

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Falcon & Pointer Limited

Of: Suite C, 4th Floor Princess House, Princess Way, Swansea, SA1 3LW

1. The Information Commissioner ("Commissioner") has decided to issue Falcon & Pointer Limited ("the 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 regulations 19 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: 06131381), 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 regulations 19 of PECR.
4. 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.”

5. Regulation 24 of PECR provides:

“(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);

...

(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."

6. 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."

7. 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.

8. 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

9. The Company operated as a claims management company offering PPI and packaged bank accounts. However, in January 2016 the Claims Management Regulator revoked the Company's licence so that it could no longer offer regulated claims management services.
10. Between 26 June 2015 and 31 October 2015, the ICO received 5,535 complaints about automated direct marketing calls made by the Company. The recorded messages sent did not always identify the sender or instigator of the call. The following are examples of the complaints received by the Commissioner's office:
 - "Our son is in hospital and as it was so late we both (my wife) thought it was concerning him. In addition it is just on top of the usual 12 or more unwanted calls we have each week."
 - "The most annoying and disgusting thing was the time of the call in the early hours of the morning. It woke everyone in the house including young children [sic] It caused me a lot of anxiety as I do not receive calls at that time of day unless it is an emergency or bad news. A family member is currently seriously ill and I immediately thought the worse. Since the call I have been unable to return to sleep."

- “They called at half 3 in the morning! I have a sick grandfather dying of cancer, and it was assumed things had taken a turn for the worst. This is a TPS registered number. I hate getting these calls at the best of times. Now they're ringing at utterly ridiculous times.”
 - “I'm disabled. I had to get up and answer the phone. It caused me additional pain on a day when I'm already feeling unwell.”
 - “I am constantly receiving these calls. They are driving me to distraction. Nothing seems to happen to prevent them. I feel completely powerless.”
11. On 26 August 2015, the ICO wrote to the Company to remind the organisation of its obligations under regulation 19 of PECR (among other things) and asking it to provide evidence that the recipients of the calls had consented to receiving automated marketing calls from the Company. The Company was also warned that the ICO could issue civil monetary penalties up to £500,000 for PECR breaches.
12. The Company informed the ICO that the automated calls had been made on its behalf by a third party, which also provided the data. The Company claimed to have been informed that the calls would be screened against the Telephone Preference Service and that the data was “opt in and or TPS checked”. However, the Company failed to produce any evidence that it had the prior consent of the recipients to send or instigate the calls.
13. Despite informing the ICO that it had ceased making automated calls by the end of June 2015, complaints about such calls continued to be received.

14. The Commissioner subsequently established that between 26 June 2015 and 7 September 2015 the Company made 2,475,481 automated direct marketing calls.
15. The Commissioner has made the above findings of fact on the balance of probabilities.
16. The Commissioner has considered whether those facts constitute a contravention of regulation 19 of PECR by the Company and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

17. The Commissioner finds that the Company contravened regulation 19(1) and (2) of PECR.
18. The Commissioner finds that the contravention was as follows:
19. Between 26 June 2015 and 7 September 2015, the Company instigated the sending of 2,475,481 automated marketing calls to subscribers without their prior consent.
20. The Commissioner is satisfied that the Company was responsible for this contravention.
21. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

22. The Commissioner is satisfied that the contravention identified above was serious. This is because the Company instigated the making of 2,475,481 automated marketing calls in a ten week period to subscribers without their prior consent. As a result of the calls instigated by the Company, the ICO received 5,535 complaints between 26 June 2015 and 31 October 2015.
23. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

24. 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).
25. The Commissioner considers that in this case the Company did deliberately contravene regulation 19 of PECR in that sense.
26. 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.

27. Having been provided with advice about the requirements of regulation 19 of PECR, and despite having informed the ICO that it had ceased making automated calls by the end of June 2015, it continued to send or instigate the sending of such calls.
28. Whilst the Company may not have deliberately set out to cause distress, it did deliberately send or instigate automated marketing calls on a large scale to subscribers.
29. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

30. 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.
31. The latter has included the issuing of a Notice of Intent dated 15 February 2016, in which the Commissioner set out his preliminary thinking. The Company did not make any representations in response to that Notice of Intent. In reaching his final view, the Commissioner has taken into account the representations made by the Company in other correspondence on this matter.
32. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

33. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.
34. 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.
35. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

36. 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.

37. 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.

38. The Commissioner has also taken into account the fact that the Company has contravened regulation 24 of PECR in that it did not always identify the person who was sending or instigating the automated marketing calls and provide the address of the person or a telephone number on which this person can be reached free of charge.
39. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£175,000 (one hundred and seventy five thousand pounds)**.

Conclusion

40. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by 20 April 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.
41. If the Commissioner receives full payment of the monetary penalty by 19 April 2016 the Commissioner will reduce the monetary penalty by 20% to **£140,000 (one hundred and forty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
42. 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.

43. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.

44. Information about appeals is set out in Annex 1.

45. 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.

46. 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 21st day of March 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;
 - 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)).