

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Xternal Property Renovations Ltd

Of: The Pentagon Centre, 36, Washington Street, Glasgow, Scotland, G3
8AZ

1. The Information Commissioner ("Commissioner") has decided to issue Xternal Property Renovations 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: SC513380), 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(b) where such notification is withdrawn, the caller shall not make such calls on that line.”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. Regulation 24 of PECR states:

“(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 (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.”

6. 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 (“TPS”) is a limited company set up by The Commissioner 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.
7. “Individual” is defined in regulation 2(1) of PECR as “a living individual and includes an unincorporated body of such individuals”.

8. 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)).

9. 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."

10. 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.

11. 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

12. The Company provides property maintenance and repair services to members of the public.
13. The Commissioner first wrote to the Company on 10 December 2015 following a number of complaints having been made by subscribers registered with the TPS about unsolicited direct marketing telephone calls. It was explained that the ICO could issue civil monetary penalties up to £500,000 for PECR breaches. Xternal Property Renovations Ltd was asked a number of questions about its compliance with PECR.
14. The Company replied in part through its legal representative to the Commissioner's enquiries in February 2016, explaining that it considered it had endeavoured to acquire legitimate and authorised third party customer information. It did not however provide the identity of the company or companies from whom the data had been acquired, nor any evidence of the due diligence performed on the list provider or the data itself. It also became apparent that Xternal Property Renovations Ltd had not performed any TPS screening as it was still in the process of completing the application process for its licence.

15. On 7 April 2016 the Commissioner asked the Company to provide evidence that it had consent to make unsolicited direct marketing calls to the TPS subscribers who had complained. She also requested copy contracts and due diligence checks on the list providers and an explanation as to why the company name was not provided to the individuals that had complained.
16. Xternal Property Renovations Ltd declined to provide the requested information as it was not satisfied that it had been provided with evidence that the complaints related to calls made by them. A full explanation of how the Commissioner had determined that they were the correct protagonist in relation to the complaints was provided on 17 May 2016.
17. In answer to the Company's further queries, correspondence was sent on 28 June 2016 setting out what steps the Commissioner had taken to identify that the Company's allocated lines were used to make the unsolicited direct marketing calls in question. The correspondence repeated the request for the information specified in the Commissioner's letter of 10 December 2015. Despite being given the opportunity on multiple occasions this has not been provided to the Commissioner.
18. Between 14 August 2015 and 11 April 2016, the ICO received 131 complaints about unsolicited direct marketing calls made by the Company. Of those, 94 complaints were made to the TPS, with a further 37 made direct to the ICO. All of these complaints were made by individual subscribers who were registered with the TPS.
19. The following are examples of the complaints received by the ICO:

- "I get these calls from early morning to late at night, I'm disabled and I worry about these calls."
 - "I was concerned about how this company had obtained my details - particularly my name. My number is TPS-registered and has been ex-directory for more than 30 years."
 - "Absolutely weary and upset by these calls, including this one."
 - "I object to being called an idiot and told 'it'll serve you right when you can't pay your bills'. Nasty and could really upset an older person."
20. The Commissioner has made the above findings of fact on the balance of probabilities.
21. 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

22. The Commissioner finds that the Company contravened regulation 21 of PECR.
23. The Commissioner finds that the contravention was as follows:
24. Between 14 August 2015 and 11 April 2016, the Company used a public telecommunications service for the purposes of making 131

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.

25. The Commissioner is also satisfied for the purposes of regulation 21 that the 131 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.
26. The Commissioner is therefore satisfied that the Company was responsible for this contravention.
27. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

28. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by the Company arising from its activities over the course of 8 months.
29. In addition, the Commissioners investigation revealed that between 7 September 2015 and 30 November 2015, 109,726 unsolicited calls for marketing purposes were made by the Company to subscribers who had registered with the TPS. This represented 81% of the total calls made by the Company in the same period.

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

Deliberate or negligent contraventions

31. 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).
32. The Commissioner considers that in this case the Company did not deliberately contravene regulation 21 of PECR.
33. The Commissioner has also gone on to consider whether the contraventions identified above were negligent.
34. First, she has considered whether the Company knew or ought reasonably to have known that there was a risk that these contraventions would occur. She 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 was widely publicised by the media as being a problem.
35. The Company has been aware of its obligations under PECR since at least December 2015 when it was first contacted by the ICO and provided with advice. The fact that the Company knew that people were complaining about calls they were receiving shows that the Company ought to have known of the risk of contravening PECR. It is reasonable to suppose that the Company should have been aware of

their responsibilities in this area.

36. 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.
37. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

38. 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.
39. The latter has included the issuing of a Notice of Intent dated 17 January 2017, in which the Commissioner set out her preliminary thinking.
40. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

41. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
42. 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.
43. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty the Commissioner proposes to impose

44. The Commissioner has taken into account the following **aggravating features** of this case:
 - Between 7 September 2015 and 30 November 2015, 109,726 direct marketing calls were made by the Company to individual subscribers registered with the TPS.
 - As late as February 2016 Xternal Property Renovations Ltd had not performed any TPS screening as it had not yet completed its TPS annual licence application process.

- There was a failure to fully cooperate with the Commissioner.
 - Xternal Property Renovations Ltd is a private organisation within a competitive direct marketing industry where continuous breaches of PECR could create an unfair advantage.
45. 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.
46. 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. Instead, it deliberately misled subscribers by using other generic company names which had no relation to Xternal Property Renovations Ltd.
47. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£80,000 (eighty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

48. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **28 April 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.

49. If the Commissioner receives full payment of the monetary penalty by **27 April 2017** the Commissioner will reduce the monetary penalty by 20% to **£64,000 (sixty four thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
50. 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.
51. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
52. Information about appeals is set out in Annex 1.
53. 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.

54. 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 28th day of March 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)).