



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0021

Determined on written submissions

Before

JUDGE

DAVID FARRER Q.C.

TRIBUNAL MEMBERS

NARENDRA MAKANJI

AND

JOHN RANDALL

Between

IT PROTECT LTD.

Appellant

and

THE INFORMATION COMMISSIONER ("THE ICO")

Respondent

DECISION AND REASONS

The Tribunal dismisses this appeal as to both the issue and the amount of the Monetary Penalty Notice (“the MPN”).

1. This appeal is against the issue and the amount of an MPN issued on 11th. January, 2017, pursuant to s.55A of the Data Protection Act, 1998 (“The DPA”) in respect of alleged contraventions of Regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations, 2003 (“The PECR”).
2. The relevant statutory provisions, as amended, set out here so far as material to this appeal, read as follows –

DPA

s.55A Power of Commissioner to impose monetary penalty

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(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 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.

PECR

Regulation 21

“(1). A person shall neither use nor instigate the use of a public electronic communications system for the purposes of making unsolicited calls for direct marketing purposes where-

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(b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26.

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(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”.

3. By virtue of regulation 2(2), “direct marketing purposes” is defined as in s.11(3) of the DPA, namely, “*the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals*”.
4. The register kept under regulation 26 is the Telephone Preference Service register (“the TPS”) administered by The Telephone Preference Service Limited (“TPSL”) on behalf of OFCOM. Any subscriber can secure registration of his/her name and telephone number without charge on application. So it is an “opt – out” service. The register can be inspected by a person intending either to use or instigate the use of a public electronic communications system for the purposes of making unsolicited calls for direct marketing purposes on payment of a fee.

The Background to this appeal, as set out in the MPN.

5. IT Protect began trading in 2013, Its business was the sale of a call blocking device, “the Pro Call Blocker”, designed to stop unwanted calls, which is, of course, the very purpose of TPS registration. Its sole means of marketing this product was unsolicited marketing calls to individual subscribers.
6. It purchased the names and numbers of subscribers from a single source, The Data Partnership Ltd., (“TDP”), previously known as “DPS”. TDP/DPS made telephone calls to subscribers for the purposes of a so – called “Lifestyle survey”, inviting them to consent to marketing calls from specified companies, including IT Protect.
7. The contractual terms governing these purchases stipulated that -

- Records to be supplied to IT Protect would not be TPS screened but would have an explicit opt – in to the IT Protect brand;
- TDP would provide date and time opt – in stamps for the data survey for a three – month period;
- Opt – ins could be supplied indefinitely for any regulatory investigation (ICO or TPS).
- If a dispute arose as to the conduct of the “Lifestyle survey”, all recordings would be supplied on advance payment of the costs involved plus a 10% handling fee.

The contract made no provision for access by IT Protect to the original evidence of subscriber consent for the purpose of due diligence procedures. According to Steve Montague of IT Protect, such evidence was no longer available when the ICO’s investigation began.

8. IT Protect did not use a company to screen calls against the TPS register.
9. From 6th. April, 2015 to 16th. May, 2016 the TPS received from TPS subscribers 122 complaints relating to direct marketing calls from IT Protect; they were referred to IT protect and reported to the ICO. IT Protect failed to respond in relation to 69 such complaints.
10. During the same period the ICO received 35 direct complaints from TPS subscribers as to IT Protect. They included claims that –
 - Callers had stated or created the impression that they were calling on behalf of BT.
 - The subscriber was told that TPS blocked only 10% of calls.

- Calls were made to elderly and possibly vulnerable subscribers.

The ICO's investigation, her case as to a contravention of regulation 21 and the issue and amount of the MPN.

11. The ICO's Case Officer notified IT Protect of the ICO's investigation on 1st. March, 2016. She posed a series of questions as to the source of its marketing data, due diligence checks, prior screening of calls, and requested evidence of consents, copies of training procedures and of the script used on calls.
12. On behalf of IT Protect, Warren Pye replied by email on 22nd. March, 2016. He supplied a number of the requested documents, including a scan of date and time stamps showing when the opt – in was purportedly made and documents containing the contractual terms summarised above.
13. There followed a series of requests for the recordings of consents and clarification as to whether they were, in fact, held indefinitely. The Case Officer's questions were not, in her view, adequately answered before she prepared her report dated 1st. June, 2016. In particular, no evidence of opt – ins by call recordings or otherwise was produced, despite assurances that TDP was marshalling the necessary evidence. Similarly, there was no record of TDP consulting the ICO to ensure compliance, as it claimed.
14. On 14th. September, 2016, the ICO issued a Notice of Intent indicating that she was minded to issue a final MPN. In summary it alleged contraventions of PECR regulation 21 such as to empower her to issue an MPN under DPA s.55A(3)(b)(3). Hence she contended that the contraventions were not deliberate but involved an obvious risk that a contravention would occur and

a failure to take reasonable steps to prevent it. In accordance with the statutory procedures, it set out the underlying case and invited representations.

15. In response, Mr. Montague provided an external drive containing a spreadsheet of opt – in date stamps, three of the opt – in calls and two of recorded sales. He described the number of complaints as minimal compared with more than a million calls made.

16. An examination of this material led the ICO team manager to record that the two IT Protect direct calls contained false statements as to the subscriber receiving nuisance calls and the Pro Block product filtering out all international and UK nuisance calls and all unwanted and automated calls. Furthermore, there were indications that the recordings had been edited.. The opt – in calls were presented as Lifestyle surveys or household questionnaires when they were, in reality, lead direction calls. No mention was made of call – blocking services and the final message stated that they called on behalf of data brokers acting for named brands including IT Protect. Subscribers would be contacted only with relevant information that they had provided to the marketing questionnaire. This was not the case.

17. The ICO, having received representations from IT Protect, issued an MPN in the sum of £40,000 on 11th. January, 2017. It repeated the case set out in the Notice of Intent for her finding of contraventions and the justification for the issue and amount of the MPN, adding only the statement that she had taken account of IT Protect’ s representations and a reference to public concern as to these practices and the need to encourage compliance with PECR and, by the same token, deter contraventions.

18. Essentially, the ICO’ s case justifying an MPN was that -

- the requirements of regulation 21(1)(b) were satisfied; it was more probable than not that the TPS - registered subscribers who complained, whether to TPSL or the ICO, did not consent to marketing calls from IT Protect, as provided for in regulation 21(4).
- That being so, the risk of such contravention in the absence of rigorous due diligence on the part of the data purchaser, here IT Protect, was obvious, given the widespread publicity given to the apparent frequency of such contraventions.
- There was no evidence of adequate checks by IT Protect on the giving of consents. The belatedly produced recordings of three “Lifestyle survey” calls said to include examples of opt – ins appeared to have been edited;
- in any case, such calls included misleading statements, were in reality themselves direct marketing calls within regulation 21, did not refer to call – blocking products and stated that they were calling on behalf of data brokers acting for IT Protect (and others).
- Therefore, such recordings did not evidence or constitute the obtaining of consent to direct marketing by IT Protect (see also regulation 22);
- The complaints probably represented a much larger number of contraventions. These were serious contraventions for the purposes of DPA s.55A(1)(a).
- IT Protect was not proved to have committed them deliberately but had failed to take any reasonable steps to prevent them.

19. IT Protect’s case is contained in its responses to the ICO investigation, including such documentary evidence as was provided, and in its Notice of Appeal.

20.It submitted that –

- The information supplied to the ICO clearly proved compliance with regulation 21.
- All subscribers called by IT Protect specifically opted in to receive marketing calls from IT Protect. Recordings of such calls were now preserved for a year but for six months at the time in question.
- Stringent checks were carried out to ensure that those whose data were supplied to IT Protect had consented to IT Protect calls.
- So far from targeting elderly subscribers, IT Protect purchased the data of those within the age range 18 – 65 only.
- There was no pretence of a connection with BT.
- The voice recordings supplied to the ICO proved that the complaints made to the TPSL and the ICO were fabrications.
- IT Protect responded promptly to every complaint received. The unanswered complaints had not been received by IT Protect.
- Its due diligence consisted in checking purchased data (evidently the opt – in time and date stamps) to ensure the validity of opt – ins.

The Notice of Appeal concludes with a criticism of the ICO’s data protection practices which is irrelevant to this appeal.

21.Submissions as to the amount of any order, should a contravention be proved, were very limited.

22.The ICO observed that IT Protect appeared to have the financial resources to mount a large recruitment operation in 2015 – 16. She had regard to five

different levels of fine imposed and concluded that a fine at the top of the second level was appropriate. The use of purported survey calls for first contact and the nature of the product marketed were aggravating features. There was no clear evidence that the fine proposed would seriously damage IT Protect.

23.IT Protect supplied merely an Abbreviated Balance Sheet as at 31st. October, 2015 showing net assets of £13,740. Its Notice of Appeal claimed that the fine would destroy it.

The reasons for our decision

24.Five issues arise.

- (a) Has the ICO proved that IT Protect made unsolicited calls to TPS subscribers who had not consented to receive such calls from IT Protect?
- (b) If so, did IT Protect know, or should it have known that there was a risk that such contraventions of PECR regulation 21 would occur?
- (c) If the answer to (b) is “Yes”, did IT Protect take reasonable steps to prevent contraventions of regulation 21?
- (d) If it did not, were the contraventions serious ?
- (e) If they were serious, was the amount of the Monetary Penalty appropriate?

25.We start from the obvious proposition that these are civil, not criminal proceedings. Hence the standard of proof required to establish a contravention is the balance of probabilities.

26. We interpret the absence from the somewhat exiguous grounds of appeal of any contradiction to a significant relevant statement in the MPN as an acceptance that it is correct. Contested matters are concisely and emphatically challenged.

27. Issue (a) involves the question whether the complaints were false, or at least, the result of confusion, that is to say that the complainants had, in fact, opted to receive calls from IT Protect in accordance with regulation 21(4). The last paragraph of Point 14 in the Grounds of Appeal states that the ICO could provide no details of the complainants nor voice recordings of their complaints and that “*the voice recording sent to the ICO proves beyond any doubt whatsoever this is a complete fabrication*”.

28. Whatever the truth as to any particular call, (and we do not, of course imply that any was a fabrication; we have not listened to them), it would be very remarkable if each of 157 independent calls, or even a significant proportion of them made a deliberately false or even a mistaken claim that the subscriber had not opted in. The ICO was perfectly justified in treating these complaints as prima facie evidence of unsolicited calls to subscribers who had not opted in, which IT Protect could challenge by production of the relevant recordings or other primary evidence of consent / opt in. Subject to the three recordings, the value of which is doubtful, to say the least, the only evidence submitted was the date/time opt in stamps. In our view those carry very little weight when matched with the large number of complaints and (save for the three, submitted after receipt of the ICO’s Notice of Intent to issue an MPN) the absence of opt in recordings, the explanation for which is unconvincing.

29. As to issue (b), the general public is widely aware of the prevalence of unsolicited “cold – calling” and a company such as IT Protect, whose very

business was the sale of related devices, clearly knew of the risk of contraventions, especially where the relevant data were purchased from a third party.

30. For the purposes of issue (c), we accept that regulation 21(4) covers a case, such as this, where the notification of consent (“no objection”) is given indirectly to the intending caller via a third party acting as its agent. That is, of course, subject to the agent complying fully with PECR when obtaining such consent.

31. Issue (c) is really the nub of this appeal, namely - did IT Protect take reasonable steps to prevent contraventions. What steps it took is a matter uniquely within the knowledge of its directors. In such circumstances, it is common, in criminal legislation, to place a legal burden on the trader to prove to the civil standard, that it took such steps, believed what it alleged or held a requisite licence or authority (e.g., Trade Marks Act, 1994, Licensing Act, 2003 and see *R v Hunt [1975] Q.B. 27*). It is, therefore entirely legitimate for the Tribunal, conducting civil, not criminal proceedings, whilst alert to the overall burden of proof resting on the ICO, to look to the Appellant to show what steps it took and that they were reasonable. It is then in a position to decide, in accordance with the civil standard of proof, (i) what steps were taken and (ii) whether they were reasonable. This Tribunal accepts that the proper approach to making its findings on regulation 21 is the same as was adopted in relation to regulation 22 by another FTT in *Optical Express (Westfield) Ltd. v Information Commissioner (EA/2015/0014)*.

32. A purchaser of opt in data must perform rigorous due diligence on the evidence that its supplier is obtaining the subscriber’s consent to direct marketing of a specific type of product or service by the purchaser. Where the

contact call is recorded (which should be the case), this must involve regular sample testing of recordings. This would generally require a specific provision in the contract with the data supplier giving the data purchaser ready access to such evidence. It must then assure itself that all the PECR requirements for overriding the TPS registration are met so as to achieve compliance with regulation 21(4). This is in line with the ICO's Guidance.

33. Here, the only evidence of opt ins supplied or required at the time of sale was the time and date stamps supposedly relating to them. There was no attempt to examine recordings, which purported to be the direct evidence of consent. There was no screening against the TPS. The contract with TDP/DPS made no provision for routine checks by IT Protect, simply offering to provide evidence, if it still existed, in the event of a regulatory inquiry (In this case it provided none).

34. IT Protect was apparently content to rely largely on assurances of compliance unsupported by contemporaneous evidence. It is noticeable that such evidence was not forthcoming from the data supplier when requested by the ICO. In any event, waiting for regulatory action before seeking evidence of consent is not adequate monitoring.

35. The Tribunal is inclined to regard the recordings eventually provided to the ICO as further strengthening her case. However, whilst we note the description of their content, we have not listened to them and do not take account of that content in determining this issue. Equally, we are unimpressed by the Appellant's reference to potential evidence which it has not produced.

36. In summary, the Notice of Appeal consists to a substantial extent of emphatic claims unsupported by evidence.

37. The Tribunal has no doubt that the steps taken to prevent contraventions fell well short of reasonable due diligence sufficient to comply with the requirements of regulation 21(4).

38. In determining the seriousness of these contraventions (issue (d)) it is right to consider the scale of contravention which may fairly be inferred from the number of complaints in the period specified, the evidence, if any, as to the subscribers targeted, the evidence as to what the caller said on the occasions reported and the type of product which the caller is seeking to sell.

39. Mr. Montague, presenting the appellant's Notice of Appeal, claimed that two million calls were made in two years and dismissed 157 complaints as "tiny". As with other assertions in this document, he does not provide the evidence which he says is available but we are prepared to accept that a very large number of calls were made. To treat the number of complaints as the number of contraventions is quite unrealistic, however. There is no formula to relate the one to the other but experience and common sense strongly suggest that only a small proportion of those unlawfully called take the matter up. Many simply end the call and resume what they were doing. We are satisfied that vastly more than 157 contraventions occurred, though it is impossible to estimate the total.

40. Whilst there were probably calls which involved obviously elderly subscribers, we do not think that a finding that this group was "targeted" is justified. There is no evidence that IT Protect had particular information enabling it to do so.

41. Similarly, we accept that there were calls that hinted or stated that the caller was related to BT. The evidence does not, however, establish that this was a feature of the IT Protect pitch.

42. More significant in the assessment of gravity is the fact that the product for sale was designed to achieve, supposedly more effectively, the screening function of TPSL. The need to demonstrate compliance with the statutory requirements could hardly be greater than in a trade designed to achieve what TPSL was supposed to provide.

43. Also relevant is the apparently misleading nature of the calls made by TDP, the pretence that it was conducting a survey, which, we conclude, was probably a common, if not universal feature of its pitch. IT Protect must have known of this ploy since it relied on recordings which included its use..

44. We have no doubt that these contraventions were sufficiently serious to merit an MPN.

45. As to the appropriate fine, the ICO has considerable experience in assessing the amount and has established graduated categories by reference to other cases. Like her, we must identify the aggravating and mitigating factors relevant to the penalty.

46. We have already referred to the aggravating features specific to this case and do not repeat them. We have regard to the scale of the contraventions in relation to the maximum penalty. The evidence of IT Protect's financial position is meagre and could have been enlarged by IT Protect without great difficulty, we believe. We must take account of the fact that these were contraventions of DPA s.55A(3) not (2). Within that lesser category of

contravention we find little mitigation, save for the fact that this was the company's first breach of PECR, albeit within a brief trading history.

47. On the minimal financial evidence before us and having regard to the relative seriousness of these multiple contraventions, we see no reason to reduce the fine imposed by the ICO. Indeed, although we consider her assessment of the appropriate contravention was entirely reasonable, there was a case for treating this contravention as deliberate. She did not do so and nor do we. If, unfortunately for the shareholders and employees of IT Protect, the result is that it ceases trading through insolvency, it is hard to see any grave damage to the wider public interest.

48. For these reasons we dismiss this appeal.

49. This is a unanimous decision.

Signed

David Farrer Q.C.

Judge of the First-tier Tribunal

Date: 21st. August, 2017

Date Promulgated: 24 August 2017