

## **DATA PROTECTION ACT 1998**

### **SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

#### **MONETARY PENALTY NOTICE**

To: Keurboom Communications Ltd

Of: Houghton Hall Lodge, The Green, Houghton Regis, Dunstable,  
Bedfordshire LU5 5DY

1. The Information Commissioner ("Commissioner") has decided to issue Keurboom Communications Ltd ("Keurboom") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is being issued because of a serious contravention of regulation 19 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by Keurboom.
2. This notice explains the Commissioner's decision.

#### **Legal framework**

3. Keurboom, whose registered office is given above (companies house registration number: 09030006), is the 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. Keurboom was incorporated on 8 May 2014.
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. 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)).
6. 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 notice 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.
7. 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.
8. 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**

9. Keurboom provides (among other things) telephony services including “voice broadcasting” to companies in order to generate leads so that they can maximise their potential sales.
10. Between 29 April 2015 and 7 June 2016, the Commissioner’s office received 1,036 complaints via the online reporting tool. The gist of the complaints was that automated marketing calls had been received by subscribers, mainly in relation to road traffic accidents and PPI claims. Some of the complainants had also received repeat calls (sometimes on the same day) and at unsocial hours.
11. The calls allowed an option to press 5 if interested, or an option to press 9 to be removed from the list. The calls did not identify the sender and the option of being connected to a person or suppressing the number was not always effective. Some of the calls were also misleading because they gave the impression that the calls were urgent and related to a recent road traffic accident or an ongoing PPI claim.
12. It was eventually discovered that between 1 October 2014 and 31 March 2016, 99,535,654 outbound calls were made using lines allocated to Keurboom (91,497,411 after 6 April 2015).
13. The Commissioner has made the above findings of fact on the balance of probabilities.

14. The Commissioner has considered whether those facts constitute a contravention of regulation 19 of PECR by Keurboom and, if so, whether the conditions of section 55A DPA are satisfied.

**The contravention**

15. The Commissioner finds that Keurboom contravened the following provisions of PECR:

Keurboom has contravened regulation 19(1) and (2) of PECR.

16. The Commissioner finds that the contravention was as follows:

Between 1 October 2014 and 31 March 2016, Keurboom sent or instigated 99,535,654 (91,497,411 after 6 April 2015) automated marketing calls to subscribers without their prior consent.

17. The Commissioner is satisfied that Keurboom was responsible for this contravention.
18. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

**Seriousness of the contravention**

19. The Commissioner is satisfied that the contravention identified above was serious. This is because Keurboom sent or instigated 99,535,654 (91,497,411 after 6 April 2015) automated marketing calls to subscribers without their prior consent resulting in 1,036 complaints to the Commissioner's office. Keurboom made repeat calls to subscribers (sometimes on the same day) and at unsocial hours. Some of the calls

were also misleading because they gave the impression that the calls were urgent and related to a recent road traffic accident or an ongoing PPI claim.

20. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

### **Deliberate or foreseeable contravention**

21. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that Keurboom's actions which constituted that contravention were deliberate actions (even if Keurboom did not actually intend thereby to contravene PECR).
22. The Commissioner considers that in this case Keurboom did deliberately contravene regulation 19 of PECR in that sense.
23. The Commissioner has also 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.
24. Whilst Keurboom may not have deliberately set out to cause distress, it did deliberately send or instigate automated marketing calls on a massive scale to subscribers.

25. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

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

26. 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.
27. The latter has included the issuing of a Notice of Intent dated 3 March 2017, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made in response to that Notice of Intent, as well as those made in other correspondence from Keurboom.
28. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
29. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
30. 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.

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

**The amount of the penalty**

32. The Commissioner has taken into account the following **aggravating features** of this case:
- Keurboom did not co-operate with the Commissioner's investigation.
  - Keurboom may obtain a commercial advantage over its competitors by generating leads from unlawful marketing practices.
33. The Commissioner has also taken into account the fact that Keurboom has contravened regulation 24 of PECR in that it did not identify the person who was sending the automated marketing calls and provide the address of the person or a telephone number on which he can be reached free of charge.
34. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£400,000 (Four hundred thousand pounds)**.

**Conclusion**

35. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **2 June 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.

36. If the Commissioner receives full payment of the monetary penalty by **1 June 2017** the Commissioner will reduce the monetary penalty by 20% to **£320,000 (Three hundred and twenty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
37. 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.
38. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
39. Information about appeals is set out in Annex 1.
40. 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.

41. 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 3rd day of May 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 (Information Rights) 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)).