

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Omega Marketing Services Ltd

Of: 8 Rigby Avenue, Glasgow, G32 6DP

1. The Information Commissioner ("Commissioner") has decided to issue Omega Marketing Services Ltd ("the Company") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to a serious contravention of Regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR") by the Company.
2. This notice explains the Commissioner's decision.

Legal framework

3. The Company, whose registered office is given above (Companies House registration number: SC517916), is the person stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for direct marketing purposes contrary to regulation 21 of PECR.
4. Regulation 21 of PECR states:

“(1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where –

(a) the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or

(b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26.

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

(3) A person shall not be held to have contravened paragraph (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.

(4) Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such calls being made on that line by that caller, such calls may be made by that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.

(5) Where a subscriber has given a caller notification pursuant to paragraph (4) in relation to a line of his –

(a) the subscriber shall be free to withdraw that notification at any time, and

(b) where such notification is withdrawn, the caller shall not make such calls on that line.”

5. Under regulation 26 of PECR, OFCOM is required to maintain a register of numbers allocated to subscribers who have notified them that they do not wish, for the time being, to receive unsolicited calls for direct

marketing purposes on those lines. The Telephone Preference Service ("TPS") is a limited company set up by OFCOM to carry out this role. Businesses who wish to carry out direct marketing by telephone can subscribe to TPS for a fee and receive from them monthly a list of numbers on that register.

6. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".
7. Section 11(3) of the DPA defines "direct marketing" as "the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals". This definition also applies for the purposes of PECR (see regulation 2(2)).
8. Section 55A of the DPA (as amended by the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2011 and the Privacy and Electronic Communications (Amendment) Regulations 2015) states:

"(1) The Commissioner may serve a person with a monetary penalty if the Commissioner is satisfied that –

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

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

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

Background to the case

11. The Company's business involves making unsolicited marketing calls to individual subscribers in order to sell solar panels and other green energy saving equipment.
12. In October 2015 the Company was identified by the ICO as being the subject of a large number of complaints about unsolicited marketing calls.
13. A company, My IML Ltd, was investigated by the Commissioner and served with a Monetary Penalty Notice on 15 February 2016 for instigating unsolicited live direct marketing calls in contravention of regulation 21 of PECR.

14. The Commissioner had identified a series of telephone numbers being used by My IML Ltd to instigate calls. Complainants had told the Commissioner that the company had identified itself using a variety of company names. Despite service of the Monetary Penalty Notice complaints continued to be received about unsolicited direct marketing calls from several of the same previously identified numbers.
15. The Commissioner's investigation identified Omega Marketing Limited as now having ownership of some of those identified numbers. It was revealed that rather than creating a new account with the service provider the Company had continued to use My IML Ltd's account but had changed the account name to identify itself as the subscriber on 19 October 2015. A small quantity of further numbers were found to be allocated to the Company from the same date. It was found that the Company had instigated 1,616,761 unsolicited direct marketing calls using these allocated numbers.
16. Between 14 October 2015 and 31 March 2016, 177 complaints were made about unsolicited direct marketing calls made by the Company. 131 of those complaints were made to the TPS, with a further 46 made direct to the ICO. All of these complaints were made by individual subscribers who were registered with the TPS.
17. When the TPS receives a complaint, it contacts the organisation complained about and invites it to explain why the call was made. This provides an opportunity for the organisation to explain to the TPS that, for example, it did not make the call or that it had the consent of the subscriber to make the call. Of the 122 occasions on which the TPS contacted the Company, it did not respond to the TPS on 75 occasions. On 35 occasions, the Company replied "the call was not made by our

organisation". On the remaining 17 occasions the letter was either returned as "gone away" or the TPS felt that they had the incorrect address.

18. The following are examples of some of the comments made by individuals who have complained to the ICO:

"...When I told one caller I didn't want such calls he got quite angry and said 'why do you have a telephone then'! If someone knocked on your door with such regularity they'd get arrested for harassment."

"Frustrating getting these calls again after a few weeks lull. I need to have my landline free to enable me to keep in touch with the hospital and medical staff looking after me after a serious accident. I was expecting an appointment confirmation call this afternoon and answered the phone - so fed up with these calls - they are getting me down."

"Aggressive. Shouted. Told me that she'd every right to call. Told me I was a waste of time. Said I should get out and get a job."

"It is frightening to be receiving these calls. We have asked them to not call and yet they continue"

"It has affected me as I know my mother is in a vulnerable state after just loosing [sic] her husband & my father, that she would of if they carried on bought the product they were selling just to stop the phone calls. They have called numerous times in the spate of a week this time I was in to have the phone handed over

to myself & inform them my mother is not interested in the product.”

“I feel victimised and like these people are picking on me personally.”

19. The Commissioner has made the above findings of fact on the balance of probabilities.
20. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by the Company and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

21. The Commissioner finds that the Company has contravened regulation 21 of PECR.
22. The Commissioner finds that the contravention was as follows:
23. Between 14 October 2015 and 31 March 2016, the Company used a public telecommunications service for the purposes of instigating 1,616,761 unsolicited calls for direct marketing purposes to subscribers where the number allocated to the subscriber in respect of the called line was a number listed on the register of numbers kept by OFCOM in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR.
24. The Commissioner is also satisfied for the purposes of regulation 21 that the 177 complaints were made by subscribers who had registered with the TPS at least 28 days prior to receiving the calls and they had not given their prior consent to the Company to receive calls.

25. The Commissioner is therefore satisfied that the Company was responsible for this contravention.
26. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

27. The Commissioner is satisfied that the contravention identified above was serious. This is because the company instigated 1,616,761 unsolicited direct marketing calls. There have been multiple breaches of regulation 21 by the Company arising from its activities and these led to a large number of complaints about unsolicited direct marketing calls to the TPS and the ICO. In addition, it is reasonable to suppose that considerably more complaints may have been made had the company taken steps to correctly identify itself or provide contact details.
28. Some complainants allege that the Company made repeat calls to them even though they had asked for their number to be suppressed.
29. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

30. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that the Company's actions which constituted that contravention were deliberate actions (even if the Company did not actually intend thereby

to contravene PECR).

31. The Commissioner considers that in this case the Company did not deliberately contravene regulation 21 of PECR.
32. The Commissioner has gone on to consider whether the contraventions identified above were negligent.
33. First, she has considered whether the Company knew or ought reasonably to have known that there was a risk that these contraventions would occur. He is satisfied that this condition is met, given that the Company relied heavily on direct marketing due to the nature of its business, and the fact that the issue of unsolicited calls has been widely publicised by the media as being a problem. The TPS contacted the Company on each occasion a complaint was made to it which should have made the Company aware of the risk that these contraventions would occur. It is therefore reasonable to suppose that the Company should have been aware of their responsibilities in this area.
34. Second, the Commissioner has gone on to consider whether the Company failed to take reasonable steps to prevent the contraventions. Again, she is satisfied that this condition is met. Reasonable steps in these circumstances would have included carrying out due diligence checks, screening the data against the TPS register/its own suppression list and providing the Company's telesales staff with written procedures and training regarding the requirements of PECR and how to comply with them. Given the volume of complaints received, it is clear that the Company failed to take those steps.

35. The Company was provided with numerous opportunities to provide the TPS with an explanation for the contraventions but failed to do so other than to say when it did respond that “the calls were not made by our organisation”.
36. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner’s decision to issue a monetary penalty

37. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A(1) DPA have been met in this case. She is also satisfied that section 55A(3A) and the procedural rights under section 55B have been complied with.
38. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made by the Company on this matter.
39. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
40. The Commissioner has considered whether, in the circumstances, she should exercise his discretion so as to issue a monetary penalty.
41. The Commissioner’s underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The making of unsolicited direct marketing calls is a matter of significant public concern. A monetary penalty in this case should act as a general encouragement towards compliance with the law, or at least as a

deterrent against non-compliance, on the part of all persons running businesses currently engaging in these practices. This is an opportunity to reinforce the need for businesses to ensure that they are only telephoning consumers who want to receive these calls.

42. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

43. The Commissioner has taken into account the following **mitigating features** of this case:

- There is a potential for damage to the Company's reputation which may affect future business.

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

- The Company may obtain a commercial advantage over its competitors by generating leads from unlawful marketing practices.

45. The Commissioner has also taken into account the fact that the Company has contravened regulation 24 of PECR in that it did not identify the person who was sending or instigating the marketing calls and, if requested, provide the address of the person or a telephone number on which he can be reached free of charge.

46. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£60,000 (sixty thousand pounds)** is reasonable and proportionate given the particular facts of the case and

the underlying objective in imposing the penalty.

Conclusion

47. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **6 October 2016** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.
48. If the Commissioner receives full payment of the monetary penalty by **5 October 2016** the Commissioner will reduce the monetary penalty by 20% to **£48,000 (forty eight thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
49. There is a right of appeal to the First-tier Tribunal (Information Rights) against:
 - (a) the imposition of the monetary penalty
and/or;
 - (b) the amount of the penalty specified in the monetary penalty notice.
50. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
51. Information about appeals is set out in Annex 1.
52. The Commissioner will not take action to enforce a monetary penalty unless:

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

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

Dated the 5th day of September 2016

Signed

Stephen Eckersley
Head of Enforcement
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice or variation notice has been served a right of appeal to the (First-tier Tribunal) General Regulatory Chamber (the 'Tribunal') against the notice.
2. If you decide to appeal and if the Tribunal considers:-
 - a) that the notice against which the appeal is brought is not in accordance with the law; or
 - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.
3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

 - a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.

- b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state: -
- a) your name and address/name and address of your representative (if any);
 - b) an address where documents may be sent or delivered to you;
 - c) the name and address of the Information Commissioner;
 - d) details of the decision to which the proceedings relate;
 - e) the result that you are seeking;
 - f) the grounds on which you rely;
 - g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
 - h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.
5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.
6. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).