
ALISON MCKENNA **DATE: 25 February 2020**

CHAMBER PRESIDENT

PROMULGATED: 28 February 2020
CORRECTED: 03 March 2020