

**DATA PROTECTION ACT 1998**

**SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

**MONETARY PENALTY NOTICE**

To: The Lead Experts Limited

Of: 3rd Floor, 207 Regent Street, London, England, W1B 3HH

1. The Information Commissioner ("Commissioner") has decided to issue The Lead Experts Limited ("TLEL") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to a serious contravention of regulations 19 and 24 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

**Legal framework**

3. TLEL, whose registered office is given above (companies house registration number: 09830112), is the organisation (person) stated in this notice to have used an automated calling system for the purpose of making recorded direct marketing calls contrary to regulation 19 of PECR.
4. Regulation 19 of PECR provides that:

"(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 system except in the circumstances referred to in paragraph (2).

(2) Those circumstances are where 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.

(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.”

5. Regulation 24 of PECR provides:

“(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);

...

(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.”

6. “Direct marketing” is defined in section 11(3) of the DPA 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)).

7. Section 55A of the DPA (as amended by the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2011 and the Privacy and Electronic Communications (EC Directive) (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, and

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

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

(3) This subsection applies if the person –

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

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

8. The Commissioner has issued statutory guidance under section 55C (1) of the DPA about the issuing of monetary penalties that has been published on the ICO’s website. The Data Protection (Monetary

Penalties)(Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.

9. PECR 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 was 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**

10. TLEL came to the attention of the Commissioner following an investigation into complaints of automated calls made between February 2015 and September 2016.
11. On 31 October 2016 the Commissioner served a third party information notice on DXI Limited ("DXI") in relation to automated calls made via the DXI voice broadcasting platform from numbers prefixed with 08454290 and 0844337, those being the prefixes for the reported complaint numbers.
12. DXI responded to the notice on 5 December 2016. They provided a spreadsheet containing a list of automated calling campaigns instigated by their customers, using these numbers as presentation CLIs. The spreadsheet included the company names, CLI's used, dates of the campaigns and volume of calls made. The information provided showed that, between 4 May 2016 and 5 May 2016, TLEL made a total of 115,341 automated calls.

13. On 12 December 2016 the Commissioner wrote to TLEL to indicate concerns about their compliance with PECR, and to request further information, particularly regarding consent, to assist with the Commissioner's enquiries.
14. The initial letter was resent on 7 March 2017 having established that there had been a change in the registered address for TLEL.
15. TLEL responded by way of email on 20 March 2017 to deny ever using automatic dialling, and stating that their "...only experience with DXI was that of buying a small batch of test leads of which we [TLEL] only dialled a small amount due to the quality not being very good."
16. DXI provided the Commissioner with a copy of a signed order form for TLEL outlining charges for calls to landlines and mobiles, and for voice recordings with a fee 'TBA' (to be arranged).
17. DXI also provided two audio files containing voice recordings of the messages to be played when the calls connected. The content of these messages were as follows:

*'Hello you could save up to £600 on your energy. This is your call to activate your gas and electricity energy reduction. Press 2 to speak with one of our energy experts or press 9 to opt out. Again for your reductions press 2 now.'*

*'Congratulations you've been chosen to have the chance of winning a 7 night packaged holiday for two. Simply Press 2 to now and complete a quick free energy comparison to save yourself £600 per year. Press 2 now to have a chance to win or 9 to opt out.'*

18. A copy of the signed order form was forwarded to TLEL on 21 March 2017 and an explanation of the same was requested.

19. TLEL responded that day to reaffirm their position that they had carried out no automated dialling and had merely purchased leads.
20. The Commissioner sought further clarification from DXI by way of correspondence dated 27 March 2017.
21. DXI responded on 4 April 2017, whereby they clarified that of the 115,341 calls made by TLEL using their dialling platform, 111,072 of the calls connected, with the remaining 4,269 calls being made to 'dead'/invalid numbers. Furthermore, DXI provided copy email correspondence between TLEL and DXI with TLEL supplying numbers to be loaded onto a dialler as part of their marketing campaign; copies of the two voice recordings to be used for connected calls; and instructions of how to direct any leads generated back to TLEL, together with confirmation of payment for those services.
22. Furthermore, DXI provided copy email correspondence dated 5 May 2016 from DXI to TLEL explaining that the automated calling campaign had generated 161 leads at a cost of £102.00.
23. The Commissioner wrote to TLEL on 22 May 2017, and again on 15 June 2017 inviting TLEL to provide an explanation for the information obtained from DXI. No response has been received to date.
24. On 27 July 2017 TLEL filed an application to strike the company off the Companies House register. As of 3 August 2017 this voluntary strike-off action has been suspended pending investigations by the Commissioner.

25. TLEL has been unable to provide evidence that it had the consent of the individuals to whom it had instigated the transmission of the automated direct marketing calls.
26. The Commissioner has made the above findings of fact on the balance of probabilities.
27. The Commissioner has considered whether those facts constitute a contravention of regulations 19 and 24 of PECR by TLEL and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

28. The Commissioner finds that TLEL contravened regulation 19(1) and (2); and 24 of PECR.
29. The Commissioner finds that the contravention was as follows:
30. Between 4 May 2016 and 5 May 2016 TLEL instigated the transmission of 111,072 automated marketing calls to subscribers without their prior consent.
31. Automated marketing calls can only be made to people who have previously notified the caller that they consent to such communications being sent by, or at the instigation of, the caller. Consent must be freely given, specific and informed, and involve a positive indication signifying the individual's agreement.
32. In this case the Commissioner is satisfied that TLEL did not have the consent of the individuals to whom it had instigated the transmission of 111,072 automated direct marketing calls.

33. The Commissioner is satisfied that TLEL was responsible for this contravention.
34. The Commissioner is also satisfied that TLEL did not identify the person who was sending or instigating the automated marketing calls and provide the address of the person or a telephone number on which this person can be reached free of charge.
35. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

**Seriousness of the contravention**

36. The Commissioner is satisfied that the contravention identified above was serious.
37. This is because TLEL instigated the making of 111,072 automated marketing calls to subscribers without their prior consent.
38. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

**Deliberate or foreseeable contravention**

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



40. The Commissioner considers that in this case TLEL did deliberately contravene regulation 19 of PECR in that sense.
41. The Commissioner has published detailed guidance for companies carrying out marketing explaining their legal requirements under PECR. This guidance explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by email, by post or by fax. Specifically, it states that marketing material can only be transmitted via an automated system with the prior consent of the subscriber.
42. TLEL has maintained throughout the course of the investigation that it merely purchased a small number of leads through DXI, in spite of clear evidence to the contrary that it instigated an automated call campaign for the purposes of direct marketing.
43. Whilst TLEL may not have deliberately set out to cause distress, it did deliberately instigate automated marketing calls on a massive scale to subscribers.
44. TLEL failed to ensure that they had the necessary consent to make the calls. Moreover, TLEL has failed to provide any evidence that they have procedures in place to comply with the regulations.
45. Furthermore, they failed to include the company name, address and telephone number in their automated messages pursuant to the requirements of Regulation 24.
46. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

**The Commissioner's decision to issue a monetary penalty**

47. The Commissioner has also taken into account the following **aggravating features** of this case:
- TLEL has repeatedly denied all wrongdoing and pleaded ignorance as to the contravention, despite evidence to verify their instigation of the direct marketing. TLEL has also disengaged with the Commissioner during the latter part of the investigation.
  - Whilst the CLI's used for the marketing calls were legitimate, they did not identify the company making the call. The CLI's were routed through Buenos Aires making it difficult to trace the company.
  - The CLI's were also 'added value' numbers which charged the individual when they would call to try to identify the company.
  - When challenged as to their practices TLEL has, on 27 July 2017, sought to liquidate the company.
48. The Commissioner has also taken into account the fact that TLEL has contravened regulation 24 of PECR in that it did not identify the person/organisation who was sending or instigating the automated marketing calls and provide the address of the person or a telephone number on which he can be reached free of charge.
49. 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.

50. 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 TLEL on this matter.
51. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
52. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
53. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending or instigating of automated 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 sending automated marketing calls in compliance with PECR.
54. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

**The amount of the penalty**

55. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£70,000 (seventy thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

**Conclusion**

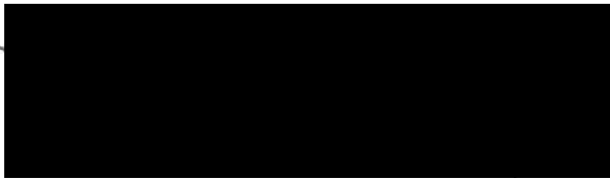
56. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **10 November 2017** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.
57. If the Commissioner receives full payment of the monetary penalty by **9 November 2017** the Commissioner will reduce the monetary penalty by 20% to **£56,000 (fifty six thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
58. 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.
59. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
60. Information about appeals is set out in Annex 1.
61. 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.

62. 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 10<sup>th</sup> day of October 2017

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 (Information Rights) (the 'Tribunal') against the notice.
2. If you decide to appeal and if the Tribunal considers:-
  - a) that the notice against which the appeal is brought is not in accordance with the law; or
  - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

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)).