

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: True Telecom Limited

Of: Ground Floor, Lakeview West Galleon Boulevard, Crossways Business Park, Dartford, DA2 6QE

1. The Information Commissioner ("Commissioner") has decided to issue True Telecom Limited ("True Telecom") 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 ("PECR") by True Telecom.
2. This notice explains the Commissioner's decision.

Legal framework

3. True Telecom, whose registered office is given above (Companies House registration number: 08225783), 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.
4. Regulation 21 applies to the making of unsolicited calls for direct marketing purposes. It means that if a company wants to make calls

promoting a product or service to an individual who has a telephone number which is registered with the Telephone Preference Service Ltd ("TPS"), then that individual must have given their consent to that company to receive such calls.

5. Regulation 21 paragraph (A1) of PECR provides that:

"(A1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making calls (whether solicited or unsolicited) for direct marketing purposes except where that person—

- (a) does not prevent presentation of the identity of the calling line on the called line; or
- (b) presents the identity of a line on which he can be contacted."

6. 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."

7. 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.”

8. Regulation 24 of PECR states:

“(1) Where a public electronic communications service is used for the transmission of a communication for direct marketing purposes the person using, or instigating the use of, the service shall ensure that the following information is provided with that communication—

(a) in relation to a communication to which regulations 19 (automated calling systems) and 20 (facsimile machines) apply, the particulars mentioned in paragraph (2)(a) and (b);

(b) in relation to a communication to which regulation 21 (telephone calls) applies, the particulars mentioned in paragraph (2)(a) and, if the recipient of the call so requests, those mentioned in paragraph (2)(b).

(2) The particulars referred to in paragraph (1) are—

(a) the name of the person;

(b) either the address of the person or a telephone number on which he can be reached free of charge.”

9. 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 set up by the Commissioner to carry out this role. Businesses who wish to carry out direct marketing by telephone can subscribe to the TPS for a fee and receive from them monthly a list of numbers on that register.
10. 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)).
11. Under section 55A (1) of the DPA (as amended by PECR 2011 and the Privacy and Electronic Communications (Amendment) Regulations

2015) the Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that –

“(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person, and

(b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person –

(a) knew or ought to have known that there was a risk that the contravention would occur, but

(b) failed to take reasonable steps to prevent the contravention.”

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. True Telecom's business involves the provision of telephony services to businesses and residential consumers. Services include broadband, line rental and calls and mobile sim only plans.
15. Between 6 April 2015 and 27 April 2017, the ICO received 201 complaints through the TPS about unsolicited direct marketing calls made by True Telecom. All of these complaints were made by individual subscribers who were registered with the TPS.
16. Some of those individual subscribers complained that they received unsolicited calls from a withheld number and that the calls were misleading because the callers gave the impression that they were calling from BT Openreach.
17. The following are examples of the complaints received by the ICO:
 - "A very long call trying to market their phonier service [sic]. Very intrusive and asked for BT account details and bank details".
 - "She said she was from Openreach and that they could offer me a cheaper deal than I was paying. Got very aggressive when I refused to give bank details".
 - "Claimed to be BT Openreach initially, then mis-sold me a product without my permission (I said I'd think about it). I have also complained to Ofcom".

- "Said I am entitled to I said not interested and I was registered with TPS, said it did not show up. Asked for me by name. Number withheld".
18. On 18 May 2016, the ICO wrote to True Telecom to explain that the ICO could issue civil monetary penalties in the sum of up to £500,000 for PECR breaches. The letter informed True Telecom that the TPS had received complaints from individual subscribers in relation to unsolicited calls. True Telecom was asked a number of questions about its compliance with PECR and its attention was drawn to the Commissioner's detailed PECR guidance.
 19. The ICO received a response from True Telecom explaining that it was unable to provide any consent for the calls made to the customers who had made a complaint. True Telecom explained that it obtained the data used to make the calls by so-called 'data scraping'. Data scraping is the act of going online and finding information in the public domain, for example from a listing website. A software tool or an online service is then utilised to pull or 'scrape' the information from the listings into a CSV file or spreadsheet. Once data has been scraped, the number is then uploaded to their TPS screening software before being allocated to their internal sales team.
 20. True Telecom indicated that it used TPS screening software. However, it advised that a selection of data was made available to the outbound sales team that was not subject to TPS screening during a transitional period after the departure of the previous IT manager.
 21. The Commissioner has made the above findings of fact on the balance of probabilities.

22. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by True Telecom and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

23. The Commissioner finds that True Telecom contravened regulation 21 of PECR.
24. The Commissioner finds that the contravention was as follows:
25. Between 6 April 2015 and 27 April 2017, True Telecom used a public telecommunications service for the purposes of making 201 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.
26. The Commissioner is also satisfied for the purposes of regulation 21 that the 201 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 True Telecom to receive calls.
27. The Commissioner is therefore satisfied that True Telecom was responsible for this contravention.
28. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

29. The Commissioner is satisfied that the contravention identified above was serious. There have been multiple breaches of regulation 21 by True Telecom arising from its activities and these led to a large number of complaints about unsolicited direct marketing calls to the TPS.
30. In addition, it is reasonable to suppose that considerably more calls were made by True Telecom because those who went to the trouble to complain are likely to represent only a proportion of those who actually received calls.
31. In addition, some complainants allege that True Telecom failed to present a caller line identification, and that the calls were misleading because the callers gave the impression that they were calling from BT Openreach.
32. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

33. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that True Telecom's actions which constituted that contravention were deliberate actions (even if True Telecom did not actually intend thereby to contravene PECR).
34. The Commissioner considers that in this case True Telecom did deliberately contravene regulation 21 of PECR.

35. The Commissioner considers that the inadequacies outlined were more than matters of serious oversight. She has published detailed guidance for those carrying out direct marketing explaining their legal obligations under PECR. This guidance explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by e-mail, by post, or by fax. Specifically, it states that live calls must not be made to subscribers who have told an organisation that they do not want to receive calls; or to any number registered with the TPS, unless the subscriber has specifically consented to receive calls.
36. The Commissioner's direct marketing guidance is also clear that organisations should keep clear records of what an individual has consented to, and when and how this consent was obtained, so that they can demonstrate compliance in the event of a complaint. True Telecom was unable to ensure that it could substantiate that individuals had consented to be called due to the nature of the way they obtained the data.
37. True Telecom had been initially contacted by the Commissioner in August 2014 as part of a 'TPS 500' project. The organisations written to, including True Telecom, had received fewer than 50 complaints from subscribers to the TPS during 2013. The Commissioner's letter outlined the requirements of PECR but stated that the number of complaints could be addressed with education and guidance as opposed to formal enforcement action. Despite receiving this guidance from the Commissioner complaints continued to escalate illustrating a lack of remedial measures taken by them to reduce the number of complaints.

38. Further and alternatively the Commissioner has also gone on to consider whether the contraventions identified above were negligent.
39. She has considered whether True Telecom 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 True Telecom relied on direct marketing due to the nature of its business, the way in which it sourced its data and the fact that the issue of unsolicited calls was widely publicised by the media as being a problem. The fact that True Telecom knew that people were complaining about calls they were receiving shows that True Telecom ought to have known of the risk of contravening PECR. It is reasonable to suppose that True Telecom should have been aware of their responsibilities in this area.
40. Secondly, the Commissioner has gone on to consider whether True Telecom 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 carrying out adequate screening of the data against the TPS register, ensuring that the entire TPS file they received from their provider was uploaded on to their system before making calls and providing True Telecom's telesales staff with written procedures and training regarding the requirements of PECR and how to comply with them. True Telecom had failed to take the necessary steps to ensure that it could substantiate that individuals had consented to be called due to the nature of the way they obtained the data. Given the volume of complaints received, it is clear that True Telecom failed to take those steps.

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

The Commissioner's decision to issue a monetary penalty

42. 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.
43. 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 True Telecom on this matter.
44. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
45. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
46. 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.

47. For these reasons, the Commissioner has decided to issue a monetary penalty in this case

The amount of the penalty

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

- There is a potential for damage to True Telecom's reputation which may affect future business.

49. The Commissioner has also taken into account the following **aggravating features** of this case:

- True Telecom had been previously contacted by the Commissioner in relation to complaints and received guidance. Despite this complaints continued to escalate illustrating a lack of remedial measures taken by them to reduce the number of complaints.
- Despite being advised by the Commissioner of the requirement to do so, True Telecom failed to register as a data controller under the DPA, and were prosecuted for this offence in March 2017. This is indicative of its attitude towards compliance with the regulatory requirements.

50. The Commissioner has also taken into account the fact that True Telecom has contravened regulation 24 of PECR in that it did not identify the person who was instigating the marketing calls and, if requested, provide the address of the person or a telephone number on which he can be reached free of charge.

51. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£85,000 (eighty five thousand**

pounds) is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

52. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **9 October 2017** 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.
53. If the Commissioner receives full payment of the monetary penalty by **6 October 2017** the Commissioner will reduce the monetary penalty by 20% to **£68,000 (sixty eight thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
54. 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.
55. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
56. Information about appeals is set out in Annex 1.

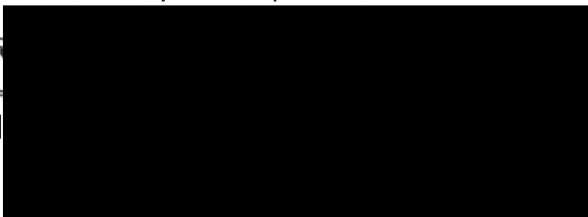
57. The Commissioner will not take action to enforce a monetary penalty unless:

- 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.

58. 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 6th day of September 2017

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 (Information Rights) (the 'Tribunal') against the notice.
2. If you decide to appeal and if the Tribunal considers:-
 - a) that the notice against which the appeal is brought is not in accordance with the law; or
 - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

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

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

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)).