

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Home Energy & Lifestyle Management Ltd

Of: 131 Cambuslang Road, Cambuslang Investment Park, Glasgow
G32 8NB

1. The Information Commissioner ("Commissioner") has decided to issue Home Energy & Lifestyle Management Ltd 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 19 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by Home Energy & Lifestyle Management Ltd ("HELM").
2. This notice explains the Commissioner's decision.

Legal framework

3. This notice is issued by virtue of regulation 19 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. HELM, whose registered office is given above (companies house registration number: SC408097), is the person stated in this notice to have used an automated calling system for the purpose of making recorded direct marketing calls contrary to regulation 19 of PECR.
7. Regulation 19 of PECR provides that:

"(1) A person shall neither transmit, nor instigate the transmission of, communications comprising recorded matter for direct marketing purposes by means of an automated calling system except in the circumstances referred to in paragraph (2).

(2) Those circumstances are where the called line is that of a subscriber who has previously notified the caller that for the time being he consents to such communications being sent by, or at the instigation of, the caller on that line.

(3) A subscriber shall not permit his line to be used in contravention of paragraph (1).

(4) For the purposes of this regulation, an automated calling system is a system which is capable of—

- (a) automatically initiating a sequence of calls to more than one destination in accordance with instructions stored in that system; and
- (b) transmitting sounds which are not live speech for reception by persons at some or all of the destinations so called.”

8. 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.
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. The Commissioner approaches the PECR regulations so as to give effect to the Directive.

Background to the case

11. HELM is an official provider of Green Deal; a Government backed energy saving initiative.
12. Between 2 October and 12 December 2014, the Commissioner's office received 242 complaints via the online reporting tool. The gist of the complaints was that a number of automated marketing calls had been received by subscribers in relation to free solar panels. The calls allowed either an option to press 5 if interested, or an option to press 9

to be removed from the list. The calls were linked to an assessment which determined whether or not the subscriber was entitled to free solar panels. The calls did not identify the sender and the option of being connected to a person or suppressing the number was not always effective.

13. The following are examples of the complaints received by the Commissioner's office:

- "We had a call some time ago in the morning to inform us that our 19 month old grandson had passed away suddenly. Whenever we get a call first thing in the morning this unsettles us and brings back the terrible memory of that call."
- "We have a sick relative and every time the phone goes my wifes heartbeat increases fearing the worst."
- "I am receiving daily updates regarding a friend in hospital, and am expecting the worst. When these calls come in I expect it to be from the hospital."
- "I did not request a call or authorise a call. My number has been registered with TPS for many years. My number is not listed in the phone book. I have never given permission for any sales calls. I am concerned about possible criminal activity relating to my personal details and phone number."
- "Waiting for phone call about terminally ill family member so I cannot ignore my phone but I feel this nuisance company have taken over my phone line! Please can something be done to stop these pests? If it was

a real person, I could ask them to stop phoning but I am powerless with these pests!!! I'm on the TPS and have been for a few years.”

- “It filled up space on my answer machine. I feel my home has been invaded. No name has been given which is horrible. They know about me but I do not even know who they are. I am on TPS and feel angry that these calls can still get through.”
14. On further investigation, it was discovered that both of the CLIs identified by the complainants were used by HELM.
 15. On 12 February 2015, the Commissioner’s office wrote to HELM to remind the organisation of their obligations under regulation 19 of PECR and to provide them with an opportunity to explain the volume of complaints.
 16. On 18 February 2015, the Commissioner’s office received a response from HELM’s compliance manager admitting that the majority of the calls were sent or instigated by HELM to carry out a marketing campaign between October and December 2014. HELM confirmed that they will not be running a similar campaign.
 17. HELM stated that each customer record was purchased from reputable suppliers and screened against the TPS list before it was added to their database. HELM explained that they also used a sophisticated filtering system to “suppress” and “block” telephone numbers from being dialled if requested by subscribers. In the circumstances, HELM couldn’t explain the volume of complaints and rejected the idea that a call could be received by a subscriber on more than one occasion.

18. On 24 February 2015, the Commissioner's office wrote to HELM to explain that in order to comply with regulation 19 of PECR, consent must be obtained from the subscriber before they could send or instigate an automated marketing call. It was also explained that the steps that HELM had taken were insufficient because the calls could only be made with such consent. HELM was asked to provide further details of the consents relied on to make the calls together with the total number of calls made in the marketing campaign.
19. On 10 March 2015, HELM wrote to the Commissioner's office explaining that they were not aware that a different PECR regulation applied to automated marketing calls. That is why HELM adopted the same approach that it used in "live call" marketing campaigns.
20. HELM has also admitted that they sent in excess of 6 million automated calls during the marketing campaign, although the calls were only connected to approximately 59,500 subscribers and at least 1,750,000 of the calls were made to invalid numbers.
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 19 of PECR by HELM and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

23. The Commissioner finds that HELM contravened the following provisions of PECR:

HELM has contravened regulation 19(1) and (2) of PECR.

24. The Commissioner finds that the contravention was as follows:

Between October and December 2014, HELM sent in excess of 6 million automated marketing calls to subscribers without their prior consent.

25. The Commissioner is satisfied that HELM was responsible for this contravention.
26. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

27. The Commissioner is satisfied that the contravention identified above was serious. This is because HELM sent in excess of 6 million automated marketing calls to subscribers without their prior consent. These calls were connected to approximately 59,500 subscribers over a three month period resulting in 242 complaints to the Commissioner's office. HELM made repeat calls to subscribers (sometimes on the same day) even though they had pressed option 9. When they pressed option 5, subscribers weren't always able to connect to a person. The calls were also misleading because the solar panels were not necessarily free as implied by the recorded message. Despite the extent and duration of the marketing campaign, HELM did not appreciate that a different PECR regulation applied to the sending or instigating of automated marketing calls.

28. 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

29. The relevant features of the kind of contravention are:
30. Nearly sixty thousand subscribers received automated marketing calls in relation to a massive marketing campaign to provide free solar panels that they had not consented to. The number could have been far higher. The automated marketing calls were often repeated and sometimes received on the same day. It was not always possible to connect to a person or suppress a number. The automated marketing calls were also misleading because the solar panels were not necessarily free as implied by the recorded message.
31. The Commissioner considers that the contravention identified above had the following potential consequences:
32. The contravention would cause distress to the subscribers who received the automated marketing calls from HELM. 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.
33. 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.

34. 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.
35. 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. For example, a subscriber is waiting for news about a family member who is terminally ill and fears the worst on hearing the telephone's ring tone.
36. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

37. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that HELM's actions which constituted that contravention were deliberate actions (even if HELM did not actually intend thereby to contravene PECR).
38. The Commissioner considers that in this case HELM did deliberately contravene regulation 19 of PECR in that sense.
39. The Commissioner has published detailed guidance for companies carrying out marketing explaining their legal requirements under PECR.

This guidance explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by email, by post or by fax. Specifically, it states that marketing material can only be transmitted via an automated system with the prior consent of the subscriber.

40. Whilst HELM may not have deliberately set out to cause distress, it did deliberately send automated marketing calls on a massive scale to subscribers.
41. The Commissioner is therefore satisfied that condition (c) 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. He 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 dated 11 June 2015, in which the Commissioner set out his preliminary thinking. In reaching his final view, the Commissioner has taken into account the representations made in response to that Notice of Intent, as well as those made in other correspondence from HELM.
44. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
45. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty. He has taken into account HELM's representations made in response to the

Notice of Intent and in other correspondence on this matter.

46. The Commissioner's underlying objective in imposing a Monetary Penalty Notice is to promote compliance with PECR. The sending or instigating of automated 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 sending automated marketing calls in compliance with PECR.
47. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

48. The Commissioner has taken into account the following **mitigating features** of this case:
- HELM has confirmed that they will not be running a similar marketing campaign
 - HELM fully co-operated with the Commissioner's investigation.
 - There is a potential for damage to HELM's reputation which may affect future business.
49. The Commissioner has also taken into account the following **aggravating features** of this case:

- HELM may obtain a commercial advantage over its competitors by generating leads from unlawful marketing practices.
50. The Commissioner has considered the likely impact of a monetary penalty on HELM. He has decided that HELM has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
51. The Commissioner has also taken into account the fact that HELM has contravened regulation 24 of PECR in that they did not identify the person who was sending the automated marketing calls and provide the address of the person or a telephone number on which he can be reached free of charge.
52. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£200,000 (Two hundred thousand pounds)**.

Conclusion

53. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by 28 October 2015 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.
54. If the Commissioner receives full payment of the monetary penalty by 27 October 2015 the Commissioner will reduce the monetary penalty by 20% to **£160,000 (One hundred and sixty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

55. 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.
56. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
57. Information about appeals is set out in Annex 1.
58. 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.
59. 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 25th day of September 2015

Signed

David Smith
Deputy Information Commissioner
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)).