

**DATA PROTECTION ACT 1998**

**SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

**MONETARY PENALTY NOTICE**

To: SGS Home Protect Limited

Of: 38 Astbury Avenue, Poole, England, BH12 5DT

1. The Information Commissioner ("the Commissioner") has decided to issue SGS Home Protect Limited ("SGS") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to 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. SGS, whose registered office is given above (Companies House Registration Number: 12084141) 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 notified the company that they do not object to receiving such calls from it.

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 which operates the register on the Commissioner's behalf. 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 122(5) of the DPA18 defines direct marketing as "*the communication (by whatever means) of advertising or marketing material which is directed to particular individuals*". This definition also applies for the purposes of PECR (see regulation 2(2) PECR & Schedule 19 paragraphs 430 & 432(6) DPA18).
9. "Individual" is defined in regulation 2(1) of PECR as "*a living individual and includes an unincorporated body of such individuals*".

10. A "subscriber" is defined in regulation 2(1) of PECR as "*a person who is a party to a contract with a provider of public electronic communications services for the supply of such services*".
11. Section 55A of the DPA (as applied to PECR cases by Schedule 1 to PECR, as variously amended) 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,*
  - (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.*
  12. 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.
  13. PECR were enacted to protect the individual's fundamental right to privacy in the electronic communications sector. PECR were subsequently amended and strengthened. The Commissioner will

interpret PECR in a way which is consistent with the Regulations' overall aim of ensuring high levels of protection for individuals' privacy rights.

14. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the DPA18: see paragraph 58(1) of Schedule 20 to the DPA18.

### **Background to the case**

15. Between 3 July 2019 and 5 October 2021 SGS was named Finesta Limited ("Finesta"). Finesta changed their name to SGS on 5 October 2021.
16. On 1 October 2019 Kelvin Dean Miles was appointed as Finesta's sole Director.
17. At various points in time, Kelvin Dean Miles was also a director of Clearwater Drainage Ltd ("Clearwater") (Companies House Registration Number: 12417073) and a director of Securahome UK Ltd ("Securahome") (Companies House Registration number: 11970068).
18. From 25 February 2020 to 24 February 2021, Finesta was registered with the Commissioner, under registration number [REDACTED], with the contact given as Kelvin Miles; the contact email address given as [REDACTED] and the contact address given as 301 Holdenhurst Road, Bournemouth, BH8 8BX.
19. SGS registered with the Commissioner on 30 September 2021, with the contact given as Kelvin Miles, Director, the contact email address given as [REDACTED], and the contact telephone number given as [REDACTED].

██████████. SGS's registration was made after the commencement of the Commissioner's investigation in this matter.

20. On 25 February 2021 a complaint was made via the Commissioner's Online Reporting Tool that named Finesta as the calling party, giving the calling line number ██████████. The complaint said:

*"I am completing this [sic] details on behalf of my father who is 90 and very vulnerable with a serious memory loss. In the past 12 months (made much worse post 1st lockdown) he has been scammed some 35 times with multiple insurances effect, with loss of c£15 to £20k stolen. I thought we had protected my father with various safeguards until this latest approach and attempt to set up a scam insurance cover by Finesta. It was only the Direct Debit block we had established with his bank - ██████████ ██████████ that prevented the DD being set up."*

21. In August 2021 a complaint was made to the TPS that also named Finesta, giving the calling number as ██████████. The complaint said:

*"Blocked drain insurance. I'm complaining on behalf of my father who has no internet access. This was an unsolicited call selling him insurance he didn't need."*

22. The record of the TPS complaint showed the TPS had contacted the company about the complaint, but no response had been received.

23. On 13 September 2021 the Commissioner sent a Third Party Information Notice to the Communications Service Provider, ██████████ ██████████, to identify the subscriber for the telephone number ██████████. A response was received on 14

September 2021, identifying the subscriber as "Finesta/ Clearwater/ Secura Home Ltd, 301 Holdenhurst RD, Bournemouth, BH1 2SD". The response also provided a list of 41 telephone numbers used by the subscriber, which included [REDACTED]

24. Subsequent enquiries with [REDACTED] established that the list of telephone numbers they had provided to the Commissioner had in fact been sub-allocated to [REDACTED].
25. The Commissioner sent a Third Party Information Notice to [REDACTED] on 16 September 2021 seeking various information and a response was received on 25 October 2021. In their response, [REDACTED] stated that "*The number of [REDACTED] is sat on an Auto Attendant for the Business of Finesta/ Clearwater/ Securahome*". [REDACTED] also provided a list of 41 telephone numbers that were "*allocated to the business*", which matched the list provided by [REDACTED], and a call log for the period 1 January 2021 to 31 August 2021.
26. The Commissioner sent further inquiries to [REDACTED] on 26 October 2021, asking for information about the calls made for each of the 41 numbers and for copies of invoices issued to Finesta/ Clearwater/ Securahome for the period January 2021 to August 2021. [REDACTED] responded on the same day, providing a series of spreadsheets of call dialler records for the period 2 January 2021 to 29 June 2021 and copies of six invoices for the period January 2021 to June 2021. The invoices were addressed to "*Finesta Ltd TA Clear Water Drainage Ltd*", at "*301 Holdern Hurst [sic] Road*".
27. The Commissioner screened the call dialler records received from [REDACTED] against the TPS register. This analysis showed that between 1 January 2021 and 30 January 2021 SGS made or instigated 29,771 calls, of

which 24,241 were to individuals whose numbers were registered with the TPS, or 81% of the total number of calls made.

28. On 22 November 2021, the Commissioner telephoned the number [REDACTED], which was answered by a voicemail message saying that the caller had reached Finesta. The voicemail system did not allow for the investigator to leave a message.
29. On 24 November 2021, the Commissioner sent an initial investigation letter by special delivery to the registered address of SGS, requesting a response by 15 December 2021. Delivery was confirmed at 12:26 on 25 November 2021, with the letter signed for by [REDACTED]. As no response was received, the Commissioner wrote again by special delivery on 12 January 2022. Delivery of that letter was attempted by 13 January 2022 but was unsuccessful. The letter was available for collection from Royal Mail until 1 February 2022, after which it was returned to the Commissioner.
30. On 10 June 2022 an end of investigation letter was hand delivered to SGS's registered address, which set out the Commissioner's findings concerning the number of calls made to numbers registered with the TPS; the Commissioner's attempts to make contact; and the next steps that would be taken by the Commissioner and the powers available to him. No response was received to this letter.
31. The Commissioner is satisfied that between 1 January 2021 and 30 June 2021 SGS made or instigated 24,241 calls to subscribers whose numbers had been registered with the TPS for 28 days or more at the time they received the calls and that these calls were all made for the purposes of direct marketing as defined by section 122(5) DPA18.

32. The Commissioner has made the above findings of fact on the balance of probabilities.
33. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by SGS and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

34. The Commissioner finds that SGS contravened regulation 21 of PECR.
35. The Commissioner finds that the contravention was as follows:
36. Between 1 January 2021 and 30 June 2021 SGS used and/or instigated the use of a public telecommunications service for the purposes of making 24,241 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 one complaint being made to the Commissioner.
37. The Commissioner is also satisfied for the purposes of regulation 21 that these 24,241 unsolicited direct marketing calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls, and who for the purposes of regulation 21(4) had not notified SGS. Further, the notification must demonstrate the individual's willingness to receive marketing calls from that company specifically. Notifications will not be valid for the purposes of regulation 21(4) if individuals are asked to agree to receive marketing calls from

"similar organisations", "partners", "selected third parties" or other similar generic descriptions.

38. For such notification to be valid under regulation 21(4), the individual must have taken a clear and positive action to override their TPS registration and indicate their willingness to receive marketing calls from the company. The notification should reflect the individual's choice about whether or not they are willing to receive marketing calls. Therefore, where signing up to use a product or service is conditional upon receiving marketing calls, companies will need to demonstrate how this constitutes a clear and positive notification of the individual's willingness to receive such calls.
39. The notification must clearly indicate the individual's willingness to receive marketing calls specifically. Companies cannot rely on individuals opting in to marketing communications generally, unless it is clear that this will include telephone calls.
40. Further, the notification must demonstrate the individual's willingness to receive marketing calls from that company specifically. Notifications will not be valid for the purposes of regulation 21(4) if individuals are asked to agree to receive marketing calls from "similar organisations", "partners", "selected third parties" or other similar generic descriptions.
41. Despite being given opportunities to engage with the Commissioner's investigation, SGS did not do so. Therefore, SGS did not assert nor present any evidence to the effect that any of the subscribers whose numbers were registered on the TPS had informed them for the purposes of regulation 21(4) that they did not, for the time being, object to such calls being made to those numbers

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

**Seriousness of the contravention**

43. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by SGS arising from the organisation's activities between 1 January 2021 and 30 June 2021, and this led to 24,241 unsolicited direct marketing calls being made to subscribers who were registered with the TPS and who had not notified SGS that they were willing to receive such calls, and one complaint being made as a result.
44. Additionally, the Commissioner considers the contravention serious, because the call that led to the complaint via the Online Reporting Tool was made to an elderly and vulnerable person.
45. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

**Deliberate or negligent contraventions**

46. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that SGS's actions which constituted that contravention were deliberate actions (even if SGS did not actually intend thereby to contravene PECR).
47. The Commissioner considers that in this case SGS did deliberately contravene regulation 21 of PECR. SGS were given an opportunity by the Commissioner to respond to the investigation, which provided an

opportunity for an account to be given on its direct marketing operations and its systems and operations for compliance with the PECR. However, SGS did not avail itself of this opportunity and has not responded to any of the Commissioner's enquiries. In the circumstances, the absence of any evidence from SGS is consistent with the contravention being deliberate.

48. For the above reasons, the Commissioner is satisfied that this breach was deliberate.
49. Further and in the alternative, the Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
  50. Firstly, he has considered whether SGS knew or ought reasonably to have known that there was a risk that this contravention would occur. He is satisfied that this condition is met, for the following reasons:
    51. As a business that was engaged in direct marketing, SGS should have been aware of the rules that apply to such communications.
    52. Furthermore, 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 any subscriber registered with the TPS, unless the subscriber has specifically notified the company that they do not object to receiving such calls. In case organisations remain unclear on their obligations, the ICO operates a telephone helpline. ICO

communications about previous enforcement action where businesses have not complied with PECR are also readily available.

53. It is therefore reasonable to suppose that SGS should have been aware of its responsibilities in this area.
54. Secondly, the Commissioner has gone on to consider whether SGS failed to take reasonable steps to prevent the contravention. Again, he is satisfied that this condition is met.
55. The range of reasonable steps that SGS could have taken to prevent the contravention include the screening of telephone numbers against the TPS register. Due to SGS's failure to engage with the Commissioner, this is no evidence of any steps being taken to prevent the contravention.
56. Given the volume of calls made to telephone numbers registered on the TPS, it is clear that SGS failed to take reasonable steps.
57. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

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

58. The Commissioner has taken into account the following aggravating features of this case:
  - The purpose of the marketing was to increase turnover and ultimately generate profit for the organisation.

- Of the 29,771 calls that SGS made between 1 January 2021 and 30 June 2021, 24,241 were to individuals whose numbers were registered with the TPS. This amounts to 81% of calls made.
- SGS were not registered with the Commissioner during part of the contravention period.

59. The Commissioner does not consider that there are mitigating features in this case.

60. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. He is also satisfied that the procedural rights under section 55B have been complied with.

61. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out his preliminary thinking. In reaching his final view, the Commissioner has received no representations from SGS.

62. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

63. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.

64. The Commissioner has attempted to consider the likely impact of a monetary penalty on SGS but has been unable to do so given the lack of recent publicly available information. SGS was invited to provide financial representations in response to the Notice of Intent but failed to do so. The Commissioner considers in the circumstances that a penalty remains the appropriate course of action.

65. 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 are not registered with the TPS and/or specifically indicate that they do not object to receiving these calls.
66. In making his decision, the Commissioner has also had regard to the factors set out in s108(2)(b) of the Deregulation Act 2015; including: the nature and level of risks associated with non-compliance, including the risks to economic growth; the steps taken by the business to achieve compliance and reasons for its failure; the willingness and ability of the business to address non-compliance; the likely impact of the proposed intervention on the business, and the likely impact of the proposed intervention on the wider business community, both in terms of deterring non-compliance and economic benefits to legitimate businesses.
67. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

**The amount of the penalty**

68. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£70,000 (seventy thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

**Conclusion**

69. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **1 September 2023** 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.
70. If the Commissioner receives full payment of the monetary penalty by **31 August 2023** the Commissioner will reduce the monetary penalty by 20% to £56,000 (fifty six thousand pounds). However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
71. 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.
72. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.

73. Information about appeals is set out in Annex 1.
74. 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.
75. 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 2 day of August 2023.

Signe

A large black rectangular redaction box covering the signature of Andy Curry.

Andy Curry  
Head 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 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:

General Regulatory Chamber  
HM Courts & Tribunals Service  
PO Box 9300  
Leicester  
LE1 8DJ

Telephone: 0203 936 8963

Email: [grc@justice.gov.uk](mailto: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)).