

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: ACT Response Ltd

Of: 384 Linthorpe Road, Middlesbrough, Cleveland, TS5 6HA

1. The Information Commissioner ("Commissioner") has decided to issue ACT Response Ltd 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 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. ACT Response Ltd, whose registered office is given above (Companies House registration number: 03645169), is the person stated in this notice to have instigated the use of 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 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(b) where such notification is withdrawn, the caller shall not make such calls on that line.”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. Under regulation 26 of PECR, the Commissioner is required to maintain a register of numbers allocated to subscribers who have registered 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 to carry out this role. Organisations that 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.
6. 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)).
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 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.
10. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of Part 9, Schedule 20 of that Act).

Background to the case

11. ACT Response Ltd is a provider of security systems to homes and businesses.
12. In February 2018 the Commissioner began an investigation into ACT Response Ltd as a result of a high volume of complaints about unsolicited direct marketing calls being made by the company.

13. ACT Response Ltd explained to the Commissioner that marketing calls were made on its behalf by a sister company, ACT Excel Ltd. The data used to make the marketing calls was obtained from "the telephone directory". Whilst that data was screened against an internal suppression list, it was not screened against the TPS register.
14. A training manual was provided to the Commissioner. It made no reference to the requirements of PECR or the TPS. However, it included a tele-marketing script to be used when making marketing calls as follows:

"Good Morning / Afternoon Mr / Mrs My name is I'm calling from ACT Excel the home security people.

Can I ask if you are on the Telephone Preference Service

If yes ask inform [sic] them your call is about home security and ask is it ok for you to continue with the call, if not apologise and tell them they will be added to our suppression list ..."

15. Call logs obtained from ACT Response Ltd revealed that it had made 609,797 unsolicited marketing calls between January 2017 and February 2018. This information was also confirmed by ACT Response Ltd's communications service provider. These call logs were checked against the TPS register which revealed that 496,455 of the calls had been made to TPS subscribers.
16. Between 1 January 2017 and 28 February 2018, 128 complaints were made to the TPS, or direct to the Commissioner, about unsolicited direct marketing calls made by ACT Response Ltd. All of these complaints were made by individual subscribers who were registered with the TPS. Each time a complaint is made to the TPS, the TPS inform the company complained about and invite their response. ACT

Response Ltd responded to the majority of those TPS complaints by citing "human error". It subsequently explained to the Commissioner that the person responsible for dealing with TPS complaints had "been instructed to add complainant's details to the suppression list, rather than dealing in detail with the substance or the cause of the complaint itself."

17. Examples of some of the complaints received are as follows:

- *"Didn't get any other details but this number calls all the time several times a day and 7 days a week and it's driving me mad."*
- *"The caller was trying to sell me home security systems. I asked for their name & number- she gave me these details & I asked where she got my number from. She did not answer that point but asked if I was registered with TPS, and I said yes. She apologised & said "some numbers slip through the net". I said all cold callers say that and I did not believe her company referred to the TPS list at all. She said she would remove me from the list."*

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 21 of PECR by ACT Response Ltd and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

20. The Commissioner finds that ACT Response Ltd contravened regulation 21 of PECR.
21. The Commissioner finds that the contravention was as follows:
22. Between 1 January 2017 and 28 January 2018 ACT Response Ltd instigated the use of a public telecommunications service for the purpose of making 496,455 unsolicited direct marketing calls to subscribers where the number allocated to the subscriber in respect of the line called was a number listed on the register of numbers kept by the Commissioner in accordance with regulation 25, contrary to regulation 21(1)(b) of PECR.
23. The Commissioner is also satisfied for the purposes of regulation 21 that these calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls and had not given their prior consent to ACT Response Ltd to receive calls.
24. In its representations to the Notice of Intent, ACT Response Ltd maintained that its sister company ACT Excel Ltd was responsible for the contravention. However, as set out at paragraph 13 above, the calls were made by ACT Excel Ltd on behalf of ACT Response Limited. Furthermore, enquiries with the relevant communications service provider confirmed that the subscriber of the landlines from which the calls were made was ACT Response Ltd. Finally, the majority of the complaints made to the TPS were in the name of ACT Response Ltd. When the TPS receives complaints, it informs the company complained about. On no occasion did ACT Response Ltd inform the TPS that it was

not responsible for the calls made. Its response was predominantly that the calls had been made due to "human error". In the circumstances, the Commissioner is satisfied that ACT Response Ltd was responsible for the contravention.

25. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

26. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 of PECR by ACT Response Ltd over a fourteen month period, and this led to a substantial number of unsolicited direct marketing calls being made to subscribers who were registered with the TPS, and a significant number of complaints being made as a result.
27. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

28. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that ACT Response Ltd's actions which constituted that contravention were deliberate actions (even if ACT Response Ltd did not actually intend thereby to contravene PECR).
29. The Commissioner considers that in this case ACT Response Ltd did deliberately contravene regulation 21 of PECR. As set out at paragraph

14 above, the tele-marketing script begins with a question asking whether the person called is registered with the TPS. It is therefore clear that ACT Response Ltd was aware of the TPS and was intentionally making marketing calls to individuals who might be registered with the TPS.

30. Further and in the alternative, the Commissioner has gone on to consider whether the contravention identified above was negligent.
31. She has considered whether ACT Response Ltd knew or ought reasonably to have known that there was a risk that this contravention would occur. She is satisfied that this condition is met, given that ACT Response Ltd relied heavily on direct marketing due to the nature of its business, and the fact that the issue of unsolicited calls has been widely publicised by the media as being a problem.
32. The Commissioner has published detailed guidance for companies carrying out marketing explaining the 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 live calls must not be made to any number registered with the TPS, unless the subscriber has specifically consented to receive calls.
33. ACT Response Ltd was clearly aware of the existence and purpose of the TPS register. The call scripts used by ACT Response Ltd contain a section on how the call handler should deal with a call that has been made to someone who says that they are on the TPS register.
34. It is therefore reasonable to assume that ACT Response Ltd were well aware of the requirements of PECR and the risk that such a contravention could occur.

35. The Commissioner has gone on to consider whether ACT Response Ltd failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met. Reasonable steps in these circumstances could have included ACT Response Ltd screening the data against the TPS register.
36. Each time a complaint is made to the TPS, the TPS inform the company complained about. ACT Response Ltd would therefore have been aware that complaints were being made by TPS subscribers which should have prompted them to take steps to investigate the reasons for this and to address any deficiencies in their practices.
37. ACT Response Ltd failed to take these or any reasonable steps to prevent the contravention.
38. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

39. For the reasons explained above, the Commissioner's view is that the conditions for issuing a monetary penalty under section 55A have been met in this case.
40. She is also satisfied that the procedural rights under section 55B have been complied with. This has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary views. In reaching her final view, the Commissioner has taken into account the representations made by ACT Response Ltd in response to that Notice of Intent.

41. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
42. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty. 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 monetary penalty

44. The Commissioner has taken into account the following mitigating features of this case:
 - ACT Response Ltd ceased telemarketing activities as of the commencement of the Commissioner's investigation.
45. The Commissioner has taken into account the following aggravating features of this case:
 - ACT Response Ltd failed to take earlier action despite the number of TPS complaints made over a fourteen month period.

46. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£140,000 (one hundred and forty 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 **29 November 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.
48. If the Commissioner receives full payment of the monetary penalty by **28 November 2018** the Commissioner will reduce the monetary penalty by 20% to **£112,000 (one hundred and twelve 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 29th day of October 2018

Signed

Stephen Eckersley
Director of Investigations
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 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice has been served a right of appeal to the (First-tier Tribunal) General Regulatory Chamber (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 he ought to have exercised his 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)).