

## **DATA PROTECTION ACT 1998**

### **SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

#### **MONETARY PENALTY NOTICE**

To: Holmes Financial Solutions Limited

Of: Unit 35, Meridian Business Village, Hansby Drive, Speke, Liverpool  
L24 9LG

1. The Information Commissioner ("Commissioner") has decided to issue Holmes Financial Solutions Limited ("HFSL") 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").
2. This notice explains the Commissioner's decision.

#### **Legal framework**

3. HFSL, whose registered office is given above (companies house registration number: 08506845), is the organisation stated in this notice to have used an automated calling system for the purpose of making recorded direct marketing calls contrary to regulation 19 of PECR.
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. "Direct marketing" is defined in section 11(3) of the DPA 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)).

7. 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."

8. 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.

9. 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**

10. HFSL's website, *www.holmesfinancialsolutions.co.uk*, indicates that the organisation offers financial services including debt management, IVA's (Individual Voluntary Arrangements) and Trust Deeds
11. HFSL first came to the attention of the Commissioner following an investigation into complaints of automated calls made between 22 October 2015 and 27 July 2016.
12. On 31 October 2016 the Commissioner served a third party information notice on DXI Limited ("DXI") in relation to automated calls made via the DXI voice broadcasting platform from numbers prefixed with 08454290 and 0844337, those being the prefixes for the reported complaint numbers.
13. 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, using these numbers as presentation CLIs. The

spreadsheet included the campaign name, CLI, date of first and last call and number of calls made. This indicated that, between 22 October 2015 and 27 July 2016, HFSL made over 24 million automated direct marketing calls using the DXI voice broadcasting platform.

14. On 14 June 2017 the Commissioner wrote to HFSL to indicate concerns about their compliance with PECR, and to request a copy of their contract with their data supplier; copies of any voice broadcasting messages; and evidence of consent for the complaints received, to assist with the Commissioner's enquiries.
15. On 15 June 2017 HFSL contacted the Commissioner to confirm that they would undertake the necessary investigations regarding the Commissioner's concerns.
16. Subsequent correspondence was sent by HFSL on 3 July 2017 and 20 July 2017 to explain that approximately 10 million sets of data were bought from one company, as part of a number of deals which took place between the parties without a contractual agreement in place; with a further 500,000 data leads bought from another company. HFSL stated that they had been assured by the companies from whom they bought data that the individuals to whom the data related had consented to receive marketing calls, however HFSL have failed to provide any evidence of reasonable due diligence checks being carried out to ensure the validity of these assurances.
17. HFSL did provide evidence of consent for a single complainant whose details appear to have been obtained from *www.prizereactor.co.uk*. The personal data provided included the individual's name, home address, email address, gender, date of birth, mobile telephone number, and the time stamp for when the 'consent' was obtained.

18. A review of the *www.prizereactor.co.uk* page shows that the website offers competition and prize draw offers.
19. The website's privacy policy indicates that personal data will be shared with "selected third parties" and sponsors; further that these third parties will contact the individual via a range of means, including mail, telephone, SMS or email; and then goes on to list a wide variety of marketing sectors including telecommunications, car finance, gambling, travel, financial products etc. The website did not specifically list HFSL as a third party or sponsor.
20. The ICO's Direct Marketing Guidance says "organisations need to be aware that indirect consent will not be enough for texts, emails or automated calls. This is because the rules on electronic marketing are stricter, to reflect the more intrusive nature of electronic messages."
21. It does goes on to say that indirect consent can be valid but only if it is clear and specific enough. Moreover, "the customer must have anticipated that their details would be passed to the organisation in question, and that they were consenting to messages from that organisation. This will depend on what exactly they were told when consent was obtained."
22. On 12 September 2017 DXI wrote to the Commissioner to confirm that a number of the calls instigated by HFSL between the dates of 22 October 2015 and 27 July 2016 was 2,034,173 higher than first alleged at the outset of the investigation, and therefore totalled 26,632,018 automated calls made by HFSL.
23. DXI further confirmed that of the 26,632,018 automated calls made, 8,792,907 were answered by subscribers.

24. A search of the ICO online reporting tool revealed that between the dates of 22 October 2015 and 27 July 2016 the Commissioner received a total of 62 complaints about automated calls made from numbers used by HFSL.

25. Many of the complainants reported that they had received multiple calls, despite attempts to opt out.

26. Some of the complaints were as follows:

*"Am on medication and the calls affected my sleep as am not able to sleep in the night sometimes due to severe pains and thus needs to sleep in the morning. The company sometime rings before 9am."*

*"This has been going on for months if not years. It causes me anxiety feeling [sic] targeted."*

*"Made me angry, as I repeatedly receive similar calls - I've asked them to remove/delete my number politely - yet they keep calling."*

*"I'm being hounded continually by this company."*

*"It rings me at least 3/4 times a week during work hours and are disruptive to my work day and meetings."*

*"Is always a little worrying when you get an unexpected [sic] cal from number you don't recognize. One tends to think something has happened to a friend or family member."*

27. Aside from the single 'consent' provided, which was insufficient for the purposes of the DPA, HFSL 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.

28. The Commissioner has made the above findings of fact on the balance of probabilities.
29. The Commissioner has considered whether those facts constitute a contravention of regulations 19 and 24 of PECR by HFSL and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

30. The Commissioner finds that HFSL contravened regulation 19(1) and (2); and 24 of PECR.
31. The Commissioner finds that the contravention was as follows:
32. Between 22 October 2015 and 27 July 2016 HFSL instigated the transmission of 8,792,907 automated marketing calls to subscribers without their prior consent, resulting in 62 complaints.
33. 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. Informing individuals that their details will be shared with unspecified third parties, is neither freely given nor specific and does not amount to a positive indication of consent.



34. In this case the Commissioner is satisfied that HFSL did not have the consent of the individuals to whom it had instigated the transmission of 8,792,907 automated direct marketing calls.
35. The Commissioner is satisfied that HFSL was responsible for this contravention.
36. The Commissioner is also satisfied that HFSL did not identify the person who was sending or instigating the automated marketing calls and provide the address of the person or a telephone number on which this person can be reached free of charge.
37. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

**Seriousness of the contravention**

38. The Commissioner is satisfied that the contravention identified above was serious.
39. This is because HFSL instigated the making of over 8.7 million automated marketing calls to subscribers without their prior consent. This resulted in 62 complaints being made to the Commissioner.
40. Furthermore, there is evidence to suggest that repeat calls were made to subscribers regardless their attempts to opt out.
41. It is reasonable to suppose that the contravention could have been far higher since it is known that HFSL instigated over 26.6 million automated calls.

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

**Deliberate or foreseeable contravention**

43. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that HFSL's actions which constituted that contravention were deliberate actions (even if HFSL did not actually intend thereby to contravene PECR).
44. The Commissioner considers that in this case HFSL did not deliberately contravene regulation 19 of PECR in that sense.
45. The Commissioner has gone on to consider whether the contravention identified above was negligent.
46. The Commissioner has considered whether HFSL 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 HFSL relied heavily on automated direct marketing, and the fact that the issue of unsolicited calls was widely publicised by the media as being a problem.
47. 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.

48. It is therefore reasonable to suppose that HFSL ought reasonably to have known that there was a risk that these contraventions would occur.
49. The Commissioner has gone on to consider whether HFSL failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met.
50. Organisations buying marketing lists from third parties must make rigorous checks to satisfy themselves that the third party has obtained the personal data it is using fairly and lawfully, and that they have the necessary consent.
51. It is not acceptable to rely on assurances of indirect consent without undertaking proper due diligence. Such due diligence might, for example, include checking the following:
- How and when was consent obtained?
  - Who obtained it and in what context?
  - What method was used – eg was it opt-in or opt-out?
  - Was the information provided clear and intelligible? How was it provided – eg behind a link, in a footnote, in a pop-up box, in a clear statement next to the opt-in box?
  - Did it specifically mention texts, emails or automated calls?
  - Did it list organisations by name, by description, or was the consent for disclosure to any third party?
  - Is the seller a member of a professional body or accredited in some way?
52. In this case the HFSL relied upon verbal assurances from its third party data suppliers that the necessary consent had been obtained for making automated direct marketing calls. However, the Commissioner

does not consider that the HFSL undertook sufficient due diligence. It did not, for example, make proper enquiries as to the basis on which the data it had bought was said to be "opted-in". Had it done so, it would have been clear that HFSL did not have consent to instigate the making of automated direct marketing calls.

53. There is also evidence that HFSL failed to ensure an effective suppression system was in place to prevent repeat calls to those who had opted out.
54. Furthermore, HFSL failed to include the company name, address and telephone number in their automated messages pursuant to the requirements of Regulation 24.
55. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

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

56. 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.
57. The latter has included the issuing 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 HFSL on this matter.
58. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

59. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
60. 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.
61. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

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

62. The Commissioner has taken into account the following **aggravating features** of this case:
- Although the contravention in this case is the making of 8,792,907 automated calls for which the organisation have failed to demonstrate consent, there is evidence that over 26.6 million calls were in fact instigated by HFSL.
  - Whilst the CLI's used for the marketing calls were legitimate, they did not identify the company making the call. The CLI's were allocated overseas before being used through DXI's dialling platform making it difficult to trace the company.

- The CLI's were also 'added value' numbers which charged the individual when they would call to try to identify the company.
63. The Commissioner has also taken into account the fact that HFSL 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.
64. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£300,000 (three hundred thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

### **Conclusion**

65. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **28 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.
66. If the Commissioner receives full payment of the monetary penalty by **27 February 2018** the Commissioner will reduce the monetary penalty by 20% to **£240,000 (two hundred and forty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
67. 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.

68. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
69. Information about appeals is set out in Annex 1.
70. 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.
71. 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 29<sup>th</sup> 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 (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)).