

## DATA PROTECTION ACT 1998

### SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

#### MONETARY PENALTY NOTICE

To: Laura Anderson Limited t/a Virgo Home Improvements

Of: Virgo House, Caledonia Street, Bradford, BD4 7AJ

1. The Information Commissioner ("Commissioner") has decided to issue Laura Anderson Limited t/a Virgo Home Improvements ("Virgo") 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 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by Virgo.
2. This notice explains the Commissioner's decision.

#### **Legal framework**

3. Virgo, whose registered office is given above (Companies House registration number: 04282629), is the person (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 an individual who has a

telephone number which is registered with the Telephone Preference Service Ltd ("TPS"), then that individual must have given their consent to that company to receive such calls.

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 set up by the Commissioner to carry out this role. 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 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. Under section 55A (1) of the DPA (as amended by PECR 2011 and the Privacy and Electronic Communications (Amendment) Regulations 2015) 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.”

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 implemented 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 the PECR regulations so as to give effect to the Directives.

## **Background to the case**

12. Virgo's business involves making marketing calls to subscribers in order to sell its home improvement products and services including the installation of windows, doors, fascia's, soffits, gutters and roofs to residential homes in England.
13. Between 6 April 2015 and 22 November 2016, the Commissioner received a total of 440 separate complaints about unsolicited direct marketing calls made by Virgo. During the Commissioner's investigations it was found that 345 complaints were made to the TPS, with a further 95 made direct to the Commissioner via the ICO's online reporting tool. All of these complaints were made by individual subscribers who had previously notified Virgo that such calls should not be made on that line and/or had registered their number with the TPS.
14. Some of those individual subscribers complained that they received repeated unsolicited calls and that their opt-out requests were being ignored.
15. The following are examples of the complaints received by the Commissioner:
  - "Angry. This is the 3rd call in 2 months. I have previously requested they delete our number. We are with TPS. More than that, the gutters were replaced 6 months ago".
  - "Unwanted and unneeded as we are currently dealing with a bereavement of my wife's father, who died yesterday!".

- “I was upset because the man was very disrespectful and impatient. I am retired and live on my own and it made me feel vulnerable”.
  - “Said they were keen to replace my wooden soffits (don't have any) and my husband had asked them to call (lie). Girl said they didn't have a TPS database (reg with them) to check against. The number just 'came up'. She didn't know anything about Data Protection, she said. Gave the company phone number as x, but that wasn't number she called from [sic]”.
16. On 7 July 2016, the Commissioner wrote to Virgo to explain that the ICO could issue civil monetary penalties in the sum of up to £500,000 for PECR breaches. The letter informed Virgo that the Commissioner and the TPS had received complaints from individual subscribers in relation to unsolicited calls. Virgo was asked a number of questions about its compliance with PECR and its attention was drawn to the Commissioner’s detailed PECR guidance.
  17. The Commissioner received a response from Virgo explaining that it originally sourced its information by door canvassing and using a small telesales team. Subsequently they increased their telesales team and purchased 500,000 telephone numbers from a third party list supplier between 2010 and 2014. Following this they relied solely on their database to generate leads with the exception of a further 400,000 numbers being purchased from another supplier between November 2015 and January 2016.
  18. There were no contracts in place with their data suppliers but Virgo say they were assured by the relevant companies that data was TPS

screened prior to being provided to them. Virgo does not hold its own TPS license and does not screen against the TPS register.

19. Virgo indicated that they operate an internal suppression list and adds to it the telephone numbers of anybody asking not to be called again.
20. Virgo also advised that prior to 2010 all data had been recorded and stored in a paper format which has now been destroyed following its transfer to an electronic format. Virgo states that it is therefore unable to provide evidence of consent.
21. The Commissioner has made the above findings of fact on the balance of probabilities.
22. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by Virgo and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

23. The Commissioner finds that Virgo contravened the following provisions of PECR:
24. Virgo has contravened regulation 21 of PECR.
25. The Commissioner finds that the contravention was as follows:
26. Between 6 April 2015 and 22 November 2016, Virgo used a public telecommunications service for the purposes of making 440 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.

27. The Commissioner is also satisfied for the purposes of regulation 21 that the 440 complaints were made by subscribers who had previously notified Virgo that such calls should not be made on that line and/or had registered with the TPS at least 28 days prior to receiving the calls and they had not given their prior consent to Virgo to receive calls.
28. The Commissioner is therefore satisfied that Virgo was responsible for this contravention.
29. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

#### **Seriousness of the contravention**

30. The Commissioner is satisfied that the contravention identified above was serious. 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 Commissioner.
31. The Commissioner received a total of 440 complaints arising from the unsolicited calls made by Virgo. It is reasonable to suppose that considerably more calls were made by Virgo because those who went to the trouble to complain are likely to represent only a proportion of those who actually received calls.



32. In addition, some complainants allege that Virgo made repeat calls to them even though they had requested that their number be suppressed.
33. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

### **Deliberate or negligent contraventions**

34. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that the Virgo's actions which constituted that contravention were deliberate actions (even if Virgo did not actually intend thereby to contravene PECR).
35. The Commissioner considers that in this case Virgo did deliberately contravene regulation 21 of PECR.
36. The Commissioner has published detailed guidance for those carrying out direct marketing explaining their legal obligations under PECR. This guidance explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by e-mail, by post, or by fax. Specifically, it states that live calls must not be made to subscribers who have told an organisation that they do not want to receive calls; or to any number registered with the TPS, unless the subscriber has specifically consented to receive calls.
37. Virgo did not have contracts in place with its list providers and were simply assured by the companies that the data was screened against the TPS. Virgo was unable to provide any evidence that it had undertaken appropriate due diligence with its list providers in

this case. Virgo does not hold a TPS license itself and confirmed that it does not screen against the TPS register. The data was purchased by Virgo between 2010 and 2016 and no further regular screening against the TPS had taken place.

38. The Commissioner's direct marketing guidance is also clear that organisations should keep clear records of what an individual has consented to, and when and how this consent was obtained, so that they can demonstrate compliance in the event of a complaint. Virgo did not ensure that it was able to substantiate that individuals had consented to be called by keeping clear records.
39. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

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

40. 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.
41. The latter has included the issuance 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 Virgo on this matter.
42. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
43. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.

44. 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.
45. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

#### **The amount of the penalty**

46. Taking into account all of the above, and the representations made by Virgo, 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**

47. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **31 August 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.
48. If the Commissioner receives full payment of the monetary penalty by **30 August 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.

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 31<sup>st</sup> day of July 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)).