

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: MyIML Ltd

Of: 53 Fountain Street, Manchester, M2 2AN

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

Legal framework

3. This notice is issued by virtue of regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR") as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2004 and by the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2011 ("PECR 2011").

4. PECR came into force on 11 December 2003 and revoked the Telecommunications (Data Protection and Privacy) Regulations 1999. PECR adopted Part V entitled, "Enforcement", and Schedules 6 and 9 of the DPA. By virtue of regulation 31(2) of PECR the Commissioner was made responsible for the enforcement functions under PECR.
5. On 26 May 2011, PECR 2011 amended regulation 31 of PECR to adopt sections 55A to E of the DPA and introduced appropriate adaptations to those sections. This was the applicable law in force at the time of the contravention.
6. The Company, whose registered office is given above (Companies House registration number: 08679439), 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.
7. 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.
8. 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."

9. 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."

10. Under regulation 26 of PECR, OFCOM 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 OFCOM to carry out this role. Businesses who wish to carry out direct marketing by telephone can subscribe to TPS for a fee and receive from them monthly a list of numbers on that register.

11. Under section 55A (1) of the DPA as adapted by PECR 2011 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,

(b) the contravention was of a kind likely to cause substantial damage or substantial distress, and

(c) 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 –

(i) that there was a risk that the contravention would occur, and

(ii) that such a contravention would be of a kind likely to cause substantial damage or substantial distress, 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 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.

Background to the case

14. The Company's business involves making unsolicited marketing calls to individual subscribers in order to sell solar panels and other green energy saving equipment.
15. In November 2013 the Company was identified by the ICO as being the subject of a large number of complaints about unsolicited marketing calls.

16. On 22 January 2014 the ICO wrote to the Company to explain that the ICO and the TPS had received complaints from individual subscribers in relation to unsolicited calls. The Company was asked a number of questions about its compliance with PECR and informed that the ICO could issue civil monetary penalties up to £500,000 for PECR breaches.
17. On 18 February 2014 the ICO received a response from the Company indicating that it made calls on behalf of a number of partners, that it purchased data from a third party and did not itself screen that data against the TPS.
18. The ICO wrote to the Company on 21 February 2014 providing it with compliance advice and a link to the ICO's guidance on PECR. Specifically, the ICO informed the Company that as the instigator of the calls, it was its responsibility to ensure that it was not making unsolicited calls to TPS subscribers. The Company was subsequently placed under a period of monitoring for three months.
19. Complaints continued to be received about the Company and in July 2014 it was invited to the ICO to discuss what it intended to do to ensure compliance with PECR. That meeting took place on 25 September 2014. Despite this, complaints continued to be received about the Company.
20. Between 23 October 2013 and 17 July 2015, the ICO received 269 complaints about the Company. All of these complaints were made by individual subscribers who were registered with the TPS.
21. The following are examples of the complaints received by the ICO:
 - "My wife has MS so finds it hard and painful to get to the phone if I'm not home, so we do not need unwanted calls."

- "I was annoyed as I was waiting a phone call from the hospital this afternoon."
 - "I am the carer for a sick 90 year old mother. Calls at this time do tend to be emergencies concerning her."
 - "The caller asked for my husband who died of cancer a few months ago. The same company have called numerous times before and have been told not to call back."
22. Between 9 October 2013 and 30 June 2015, the TPS received 779 complaints about the Company. The TPS referred all of those complaints to the Company and also notified the ICO.
23. Attached at Annex 2 is a spreadsheet detailing the 779 complaints made by individual subscribers to the TPS. This list includes the subscribers' names and telephone numbers together with the date and time of the call (under the headings, 'complaint date' and 'complaint time') and the date that the complaint was processed by the TPS. In all cases, by virtue of the fact that the subscribers have placed their number on the TPS do not call list, the Company has breached regulation 21(1)(b) PECR by calling those numbers.
24. The explanations provided by the Company to the TPS for making these calls is as follows:
- On 316 occasions – had prior consent.
 - On 216 occasions – no reason was given.
 - On 116 occasions – human error.
 - On 28 occasions – programming error.
 - On 67 occasions – used third party.

- On 32 occasions – call not made.
 - On 1 occasion – called before aware of regulations.
 - On 2 occasions - called prior to becoming a subscriber.
 - On 1 occasion - for outbound calling.
25. The Commissioner has made the above findings of fact on the balance of probabilities.
26. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by the Company and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

27. The Commissioner finds that the Company contravened regulation 21 of PECR.
28. The Commissioner finds that the contravention was as follows:
29. Between 9 October 2013 and 17 July 2015, the Company used a public telecommunications service for the purposes of making 1048 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 OFCOM in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR.
30. The Commissioner is also satisfied for the purposes of regulation 21 that 1048 complaints were made by 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 the Company to receive calls.

31. The Commissioner is satisfied that the Company was responsible for this contravention.
32. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

33. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by the Company arising from its activities over a long period of time and these led to a large number of complaints about unsolicited direct marketing calls to the TPS and the ICO. In addition, it is reasonable to suppose that considerably more calls were made by the Company because those who went to the trouble to complain are likely to represent only a proportion of those who actually received calls.
34. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Contraventions of a kind likely to cause substantial damage or substantial distress

35. The relevant features of the kind of contravention are:
36. 1048 individual subscribers received unsolicited marketing calls that they had not consented to. The number could have been far higher.

37. The Commissioner considers that the contravention identified above had the following potential consequences:
38. The contravention would cause distress to the subscribers who received the unsolicited marketing calls from the Company. This is supported by the large numbers of individuals who have complained about these calls and because of the nature of some of the complaints they gave rise to.
39. The Commissioner considers that the distress described above was likely to arise as a consequence of the kind of contravention. In other words, the Commissioner's view is that there was a significant and weighty chance that a contravention of the kind described would have such consequences.
40. The Commissioner also considers that such distress was likely to be substantial, having regard to the extent of the contravention and its nature. The likely distress was certainly more than trivial.
41. The Commissioner has also given weight to the number of affected individuals. The Commissioner considers that even if the distress likely to have been suffered by each affected individual was less than substantial, the cumulative impact would clearly pass the threshold of "substantial". In addition, given the number of affected individuals, it was inherently likely that at least a small proportion of those individuals would have been likely to suffer substantial distress on account of their particular circumstances.
42. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

43. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that the Company's actions which constituted that contravention were deliberate actions (even if the Company did not actually intend thereby to contravene PECR).
44. The Commissioner considers that in this case the Company did not deliberately contravene regulation 21 of PECR in that sense.
45. The Commissioner had gone on to consider whether the contraventions identified above were negligent. First, he has considered whether the data controller knew or ought reasonably to have known that there was a risk that these contraventions would occur. He is satisfied that this condition is met, given that the Company relied heavily on direct marketing due to the nature of its business, and the fact that the issue of unsolicited calls was widely publicised by the media as being a problem. It is therefore reasonable to suppose that they should have been aware of their responsibilities in this area.
46. The Company has been aware of its obligations under PECR since at least 16 December 2013 when the ICO first raised its concerns with them. Since that date the ICO has provided the Company with clear advice about the requirements of PECR, both in writing and in person. The TPS also contacted the Company 779 times regarding complaints which should have made the Company aware of the risk that that these contraventions would occur.

47. Complaints continued to be received by the TPS and the Commissioner even after the ICO's letters and the Company's assurances.
48. Second, the Commissioner has considered whether the Company knew or ought reasonably to have known that those contraventions would be of a kind likely to cause substantial distress. He is satisfied that this condition is met, given that the Company knew that individual subscribers were complaining about calls they were receiving and that the recipients of those calls had asked not to receive them. This demonstrates that the Company knew of the risk of contraventions. They therefore ought to have known that it was only a matter of time before substantial distress to the recipients of the calls was likely to be caused.
49. Third, the Commissioner has considered whether the Company failed to take reasonable steps to prevent the contraventions. Again, he is satisfied that this condition is met. Reasonable steps in these circumstances would have included carrying out due diligence checks, screening the data against the TPS register/its own suppression list and providing the Company's telesales staff with written procedures and training regarding the requirements of PECR and how to comply with them. The Company failed to take those steps.
50. The Commissioner is therefore satisfied that condition (c) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

51. 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 section 55A(3A) and the procedural rights under section 55B have been complied with.

52. The latter has included the issuing of a Notice of Intent dated 17 December 2015, in which the Commissioner set out his preliminary thinking.
53. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
54. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.
55. 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.
56. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

57. The Commissioner has taken into account the following **mitigating features** of this case:

- There is a potential for damage to the Company's reputation which may affect future business.
58. The Commissioner has also taken into account the following **aggravating features** of this case:
- The Company may obtain a commercial advantage over its competitors by generating leads from unlawful marketing practices.
 - The Company failed to suppress numbers when requested to do so.
59. The Commissioner has considered the likely impact of a monetary penalty on the Company. He has decided that the Company has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
60. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£80,000 (eighty thousand pounds)**.

Conclusion

61. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by 17 March 2016 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.
62. If the Commissioner receives full payment of the monetary penalty by 16 March 2016 the Commissioner will reduce the monetary penalty by 20% to **£64,000 (sixty four thousand pounds)**. However, you

should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

46. 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.
47. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
48. Information about appeals is set out in Annex 1.
49. 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.
50. 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 15th day of February 2016

Signed

Stephen Eckersley
Head of Enforcement
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) General Regulatory Chamber (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:

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;
- d) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
 - e) 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)).