



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2018/0030**

**Heard at Liverpool Civil and family Court  
On 21 August 2018**

**Before  
KAREN BOOTH  
JUDGE**

**JEAN NELSON and PAUL TAYLOR  
TRIBUNAL MEMBERS**

**Between**

**HOLMES FINANCIAL SOLUTIONS LIMITED**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**DECISION AND REASONS**

## DECISION

1. The monetary penalty notice dated 29<sup>th</sup> January 2018 served on the Appellant by the Respondent is in accordance with the law. We did not consider that the Respondent ought to have exercised her discretion differently in relation to the issue of the monetary penalty notice or the amount of the penalty specified in it. The appeal is dismissed, although the following amendments are made to the monetary penalty notice:

(a) in paragraph 32, for the reference to “8,792,907 automated marketing calls”, we substitute “at least 8,520,123 automated marketing calls”; and

(b) in paragraph 65, we substitute a payment date of 28 February 2019 at the latest.

## REASONS

### ***Background to the appeal***

2. This is an appeal against a monetary penalty notice (“MPN”) that was served on the Appellant (“HFS”) by the Respondent on 29/1/18 under section 55A of the Data Protection Act 1998 (“the DPA”).
3. HFS is a private company, limited by shares and registered in England and Wales. There are three directors (referred to below as “MF”, “MJ” and “RC”). The business generates leads for third party entities that provide debt management services. HFS receives a commission for those introductions.
4. The MPN (a copy of which is at pages 189-206 of the bundle of evidence) was in respect of an alleged serious contravention of regulations 19 and 24 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (“PECR”) (SI 2003/2426), as amended. The amount of the penalty is £300,000 and was payable by 28/2/18 (reduced to £240,000 if paid by 27/2/18).
5. The MPN describes the alleged contraventions in the following terms.
  - Between 22/10/15 and 27/7/16 HFS instigated the transmission of 8,792,907 automated marketing calls (via a voice broadcasting platform provided by DXI Limited (“DXI”)) to subscribers without their prior consent, resulting in 62 complaints.
  - HFS failed to identify the person (itself) who was sending/instigating the automated calls and failed to provide its address or telephone number on which HFS could be reached free of charge.
  - The contraventions were serious because: HFS had instigated the making of over 8.7 million answered calls to subscribers, without their prior consent, which resulted in 62 complaints being made to the Respondent; there was evidence to suggest that repeat calls had been made to subscribers who had attempted to opt out; and the contravention could have been far higher as HFS had instigated over 26.6 million calls in total.
  - It was accepted that the contraventions were not deliberate, but it was considered that HFS knew or ought reasonably to have known that the

contraventions would occur (the issue of unsolicited calls had been widely publicised by the media and the Respondent has published detailed guidance about the PECR requirements).

- HFS failed to take reasonable steps to prevent the contraventions. HFS failed: to exercise due diligence in relation to checking whether the necessary consents had been obtained (relying on verbal assurances from its data suppliers); to ensure that an effective suppression system was in place; and to include the required information in the automated message.
- A penalty was appropriate in order to promote compliance with PECR. In setting the amount of the penalty, the Respondent took account of the following aggravating factors: 26.6 million calls were actually instigated; the numbers from which the calls were made (CLIs) were allocated overseas before being used through DXI's dialling platform, making it difficult to trace HFS; the CLI's were "added value" numbers which charged an individual who tried to call to try to identify HFS; and no identifying particulars relating to HFS were included in the automated message.

### ***The relevant PECR provisions***

6. The text of regulations 19 and 24 of PECR is set out in the Annex to this decision.

### ***The relevant DPA provisions***

7. The Respondent's power to impose a monetary penalty is contained in section 55A of the DPA (which was extended, with modifications, for the purposes of PECR by regulation 31 and Schedule 1 of PECR). The text of section 55A, as so modified, is set out in the Annex to this decision.
8. Section 55B of the DPA (as so extended and modified) imposes the procedural requirements in relation to an MPN. The text of section 55B, as so modified, is also set out in the Annex to this decision.
9. The right to appeal against an MPN served under section 55A is conferred by section 55B(5) (which is also so extended and modified). Section 55B(5), as modified, provides as follows.

(5) A person on whom a monetary penalty notice is served may appeal to the Tribunal against--

(a) the issue of the monetary penalty notice;

(b) the amount of the penalty specified in the notice.

### ***The Respondent's investigation***

10. Following the receipt of complaints about "cold calls" that appeared to have been instigated by HFS, the Respondent instigated an investigation. Based on the responses to the questions they raised with DXI and HFS, an Enforcement Report was produced on 11/8/17 (pages 86-100 of the bundle of evidence).

This was discussed at a panel meeting on 21/8/17, when the decision to impose a penalty was agreed. The level of the penalty imposed was agreed at a subsequent penalty setting meeting held on the same date.

11. A Notice of Intent was served on the Appellant on 21/11/17 (pages 101-117) with a Preliminary Enforcement Notice (the latter informed HFS that the Respondent was minded to serve an enforcement notice requiring HFS to cease the unlawful activities – the Respondent subsequently decided that it was unnecessary to serve an enforcement notice, but that they would monitor HFS and reactivate it if necessary (page 173, last paragraph).
12. Written representations were provided by a firm of solicitors (Brabners), on behalf of HFS (pages 260-266 - with attachments at pages 267-276). Those representations can be summarised as follows.
  - The size of the penalty is neither reasonable nor proportionate. The last set of filed accounts for year ending 31/12/16 show total net assets of £8,599. The penalty cannot be paid without causing undue financial hardship. The penalty would force HFS into liquidation with the loss of 14 jobs.
  - HFS cooperated fully and promptly with the investigation. The business is now fully compliant with DPA and PECR requirements. At worst, its actions were naive and not deliberate or negligent.
  - HFS purchased personal data from the data brokers in good faith. HFS naively accepted verbal assurances that necessary consents had been obtained. Data-Source CK (“DS”) was established and registered with the Respondent. HFS naively inferred from wording in a DS invoice that all of the data subjects had provided consents. It has now cut all ties with Lad Media (“LM”), DS and DXI.
  - HFS had entered into a written contract with DXI. Reference was made to the standard terms and conditions signed up to (and attached to the representations – page 270) and, in particular, to clauses 4.3.2 and 4.3.3 (Services to be performed in a professional/competent manner and warranty that DXI had all necessary rights, permissions and consents to enter into the agreement and perform the Services). DXI (as data processor) was obliged to act strictly in accordance with the direction of HFS (as data controller). The numerous DPA and warranty breaches by DXI significantly contributed to the alleged breaches of PECR by HFS.
  - HFS accepts that it made a large number of unsolicited automated calls. But not the number claimed (26,632,018). Without HFS’s authority/permission, DXI unilaterally instigated a significant number of those calls. The information provided to the Respondent by DXI is materially inaccurate and the Respondent has placed undue reliance on it. A more robust analysis is required.
  - DXI shared access to the relevant automated telephone numbers with others and consequently the number of calls attributed to HFS is inaccurate.
  - Only 7 of the 99 alleged complainants had phone numbers that matched those on HFS’s database. Even then, it cannot be assumed that those complaints related directly to HFS.
  - HFS only authorised automated calls after 9am and normally only once a week (on a Monday or Tuesday). Calls that took place at other times or

which were sent on multiple occasions to the same person can only have been made by DXI acting unilaterally and without authority.

- There is no reliable information to link the 99 complaints with HFS. The businesses described by the complainants do not relate to debt consolidation. Some of the entries relate to a date range that predates the period when the allocated number was used solely by HFS. The complainant evidence is substantively inaccurate, unreliable and fatally flawed.
  - DXI had informed HFS that it operated a suppression list on behalf of HFS. Based on email evidence from a DXI account manager, HFS had reasonable grounds for believing this to be the case.
  - HFS accept that its details were not included on the automated message. However, HFS had understood that individuals who rang the number that was provided with the automated message would be given HFS's details. DXI assured HFS that that was acceptable and HFS relied on that assurance. HFS believes that DXI deliberately withheld their information because they were sharing the CLIs with other companies.
  - Given the inaccuracy/unreliability of DXI's evidence, it is impossible to establish with any degree of certainty either the volume of the calls made by HFS or the number of complaints that related to HFS. HFS does not have this information but has reasonably calculated that the maximum possible number of relevant complaints is 7 and not 99 (7% of the number stated). Using that methodology as a blunt tool it is not inconceivable that the actual number of calls made by HFS was also around 7% of the number stated (i.e. in the region of 1,864,241 - as opposed to 26,632,018). If this is accepted, the size of the penalty is unreasonable and disproportionate to the number of calls made and complaints received.
  - In two other cases the Respondent issued a lower penalty: Advanced VOIP Ltd (penalty of £180,000 - breach of regulation 19 of PECR - 6,381 complaints made - unknown number of calls); and Xerpla Ltd (penalty of £40,000 – breach of regulation 22 of PECR – 14 complaints).
  - A maximum penalty of £10,000 (being in line with the net asset position in its accounts) would be proportionate and reasonable in the circumstances.
13. A representations meeting was held on 19/1/18. The issues for consideration were set out in an email from the Respondent's Enforcement Lawyer (pages 145-151) dated 5/1/18. On the same date, the Respondent served a third party information notice on DXI Limited (as "communications provider") requiring the information described on page 157. The minutes of the representations meeting are at pages 172-174. The final MPN was sent on 29/1/18. It differed from the Notice of Intent in the following respects:
- the number of complaints attributed to HFS was reduced from 72 to 62;
  - the reference to reliance on contractual assurances in relation to the issue of consents was changed from "contractual assurances" to "verbal assurances";
  - the MPN omitted paragraph 58 of the Notice of Intent (reference to the Respondent having considered the likely impact of an MPN and having decided that, on the available information, HFS had access to sufficient

financial resources to pay the MPN without causing undue financial hardship).

- The Respondent had also decided not to serve an enforcement notice on HFS (see page 173, last paragraph).

***The appeal against the MPN***

14. The Appellant appealed to this Tribunal against the MPN. The powers of the Tribunal on such an appeal are set out in section 49 of the DPA (as extended, with modifications (as shown below), by regulation 31 and Schedule 1 of PECR).

**49 Determination of appeals**

(1) If on an appeal under section [55B(5)]<sup>1</sup> the Tribunal considers--

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice or decision as could have been served or made by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any determination of fact on which the notice in question was based.

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15. The appeal grounds are set out in MJ’s letter dated 19/2/18 to the Tribunal (page 237 of the bundle).

- HFS admitted a breach of the regulations but not the size of the breach.
- The Respondent had not considered all of the facts provided by HFS before the final decision was made.
- The size of the fine is unreasonable and disproportionate to the level of breach.
- The day after the MPN was issued, HFS’s details were handed to national press before the Tribunal had the chance to view their case, which was unprofessional and unfair.
- The final decision notice appears to be a carbon copy of the Notice of Intent and does not make reference to the points they challenged. Their representations were disregarded. The Tribunal is asked to consider those representations.

16. The Respondent’s Response dated 29/3/18 is at pages 307-319. The main points can be summarised as follows.

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<sup>1</sup> See article 7 of the **Data Protection (Monetary Penalties) Order 2010 (SI 2010/910)**.

- HFS has not supplied the Respondent with any records or invoices for the calls which it placed with DXI.
- The objective of an MPN is to promote compliance with the regulations by punishing illegal behaviour and deterring other contraventions – even where the appellant had fully solved its compliance issues subsequently (Amber UPVC Fabrications Ltd v the ICO (EA/2014/0112)).
- The Respondent has produced guidance on the issue of monetary penalties as required by section 55C(1) of the DPA (as summarised on pages 8 and 9 of the response).
- The Respondent *did* consider HFS’s representation and took them into account.
- There has never been an allegation of 99 complaints. The original number was 72, reduced to 62 after further investigation.
- The Respondent accepts that HFS’s contraventions were not deliberate.
- The Respondent did consider the representations about HFS’s net assets but that HFS’s conduct in failing to secure the necessary consents was not the conduct of a responsible person. A statement as to a company’s accounts in the previous year is not conclusive of an ability to pay. DPA fines might force companies into greater levels of hardship than they might otherwise have been.
- Financial hardship has to be weighed against the need to impose a sanction proportionate to the breach. In this case the breach was serious and there were aggravating factors justifying a penalty at just over the middle of the range of fine permitted.
- The Respondent could not disregard DXI’s evidence. Without that evidence there was no basis for enforcement action.
- The Respondent was not bound to adopt HFS’s “blunt” extrapolation technique. Her own method (of ascertaining the calls made for HFS through data provided by DXI and then identifying complaints relating to such calls by analysing the line numbers and content of the complaints) was more appropriate.
- The level of the fine is reasonable and proportionate to the size of the breach. 8,792,907 calls were transmitted and connected, resulting in 62 complaints. HFS contests the figures but has failed to supply any evidence of numbers other than that the number was “large”.
- Aggravating factors included: the making of 26.6 million calls; as admitted, the CLIs failed to identify the company making the call, were difficult to trace as they were overseas and charged individuals who returned the call to identify the caller.
- Comparisons had been made with other cases before the penalty was set, specifically: Check Point Claims Ltd (17.5 million calls made and 6.4 million connected – penalty of £250,000); and Media Tactics Ltd (22 million calls made – unspecified connected – penalty of £270,000).
- Cases cited by HFS are distinguishable. Xerpla Ltd related to a breach of regulation 22 (electronic mail). VOIP related to 6,381 calls made and

not complaints received.<sup>2</sup> The publication of the MPN was appropriate and is not a matter for the Tribunal.

- The MPN is not a carbon copy of the notice of intent. Two key differences are: the number of complaints considered – reduced from 72 to 62; and the Respondent no longer asserted that HFS had sufficient resources to pay the penalty. The representations were considered even if they were not expressly referred to.

17. HFS submitted a further Response (pages 338-349 of the bundle), which can be summarised as follows.

*Factual background*

- They had been naïve to accept verbal assurances about consents obtained from the data brokers. The fact they were “members” of the ICO meant something to HFS at that time.
- The implication that HFS was making automated calls other than through DXI is incorrect and inflammatory.
- DXI kept moving the goalposts – out of spite, they had come back with increased figures that were false after HFS had cut ties with them.
- DXI had admitted that it was sharing CLIs with other clients and reduced the number of relevant complaints when this came to light. This point is of the utmost importance and has been overlooked. It is clear from the company name column of the complaints list that only 3 of the original 99 complaints was to do with debt.
- Lack of clarity regarding what figure the Respondent is relying on (26 million, 24 million or 8.7 million).
- HFS provided their details to DXI in the form of a recorded message to be played to any client who called the number they had been called on. DXI advised HFS that that was a legal requirement. As DXI was sharing the CLIs no potential client/complainant would have heard the message.
- HFS accepts using the DXI platform but denies making 8.7 million calls. HFS was not asked to provide any records but did not hold any. Has anyone seen the call records referred to and counted them to check that the alleged figures are correct?
- HFS did not claim that DXI was sharing the CLIs, DXI has admitted that.
- Only 7 of the attributed complaints were on the HFS website. The database was never requested from HFS despite the offer to provide it. The Respondent did allege 99 complaints at one stage and has reduced the figures 2 or 3 times, which demonstrated the uncertainty/inaccuracy of the charges.
- HFS did not make calls before 9am but cannot prove this as DXI made the calls and would have the records.

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<sup>2</sup> This appears to be incorrect. The MPN relating to this case refers to 6381 complaints made and at least 6381 calls connected (total calls made unspecified).



- The size of the penalty is disproportionate to size of business and its assets and contrary to the Respondent's own submissions. In other cases companies (including Advanced VOIP and Your Money Rights)
- The MPN makes no reference to the representations

#### *Legal framework*

- HFS held it hands up to a breach of regulation 19 of PECR – “we were naïve in our dealings and very much wet behind the ears”.
- HFS had fallen foul of regulation 19(1), (2)(a) but not 2(b). Any breach of 19(2)(b) is down to DXI.
- HFS had fallen foul of regulation 24 “to a certain degree”. We provided a message to DXI that an individual would hear if they called back the number given to them. That message included HFS's name and a free phone number. As DXI was sharing the CLIs with other companies HFS's message would not have been accessible. That breach is down to DXI.
- HFS accept that the Respondent followed the correct procedures regarding the notice of intent and the MPN.
- The penalty would achieve nothing other than to put 14 people out of work and into the benefits system.
- Querying why companies that deliberately break law are given smaller fines than those that do so unwittingly. The penalty will shut down a business that is now fully compliant. The experience itself has been a massive and costly lesson – that is the deterrent.
- It is unclear what the relevant figure is (8.7 million or 26 million). As regards the repeat calls, HFS is as upset as the Respondent about this. DXI was meant to be operating a suppression system – the fault for this is theirs.
- As to whether HFS knew or ought to have known that a breach would occur, the point about media coverage of the issue is unfair. If HFS was aware that its practices were illegal, it would have stopped them right away.
- Penalties of this level will not act as a deterrent. Companies that have been penalised in this way just close down and the fines go uncollected. Such companies start up again under a new banner and continue to operate illegally. HFS has not operated that way since July 2016.
- The directors of HFS *are* “otherwise responsible persons”. They made a mistake 2 years ago and have since managed to grow a business employing 14 people. The publicity surrounding this issue has already caused significant financial hardship through the loss of business relationships that took many years to grow.
- Regarding the point about an MPN aiming to eliminate financial gain, HFS would have been happy to provide their company accounts from the relevant year but were never asked to do so. The accounts showing HFS's position at the time of the alleged offences have now been

produced. It is clear that the penalty is excessive and goes way beyond eliminating any financial gain from the practices concerned.

*Submissions – ground 1 - consideration of the representations*

- It isn't clear that the Respondent directed her mind to the points made by HFS in its representations. The Tribunal is asked to take all of the representations /submissions made by HFS into account.
- HFS wants to see evidence of the reinvestigation given the number of changes to the complaints figures.
- Many of the breaches are down to DXI.
- The Respondent has selectively quoted from her guidance and missed out other significant parts including mitigating factors (e.g. damage to reputation/future business).
- Why is it proportionate to determine a fine "just over the middle of the range"?
- The DXI evidence is unreliable and should be disregarded.
- Some of the complaints refer to practices we didn't follow – we only called people on a Monday or a Tuesday and never before 9am or on multiple occasions in a day.
- The "blunt" extrapolation technique was proposed by HFS's solicitor. It has greater merit than the evidence provided as it is based on facts. The Respondent has not addressed the point about most of the complaints referring to unrelated businesses.

*Submissions - ground 2 – level of fine*

- The level of the fine is not reasonable or proportionate. Only 7 of the attributed complaints appear in HFS's database. The remainder could not have been about HFS as HFS didn't have their numbers to call them.
- HFS doesn't have evidence of the call records as the calls were made through DXI. Where is the evidence of the 8.7 million calls referred to? Any such list would be unreliable in any event as DXI has admitted sharing the CLIs.
- All MPNs issued by the Respondent refer to the breach as "serious". HFS has made some honest admissions. The size of the penalty does not match the crime. Numerous mitigating factors have not been considered.
- HFS provided a message for DXI to play to individuals who called the CLI. DXI failed to use it.
- The fact that the CLIs were based overseas was unknown to HFS and was DXI's action, as was DXI's decision to use CLI's that charged the caller.
- DXI provided the advice that it was sufficient to include HFS's details on a message that was played if a caller rang the CLI. The automated message was recorded by a DXI voice artist so DXI were aware that it did not include HFS's details.
- Querying why the Respondent hadn't previously mentioned having considered the Check Point and Media Tactics cases. The press

releases for those cases refer to 17.5 million calls (Check Point) and 22 million calls (Media Tactics), whereas the press release for HFS cites 8.7 million calls. Although the publicity for Check Point also referred to calls connected (6.4 million), in all other cases there is no distinction made between calls made and calls connected.

- One would assume that the number of complaints made would be a major factor in setting the penalty i.e. how many people have been upset by the actions. HFS admits to 7 of the 62 complaints being attributable to HFS but disputes the remainder.
- HFS had referred to the Xerpla case (contravention of regulation 22) because 14 complaints had been received from the public – twice the number of complaints that are accepted by HFS. The Respondent's assertions re the Advanced VOIP case were wrong. The penalty there was half that imposed on HFS and the Respondent took into account some mitigating circumstances which it has failed to do in HFS's case. HFS considers that 6 additional cases (those listed on page 348) demonstrate the unfairness shown to HFS.
- The publicity relating to the MPN was particularly hurtful as it indicated that HFS's representations had been disregarded. The case has had serious reputational impacts as well as damage to business relationships, loss of jobs and professional; damage in particular to MF.
- Neither of the two cited differences between the notice of intent and the MPN are attributable to HFS's representations. In view of the impact of the case, it would have been reasonable and fair to have explicitly addressed HFS's numerous representations and explained why they did not lead to any adjustment of the penalty.

18. The Respondent subsequently provided a Skeleton Argument dated 31/7/18, to which three First-tier Tribunal decisions were attached. A Supplementary Skeleton Argument was served on 9/8/18 explaining that it was now accepted that the calls answered figure was lower than stated in the MPN (8,520,123 as opposed to 8,792,907). As we understood it, the reason for the error was that when the total calls figure was reduced to remove the calls made from the CLI that had been shared with another company, a corresponding adjustment had not been made to the calls answered figure. A supplementary bundle, comprising 21 pages of supporting documents, was also provided on 9/8/18.

***The issues we had to decide***

19. At the hearing, the Respondent's representative asserted that the only disputed issue was the level of the fine. It was not clear to us that that was the case, given that HFS appeared to be disputing: the figures relating to the calls made, the calls answered and the complaints received; the assertion that they ought to have known that there was a risk that the contraventions would occur; and the Respondent's assertion that they had taken HFS's representations into account before making their final decision.

20. In any event, particularly given that HFS had no legal representation, we had to satisfy ourselves that HFS had indeed contravened regulations 19 and 24 of

PECR and that the requirements of section 55A of the DPA were met. We therefore considered the following issues.

**Issue 1: Regulation 19 of PECR.** (a) Did HFS transmit, or instigate the transmission of, communications comprising recorded matter for direct marketing purposes by means of an automated calling/communications system? (b) If so, did the permitted circumstances specified in (2)(a) and (b)(i) or (ii) apply?

**Issue 2: Regulation 24 of PECR.** (a) Did HFS use (or instigate the use of) a public electronic communications service for the transmission of direct marketing purposes? (b) If so, did HFS ensure that the following information was provided with that communication - HFS's name and either HFS's address or a telephone number on which HFS could be reached free of charge?

**Issue 3: Section 55A of the DPA, as modified.** (a) Was there a serious contravention by HFS of PECR. (b) If so, did HFS know or ought to have known that there was a risk that the contravention would occur but failed to take reasonable steps to prevent it? It had been accepted that HFS's conduct was not deliberate.

**Issue 4: Procedural issues.** Did the Respondent take into account HFS's representations before making their final decision? This was the only procedural point raised.

**Issue 5: The monetary penalty.** Should the Respondent have exercised her power to issue a monetary penalty notice and ought she have exercised her discretion differently in relation to the amount of the penalty specified in the notice?

The publicity given to the MPN was not a matter that was within our remit.

### ***The hearing***

21. Both parties opted to attend an oral hearing. MJ and MF attended the hearing and were unrepresented. Miss C. Bamford and Mr C. Gibson attended on behalf of the Respondent and were represented by their Counsel, Ms Jen Coyne.
22. At the start of the hearing we made an order (under rule 14(1) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009) prohibiting the disclosure or publication of any information from the evidence before us relating to the individuals who had allegedly received and complained about cold calls instigated by HFS.
23. The evidence before us consisted of: the 403 pages of evidence in the open bundle of documents; the additional open documents (Respondent's Skeleton Arguments, Supplementary Skeleton Arguments and related enclosures); the unaudited financial statements for the year ended 31/12/16 that MJ and MF produced part way through the hearing; and the oral evidence of MJ and MF. We considered all of that evidence before we reached our decision.

24. After the hearing (and after we had made our decision) the Respondent submitted further evidence asserting that the calls connected figure had been miscalculated and had been higher than claimed in their last submission. We did not accept that evidence because it had come too late. It would have been unfair to have done otherwise without allowing HFS to have an opportunity to have responded to it and we had already made our decision based on the lower figure

***Relevant findings of fact***

25. We made the following findings of fact:

- HFS was incorporated in 2014. It obtained a licence from the Financial Conduct Authority by the end of 2014 and also registered with the Respondent as a data controller. At the start, the only staff were the three directors, MF, MJ and RC. They initially operated from a room in the loft of MJ's house and they subsequently took on a small office in Anfield. At the end of 2016 (after the period of contravention specified in the MPN) the directors started taking on staff. At one stage, there were 11 members of staff in addition to the directors. There are currently 9 members of staff.
- As well as generating the leads for their third party debt management clients, the directors also completed the initial paperwork (collecting the necessary documentation – bank statements, proof of income, tax returns, asset details, proof of identification etc.).
- Copies of unaudited financial statements for HFS for the year ended 31/12/16 December 2016 (produced at the hearing) show a turnover of £596,135, staff costs of £91,829 and a net profit of £104,726. The figures for the year ended 31/12/15 were £367,084, £41,622 and £81,084 respectively.
- MF and RC had previously set up a company together. MF is a mortgage adviser/broker. He previously worked for Nat West for 5-6 years and left to work for an insurance broker friend. He was interested in getting into the mis-sold mortgages business and he and RC set up a company with that in mind. For reasons that are not clear, they had a change of plan and they did not pursue this.
- HFS's system for contacting potential leads via automated calls during the relevant period was as follows.
  - DX is a communications service provider which offers hosted dialler systems to customers, including a system referred to as an outbound dialling system which transmits automated calls to individuals with a customer message. On 29/7/15, HFS entered into a contract with DXI for the provision of such services to HFS. Under that contract, HFS was clearly the "data controller" (as defined in section 1 of the DPA) in relation to the personal data provided by HFS, and DXI was the "data processor" (as defined in the same section), as accepted by HFS (fifth paragraph of page 262).

- HFS purchased information about individuals (names and telephone numbers) from two “data brokers”, LM (the primary source) and DS. HFS emailed that information to DXI in batches for downloading on to HFS’s account. Before they were downloaded, DXI would carry out a check of the numbers provided against a global “do not call list” and inform HFS how many numbers could not be used (HFS would then in turn report this back to the relevant data broker).
- DXI provided HFS with an online “dashboard” of their account. The dashboard has multiple tabs, including a play and pause facility. The HFS directors would manipulate the dashboard in order to set a time for the calls to be made, or they could simply press “play” for the process to start.
- DXI allocated specific “CLIs” (call identification lines - being the telephone numbers presented when an individual receives a telephone call) to HFS. The CLIs allocated to HFS during the relevant period were the 7 CLIs referred to on pages 1 and 14 of the supplementary bundle.
- DXI also allocate “queue numbers” to their customers. The queue numbers are unique to a customer and are not shared. The queue numbers allocated to HFS were 16167 and 16166 (page 16 of the main bundle). At one stage, DXI also allocated one of those numbers to another customer (7 Wonders Consult).
- As the communication service provider, DXI held “CDRs” (call detail records). These are records of each call made (time, date, numbers called and duration) against a customer’s queue number(s).
- The directors would typically run the system on a Monday (sometimes on a Tuesday) for around two hours (or as long as they thought necessary to generate enough work for a week – approximately 30 answered calls) and then press “stop”. The system would make a pre-set number of calls per minute. A “survey tab” reveals how many calls have been answered and the number of opt-outs. The directors would then make follow up telephone calls to each of the individuals who had expressed an interest. They would allow an hour for each follow up call.
- An individual who answered one of these automated calls would hear a pre-recorded message about debt management services with an instruction to “press 5” if they wanted to hear more or to “press 9” in order to opt out. The automated message did not include HFS’s name, address or a telephone number on which HFS could be contacted free of charge. HFS had intended that when an individual pressed 5 they would hear a message provided by HFS (and recorded by a voice actor) providing HFS’s contact details. As we understood it, that did not happen. Instead, the individual was charged for a call to the relevant CLI. It would seem that the complainants had been able to identify the

CLI if it appeared on their telephone or by dialling 1471 to hear the last number they were called by.

- The arrangements between HFS and the data brokers were very informal. Their business relationships were mainly conducted via social networking. There were no written contracts. The HFS directors sought advice via Linked In regarding which data brokers to use and took leads from their own main clients in this respect. They did little in the way of price comparisons as the arrangements they had were working well enough for them. They did not receive invoices from LM. They produced one invoice from DS (page 268). At no stage did HFS know or seek to establish how each broker had acquired the datasets. No checks were undertaken by the directors of HFS as to whether the individuals whose details they had purchased had consented to being called and no written confirmation of such consents was provided by the data brokers. Evidence of consent has only been provided in relation to *one* individual.
- Between 22/10/15 and 27/7/16 HFS transmitted in excess of 26 million automated calls, of which at least 8,520,123 were answered. In the same period the Respondent received 62 complaints about automated calls from CLIs used exclusively by HFS.

### ***What we decided and why***

#### ***Issue 1 - Regulation 19 of PECR***

26. (a) Did HFS transmit, or instigate the transmission of, communications comprising recorded matter for direct marketing purposes by means of an automated calling/communications system? (b) If so, did the permitted circumstances specified in (2)(a) and (b)(i) or (ii) apply?
27. We decided that the answer to (a) was clearly “yes”. It was clear from the contract with DXI that, as data controller, HFS would be instigating the transmission of the calls. And this was supported by the description provided by the directors at the hearing of the way they manipulated the online dashboard and chose precisely when, and for how long, the calls would be made.
28. The recipients of the automated calls had clearly not previously notified HFS that they consented to such calls being sent by, or at the instigation of, HFS on the lines called. As regulation 19(2)(a) did not therefore apply, it was unnecessary for us to consider 19(2)(b) (the exception in 19(1) only applies if the circumstances described in 19(2)(a) and (b) are both satisfied).
29. This contravention was accepted by HFS but the failure to obtain consents was blamed primarily on the data brokers.

**Issue 2 - Regulation 24 of PECR.**

30. It was clear that neither HFS's name and address nor a telephone number on which HFS could be reached free of charge was provided with the automated message. Again, this contravention was accepted by HFS, but blamed primarily on DXI.

**Issue 3 - Section 55A of the DPA, as modified**

*Call volumes*

31. HFS did not accept the evidence on which the figures referred to in the MPN relating to calls made, calls connected figures or complaints attributable to HFS were based. This is relevant to the issue of whether a *serious contravention* of PECR had occurred. HFS also appeared to be disputing the assertion that they *knew or ought to have known* that there was a risk that the contravention would occur.
32. As to the call volume, as explained in the Supplementary Skeleton argument (paragraph 2) the original figure provided by DX for calls *made* was 24,870,629. On realising that one CLI had been shared with another customer, DXI removed the call figures relating to that CLI that were not attributable to HFS and made a corresponding reduction in the calls made figure to 24,597,845. Subsequently, DXI discovered more records which revealed an additional 2,034,173 calls made by HFS, bringing the final total to 26,632,018. These figures are supported, in particular, by the evidence at pages 1, 10 and 14 of the supplementary bundle.
33. Page 14 of the supplementary bundle includes (last column) a record of the calls *connected* (or "answered"). For the reasons explained in paragraphs 3-6 of the Supplementary Skeleton, the calls connected figure in the MPN is incorrectly given as 8,792,907, when it should have been 8,520,123.
34. The supporting evidence for the calls made and calls connected figures includes the CLIs allocated to HFS, the dates on which the calls were made and the number of calls made and answered on each date. DXI explained that these figures derive from their CDRs and are based on the customer's queue number, which is unique to a customer and cannot be shared.
35. Although the figures relied on changed throughout the investigation, we did not consider this to be an indication of unreliability, but simply a consequence of further checks having been made during an ongoing investigation and the figures having been adjusted and refined according to the most recent findings.
36. There was no obvious incentive for DXI to have produced inflated figures. On the contrary, they knew that they were part of a formal ICO investigation and would have known that there could be adverse consequences for DXI if they did not deal with the enquiries competently and credibly. The information notice served on DXI on 5/1/18 advised DXI that a failure to comply with such a notice constitutes an offence. We did not accept that DXI increased the figure out of spite after HFS cut ties with them. There was no evidence to support that allegation.



37. The DXI evidence was the *only* evidence available to the Respondent. HFS had been unable to provide any evidence relating to the numbers of calls made, other than to say that the numbers were “large”. We considered their apparent complete lack of knowledge in that respect to be surprising and somewhat lacking in credibility. HFS did not raise any specific points about the evidence described above. They did not dispute that the CLIs referred to were theirs and they did not dispute any of the dates. We were satisfied that the Respondent had adequately investigated the matter and we accepted, on the balance of probabilities, that the Respondent had correctly concluded that the figures provided by DXI (as subsequently adjusted) in relation to calls made and calls connected *were* correct.

#### *Complaints*

38. As regards the complaints figures, the key evidence is at pages 2-6, 11-13 and 16-20 of the supplementary bundle. HFS were correct in saying that the original figure provided was 99. The final figure was 62. It seems clear from the colour code information on page 11 that the only complaints included in the final list were those supported by DXI's CDRs and/or where HFS had confirmed that the dialled number was recognised by them. Complaints made outside the contravention period had been removed as had some duplicate entries. Again, HFS did not raise any specific points about the entries on the final list.

We again accepted, on the balance of probabilities, that the Respondent had adequately investigated the matter and had correctly concluded that there were 62 complaints properly attributable to HFS.

#### *Known/ought to have known*

39. It was clear to us that the directors of HFS knew or ought to have known of the risks that a contravention of the relevant regulations would occur and that they had failed to take reasonable steps to prevent this.

The processing of personal data is at the very core of their business. It is not a side line or an incidental part of what they do. They are working in a highly regulated sector and handling large quantities of information that is obviously “personal data” (as defined in section 1 of the DPA). The very fact that they had a data controller/ data processor relationship with DXI (as HFS has acknowledged) meant that they had certain obligations under the Seventh Data Protection Principle. These are clearly set out in Part II of Schedule 1 to the DPA (paragraphs 11 and 12). Here, the DPA is clear that a processor must act only on *written* instructions given by the data controller. HFS failed to put any such written instruction in place stating clearly what DXI should and should not do with the personal data provided to them.

40. At the hearing MF said that the directors held their hands up on this issue “to a degree”. He asserted that if they had employed someone at the start, such as a consultant “with superior knowledge” this may not have occurred but that, as a start-up business, “they went with the assurances”. He also mentioned being swayed by the fact that the parties concerned were registered with the

Respondent, a point that HFS made several times in their paper submissions. He accepted that they had signed a contract which clearly described HFS as the data controller and DXI as a data processor but admitted that they had “probably not” read the contract thoroughly. He emphasised that HFS does things very differently now, making the relevant due diligence enquiries and obtaining written assurances.

41. They clearly had some awareness of the data issues; at a basic level at the very least. HFS was registered with the Respondent as a data controller. MF had worked for a major bank for a number of years and is a qualified mortgage adviser. He conceded at the hearing that he must have had some data protection training. In relying on verbal assurances that necessary consents had been obtained and failing to make any independent checks on the rules relating to cold calls they had, in our judgement, demonstrated an almost complete failure to engage in that aspect of the business which cannot be described as mere naivety.
42. As HFS was data controller of a very significant amount of personal data, the directors should have made it their business to understand their legal obligations. The issues relating to cold calling were common knowledge amongst players in their business in particular. There was no merit whatsoever in their assertions that their failings in these respects were down to the data brokers or DXI, their data processor. Organisations that are registered with the Respondent as data controllers apply for registration because the law requires it. Registration does not imply that the organisation has any special status or relationship with the Respondent.

***Issue 4 - Procedural issues***

43. The only procedural issue raised by HFS was their repeated assertion that their representations had not been addressed before the final MPN was issued. We did not accept this. The MPN (paragraph 57) states that the Respondent took the representations into account when reaching her final view and we had no reason to doubt this. There was a representations meeting and a detailed paper was circulated prior to that meeting (pages 145-151). Many of the representations made were without merit. The Respondent did make changes to the Notice of Intent. We were satisfied that HFS’s representations had been taken into account even though they were not individually addressed in the MPN

***Issue 5 - The monetary penalty***

44. Paragraphs 8-14 of the Respondent’s skeleton argument correctly summarise the law, guidance and relevant considerations relating to the power to impose an MPN and the level of the penalty. HFS had accepted that a penalty was appropriate, but they disputed the *level* of the penalty. They proposed a penalty of £10,000.
45. Looked at in the round, we were satisfied that in imposing a penalty of £300,000 the Respondent had exercised her discretion appropriately.

46. The main factors that justified a penalty of that size were, in our judgement as follows.

- The unlawful conduct had occurred over a fairly significant length of time – almost 9 months.
- The number of connected calls was extremely high and could have been significantly higher given the unusually high number of total calls made. The Respondent’s representative explained at the hearing that there had been a recent change of focus when setting penalties, from total calls made (previous focus) to calls made and connected (current focus). This may have worked to the advantage of HFS given the unusually high number of calls made in their case.
- Albeit not deliberate, the negligence of HFS’s directors was quite extreme. Despite the fact that the activities governed by PECR and the handling of personal data was at the core of their business, they took no responsibility for acquainting themselves with the relevant legal requirements. They had no due diligence arrangements in place and they unreasonably relied on informal, verbal advice and assurances provided by their business partners without making any checks to ensure that they were operating within the law. It seemed to us that they simply “turned a blind eye” to all of this.
- A significant penalty was appropriate in this case to provide a strong deterrent against contraventions of this scale.
- The penalty was sufficiently consistent with penalties imposed in the relevant cases that had been drawn to our attention.

We considered that these factors alone justified the size of the penalty.

47. Since 2015 there is no longer a requirement to demonstrate substantial damage/distress in PECR cases<sup>3</sup>. We did not, therefore, consider the number of complaints to be a decisive factor, although this provided important background information and highlights the “mischief” that PECR aims to eradicate.

48. As regards the aggravating factors identified in the MPN, we thought there was an element of “double counting”, because they include a reference to the failure to provide HFS’s details with the automated message (the key part of the contravention of regulation 24 itself). Having said that, HFS did contravene two separate PECR provisions and that is relevant to the level of the penalty.

49. The charging for return calls was correctly considered to be an aggravating factor. However, the evidence regarding the CLIs being allocated overseas was unclear and we were unable, therefore, to consider the relevance of that issue.

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<sup>3</sup> When PECR were amended by SI 2015/355.

50. HFS made many references to “mitigating factors”, primarily relating to the conduct/actions of DXI and the data brokers. However, HFS was the data controller and instigator of the calls and the directors should have made it their business to ascertain the legal requirements that applied to their core business and made the necessary checks to ensure that they were complying with the law. We were not persuaded that any of the factors they referred to were valid grounds for reducing the penalty.
51. As regards financial hardship, HFS did not produce any evidence (other than the unsupported information in the representations letter) relating to HFS’s financial position until they were prompted to do so at the hearing (despite the direction at paragraph 8 of the Case Management Directions issued on 22/3/18 – pages 3012-304 of the bundle of evidence). Even then, they only produced copies of the accounts for the year ended 21/12/16, without any evidence about HFS’s assets. The Respondent had accepted that HFS might not be able to meet the fine but considered that this was overridden by the seriousness of its conduct and the need for a clear and effective deterrent. We considered that to be the correct approach in all the circumstances.

### **Conclusion**

52. We were grateful for the cooperation, openness and candour demonstrated by MJ and MF at the hearing and it is to their credit that they have turned things round and now running a compliant business. However, for the reasons set out above, we were satisfied that the MPN was in accordance with the law and that the Respondent had exercised her discretion appropriately in issuing a monetary penalty notice and specifying a penalty of £300,000. We therefore dismissed the appeal.

**Signed: Karen Booth**

**Judge of the First-tier Tribunal  
Date: 8<sup>th</sup> October 2018**

# ANNEX

## Relevant PECR provisions

### 19 Use of automated calling systems

(1) A person shall neither transmit, nor instigate the transmission of, communications comprising recorded matter for direct marketing purposes by means of an automated calling [or communication] system except in the circumstances referred to in paragraph (2).

[(2) Those circumstances are where--

(a) the called line is that of a subscriber who has previously notified the caller that for the time being he consents to such communications being sent by, or at the instigation of, the caller on that line; and

(b) the person transmitting, or instigating the transmission of, such communications--

(i) does not prevent presentation of the identity of the calling line on the called line; or

(ii) presents the identity of a line on which he can be contacted.]

(3) A subscriber shall not permit his line to be used in contravention of paragraph (1).

(4) For the purposes of this regulation, an automated calling system is a system which is capable of -

(a) automatically initiating a sequence of calls to more than one destination in accordance with instructions stored in that system; and

(b) transmitting sounds which are not live speech for reception by persons at some or all of the destinations so called.

### 24 Information to be provided for the purposes of regulations 19, 20 and 21

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

(a) in relation to a communication to which regulations 19 (automated calling systems) and 20 (facsimile machines) apply, the particulars mentioned in paragraph (2)(a) and (b);

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

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

(a) the name of the person;

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

## Relevant DPA provisions

### **55A Power of Commissioner to impose monetary penalty**

(1) *The Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that--*

- (a) *there has been a serious contravention of the requirements of [PECR], 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.*

(4) *A monetary penalty notice is a notice requiring the person to pay to the Commissioner a monetary penalty of an amount determined by the Commissioner and specified in the notice.*

(5) *The amount determined by the Commissioner must not exceed the prescribed amount.*

(6) *The monetary penalty must be paid to the Commissioner within the period specified in the notice.*

(7) *The notice must contain such information as may be prescribed.*

(8) *Any sum received by the Commissioner by virtue of this section must be paid into the Consolidated Fund.*

(9) *In this section--*

*"prescribed" means prescribed by regulations made by the Secretary of State [; and .....]*

### **55B Monetary penalty notices: procedural rights**

[(1) Before serving a monetary penalty notice, the Commissioner must serve the person with a notice of intent.

(2) A notice of intent is a notice that the Commissioner proposes to serve a monetary penalty notice.

(3) A notice of intent must--

(a) inform the person that he may make written representations in relation to the Commissioner's proposal within a period specified in the notice, and

(b) contain such other information as may be prescribed.

(4) The Commissioner may not serve a monetary penalty notice until the time within which the person may make representations has expired.

(5) [right of appeal – see above]

(6) In this section, "prescribed" means prescribed by regulations made by the Secretary of State.