

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: D M Design Bedrooms Limited

Of: 1 Deerdykes Place, Westfield Industrial Area, Cumbernauld, Glasgow
G68 9HE

1. The Information Commissioner ("Commissioner") has decided to issue D M Design Bedrooms Limited ("D M Design") 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.
2. This notice explains the Commissioner's decision.

Legal framework

3. D M Design, whose registered office is given above (Companies House Registration Number: SC089938) is the person 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 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.

12. 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

13. D M Design has a website presence (www.dmdesignuk.com) where they state that they are "...one of Scotland's leading providers of kitchens, bedrooms and bathrooms..."
14. D M Design came to the attention of the Commissioner when a number of complaints were identified about them within a monthly TPS report for April 2017. This report contained complaints from individual subscribers who had received unsolicited direct marketing telephone calls from D M Design despite being registered with the TPS indicating their wish not to receive such calls.
15. Analysis of those complaints identified that a total of 79 complaints were received by the TPS between 1 April 2017 and 30 September 2017. D M Design was notified of each of the 79 complaints by the TPS, with D M Design responding on each occasion.
16. In addition, an interrogation of the ICO's on-line reporting tool showed that a further 20 complaints had been received between 1 April 2017 and 31 October 2017 from individuals who were registered with the TPS but had received unsolicited direct marketing calls from D M Design.

17. The following are examples of complaints received via the ICO's online reporting tool:

- *"Said I had submitted my details and won a £1000 voucher in a competition at the start of this year. Asked which room in my house I want to do up first. Female sounded like a robot reading from a script. When I told her I was on the TPS list she said she had no note of that. I work night shift for the NHS. The call woke me. I also have concerns for my mother who has Alzheimer's receiving a call like this. She would not remember entering a competition and would believe the caller. This company must be stopped. If the fine in 2013 didn't stop them, further action must be taken that will".*
- *"Lady called [...] said I had done a phone survey back in March, which was a lie. I told her I don't do phone surveys but she wouldn't listen, said they are legally only allowed to call people who completed the survey. I said I was a member of TPS to which she replied I couldn't be on it, and had I checked recently. Checked as soon as I came off phone and I am still registered with TPS. She was very rude and insisted I took a survey. She argued with me, and in the end I hung up. This is not the first time they have phoned and the previous time, different person same rubbish".*
- *"Female caller, [...], mentioned the company name. I told her that tps had told this company to stop calling me and remove my number from their records. (Reported 31.1.17) I have an email response to this effect. This company is attributed to DM design - fined before for these calls. Need to be fined again. Seem to have ignored tps warning. They are persistent and need dealt with".*

- *"Called to say I had won a £1,000 voucher to put towards home improvements for work in kitchen, bathroom or bedroom. They wanted a designer to call and provide me with a design for improvements which I told them I was not interested in and that they should not call back. Having told this company before that I do not want to receive calls from them, it is concerning that they just ignore this and continue to harass people"*
18. On 27 October 2017 a letter setting out the Commissioner's concerns and questions about D M Design's compliance with PECR was sent by special delivery to them with two spreadsheets containing the details of the 79 complaints received by the TPS and the details of the 20 complaints received via the ICO's online reporting tool.
 19. On 17 November 2017 the Commissioner received a response to her initial correspondence. This response sought to address the Commissioner's questions, and provided a copy of a list detailing the CLIs used by D M Design; and a 'sales order' invoice indicating that D M Design had bought 23,828 data records from a third party sales provider, with each of the records belonging to people in the area of Aberdeen, Scotland, who met the criteria of spending an average of over £1000 in the past 6 months with "high end retailers".
 20. D M Design also indicated that they operate a suppression list; and that they do screen against the TPS register, which is downloaded every month. As an explanation for the 79 TPS complaints D M Design provided a spreadsheet confirming that the complainants' details originated from 'bought in' data lists.
 21. Enquiries carried out with the TPS on 21 November 2018 revealed that whilst D M Designs do pay to download the TPS register, the last time

this was downloaded was March 2017. D M Design subsequently claimed that the reason for this was that the current TPS register is held within their dialler system and was therefore checked automatically for them by DXI. Subsequent checks with DXI have revealed that this is an optional service and the Commissioner has been provided with no evidence that it was engaged by D M Design.

22. On 29 November 2017 the Commissioner served a Third Party Information Notice on DXI Limited ("DXI"), a communications service provider, to establish the precise number of CLI's utilised by D M Design; together with a full list of the numbers called, and volume of calls made since 1 April 2017.
23. On 1 December 2017 DXI confirmed that 189 separate CLI's were provided to D M Design, and on 13 February 2018 they provided figures to show that a total of 4,726,964 calls were made by D M Design within the period of 1 April 2017 to 30 November 2017, with 3,019,778 of those being to unique numbers. This list was filtered to establish the number of calls made to numbers which were registered with the TPS at least 28 days before receiving a call to show that there were 1,661,607 such calls made.
24. The Commissioner has made the above findings of fact on the balance of probabilities.
25. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by D M Design and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

26. The Commissioner finds that D M Design has contravened regulation 21 of PECR.
27. The Commissioner finds that the contravention was as follows:
28. Between 1 April 2017 and 30 November 2017, D M Design used a public telecommunications service for the purposes of making 1,661,607 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. This resulted in a total of 99 complaints being made to the TPS and the Commissioner.
29. The Commissioner is also satisfied for the purposes of regulation 21 that these 1,661,607 unsolicited direct marketing calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls, and they had not given their prior consent to D M Design to receive calls.
30. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

31. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by D M Design arising from the organisation's activities over an 8 month period, and this led to a significant number of unsolicited direct marketing calls being made to subscribers who were registered with the TPS, and a substantial number of complaints being

made as a result.

32. The 1,661,607 unsolicited direct marketing calls made between 1 April 2017 and 30 November 2017 have been made from CLI's allocated to D M Design. These calls were not screened against the TPS register, nor is there any evidence of consent being provided to D M Design from the individual subscribers. There is no evidence of sufficient contractual terms between D M Design and the data suppliers, or of any due diligence checks being carried out to ensure the veracity of the data being purchased, with D M Designs relying on assurances alone that the personal data they were purchasing was fit for purpose and compliant with PECR.
33. Furthermore, there is evidence of repeat calls despite requests of the recipients to be removed from D M Design's marketing lists, and the complaints themselves demonstrate that they suffered rude and potentially intimidating behaviour from the callers.
34. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

35. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that D M Design's actions which constituted that contravention were deliberate actions (even if D M Design did not actually intend thereby to contravene PECR).
36. The Commissioner considers that in this case D M Design did deliberately contravene regulation 21 of PECR.

37. The Commissioner considers that the inadequacies outlined were more than matters of serious oversight. She 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.
38. The Commissioner's direct marketing guidance also makes clear that organisations buying marketing lists from a third party must undertake rigorous checks to satisfy themselves that the personal data was obtained fairly and lawfully, that their details would be passed along for direct marketing to the specifically named organisation in the case of live calls, and that they have the necessary consent.
39. On 18 March 2013 the Commissioner issued DM Design with a civil monetary penalty of £90,000 for breaches of regulation 21. Despite this, D M Design has continued to operate otherwise than in compliance with their statutory obligations, and the current breaches of that same regulation illustrate a clear lack of remedial measures being taken to address their compliance issues.
40. Further and alternatively the Commissioner has also gone on to consider whether the contraventions identified above were negligent.
41. She has considered whether D M Design 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 D M Design

relied on direct marketing due to the nature of its business, the way in which it sourced its data and the fact that the issue of unsolicited calls was widely publicised by the media as being a problem. The fact that D M Design knew that people were complaining to the TPS about calls they were receiving shows that they ought to have known of the risk of contravening PECR. It is reasonable to suppose that D M Design should have been aware of their responsibilities in this area, particularly given the previous enforcement action taken against the organisation for a breach of the same regulation.

42. Secondly, the Commissioner has gone on to consider whether D M Design failed to take reasonable steps to prevent the contraventions. Again, she is satisfied that this condition is met. Reasonable steps in these circumstances would have included carrying out adequate screening of the data against the TPS register, asking its third party data provider for evidence that the subscribers had consented to receiving calls from D M Design, screening the data against the TPS register itself regardless of any assurances that might have been given by the providers of the data, and ensuring that it had in place an effective and robust suppression list. Given the volume of calls and complaints, it is clear that D M Design failed to take those steps.
43. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met

The Commissioner's decision to issue a monetary penalty

44. 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 the procedural rights under section 55B have been complied with.

45. 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 D M Design on this matter.
46. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
47. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
48. 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.

The amount of the penalty

49. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£160,000 (one hundred and sixty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

50. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **28 December 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.
51. If the Commissioner receives full payment of the monetary penalty by **27 December 2018** the Commissioner will reduce the monetary penalty by 20% to **£128,000 (one hundred and twenty eight thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
52. 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.
53. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
54. Information about appeals is set out in Annex 1.
55. 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.

56. 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 23rd day of November 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 (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:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
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 section 55B(5) 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)).