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Information Commissioner's Office

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

To: Ice Telecommunications Ltd

Of: 4 Crewe House, Oak Street, Crewe, Cheshire, CW2 7DB

1. The Information Commissioner ("the Commissioner") has decided to issue Ice Telecommunications Ltd ("Ice Comms") with an enforcement notice under section 40 of the Data Protection Act 1998 ("DPA"). The notice is being issued because of a serious contravention of regulations 21(1)(a) and (b) of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").

2. This notice explains the Commissioner's decision.

Legal framework

3. Ice Comms, whose registered office is given above (Companies House Registration Number: 09180490) is the organisation stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for the purposes of direct marketing contrary to regulation 21 of PECR.

4. Regulation 21 applies to the making of unsolicited calls for direct marketing purposes. It means that if a company wants to make calls

promoting a product or service to a subscriber who has a telephone number which is registered with the Telephone Preference Service ("TPS") or Corporate Telephone Preference Service ("CTPS") then that subscriber must have notified the company that they do not object to receiving such calls from it.

5. Regulation 21 paragraph (1) of PECR provides that:

"(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."

6. Regulation 21 paragraphs (2), (3), (4) and (5) provide that:

"(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."

7. Under regulation 26 of PECR, the Commissioner 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 Limited ("TPS") is a limited company which operates the register on the Commissioner's behalf. Businesses who wish to carry out direct marketing by telephone can subscribe to the TPS for a fee and receive from them monthly a list of numbers on that register.

8. Section 122(5) of the DPA18 defines direct marketing as "*the communication (by whatever means) of any advertising material which is directed to particular individuals*". This definition also applies for the purposes of PECR (see regulation 2(2) PECR & Schedule 19 paragraphs 430 & 432(6) DPA18).

9. "Individual" is defined in regulation 2(1) of PECR as "*a living individual and includes an unincorporated body of such individuals*".

10. A "subscriber" is defined in regulation 2(1) of PECR as "*a person who is a party to a contract with a provider of public electronic communications services for the supply of such services*".

11. The DPA contains enforcement provisions at Part V which are exercisable by the Commissioner. Those provisions are modified and extended for the purposes of PECR by Schedule 1 PECR.

12. Section 40(1)(a) of the DPA (as extended and modified by PECR) provides that if the Commissioner is satisfied that a person has contravened or is contravening any of the requirements of the Regulations, he may serve him with an Enforcement Notice requiring him to take within such time as may be specified in the Notice, or to refrain from taking after such time as may be so specified, such steps as are so specified.

13. PECR were enacted to protect the individual's fundamental right to privacy in the electronic communications sector. PECR were subsequently amended and strengthened. The Commissioner will interpret PECR in a way which is consistent with the Regulations' overall aim of ensuring high levels of protection for individuals' privacy rights.

14. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the DPA18: see paragraph 58(1) of Schedule 20 to the DPA18.

The contravention

15. The Commissioner finds that Ice Comms contravened regulations 21(1)(a) and (b) of PECR.

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

17. Between 13 September 2021 and 31 January 2022, Ice Comms used a public telecommunications service for the purposes of making 72,682 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 the Commissioner in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR. This resulted in 30 complaints being made to the TPS and the Commissioner.

18. The Commissioner is also satisfied for the purposes of regulation 21 that these 72,682 unsolicited direct marketing calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls, and who for the purposes of regulation 21(4) had not notified Ice Comms that they did not object to receiving such calls.

19. For such notification to be valid under regulation 21(4), the individual must have taken a clear and positive action to override their TPS registration and indicate their willingness to receive marketing calls from the company. The notification should reflect the individual's choice about whether or not they are willing to receive marketing calls. Therefore, where signing up to use a product or service is conditional upon receiving marketing calls, companies will need to demonstrate how this constitutes a clear and positive notification of the individual's willingness to receive such calls.

20. The notification must clearly indicate the individual's willingness to receive marketing calls specifically. Companies cannot rely on individuals opting in to marketing communications generally, unless it is clear that this will include telephone calls.

21. Further, the notification must demonstrate the individual's willingness to receive marketing calls from that company specifically. Notifications will not be valid for the purposes of regulation 21(4) if individuals are asked to agree to receive marketing calls from "similar organisations", "partners", "selected third parties" or other similar generic descriptions.

22. Ice Comms advised the Commissioner that it sourced telephone numbers for marketing purposes from [redacted]. Ice Comms failed to carry out appropriate due diligence or screening of the data it had bought in and failed to ensure that the data had been appropriately screened against the TPS/CTPS register by [redacted]. Ice Comms also failed to prevent some of its staff from sourcing unscreened call data from public websites. Although Ice Comms stated that they operate an internal suppression list and that staff are trained with the required knowledge that calling individuals and businesses registered with the TPS/CTPS is prohibited (and a disciplinary offence), this proved to be ineffective. Ice Comms had no written policy regarding PECR in place. During the investigation, Ice Comms has been unable to demonstrate valid notification by individuals registered with the TPS/CTPS that they did not object to such calls being made by Ice Comms.

23. The Commissioner has considered, as he is required to do under section 40(2) of the DPA (as extended and modified by PECR) when deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage. The

Commissioner has decided that it is unlikely that damage has been caused in this instance.

24. **In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of his powers under section 40 of the DPA, he requires Ice Comms to take the steps specified in Annex 1 of this Notice**.

Right of Appeal

25. There is a right of appeal against this Notice to the First-tier Tribunal (Information Rights), part of the General Regulatory Chamber. Information about appeals is set out in the attached Annex 2.

Dated the 9th day of May 2023.

Andy Curry
Head of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

TERMS OF THE ENFORCEMENT NOTICE

Ice Comms shall within 30 days of the date of this notice:

- Neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where the called line is that of:

  (a) a subscriber who has previously notified Ice Comms that such calls should not be made on that line; or

  (b) a subscriber who has registered their number with the TPS or CTPS at least 28 days previously and who has not notified Ice Comms that they do not object to such calls being made.

ANNEX 2

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom an enforcement 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 he ought to have exercised his 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:

   General Regulatory Chamber
   HM Courts & Tribunals Service
   PO Box 9300
   Leicester
   LE1 8DJ

   Telephone: 0203 936 8963
   Email: grc@justice.gov.uk

- The notice of appeal should be served on the Tribunal within 28 days of the date on which the enforcement notice was sent

4. 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)).