

## DATA PROTECTION ACT 1998

### SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

#### MONETARY PENALTY NOTICE

To: Smart Home Protection Limited

Of: 12/13 Conduit Road, Norton Canes, Cannock, Staffordshire, WS11 9TJ

1. The Information Commissioner ("Commissioner") has decided to issue Smart Home Protection 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") by Smart Home Protection Ltd.
2. This notice explains the Commissioner's decision.

#### Legal framework

3. Smart Home Protection Ltd, whose registered office is given above (companies house registration number: 06995997), 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 Telephone Preference Service Limited ("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. Smart Home Protection Ltd's business involves, in part, making unsolicited marketing calls to subscribers in order to sell its home security products and services.
14. Between 10 January 2017 and 24 September 2018, the Commissioner received 125 complaints about unsolicited direct marketing calls made by Smart Home Protection Ltd. Of those, 97 complaints were made to the TPS, with a further 28 made direct to the Commissioner. All of these complaints were made by individual subscribers who were registered with the TPS.
15. The following are examples of the complaints received by the Commissioner:
  - Intro [sic] as Smart Home Protection and said they were following up on contact a couple of years back. Mentioned the police and made it sound like it was something to do with them. I asked if it was insurance and she said no then started the spiel again. I asked was she selling something and she said yes so I told her I had never heard of them, and was reg with TPS and would report them."
  - "A woman claimed that I needed extra home security because the cuts in police funding meant I am liable to become a victim of crime."

- "Selling home protection...I told him we were registered with the TPS service and he said that his info had not flagged that up?!!"
  - "Offering to visit me during a forthcoming campaign in the Colchester area selling some sort of panic alarm. The script was designed to imply a connection with the police."
  - "Paul talked about rising crime in area and security, but I cut him short saying a colleague of his called the other day... I said we are TPS and he should not be calling."
  - "I have physical movement difficulties and I am sick of having to get up and answer unwanted calls. They are preying on the fears of criminal activity against people at home."
16. On 17 September 2018, the Commissioner wrote to Smart Home Protection Ltd to explain that she could issue civil monetary penalties up to £500,000 for PECR breaches. The letter informed Smart Home Protection Ltd that the Commissioner and the TPS had received complaints from individual subscribers in relation to unsolicited calls. Smart Home Protection Ltd was asked a number of questions about its compliance with PECR.
17. The Commissioner received a response from Smart Home Protection Ltd explaining that in 2017 it had invested in a cloud based dialler system to assist their outgoing telesales. It understood that the dialler would suppress the dialling of TPS listed numbers. This means that the dialler attempts to dial a number but if the number is TPS registered, the service provider blocks the call. However, Smart Home Protection Ltd had not realised that this feature had to be specifically requested

from their service provider, which meant the feature was not enabled at the time of the contravention.

18. Smart Home Protection Ltd further explained that it had purchased data from a third party. It had used that data to call individual subscribers to market its products and services. It had not screened the data against the TPS since its purchase it had been assured by its provider that it was "covered for GDPR so it all good" [sic].
19. Smart Home Protection Ltd conceded that it conducted no due diligence when the data was purchased before using it to make marketing calls. It was unable to ascertain from where the data was originally sourced or the basis of the consent relied on. It had no contract in place with its provider. The particular provider was only chosen as it was recommended by a colleague but Smart Home Protection Ltd could provide no details of who made the recommendation or when.
20. The Commissioner's investigation revealed that of the calls made by Smart Home Protection Ltd within the period of 10 February 2017 and 24 September 2018, 118,006 of these were made to numbers which were registered with the TPS at least 28 days before receiving a call.
21. The Commissioner has made the above findings of fact on the balance of probabilities.
22. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by Smart Home Protection Ltd and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

23. The Commissioner finds that Smart Home Protection Ltd contravened the following provisions of PECR:
24. Smart Home Protection Ltd has contravened regulation 21 of PECR.
25. The Commissioner finds that the contravention was as follows:
  26. Between 10 February 2017 and 24 September 2018 Smart Home Protection Ltd used a public telecommunications service for the purpose of making 125 unsolicited calls for direct marketing purposes 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 26, contrary to regulation 21(1)(b) of PECR; and
  27. 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 Smart Home Protection Ltd to receive calls.
  28. The Commissioner is therefore satisfied that Smart Home Protection Ltd was responsible for this contravention.
  29. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

### **Seriousness of the contravention**

30. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by Smart Home Protection Ltd arising from its activities over a 21 month period, and this led to a significant number of complaints about unsolicited direct marketing calls to the TPS and the Commissioner.
31. In addition, it is reasonable to suppose that considerably more calls were made by Smart Home Protection Ltd because those who went to the trouble to complain are likely to represent only a proportion of those who actually received calls. Between 10 January 2017 and 24 September 2018 Smart Home Protection Ltd conducted a direct marketing telephone campaign in respect of which they made 118,006 calls to subscribers without conducting any due diligence on the data provided to them.
32. Some individual subscribers have complained that the calls were misleading because the callers gave the impression that the subscriber may have been contacted by Smart Home Protection Ltd previously and agreed at that time to receive further calls in the future.
33. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

#### **Deliberate or negligent contraventions**

34. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that Smart Home Protection Ltd's actions which constituted that contravention were deliberate actions (even if Smart Home Protection

Ltd did not actually intend thereby to contravene PECR).

35. The Commissioner considers that in this case Smart Home Protection Ltd did not deliberately contravene regulation 21 of PECR in that sense.
36. The Commissioner has gone on to consider whether the contravention identified above was negligent.
37. First, she has considered whether Smart Home Protection 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 Smart Home Protection 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.
38. Each time a complaint is made to the TPS, the TPS inform the company complained about. Smart Home Protection 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. The Commissioner notes that Smart Home Protection Ltd did not respond to the TPS in relation to any of the complaints.
39. The Commissioner has also 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 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.

40. Finally, the Commissioner has gone on to consider whether Smart Home Protection Ltd failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met.
41. 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, and can evidence, the necessary consent. It is not acceptable to rely on assurances of indirect consent without undertaking proper due diligence. Such due diligence might, for example, include the following:
  - How and when was consent obtained?
  - Who obtained it and in what context?
  - Was the information provided clear and intelligible? How was it provided – e.g. 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 live calls, texts, e-mails or automated calls?
  - Did it list organisations by name, by description, or was the consent for disclosure to any third party?
42. Organisations must ensure that consent was validly obtained, that it was reasonably recent and that it clearly extended to them specifically or to organisations fitting their description.
43. Smart Home Protection Ltd is unable to provide sufficient evidence that it had undertaken appropriate due diligence in this case. Other reasonable steps in these circumstances would have included ensuring that it had in place a contractual arrangement with its third party data

supplier; confirming that the data was being screened against the TPS register and ensuring that it had in place an effective and robust suppression list.

44. The Commissioner is therefore satisfied that Smart Home Protection Ltd failed to take reasonable steps to prevent the contravention.
45. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

#### **The Commissioner's decision to impose a monetary penalty**

46. 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)DPA and the procedural rights under section 55B have been complied with.
47. The latter has included the issuing of a Notice of Intent dated 5 April 2019 in which the Commissioner set out her preliminary thinking.
48. The Commissioner has considered whether, in the circumstances she should exercise her discretion so as to issue a monetary penalty. In reaching her final view, the Commissioner has taken into account representations made by Smart Home Protection Ltd dated 22 April 2019, 2 May 2019 and in other correspondence on this matter, however there is nothing contained therein to dissuade the Commissioner from her preliminary view.
49. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

### The amount of the penalty

50. The Commissioner has taken into account the following **mitigating features** of this case:
- There is no evidence of further complaints having been received in relation to Smart Home Protection Ltd since it subsequently changed its data supplier and enabled the TPS screening function on its dialler.
51. The Commissioner has taken into account the following **aggravating features** of this case:
- Several of the subscriber complaints indicate that some were particularly upset by the nature of the calls and the intimation that they were at an increased risk of being a victim of crime.
52. 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.
53. Taking into account all of the above, the Commissioner has decided that the amount of the penalty is **£90,000 (Ninety thousand pounds)**

## Conclusion

54. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **12 July 2019** 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.
55. If the Commissioner receives full payment of the monetary penalty by **11 July 2019** the Commissioner will reduce the monetary penalty by 20% to **£72,000 (Seventy two thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
56. 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.
57. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
58. Information about appeals is set out in Annex 1.
59. 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.
60. 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 11<sup>th</sup> day of June 2019

Signed [REDACTED]

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 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)).