

**DATA PROTECTION ACT 1998**

**SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

**MONETARY PENALTY NOTICE**

To: Assist Law Limited

Of: 9 Morston Court, Aisecome Way, Weston Super Mare, Somerset, BS22 8NG

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

**Legal framework**

3. The Company, whose registered office is given above (Companies House registration number: 09132499), is the person stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for direct marketing purposes contrary to regulation 21 of PECR.

4. Regulation 21 of PECR states:

“(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.

(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(b) where such notification is withdrawn, the caller shall not make such calls on that line.”

5. 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 Telephone Preference Service ("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.
6. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".
7. 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)).
8. Section 55A of the DPA (as amended by the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2011 and the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2015) 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, 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.”

9. 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.
10. PECR implements 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 PECR so as to give effect to the Directives.

### **Background to the case**

11. The Company provides will making and related services to members of the public.
12. The Commissioner first wrote to the Company in May 2015 following a number of complaints having been made by subscribers registered with the TPS about unsolicited direct marketing telephone calls. The Commissioner decided that she would provide the Company with advice and guidance on compliance with PECR rather than take regulatory action at that time. However, the Company was warned

that the Commissioner could issue monetary penalties up to £500,000 for PECR breaches.

13. Despite this, complaints continued to be made to both the Commissioner and TPS about unsolicited marketing calls made by the Company. The Commissioner therefore wrote to the Company on 8 January 2016 to ask a number of questions about its compliance with PECR. The Commissioner again warned the Company that she could issue monetary penalties of up to £500,000 for PECR breaches.
14. The Company replied to the Commissioner's enquiries on 27 January 2016 explaining that the majority of complaints made were from subscribers whose data had been obtained from a third party provider. The third party data provider had assured the Company that the data was "opted in".
15. On 28 January 2016 the Commissioner asked the Company to provide evidence that it had consent to make unsolicited direct marketing calls to the TPS subscribers who had complained.
16. It was subsequently explained that the data bought by the Company from its third party data supplier had been sourced from a number of different organisations. Examples of the consent relied upon included the following:

"Please tick the box to receive information on selected products and services by ourselves and trusted third parties via telephone, SMS, post and email".

"By entering this competition you agree to the Terms & Conditions and Privacy Policy. You also agree to receive information by post,

telephone, email & SMS from xxxxx and third parties listed in our Data Collection Notice & for your data to be available for tracing companies.”

“By registered and entering your details, you consent to xxxx and their carefully selected third parties, as well as the brands listed in our Privacy Policy to contact you about products and/or services that have been selected based on your stated interests and responses. This may be by Telephone, Mail, SMS and/or by Email.”

17. Between 29 April 2015 and 15 April 2016, 99 complaints were made about unsolicited direct marketing calls made by the Company. 84 of those complaints were made to the TPS, with a further 15 made direct to the ICO. All of these complaints were made by individual subscribers who were registered with the TPS. Spreadsheets containing details of these complaints are attached at Annexes 1 and 2.
18. The Commissioner has made the above findings of fact on the balance of probabilities.
19. 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**

20. The Commissioner finds that the Company contravened regulation 21 of PECR.
21. The Commissioner finds that the contravention was as follows:

22. Between 29 April 2015 and 15 April 2016, the Company used a public telecommunications service for the purposes of making 99 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.
23. The Commissioner is also satisfied for the purposes of regulation 21 that the 99 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.
24. The Commissioner is also satisfied that those TPS subscribers had not opted in to receive unsolicited direct marketing calls from the Company and regulation 21(4) of PECR did not therefore apply.
25. The Commissioner is therefore satisfied that the Company was responsible for this contravention.
26. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

### **Seriousness of the contravention**

27. 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 the course of 12 months. 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.

28. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

**Deliberate or negligent contraventions**

29. 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).
30. The Commissioner considers that in this case the Company did not deliberately contravene regulation 21 of PECR.
31. The Commissioner has gone on to consider whether the contraventions identified above were negligent.
32. First, she has considered whether the Company 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 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. The Company has been aware of its obligations under PECR since at least May 2015 when it was first contacted by the ICO and provided with advice on its obligations under PECR. The fact that the Company knew that people were complaining about calls they were receiving shows that the Company ought to have known of the risk of contravening PECR. The TPS also contacted the Company on each occasion a complaint was made to it which should have also made the Company aware of the risk



that these contraventions would occur. It is therefore reasonable to suppose that the Company should have been aware of their responsibilities in this area.

33. Second, the Commissioner has gone on to consider whether the Company failed to take reasonable steps to prevent the contraventions. Again, she is satisfied that this condition is met. Reasonable steps in these circumstances would have included (i) asking its third party data provider for evidence that the subscribers had consented to receiving calls from the Company and (ii) screening the data against the TPS register by the Company itself regardless of any assurances that might have been given by its third party data provider.
34. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

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

35. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A(1) DPA have been met in this case. She is also satisfied that section 55A(3A) and the procedural rights under section 55B have been complied with.
36. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made by the Company on this matter.
37. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

38. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
39. 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.
40. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

#### **The amount of the penalty**

41. 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.
42. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£30,000 (thirty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

## **Conclusion**

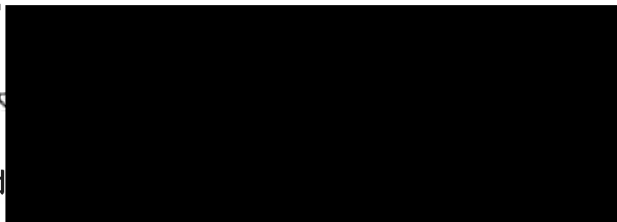
43. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **6 December 2016** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.
44. If the Commissioner receives full payment of the monetary penalty by **5 December 2016** the Commissioner will reduce the monetary penalty by 20% to **£24,000 (twenty 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.
45. 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.
46. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
47. Information about appeals is set out in Annex 1.
48. 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.

49. 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 3<sup>rd</sup> day of November 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 she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

GRC & GRP Tribunals  
PO Box 9300  
Arnhem House  
31 Waterloo Way  
Leicester  
LE1 8DJ

- a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.

- b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state:-
- a) your name and address/name and address of your representative (if any);
  - b) an address where documents may be sent or delivered to you;
  - c) the name and address of the Information Commissioner;
  - d) details of the decision to which the proceedings relate;
  - e) the result that you are seeking;
  - f) the grounds on which you rely;
  - g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
  - h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.
5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.
6. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).