

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Apex Assure Limited

Of: Second Floor
127 Gloucester Road
Brighton
BN1 4AF

1. The Information Commissioner ("the Commissioner") has decided to issue Apex Assure Limited ("Apex") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to a serious contravention of regulations 21 and 24 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. Apex, whose registered office is given above (Companies House Registration Number: 12747643) is the organisation 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 notified the company that they do not object to receiving such calls from it.

5. 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."

6. 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.”

7. 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 –

...

(b) in relation to a communication to which regulation 21 [or 21A] (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.”*

8. 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 which operates the register on the Commissioner’s behalf. 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.
9. Section 122(5) of the DPA18 defines direct marketing as *“the communication (by whatever means) of advertising material or marketing material which is directed to particular individuals”*. This definition also applies for the purposes of PECR (see regulation 2(2) PECR & Schedule 19 paragraphs 430 & 432(6) DPA18).
10. “Individual” is defined in regulation 2(1) of PECR as *“a living individual and includes an unincorporated body of such individuals”*.
11. A “subscriber” is defined in regulation 2(1) of PECR as *“a person who is a party to a contract with a provider of public electronic communications services for the supply of such services”*.
12. Section 55A of the DPA (as applied to PECR cases by Schedule 1 to PECR, as variously amended) 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,

(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."

13. 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.
14. PECR were enacted to protect the individual's fundamental right to privacy in the electronic communications sector. PECR were subsequently amended and strengthened. The Commissioner will interpret PECR in a way which is consistent with the Regulations' overall aim of ensuring high levels of protection for individuals' privacy rights.
15. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the DPA18: see paragraph 58(1) of Schedule 20 to the DPA18.

Background to the case

16. Apex is a company based in Brighton. It first came to the attention of the Commissioner during a meeting with Brighton Trading Standards ("BTS"). BTS was investigating breaches of consumer protection legislation by several companies based in Brighton that operated call-centres from serviced office space. BTS informed the Commissioner that it was to carry out a warrant against Apex on 17 May 2021 and subsequently arranged for the Commissioners' Officers to be in attendance.
17. Entry to the premises was successful and the Commissioner obtained information including the identification of trading names used by Apex during its calls, links between Apex and several other companies, call scripts, and confirmation that the call centre staff used [REDACTED] ("[REDACTED]") as the communications service provider to make outgoing calls from the premises.
18. The Commissioner issued a third-party information notice to [REDACTED] on 9 July 2021 ("the 3PIN"). The 3PIN requested, for the period from 16 July 2020 to 9 July 2021, information including a list of the telephone numbers or range of numbers allocated to Apex, the connection dates and periods of use for each allocated number, and the call detail records for each CLI, including the numbers called, the time and date of the call and the call duration.
19. On 4 August 2021 [REDACTED] confirmed that its end client was not Apex but a company called PRO. It informed the Commissioner it would provide call dialler records and calling line identifiers ("CLIs") used by PRO. It also informed the Commissioner that it was unable to determine which CLIs used by PRO had been specifically allocated to Apex. Due to the

number of call dialler records, the Commissioner agreed that [REDACTED] would only provide the records for the 6-month period from 1 February 2021 to 31 July 2021 ("the contravention period").

20. Following receipt of these call detail records and CLIs, on 16 August 2021 the Commissioner opened an investigation into whether Apex was in breach of Regulations 21 and 24 of the PECR. An Information Notice was issued to Apex on 18 August 2021 by special delivery. It requested, amongst other things, the volumes of calls made and received by Apex, the CLIs Apex used to make the calls, and the sources of the data Apex used to make calls to individuals. It required a response with 35 days.
21. The Commissioner did not receive a response and sent a chaser letter to Apex on 28 September 2021. The letter was returned by Royal Mail on 30 September 2021, as no one was present at the address.
22. As Apex had failed to respond to the Information Notice, it was not clear to the Commissioner which telephone numbers had been used to make calls. On 11 October 2021, the Commissioner therefore asked BTS for any information it held as to which numbers were used by Apex. BTS confirmed that, on the basis of information obtained during the execution of the warrant, Apex used number ranges starting 01273 977 or 01273 655.
23. Using this information, the call detail records obtained from [REDACTED] were screened against the TPS register to identify any telephone numbers which had received a call from the above number ranges after 28 days of registration. The results indicated that, during the contravention period, 2,112,115 calls had been made from CLIs in the number ranges used by Apex. Of those calls, 1,090,881 (51.64%) were made to

individuals registered with TPS. The screening exercise also showed that 38 CLIs had been used to make these calls.

24. These CLIs were then examined against complaints submitted to the TPS and to the Commissioner. This showed that 39 complaints had been submitted to the TPS, and 83 complaints had been submitted to the Commissioner, about calls made from these CLIs during the contravention period. The trading names used in the calls which were the subject of these complaints included (amongst others) [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

25. The complaints related to unsolicited marketing calls, claiming to be from organisations including those listed above, seeking to sell white goods warranties and renewals on white goods insurance. For instance, one individual complained that:

"They were trying to tell me my cover had ran out on my washing machine and that I should take a new cover out with them. I have had numerous calls. They appear as though they are calling from [REDACTED] [REDACTED]. I have phoned [REDACTED] who say they are aware of this Company. I do not wish to keep being pestered. I have asked them numerous times to stop phoning. They are so persistent and try to fool the recipient into believing their insurance cover on an appliance has expired. It concerns me that although I realise they are not who they purport to be, elderly or vulnerable people are likely to panic and be caught out. They must be stopped from making these unwanted calls."

26. Another individual complained that the caller was:

"Trying very hard to sell my vulnerable elderly father insurance for his washing machine and white goods. It is a completely unsolicited and very annoying sales call, especially as my dad can't hardly walk. I registered him to give him some peace but lately he has has a continuous and determined phone sales, about three a day. It is almost as if someone has sold his phone number as an easy sales target... They cold called an elderly and very disabled man who is registered with the telephone preference service in order not to have to be pestered with unsolicited nuisance hard sales calls. It made me furious because he was expecting an important call from somebody important, and this call not only prevented a vital call to the family from getting through, it caused him to struggle to the phone just so they could cause annoyance. They should be outright ashamed of themselves."

27. A third complaint stated that the caller:

"Told me I had previously had a homecare plan with them for washer, fridge and cooker. I've never had a plan with them. Caller told me his name was [REDACTED]. I told him that this was an unsolicited phone and he continued talking. I repeated that this is an unsolicited phone call. As soon as I asked him if he had heard of the telephone preference service he hung up.. It worries me when I receive unsolicited calls. Where did they get my number from? Why didn't they check the telephone preference service?"

28. The Commissioner also acquired several call scripts, obtained at the execution of the warrant on Apex's address, containing instructions on how to make various different unsolicited marketing calls.
29. It therefore appears that the 38 CLIs identified from the number ranges supplied by BTS have been used by Apex to make unsolicited

marketing calls to TPS telephone numbers, and without identifying Apex as the company making the calls.

30. Due to Apex's lack of engagement with Commissioner's investigation, the Commissioner is unable to determine how many of the 1,090,881 calls successfully connected. However, the Commissioner is satisfied that the 122 calls that resulted in complaints to the TPS and the Commissioner were connected calls and were all made for the purposes of direct marketing as defined by section 122(5) DPA18.
31. The Commissioner has made the above findings of fact on the balance of probabilities.
32. The Commissioner has considered whether those facts constitute a contravention of regulations 21 and 24 of PECR by Apex Assure and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

33. The Commissioner finds that Apex Assure contravened regulations 21 and 24 of PECR.
34. The Commissioner finds that the contravention was as follows:
35. Between 1 February 2021 to 31 July 2021, Apex used a public telecommunications service for the purposes of making 122 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. This resulted in 122 complaints being made to the TPS and the

Commissioner.

36. The Commissioner is also satisfied for the purposes of regulation 21 that these 122 unsolicited direct marketing calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls, and who for the purposes of regulation 21(4) had not notified Apex that they did not object to receiving such calls.
37. For such notification to be valid under regulation 21(4), the individual must have taken a clear and positive action to override their TPS registration and indicate their willingness to receive marketing calls from the company. The notification should reflect the individual's choice about whether or not they are willing to receive marketing calls. Therefore, where signing up to use a product or service is conditional upon receiving marketing calls, companies will need to demonstrate how this constitutes a clear and positive notification of the individual's willingness to receive such calls.
38. The notification must clearly indicate the individual's willingness to receive marketing calls specifically. Companies cannot rely on individuals opting in to marketing communications generally, unless it is clear that this will include telephone calls.
39. Further, the notification must demonstrate the individual's willingness to receive marketing calls from that company specifically. Notifications will not be valid for the purposes of regulation 21(4) if individuals are asked to agree to receive marketing calls from "similar organisations", "partners", "selected third parties" or other similar generic descriptions.
40. The Commissioner considers that Apex failed to seek or obtain any notification of any individual's willingness to receive marketing calls from it.

41. Further, Apex failed, as required by regulation 24 of PECR, to provide the recipient of the calls with the particulars specified at regulation 24(2) of PECR. In particular, Apex failed to inform the recipient of the calls of its name. Instead, it misrepresented itself as being one of a number of different companies.
42. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

43. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulations 21 and 24 by Apex arising from the organisation's activities between 1 February 2021 to 31 July 2021, and this led to 122 unsolicited direct marketing calls being made to subscribers who were registered with the TPS and who had not notified Apex that they were willing to receive such calls, and 122 complaints being made as a result.
44. The contravention identifies 122 connected calls being made in breach of the PECR. However, Apex made 1,090,881 calls to numbers registered with the TPS over the contravention period. Although the Commissioner is unable to determine how many of these calls connected, many of them will have done so. It is therefore likely that a large number of other individuals registered with the TPS for more than 28 days, other than those who submitted complaints to the TPS and the Commissioner, also received unsolicited marketing calls from Apex. The number of calls made in breach of the PECR is therefore almost

certainly higher than the 122 connected calls identified by the Commissioner.

45. Further, although the contravention period is limited to 1 February 2021 to 31 July 2021, this was due to technical difficulties on the part of [REDACTED] in providing the Commissioner with call dialler records and CLIs. On balance, it is likely that other calls in breach of the PECR were made outside of this contravention period.
46. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

47. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that Apex's actions which constituted that contravention were deliberate actions (even if Apex did not actually intend thereby to contravene PECR).
48. The Commissioner considers that in this case Apex did deliberately contravene regulations 21 and 24 of PECR. The calls scripts found at Apex's premises and the significant number of calls made suggests that this was part of a large-scale campaign of making unsolicited marketing calls. There is no evidence that any steps were taken to comply with PECR.
49. Previous conduct by the network of linked companies of which Apex is a part suggests that this is not an isolated contravention. When the Commissioner carries out an investigation, the individuals behind these companies seek to close them down in order to avoid further sanctions. The individuals behind these companies have been warned on several

occasions that their activity fails to comply with PECR and that they must cease making such calls. However, when the Commissioner brings enforcement action, they close down the company that is the subject of the enforcement and open a new organisation to continue their activities.

50. For the above reasons, the Commissioner is satisfied that this breach was deliberate
51. Further and in the alternative, the Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
 52. Firstly, he has considered whether Apex knew or ought reasonably to have known that there was a risk that this contravention would occur. He is satisfied that this condition is met. The individuals behind Apex have previously run companies which have been the subject of investigations by the Commissioner, and so are aware of the PECR. Further, given that Apex relied entirely on direct marketing due to the nature of its business, it should reasonably have sought to familiarise itself with the relevant legislation.
 53. The Commissioner has also 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 live calls must not be made to any subscriber registered with the TPS, unless the subscriber has specifically notified the company that they do not object to receiving such calls. In case organisations remain unclear on their obligations, the ICO operates a telephone helpline. ICO communications about

previous enforcement action where businesses have not complied with PECR are also readily available

54. Standard practice of the TPS is to contact the organisation making the calls on each occasion a complaint is made. It is therefore reasonable to believe that Apex would have received a notification from the TPS for each of the complaints being made in this case. That there were 39 complaints made to the TPS alone over the period of the contravention should have made Apex aware of the risk that such contraventions may occur and were indeed occurring.
55. It is therefore reasonable to suppose that Apex Assure should have been aware of its responsibilities in this area.
56. Secondly, the Commissioner has gone on to consider whether Apex Assure failed to take reasonable steps to prevent the contravention. Again, he is satisfied that this condition is met. Given the volume of calls and complaints, it is clear that Apex failed to take those reasonable steps.
57. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

58. The Commissioner has taken into account the following aggravating features of this case:
 - The complaints demonstrate that the calls in this case were aggressive and misleading in nature. False statements were made, such as claiming

that the caller already had an established business relationship with individuals when this was not the case.

- This case involved deliberate action for financial or personal gain. The purpose of this marketing was to generate cashflow and profit for Apex and associated individuals.
- The Commissioner's Guidance or Advice has been ignored. The Commissioner provides clear guidance on its website on the rules of direct marketing. There is also a helpline should organisations require further clarification in the event of any queries about their obligations under the PECR.
- There has been no engagement with the Commissioner's investigation by Apex or the individuals concerned.

59. The Commissioner has considered that there are no mitigating factors to take into account in this case.

60. 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 the procedural rights under section 55B have been complied with.

61. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out his preliminary thinking. Apex were invited to make representations in response to that Notice of Intent but did not do so.

62. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

63. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.
64. The Commissioner has considered the likely impact of a monetary penalty on Apex. The Commissioner has limited information available to him about the financial status of the company, not least due to Apex's lack of engagement. However, he has decided on the information that is available to him, that a penalty remains the appropriate course of action in the circumstances of this case. Apex was invited to make financial representations in response to the Notice of Intent but did not do so.
65. 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 are not registered with the TPS and/or specifically indicate that they do not object to receiving these calls.
66. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

67. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£230,000 (two hundred and thirty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

68. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **17 November 2022** 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.
69. If the Commissioner receives full payment of the monetary penalty by **16 November 2022** the Commissioner will reduce the monetary penalty by 20% to **£184,000 (one hundred and eighty 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.
70. 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.

71. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
72. Information about appeals is set out in Annex 1.
73. 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.
74. 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 17 October 2022

Andy Curry
Head of Investigations
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 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty 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 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:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester
LE1 8DJ

Telephone: 0203 936 8963

Email: grc@justice.gov.uk

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 (Information Rights) are contained in section 55B(5) 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)).