

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Black Lion Marketing Limited

Of: Devonshire House, Manor Way, Borehamwood, Hertfordshire WD6 1QQ

1. The Information Commissioner ("Commissioner") has decided to issue Black Lion Marketing Limited ("BLM 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 regulations 21 and 24 of the Privacy and Electronic Communications (EC Directive) Regulations 2003.
2. This notice explains the Commissioner's decision.

Legal framework

3. BLM Ltd, whose registered office address is given above (Companies House Registration Number: 11097222) is the organisation 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. 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
9. 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)).
10. 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.”

11. 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.
12. 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.
13. 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

14. Since mid-2017 the Commissioner has conducted a series of investigations into suspected contraventions of Regulations 21 and 24 PECR by various organisations with links to Kurlos Sami Asaad. Mr Assad is a Director of BLM Ltd.
15. On 12 March 2019, having received a number of complaints relating to unsolicited direct marketing calls made by BLM Ltd, the Commissioner sought and executed a search warrant at the company's premises. The documents secured in the course of executing that warrant helped to corroborate the Commissioner's suspicions that BLM Ltd was indeed

carrying out direct marketing in contravention of Regulation 21 PECR, and that such direct marketing was being carried out with various trading names being used. The Commissioner subsequently issued BLM Ltd with an Enforcement Notice (dated 18 April 2019) which instructed BLM Ltd to cease its unlawful direct marketing. It is noted that BLM Ltd made an application to be struck off the Companies House register on 3 April 2019.

16. The Commissioner was in contact with BLM's Communication's Service Provider ("CSP") around this time, and had sought to ascertain from them details of the volume of calls made by BLM over a specified time.
17. The CSP provided the Commissioner with details of its current archive supplier, who, it said, would have access to the call detail records ("CDR"s) for all of the CSP's customers, BLM Ltd included.
18. A Third Party Information Notice ("3PIN") was sent to the archive supplier on 29 April 2019. In its response to the Commissioner it provided a spreadsheet which confirmed that there were 7,234,131 connected outbound calls between 13 July 2018 to 02 April 2019 from 'Calling Line Identifiers ("CLIs") attributed to BLM Ltd.
19. Of those, it was possible to establish via a method of filtration that 240,576 calls were made to subscribers who had been registered with the TPS for not less than 28 days at the time they received the call.
20. The Commissioner notes that between 13 July 2018 to 02 April 2019 there were a total of 233 complaints made regarding unsolicited direct marketing calls made by BLM Ltd.
21. The Commissioner has not been provided with any evidence of consent from BLM Ltd for those subscribers who were registered with the TPS for not less than 28 days at the time they received the call.

22. It is further the view of the Commissioner, in light of the material seized in the course of her warrant, that BLM Ltd would use fictitious trading names in the course of its direct marketing; an action which would be likely to contravene the requirements of Regulation 24 PECR.
23. On 20 May 2019 BLM Ltd was placed into creditors voluntary liquidation.
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 Regulations 21 and 24 of PECR by BLM Ltd and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

26. The Commissioner finds that BLM Ltd has contravened regulations 21 and 24 of PECR.
27. The Commissioner finds that the contravention was as follows:
28. Between 13 July 2018 to 02 April 2019, BLM Ltd used a public telecommunications service for the purposes of making 240,576 unsolicited calls to subscribers 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.

29. The Commissioner is also satisfied for the purposes of regulation 21 that these 240,576 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 BLM Ltd 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 BLM Ltd arising from the organisation's activities over approximately a 9 month period, and this led to a significant number of unsolicited direct marketing calls being made to subscribers who were registered with the TPS.
32. There is no evidence that BLM Ltd took steps to check their data against the TPS register, nor is there evidence of consent being provided to BLM Ltd from the individual subscribers.
33. Furthermore, the Commissioner has obtained evidence that in the course of its direct marketing activities BLM Ltd would use fictitious company names in an apparent attempt to conceal its true identity.
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.
36. The Commissioner considers that in this case there is evidence that BLM Ltd did deliberately contravene Regulations 21 and 24 of PECR.
37. The Commissioner considers that the making of the calls was a deliberate act. The Director, Mr Assad, is familiar with the Commissioner through her investigations into a number of other organisations linked to him, some of which have previously culminated in regulatory action for contraventions of Regulation 21 PECR. As such, the Commissioner takes the view that it is reasonable to suppose that BLM Ltd must have been at least conversant with its obligations under PECR.
38. The fact that there appears to have been further calls and complaints made following the execution of the Commissioner's warrant at BLM Ltd's premises would appear to demonstrate that BLM Ltd were aware that their actions could be unlawful, yet continued to engage in them anyway.
39. Furthermore, the Commissioner 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.
40. It is not clear how BLM Ltd obtained the data that they relied upon for the purposes of their direct marketing campaigns, although the

Commissioner's investigations suggest that the data may have come from a number of third party sources. The Commissioner's direct marketing guidance also makes clear that organisations utilising 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.

41. Further and alternatively the Commissioner has also gone on to consider whether the contraventions identified above were negligent.
42. She has considered whether BLM Ltd 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 previous investigative and regulatory action has been taken against BLM Ltd, and also to companies related to Mr Assad, for breaches of PECR. Furthermore, the issue of unsolicited calls has been widely publicised by the media as being a problem. It is reasonable to suppose that BLM Ltd should, and indeed must, have been aware of their responsibilities in this area.
43. Secondly, the Commissioner has gone on to consider whether BLM Ltd failed to take reasonable steps to prevent the contraventions. Again, she is satisfied that this condition is met. Indeed, it would appear to be the case that BLM Ltd has failed to take any steps whatsoever to prevent these contraventions.
44. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met

The Commissioner's decision to issue a monetary penalty

45. The Commissioner has also taken into account the following **aggravating features** of this case:
- BLM Ltd, in breach of Regulation 24 PECR, used multiple fictitious company names during the course of its unsolicited direct marketing campaigns with the apparent intention to conceal its true identity;
 - Evidence obtained during the execution of the Commissioner's warrant indicated that the leads generated by the direct marketing calls being made were subsequently being referred on to law firms for remuneration;
 - Following the execution of the warrant, BLM Ltd took steps to enter voluntary liquidation, a common tactic used by organisations seeking to avoid regulatory action;
 - The Commissioner has reason to suspect that the director of BLM Ltd has "phoenixed" the business, i.e. opened a separate company to continue its unlawful direct marketing, albeit under a separate company name.
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 the procedural rights under section 55B have been complied with.
47. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. The Commissioner received no representations from BLM Ltd in response to the Notice of Intent.

48. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
49. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
50. 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.
51. For these reasons the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

52. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£171,000 (one hundred and seventy one thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

53. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **1 May 2020** 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.

54. If the Commissioner receives full payment of the monetary penalty by **30 April 2020** the Commissioner will reduce the monetary penalty by 20% to **£136,800 (one hundred and thirty six thousand, eight hundred pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
55. 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.
56. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
57. Information about appeals is set out in Annex 1.
58. 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.

59. 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 27th day of March 2020.

Stephen Eckersley
Director of Investigations
Information Commissioner's Office
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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

Telephone: 0300 123 4504

Email: grc@justice.gov.uk

- 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 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)).