

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Miss-Sold Products UK Limited

Of: Suite A0239, 35 Victoria Road, Darlington, County Durham, DL1 5SF

1. The Information Commissioner ("Commissioner") has decided to issue Miss-Sold Products UK Ltd ("MSPL") 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 19 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. MSPL, whose registered office is given above (companies house registration number: 09470330), 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. MSPL was incorporated on 4 March 2015.
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. MSPL 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. In order to investigate the complaints made, on 31 October 2016 the Commissioner served a third party information notice on DXI Ltd in relation to automated calls made via the DXI voice broadcasting platform.
11. DXI provided an initial response to the notice on 5 December 2016 including a spreadsheet containing a list of automated calling campaigns carried out by their customers. The Commissioner then requested further information relating to the spreadsheet which was provided by DXI. On 11 April 2017, DXI provided updated call volumes which confirmed that during the period 16 November 2015 to 7 March 2016 MSPL made a total of 74,965,420 calls.
12. On 30 March 2017 the Commissioner wrote to MSPL to request specific information in relation to the calls that had been made. As no response was received, the Commissioner wrote again to MSPL on 2 May 2017. A

response, dated 21 May 2017, was received by the Commissioner on 12 June 2017. It explained that MSPL had ceased trading in March 2016 and that the author of the letter was involved only in the dissolution of the company. The letter did not address the Commissioner's specific request for information regarding the calls.

13. The automated calls contained recorded messages about 'refunds' primarily concerning PPI claims.
14. A search of the complaints submitted via the ICO online reporting tool showed that, between 16 November 2015 and 8 March 2016, the Commissioner received a total of 146 complaints about automated calls from MSPL.
15. Many of the complainants reported that they had received multiple calls and that they appeared to be unable to opt-out of the calls. Others expressed further distress as they were concerned that the calls may have been from family members or those to whom the complainant provided care.
16. Some of the complaints were as follows:

"As I receive a call from this number almost daily, it has become an intrusive and unwelcome interruption."

"I have been receiving calls from this number for many months, sometimes every day. I feel trapped in being unable to end the disruption to my attention and intrusion on my privacy. Calls are coming from two separate numbers and I will report the other number as another submission to ICO."

"I receive at least two calls a day, normally more, from these PPI companies despite the fact I always block the number as soon as I receive a call from one. This means my details are continuously being sold and it makes me very anxious and annoyed to know this is happening to my personal information without my consent."

"I am a carer and when I get evening calls I am anxious that it may be connected to the person I care for. It is an unwelcome interruption."

"We have been receiving calls for several months from this number, they call twice a day playing the same messages and even pressing 9 does not stop the calls despite the promise to remove our number. It is very inconvenient and frustrating we are unable to opt out."

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

The contravention

20. The Commissioner finds that MSPL contravened regulation 19(1) and (2) of PECR.
21. The Commissioner finds that the contravention was as follows:
22. Between 16 November 2015 and 7 March 2016 MSPL instigated the transmission of 74,965,420 automated marketing calls to subscribers without their prior consent, resulting in 146 complaints.
23. 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.

24. In this case the Commissioner is satisfied that MSPL did not have the consent of the individuals to whom it had instigated the transmission of 74,965,420 automated marketing calls.
25. The Commissioner is satisfied that MSPL was responsible for this contravention.
26. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

27. The Commissioner is satisfied that the contravention identified above was serious.
28. This is because MSPL instigated the making of over 74 million automated marketing calls to subscribers without their prior consent over a period of around four months. This resulted in 146 complaints being made to the Commissioner.
29. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or foreseeable contravention

30. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that MSPL's actions which constituted that contravention were deliberate actions (even if MSPL did not actually intend thereby to contravene PECR).

31. The Commissioner considers that in this case MSPL 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.
32. 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.
33. Whilst MSPL may not have deliberately set out to cause distress, it did deliberately send or instigate automated marketing calls on a massive scale to subscribers.
34. MSPL has failed to engage with the Commissioner in relation to her enquiries, and so the Commissioner has not been provided with any evidence that MSPL had the necessary consent to make the calls. The complainants have reported that they did not provide consent to receive the calls.
35. Furthermore, they failed to include the company name, address and telephone number in their automated messages pursuant to the requirements of Regulation 24.
36. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to impose a monetary penalty

37. 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.
38. The latter has included the issuing of a Notice of Intent dated 13 November 2017 in which the Commissioner set out her preliminary thinking. The Notice of Intent, which was initially sent by both special delivery and first class mail to MSPL's registered office was returned by MSPL, however a further copy was sent to the address of the sole director by first class mail on 11 December 2017. Accordingly MSPL is deemed to have received the Notice of Intent on 12 December 2017. The date for receipt of representations has now passed.
39. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
40. 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.
41. The Commissioner has taken into account the following **aggravating features** of this case:

- The volume of calls made was substantially high and instigated in a relatively short period of time. The calls were persistent and individuals stated they did not consent to receive automated calls.
 - MSPL has effectively failed to engage with the Commissioner in assisting with her investigations, and has failed to respond to enquiries.
42. The Commissioner has also taken into account the fact that MSPL 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. Furthermore, the numbers used by MSPL were so-called 'added value' numbers that generate revenue when an individual calls the number which is then apportioned and passed to associated companies and the network carrier.

The amount of the penalty

43. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£350,000 (three hundred and fifty thousand pounds)**.

Conclusion

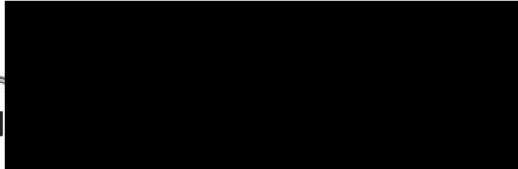
44. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **14 February 2018** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.

45. If the Commissioner receives full payment of the monetary penalty by **13 February 2018** the Commissioner will reduce the monetary penalty by 20% to **£280,000 (Two hundred and eighty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
46. 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.
47. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
48. Information about appeals is set out in Annex 1.
49. 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.
50. 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 12th day of January 2018

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)).