Case Reference: EA-2021-0200

First-tier Tribunal
General Regulatory Chamber
[Monetary Penalty Notice]

Decided without a hearing
Heard on: 25 May 2022
Decision given on: 30 May 2022

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER MARION SAUNDERS
TRIBUNAL MEMBER EMMA YATES

Between

LTH HOLDINGS LIMITED

Appellant

and

THE INFORMATION COMMISIONER

Respondent

Decision: The appeal is dismissed. The penalty notice is confirmed.

REASONS

Mode of hearing

1. The parties have agreed to the Reference being determined on the papers under rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and we are satisfied that we can properly determine the issues without a hearing.

Introduction

2. LTH Holdings Ltd ('LTH') are a telephone marketing company, selling a variety of products under different trading names.

3. In a Notice of Appeal dated 27 July 2021 LTH seeks to challenge a Monetary Penalty Notice ('MPN') imposing a fine of £145,000 and an Enforcement Notice ('EN') both issued on 3 June 2021. The MPN contains findings that the Appellant had contravened regulation 21 of the Privacy and Electronic Communications Regulations 2003 (PECR) by means of unsolicited calls for direct marketing purposes.

The Law

4. PECR implemented the Privacy and Electronic Communications Directive 02/58/EC (the Directive) in domestic law. The Commissioner's power to impose a monetary penalty notice, the Appellant's right of appeal and the Tribunal's jurisdiction to hear the Appeal all derive from the Data Protection Act 1998 (DPA 1998). The repeal of DPA 1998 does not affect its operation insofar as it relates to PECR: paragraph 58 of Schedule 20 to the Data Protection Act 2018.

5. Regulation 21 of the Privacy and Electronic Communications Regulations 2003 provides:

> (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 the subscriber in respect of the called line is one listed in a register kept under regulation 26.
> (2) A subscriber shall not permit his line to be used in contravention of paragraph (1).
> (3) A person shall not be held to have contravened paragraph (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.
> (4) Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such calls being made on that line by that caller, such calls may be made by that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.

> (5) Where a subscriber has given a caller notification pursuant to paragraph (4) in relation to a line of his–
> (a) the subscriber shall be free to withdraw that notification at any time, and
> (b) where such notification is withdrawn, the caller shall not make such calls on that line.

6. Reg 2(1) defines a 'subscriber' as 'a person who is a party to a contract with a provider of public electronic communications services for the supply of such services.

7. Regulation 21 does not use the word 'consent'. However, when determining whether or not a subscriber has notified a caller that he does not, for the time being, object to such calls being made on that line by that caller, the definition of 'consent' under PECR set out in article 4(11) of Regulation 2016/679 ('the GDPR') is a useful guide:

> 'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

8. Similarly we find that the following recitals are a helpful guide to interpretation of regulation 21(4). Recital 32 of the GDPR provides, 'When the processing has multiple purposes, consent should be given for all of them'. Recital 42 materially provides that "For consent to be informed, the data subject should be aware at least of the identity of the controller". Recital 43 states that "Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case'.

9. The Upper Tribunal in **Leave.EU Group Limited and Eldon Insurance Services Limited v IC** (GIA/921/2020, GIA/922/2020 & GIA/923/2020) (**Leave.EU)** considered the meaning of "specific and informed" consent as follows:

> 48. There are two decisions of the Court of Justice (CJEU) which are helpful in this context: Case C-673/17 *Verbraucherzentrale Bundesverband eV v Planet49 GmbH* (EU:C:2019:801) [2020] 1 WLR 2248 ('Planet49') and Case C-61/19 *Orange Romania SA v ANSPDCP* (EU:C:2020:901) ('Orange Romania')….
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> 49. The *Planet49* case concerned an online promotional lottery. The registration process involved the installation of cookies on users' computers and pre-selected boxes agreeing to being contacted by third parties. In the first instance, users who wished to enter the lottery were presented with a generic opening statement as to their consent to receiving information from "certain sponsors and cooperation partners". However, they then had the opportunity to specify their preferences in considerable detail (see the CJEU judgment at [26]-[30]). The Court of Justice ruled that "the indication of the data subject's wishes referred to in Article 2(h) of Directive 95/46 must, inter alia, be 'specific' in the sense that it must relate specifically to the processing of the data in question and cannot be inferred from

an indication of the data subject's wishes for other purposes" (at [58]). The Court also agreed with the Advocate General that clear and comprehensive information (as required by Article 5(3) of the 2002 Directive) "implies that a user must be in a position to be able to determine easily the consequences of any consent he or she might give and ensure that the consent given is well informed. It must be clearly comprehensible and sufficiently detailed so as to enable the user to comprehend the functioning of the cookies employed" (CJEU judgment at [74]).

50. Furthermore, the passage at paragraph [58] of the Court of Justice's judgment was expressly adopted in Orange Romania (at [38]). Likewise, and notably, the Court reaffirmed the passage from Planet49 at [74] in Orange Romania at [40]:

> [40] As regards the requirement arising from Article 2(h) of Directive 95/46 and Article 4(11) of Regulation 2016/679 that consent must be 'informed', that requirement implies, in accordance with Article 10 of that directive, read in the light of recital 38 thereof, and with Article 13 of that regulation, read in the light of recital 42 thereof, that the controller is to provide the data subject with information relating to all the circumstances surrounding the data processing, in an intelligible and easily accessible form, using clear and plain language, allowing the data subject to be aware of, inter alia, the type of data to be processed, the identity of the controller, the period and procedures for that processing and the purposes of the processing. Such information must enable the data subject to be able to determine easily the consequences of any consent he or she might give and ensure that the consent given is well informed (see, by analogy, judgment of 1 October 2019, Planet49, C-673/17, EU:C:2019:801, paragraph 74).

51. We consider that Planet49 and Orange Romania are high authority as to the proper approach to the meaning of consent in this context. The decisions are especially helpful as regard the requirement that consent be both "specific" and "informed". They set a relatively high bar to be met for a valid consent.

10. The register under regulation 26 is maintained by the Telephone Preference Service (TPS) on behalf of the Commissioner.

11. S 122(5) of the Data Protection Act 2018 (DPA) defines direct marketing as, 'the communication (by whatever means) of any advertising material which is directed to particular individuals'. This definition applies for the purposes of the PECR (reg 2(2) PECR and para 430 and 432(6) of Schedule 19 of the DPA).

12. A breach of the Regulations is a matter falling under s 55A of the DPA 1988 which provides:

> (1) 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, 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.

13. The Upper Tribunal in **Leave.EU** at paragraph 70 explains:

> 70. MPNs represent one part of a suite of enforcement measures available to the Commissioner. In this context we note that Directive 2009/136/EC ('the 2009 Directive') amended the 2002 Directive, in part to strengthen enforcement of the rules governing the use of electronic mail for direct marketing. Article 15a(1) of the 2002 Directive, as amended, provides (…):
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> > Members States shall lay down the rules on penalties, including criminal sanctions where appropriate, applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided must be effective, proportionate and dissuasive and may be applied to cover the period of any breach, even where the breach has subsequently been rectified.

14. The maximum limit for a MPN under the DPA 1998 is £500,000 (s 55A(5) and reg 2 of the Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 (SI 2010/31; 'the 2010 Regulations'). The information that must be contained in the MPN includes, 'the reasons for the amount of the monetary penalty including any aggravating or mitigating features the Commissioner has taken into account.'

15. S 55B sets out the procedural requirements of imposing a monetary penalty notice, including at subsection (1) that 'the Commissioner must serve the data controller with a notice of intent' before serving the monetary penalty notice. Article 2 of the Data Protection (Monetary Penalties) Order 2010 (the Order) requires the Commissioner to 'consider any written representations made in relation to a notice of intent when deciding whether to serve a monetary penalty notice.'

16. Section 55B(5) DPA 1998 provides:

> A person on whom a monetary penalty notice is served may appeal to the Tribunal against—
> (a) the issue of the monetary penalty notice;
> (b) the amount of the penalty specified in the notice.

17. The s 55B(5) right of appeal is to be determined in accordance with s 49 DPA 1998. This provides that the tribunal shall allow the appeal and (or) substitute another Notice if the Notice is 'not in accordance with the law' or to the extent that the Commissioner exercised her discretion, it should have been exercised differently.

18. S 160 DPA 2018 requires the Information Commissioner to publish a Regulatory Action Policy giving guidance about how she proposes to exercise her functions under the DPA 2018. This was published in November 2018. The Commissioner also publishes internal guidance which it uses when deciding the level of an MPN:-

> The [Case Working] Group will determine a starting figure that reflects the nature and seriousness of the contravention of the Act by the data controller or collection of breaches of PECR by a person.
>
> This will involve looking at the nature of the contravention or collection of breaches together with the scope of the potential harm caused, and a consideration of what is reasonable and proportionate, given the circumstances of the case.
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> The initial view is based on the sanction available based on the statutory maximum of £500,000, which will be considered against a 'nature and seriousness' rating as follows:
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> Level A = £1 to £10,000
> Level B = £10,001 to £40,000
> Level C = £40,001 to £100,000
> Level D = £100,001 to £250,000
> Level E = £250,001 to £500,000
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> Once the level of nature and seriousness has been determined, the starting figure will be set by moving upwards or downwards in the band dependent on the specific circumstances of the case.
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> For PECR breaches, the Group will take into account the number of unlawful communications which were the subject of complaints, the types of complaints and the period over which the collection of PECR breaches extended.

19. In relation to seriousness the Upper Tribunal in **Leave.EU** emphasised that it was a factually specific issue in each case but also noted at para 81 that 'the number of emails involved gives a sense of scale. On any reckoning, over a million emails is a serious number and the FTT was entitled to take that as a starting point' and at para 93 that 'we are satisfied that the contravention of Regulation 22 PECR was serious in view of the 1,069,852 million emails sent'.

Factual background

20. In the period 1 May 2019 to 11 May 2020 the Commissioner received 5 complaints and the TPS received 12 complaints about calls from Serenity Funeral Plans (a trading name of the Appellant).

21. The Commissioner sent a series of investigatory letters to the Appellant and its enquiries established that the Appellant had, during the relevant period conducted 29 direct-marketing campaigns using 19 outgoing telephone numbers. These calls had resulted in 41 complaints (19 to the Commissioner and 22 to the TPS).

22. The detail of the investigation is set out in the MPN and is not repeated in full here.

23. During the course of the investigation the Appellant stated that the telephone numbers had been provided primarily by Easylife Group Limited ('Easylife') and Direct Response Marketing Group ('DRG'). The data had not been screened by the Appellant against the TPS register.

24. The Appellant told the Commissioner that any third party data is checked against the Appellant's internal suppression list and that the providers 'only provide data from sources that have contracted to be called'.

25. The Appellant provided a contract with Easylife which did not include any reference to data protection legislation. The appellant did not provide a contract with DTG. The appellant provided an extract from a privacy statement used by DRG and extracts from privacy policies of third party providers including Easylife and DRG.

26. The Commissioner issued a Notice of Intent to issue a monetary penalty and Preliminary Enforcement notice to the Appellant on 25 March 2021. Representations were received on 23 April 2021.

27. In the representations the Appellant stated as follows:

    27.1. The business does not target a specific audience, the data called is what their client companies provide.
    27.2. The Appellant did not feel that they failed to cooperate.
    27.3. The Appellant believes they provided call figures in the submission of 6 July 2000.

28. The Appellant confirmed that the figure of 1,414,519 was accurate and represented the number of calls made. The contact rate was 48% so they have spoken to 678,979 people.

29. The Appellant asserted that the calls were not unsolicited. They were provided by the Appellant's clients as callable data, having relied, the Appellant understands on a soft opt in option.

30. The Appellant asserted that it was not accurate to assert that the numbers were all registered with TPS. 46% of the data are mobile phone numbers which are not subject to TPS. The fine should be based on the landlines only.

31. The MPN was issued on 3 June 2021.

The MPN

32. The contravention is detailed in the MPN as follows:

> 58. Between 1 May 2019 and 12 May 2020, LTH used a public telecommunications service for the purposes of making 1,414,519 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.
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> 59. The Commissioner is also satisfied for the purposes of regulation 21 that these 1,414,519 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 LTH to receive calls. These calls resulted in a total of 41 complaints over the period of contravention.
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> 60. For consent to be valid it is required to be "freely given", by which it follows that if consent to marketing is a condition of subscribing to a service, the organisation will have to demonstrate how the consent can be said to have been given freely. LTH have been unable to do this. For both of LTH's third-party data providers, the data of individuals who purchased a product from one of their sites was passed to LTH for use in further direct marketing campaigns, without those individuals being given a genuine choice about whether to consent to such marketing from LTH.
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> 61. Consent is also required to be "specific" as to the type of marketing communication to be received, and the organisation, or specific type of organisation, that will be sending it. The Commissioner is concerned, particularly in respect of the consents obtained by DRG, that individuals were not able to select the method by which they might wish to receive direct marketing, or even from whom they may consent to receive it.
>
> 62. Consent will not be "informed" if individuals do not understand what they are consenting to. Organisations should therefore always ensure that the language used is clear, easy to understand, and not hidden away in a privacy policy or small print. Consent will not be valid if individuals are asked to agree to receive marketing from "similar organisations", "partners", "selected third parties" or other similar generic description.
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> 63. LTH did not have valid consent, and nevertheless engaged in direct marketing to individuals who had been registered with the TPS for not less than 28 days.

33. The Commissioner went on to consider if the conditions under s 55A were met.

34. The Commissioner was satisfied that the contravention was serious because there had been multiple breaches of regulation 21 by LTH arising from the organisation's activities over a twelve-month period, and this led to 1,414,519 unsolicited direct marketing calls being made to subscribers who were registered with the TPS. These 1,414,519 unsolicited calls led to a total of 41 complaints being made over the period of contravention, with 19 being made to the Commissioner, and 22 being made directly to TPS.

35. The Commissioner concluded that the Appellant knew or ought to have know that there was a risk that this contravention would occur because:

    35.1. The Commissioner has published detailed guidance, the ICO operates a telephone helpline and ICO communications about previous enforcement actions are readily available;
    35.2. Standard practice of the TPS is to contact the organisation making the calls on each occasion a complaint is made. It is reasonable to believe the Appellant would have received a notification in relation to the 22 complaints made over the period of the contravention.

36. The Commissioner concluded that the Appellant failed to take reasonable steps to prevent the contravention because:
    36.1. It is not acceptable to rely on assurances from third party suppliers without undertaking due diligence. Beyond checking data against its own suppression list the Appellant did not carry out any due diligence on the data.
    36.2. The Appellant did not check any data against the TPS register.
    36.3. The Appellant have not produced any internal training documents to demonstrate any regard for lawful direct marketing practices or compliance with PECR.
    36.4. The Appellant has not produced any contractual terms with DRG. The contract with Easylife is dated after the direct marketing campaigns had commences and does not contain provision for consideration of data protection legislation of protection of individual rights.
    36.5. The volume of calls and complaints make it clear that the Appellant failed to take sufficient reasonable steps.

37. In determining to issue a MPN the Commissioner took account of the following aggravating features:

    37.1. The Appellant's primary audience appears to be older people.
    37.2. There are online reports that the Appellant adopted aggressive, coercive and persuasive methods in its direct marketing.
    37.3. The current owner of the business is now disqualified from acting as a director.
    37.4. The Appellant provided superficial responses to the Commissioner's correspondence but failed to cooperate. They referred the Commissioner to

third party providers for some information and failed to provide accurate call figures when asked to do so.

38. The Commissioner had attempted to consider the likely impact of a monetary penalty on LTH but was unable to do so given the lack of recent publicly available information. LTH was invited to provide financial representations in response to the Notice of Intent but failed to do so. The Commissioner considered in the circumstances that a penalty remained the appropriate course of action.

39. In relation to the amount of the penalty, the Commissioner decided that a penalty in the sum of £145,000 (one hundred and forty-five thousand pounds) was reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

The Appeal

40. The Appellant appealed on 22 July 2021. The Appellant was given permission to appeal out of time. The grounds of appeal are, in summary, as follows:

Ground One
The calculation of the data usage is wrong because it includes mobile numbers or non-TPS data.

Ground Two
The decision is based on the grounds of funeral plan activity only. If so, only funeral plan activity should be included in the calculations.

The Commissioner's response to the appeal

41. The Commissioner responded on the basis that the decision in principle to impose the MPN was not in issue, although the amount of the MPN was in issue. The Commissioner stated 'Should the Appellant seek, in Reply, to challenge the decision to impose an MPN per se then the Commissioner reserves the right to make further responsive submissions.' The Appellant did not file a Reply.

42. In response to ground one the Commissioner submits that the data provided by the Appellant's communications subscriber is likely to be accurate and:

    42.1. Only connected calls to TPS-registered subscribers have been taken into account
    42.2. Mobile numbers can be registered with the TPS.

43. In response to ground two the Commissioner submits that the Commissioner has never stated that the contravention of PECR was confined to Serenity Funeral Plans calls.

44. In conclusion it is submitted that the Commissioner explained the basis for the penalty of £145,000 in the MPN. It was based on (i) the nature and seriousness of the contravention and the Appellant's negligence, (ii) a number of aggravating factors, and (iii) the underlying objective of promoting compliance with PECR. This is consistent with the flexible approach described in LAD Media Ltd v Information Commissioner [2017] UKFTT 2017.

Evidence

45. The tribunal took into account a bundle of documents. This included a witness statement from Christopher Gibson, Lead Case Officer at the ICO in the Privacy and Digital Marketing Investigation Team.

46. We accept the following evidence of Christopher Gibson.

47. The Appellant initially stated that they had conducted 1,197,717 connected calls through their live marketing campaigns. A Third Party Information Notice was issued to Telecom2, the Appellant's communication service provider, to obtain the connected call detail records (CDR) for the calling line identifiers identified by the Appellant for each marketing campaign. The CDR provided showed a large variance between the figures provided by the Appellant and those provided by Telecom2. The CDR showed that the calling line identifiers used by the Appellant for marketing had conducted 2,747,815 connected calls in the relevant period.

48. TPS have created a tool which allows the ICO to check CDRs against the TPS register to discover if a callee is registered and if so the date when they became registered. Of the 2,675,815 connected calls, 1,460,876 were to subscribers registered with the TPS. Discounting those that had been registered within 28 days left 1,448, 319. The Commissioner discounted 33,800 calls which the Appellant said had been collected internally or from web leads. This produced a final figure of 1,414,519 calls out of a total of 2,614,015 calls that had been made to subscribers who had been registered with the TPS for not less than 28 days.

Discussion and conclusions

49. On the basis of the evidence from Christopher Gibson and the related documents in the bundle we accept that the Appellant made 1,414,519 unsolicited calls to subscribers who had been registered with the TPS for not less than 28 days. We find that the purpose of contacting those individuals was to communicate advertising material to them and the calls were therefore made for the purposes of direct marketing.

50. These calls included mobile numbers and landline numbers, both of which can be registered with the TPS.

51. The MPN was not issued on the basis of funeral plan activity alone, and there is no reason why only funeral plan activity should be included in the calculations.

52. Although the word 'consent' is not used in regulation 21, in determining whether or not the subscribers had notified the Appellant that they did not for the time being, object to calls being made on that line by the Appellant, we find that as is the case with 'consent', the notification must be a freely given, specific, informed and unambiguous indication of the subscriber's wishes, by which he or she, by a statement or by a clear affirmative action, notifies the caller that he or she does not object to calls being made on that line by the caller.

53. This is appropriate for two reasons. First, there is a common purpose underlying s 21 and, for example, s 22. In accordance with the underling purpose of the PECR and the E-Privacy Directive it is appropriate to interpret 'notification' as including only notifications that are freely given, informed and unambigous. Second, the wording of s 21 expressly incorporates specificity ('notified a caller', 'such calls', 'that caller' and 'on that line') and a statement or affirmative action ('has notified the caller').

54. We have considered the evidence which was produced by the Appellant to support its assertion that it had been notified that the callees did not object to calls being made on that line by the Appellant. We agree with the Commissioner that the evidence does not show that the required notification had been given.

55. The Easylife checkout page gives individuals who create an account the option to opt-in to email marketing from Easylife and to opt-in to products/offers by post from third parties. Individuals checking out as guests have not opt-in/opt-out options. Both checkout pages contain the text:

> We may also telephone you offering services like our Motor Club, Lotto, Gardening Club, Book Club, Supercard, Health Club and other leisure services that we very carefully select. We may also email you special offers and promotions. We work with other companies to understand what sort of products and services you might like so we can aim to contact you only about things you will be interested in.

56. There is no option to agree to or decline this when placing an order, and individuals who do not create an account have no ability to log into an account to amend their details.

57. DRG has a number of catalogues which include statements on consent. None of the catalogues which the Commissioner was able to identify contain an option to agree to telephone direct marketing from third parties, or to select which third parties if any they might wish to be contacted by, or to select the method by which they might consent to be contacted.

58. A screenshot of a 'privacy promise' from the paper catalogue of Easylife was provided, the text of which was:

> As customers or subscribers, we will send you our catalogues and information by post or email and may telephone offering services or products such as our Health Motor, Supercard or Gardening clubs. If you would prefer not to receive these communications let us know (see below) or simply unsubscribe from any of the communications you receive at the time.
>
> We would also like to pass your name and address to other companies in the Charity, Financial, Leisure, Travel and Mail Order Sector so they can contact you with details of their products, services, offers and competitions. You can opt-out at anytime by either calling our customer service line or by contacting us at DPO@easylifegroup.com

59. On the basis of the above we find that the individuals who purchased products from Easylife or DRG were not given a genuine choice about whether to consent to direct telephone marketing from the Appellant. Any consent was not specific to telephone calls nor to the Appellant. In other words we do not accept that the individuals had notified the Appellant that they did not object to calls being made on that line by that caller. We agree with the Commissioner that regulation 21(4) was satisfied. We therefore find that there was a contravention of regulation 21.

60. We agree with the Commissioner that the contravention was serious. Out of a total of 2,614,015 calls over a 12 month period 1,414,519 calls had been made in contravention of regulation 21. There were 41 complaints made during the relevant period.

61. We accept that the Appellant ought reasonably to have known that there was a risk that the contravention would occur in the light of the detailed guidance published by the Commissioner and the availability on the internet of ICO communications about previous enforcement action where businesses have not complied with PECR. Further we take account of the likelihood that the Appellant will have been contacted on numerous occasions by the TPS about complaints, given that this is standard practice by the TPS.

62. We find that the Appellant has not taken reasonable steps to prevent the contravention. The Appellant undertook very limited checks on the data provided, checking it only against its own suppression list. There is no evidence of any internal training in relation to compliance with PECR or lawful direct marketing. The data was not checked against the TPS register. The Appellant was not even aware that mobile numbers could be registered on TPS. It is not sufficient to simply rely on assurance from third party suppliers.

63. We are satisfied that the condition in s 55A(1)(b) DPA is met.

64. We have considered whether the Commissioner ought to have exercised her discretion to issue a MPN differently and we are satisfied that she was right to issue a MPN in this case. In reaching this decision we have taken account of the following:

    64.1. The volume of calls made to TPS registered numbers.
    64.2. The number of complaints – 41 over a 12 months period.

64.3. The significant lack of due diligence and the lack of basic awareness of the TPS, as demonstrated by the assertion that mobile numbers cannot be registered with TPS.

64.4. The fact that the Appellant did not fully assist the Commissioner during the investigation:

64.4.1. In the Appellant's reply on 17 June 2020 the Appellant said that in respect of the 3 remaining catalogues 'the Commissioner would need to get in contact with DRG to request the domain names'.

64.4.2. On 7 August 2020 the Commissioner sought details of the call volume made by the Claimant from 1 May 2019 to 12 May 2020 together with details of any 'opt-out' script read to individuals when ordering products from Easylife by telephone. The Appellant responded on 17 August 2020 explaining that it did not hold Easylife's telephone order script and that the Commissioner would need to contact Easylife directly for this.

64.4.3. The Appellant confirmed that between 1 May 2019 and 12 May 2020 it had made 1,542,069 direct marketing calls, of which 1,197,717 connected to an individual subscriber. This was significantly lower than the number in the CDRs provided by Telecom2.

64.5. That there is some, albeit limited, evidence that at least some of the calls are specifically aimed at older individuals, who may be more vulnerable, and that there is at least some anecdotal online evidence from alleged former employees to support this.

64.6. We have taken account as a mitigating factor the acceptance by the Appellant of some responsibility in the notice of appeal: 'we realise there is a responsibility to be taken into account'.

65. In relation to the Commissioner's exercise of discretion in the amount of the monetary penalty, we find that a £145,000 was proportionate in the sense that a fair balance was struck between means and ends. In reaching this decision we have taken account of all the aggravating factors set out above and that the amount of the penalty should be of a level to deter further contraventions by the recipient or others.

66. We note that the Appellant was explicitly given the opportunity by the Commissioner by letter dated 10 May 2021 to provide further representations as to its financial position.

67. The information that was provided was very limited:

> As per October 2020, LTH Holdings Ltd ceased all telemarketing activity and hence have limited turnover at present. This was a result of previous owners and Directors not being able to continue and the impact of COVID. It did receive any assistance during the Pandemic.
>
> Currently, LTH Holdings supply distribution facilities for mail order plant delivery.

68. The Appellant confirms in the Notice of Appeal that it has ceased telemarketing activity.

69. We do not have any financial information showing the turnover or profit of the company from its current operations. Given the change in activity, the information previously obtained by the Commissioner in relation to turnover in 2019 is not only out of date, but highly unlikely to be accurate. We have no evidence before us on which we can properly assess the impact on the Appellant of a fine of this level.

70. The Appellant has had the opportunity to provide details of its financial position. It was prompted to do so by the Commissioner in May 2021. It has not done so. In the absence of any specific financial information, we find that the amount of the fine was proportionate for the reasons set out above.

71. For the above reasons the appeal is dismissed and the Monetary Penalty Notice in the sum of £145,000 stands.

Signed **SOPHIE BUCKLEY** Date: 27 May 2022
Judge of the First-tier Tribunal