

**DATA PROTECTION ACT 1998**

**SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

**MONETARY PENALTY NOTICE**

To: Barrington Claims Limited

Of: 58 Westlands, Port Talbot, Wales, SA12 7DD

1. The Information Commissioner ("Commissioner") has decided to issue Barrington Claims Limited ("BCL") 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") by BCL.
2. This notice explains the Commissioner's decision.

**Legal framework**

3. BCL, whose registered office is given above (companies house registration number: 09359594), 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 regulations 19 and 24 of PECR. BCL was incorporated on 17 December 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. 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. 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.”

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. BCL came to the attention of the Commissioner due to a significant number of complaints about automated marketing calls received from a number of companies.
10. The messages were being transmitted using DXI Limited's software. DXI are a communication service provider and offer hosted dialler systems to companies. One of these services is an outbound dialling platform where companies can upload a message, which then transmits automated calls to individuals. On 31 October 2016 the Commissioner served a third party information notice on DXI in relation to automated calls made via the DXI voice broadcasting platform.
11. DXI responded to the notice on 5 December 2016. They provided a spreadsheet containing a list of automated calling campaigns carried out by their customers, which showed that, between 22 February 2016 and 23 May 2016, BCL made a total of 15,288,474 calls.
12. On 19 January 2017 the Commissioner wrote to BCL to request specific information in relation to the calls that had been made. A response was received on 31 January 2017 in which the Commissioner was informed that the request for information should be sent to another named

individual who was the director of BCL at the time of that the calls had been made. A further letter was sent by the Commissioner on 2 February 2017 advising BCL that it was BCL itself that was responsible for compliance with PECR and asking for a substantive response to her letter of 19 January 2017.

13. As no response was forthcoming the Commissioner again wrote to BCL on 7 March 2017 and 18 April 2017, however BCL failed to respond.
14. The automated calls contained recorded messages from BCL which contained the following wording:

*"Dear customer. We're obliged to inform you that you are entitled to a full PPI refund plus compensation. To get your full refund within 12 weeks press 5 to speak to an agent now or press 9 to opt out and the bank will keep your compensation."*

15. A search of the complaints submitted via the ICO online reporting tool showed that, between 23 February 2016 and 20 May 2016, the Commissioner received a total of 41 complaints about automated calls from BCL.
16. Many of the complaints referred to concerns about the rate and frequency of the calls received and the persuasive nature of the wording.
17. Some of the complaints were as follows:

*"I am currently home just post op major surgery and I am finding these calls annoying/and distressing as I have to have the phone free for district nurses and others and they are also waking me up when I need to be sleeping"*

*"Having family at a distance including a very elderly mother I am always concerned about calls outwith [sic] their usual times"*

*"I have a toddler and an autistic 7 year old. Unwanted phone calls on the landline wake sleeping kids up, cause anxiety and can lead to my son becoming distressed. It's not okay. We don't give the number out to anyone but close family - we mainly use it to access the internet, in fact."*

*"I have a Father in law in hospital and an elderly mother in a care home--I always have to answer the call in case its [sic] is an emergency concerning them I have these calls so many times now I ask to speak to the expert and be rude to him--They state they cannot remove my phone number off the system PLEASE PLEASE PLEASE stop these incessant unwanted calls.. I will be very rude every time they call"*

18. BCL 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.
19. The Commissioner has made the above findings of fact on the balance of probabilities.
20. The Commissioner has considered whether those facts constitute a contravention of regulation 19 of PECR by BCL and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

21. The Commissioner finds that BCL Limited contravened regulation 19(1) and (2) of PECR.
22. The Commissioner finds that the contravention was as follows:

23. Between 23 February 2016 and 20 May 2016 BCL instigated the transmission of 15,288,474 automated marketing calls to subscribers without their prior consent, resulting in 41 complaints.
24. 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.
25. In this case the Commissioner is satisfied that BCL did not have the consent of the individuals to whom it had instigated the transmission of 15,288,474 automated direct marketing calls.
26. The Commissioner is satisfied that BCL was responsible for this contravention.
27. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

### **Seriousness of the contravention**

28. The Commissioner is satisfied that the contravention identified above was serious.
29. This is because BCL instigated the making of over 15 million automated marketing calls to subscribers without their prior consent over a period of around three months. This resulted in 41 complaints being made to the Commissioner.

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

**Deliberate or foreseeable contravention**

31. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that BCL's actions which constituted that contravention were deliberate actions (even if BCL did not actually intend thereby to contravene PECR).
32. The Commissioner considers that in this case BCL did deliberately contravene regulation 19 of PECR in that sense because it engaged with DXI with the explicit purpose of using their voice broadcasting platform to make automated calls.
33. 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.
34. Whilst BCL may not have deliberately set out to cause distress, it did deliberately send or instigate automated marketing calls on a massive scale to subscribers.
35. BCL failed to ensure that they had the necessary consent to make the calls.



36. Furthermore, they failed to include the company name, address and telephone number in their automated messages pursuant to the requirements of Regulation 24.
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(3) and the procedural rights under section 55B have been complied with.
39. The latter has included the issuing of a Notice of Intent dated 8 November 2017 in which the Commissioner set out her preliminary thinking. BCL received the Notice of Intent on 9 November 2017 and the date for receipt of representations has now passed.
40. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
41. 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.

42. The Commissioner has taken into account the following **aggravating features** of this case:

- The Commissioner understands that BCL had its claims management authorisation removed by the Ministry of Justice CMR in April 2017.
- BCL has failed to engage with the Commissioner in assisting with her investigations, and has failed to respond to enquiries.

43. The Commissioner has also taken into account the fact that BCL 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.

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

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

45. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£250,000 (two hundred and fifty thousand pounds)**.

#### **Conclusion**

46. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **8 February 2018** 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.

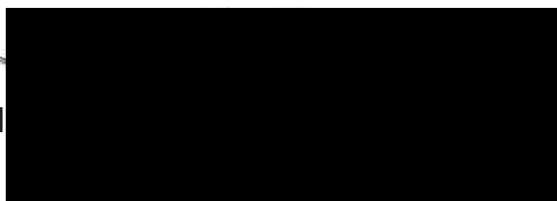
47. If the Commissioner receives full payment of the monetary penalty by **7 February 2018** the Commissioner will reduce the monetary penalty by 20% to **£200,000 (Two hundred thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
48. 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.
49. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
50. Information about appeals is set out in Annex 1.
51. 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.

52. 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 8th day of January 2018

Signed

A large black rectangular box redacting the signature of Stephen Eckersley.

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)).