

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Eco Spray Insulations Limited

Of: Monksbrook House
13-17 Hursley Road
Chandler's Ford
Eastleigh
SO53 2FW

1. The Information Commissioner ("the Commissioner") has decided to issue Eco Spray Insulations Limited ("Eco Spray") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to a serious contravention of regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2003/2426) ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. Eco Spray, whose registered office is given above (Companies House Registration Number: 11063555) 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 its calls.

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. 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 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.
8. Section 122(5) of the Data Protection Act 2018 (“DPA18”) defines direct marketing as “*the communication (by whatever means) of advertising 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).

9. 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”.

10. 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.”

11. 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.

12. 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.

13. 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

14. Eco Spray is an energy efficiency company specialising in energy saving products for roofs, floors and internal walls. At the relevant times, it operated a website which stated that the company is "one of the leading spray foam insulation in the UK with 20 years experience in the insulation industry," (sic).
15. Eco Spray came to the attention of the ICO in August 2020 when complaints data from the TPS indicated that it was in the top 20 of organisations complained about in February, May and June 2020.
16. Enquiries made with the relevant service providers established that the telephone numbers identified by the complaints were allocated to Eco Spray, and that between 2 January and 30 September 2020, 178,190 connected calls had been made to TPS registered numbers.
17. On 4 November 2020, the ICO sent Eco Spray an initial investigation letter, outlining the requirements of regulation 21 and the Commissioner's powers, along with a spreadsheet of complaints, and asking questions about the calls it had made to TPS registered numbers.

18. On 5 November 2020, Eco Spray provided a brief response confirming the telephone numbers used in making marketing telephone calls, along with its trading styles, a copy of its call script, and the call volumes. Eco Spray stated that it had made 549,000 marketing calls between 1 January and 30 October 2020, of which 184,384 were connected calls. Eco Spray informed the ICO that the call data was sourced from two data providers: DBS Data and JH Data, which were third parties which had obtained consent from individuals through surveys, either online or via the telephone using legitimate interest.
19. In the course of this and further correspondence exchanged between November 2020 and March 2021, it was confirmed that:
 - (a) Of the 549,000 marketing calls made, approximately 90% of the data had come from JH Data and 10% from DBS Data;
 - (b) Eco Spray could provide little information about JH Data, which had provided 90% of the leads. The ICO was unable itself to find information about "JH Data" at Companies House, save for an entry for an organisation called "JH Data Services Ltd" which dissolved on 27 December 2011.
 - (c) Eco Spray was unable to provide information about how the leads had been generated by either company to where the data had been obtained from;
 - (d) Eco Spray had not carried out any due diligence checks into the data it had bought and had simply assumed it would be compliant and screened against the TPS register;
 - (e) Eco Spray was unable to provide any records indicating that those subscribers it called had informed Eco Spray that they did not object to receiving marketing calls from them;
 - (f) Eco Spray was not aware that the system they were using had the TPS screening facility turned off;

(g) Eco Spray accepted that it was negligent in its actions in this regard.

20. The Commissioner is satisfied that the 178,190 connected calls made by Eco Spray to TPS registered numbers between 2 January and 30 September 2020 (approximately 19,798 per month and 4,689 per week) were all made for the purposes of direct marketing as defined by section 122(5) DPA18.
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 Eco Spray and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

23. The Commissioner finds that Eco Spray contravened regulation 21 of PECR.
24. The Commissioner finds that the contravention was as follows:

Between 2 January 2020 and 30 September 2020, Eco Spray used a public telecommunications service for the purposes of making 178,190 unsolicited calls for direct marketing purposes which were connected 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 22 complaints being

made to the TPS and a further 14 complaints being made directly to the ICO through the ICO Online Reporting Tool.

25. The Commissioner is also satisfied that, for the purposes of regulation 21, these 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 Eco Spray that they did not object to receiving such calls.
26. For such notification to be valid under regulation 21(4), the individual must have taken a 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.
27. The notification must clearly indicate the individual's willingness to receive marketing calls specifically. Companies cannot rely on individuals opting into marketing communications generally, unless it is clear that this will include telephone calls.
28. 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.
29. Eco Spray has been unable to demonstrate that any of the TPS subscribers it made marketing calls to had notified it that they did not

object to receiving such calls.

30. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

31. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by Eco Spray arising from the organisation's activities between 2 January 2020 and 30 September 2020 and this led to 178,190 unsolicited direct marketing calls being made to subscribers who were registered with the TPS and who had not notified Eco Spray that they were willing to receive such calls, and 36 complaints being made as a result.
32. Eco Spray stated that leads were purchased from JH Data and DBS Data, of which the former supplied 90% of the leads used to make calls. The ICO asked Eco Spray on several occasions to provide details of how it was introduced to JH Data, however, Eco Spray was unable to provide such details, or to verify from where the data had been obtained. Eco Spray made multiple errors which contributed to the contravention, from having limited procedures or policies to ensure compliance, to failing to conduct due diligence into the data providers and not keeping records of how consent was obtained.
33. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

34. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this would mean that Eco Spray's actions which constituted that contravention were deliberate actions (even if Eco Spray did not actually intend thereby to contravene PECR).
35. The Commissioner does not consider that Eco Spray deliberately set out to contravene PECR in this instance. He has therefore gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
36. Firstly, he has considered whether Eco Spray 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, for the following reasons.
37. The Commissioner notes that any company conducting direct telephone marketing should take appropriate and necessary organisational steps to comply with Regulation 21 of PECR. From the information provided by Eco Spray, the Commissioner considers that Eco Spray failed to implement necessary policies or procedures to ensure compliance, instead relying on assurances from the data providers that the data was obtained compliantly.
38. Eco Spray conducted a very large amount of direct telephone marketing as part of its business model. In conducting such a large number of calls, Eco Spray ought reasonably to have familiarised itself with the legislation around direct marketing calls. It failed abjectly to do so. Further, the existence of legal controls on direct marketing and of the importance of the TPS register is widely known, and public awareness of wider data protection issues and of the importance of

using data lawfully is also widespread.

39. 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 Commissioner operates a telephone helpline. ICO communications about previous enforcement action where businesses have not complied with PECR are also readily available.
40. It is therefore reasonable to expect organisations involved in direct marketing, like Eco Spray, to make sure that they have taken practical steps to understand and embed the law into their marketing processes.
41. 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 Eco Spray received a notification from the TPS for each of the complaints being made in this case, including in advance of the ICO's investigation. That there were 22 complaints made to the TPS alone over the period of the contravention should have made Eco Spray aware of the risk that such contraventions may occur and were indeed occurring.
42. It is therefore reasonable to suppose that Eco Spray should have been aware of its responsibilities under regulation 21.

43. Secondly, the Commissioner has gone on to consider Eco Spray failed to take reasonable steps to prevent the contravention. Again, he is satisfied that this condition is met.
44. The Commissioner's direct marketing guidance makes clear that organisations acquiring marketing lists from a third party must undertake rigorous checks to satisfy themselves that the personal data was obtained fairly and lawfully, that their details would be passed along for direct marketing to the specifically named organisation in the case of live calls, and that they have the necessary notifications for the purposes of regulation 21(4). It is not acceptable to rely on assurances given by third party suppliers without undertaking proper due diligence. No such checks were undertaken here.
45. Any organisation which purchases third party data should know the substantial risks involved, especially if they are not conducting due diligence on the third party data providers to ensure that the data supplied is as described. It was Eco Spray's responsibility to ensure that the data purchased was compliant. Reasonable steps that Eco Spray could have been expected to take in these circumstances may also have included:
 - a. screening the data in question against the TPS register itself, regardless of the assurances given by the third parties in question;
 - b. ensuring that it had in place an effective and robust suppression list;
 - c. familiarising itself with the legislation and ICO guidance applicable to marketing calls, and providing training to its staff accordingly.

46. Given the high volume of non-compliant calls, at 178,190, and indeed Eco Spray's own submissions, it is clear that it failed to take those reasonable steps.
47. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

48. The Commissioner has taken into account the following **aggravating features** of this case:
- a. Eco Spray's actions were done deliberately for financial gain, in that they aimed to generate sales and therefore profit;
 - b. Eco Spray's ignorance of the law was unacceptable given the nature of its business and the ready availability of guidance;
 - c. although Eco Spray cooperated with the Commissioner, it was unable to provide some of the information that was requested due to the serious inadequacy of its record-keeping;
49. The Commissioner has taken into account the following **mitigating features** of this case:
- a. No further complaints about Eco Spray appear to have been received since November 2020.
50. 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.

51. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out his preliminary thinking. In reaching his final view, the Commissioner has taken into account the representations made by Eco Spray on this matter.
52. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
53. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.
54. The Commissioner has considered the likely financial impact of a monetary penalty on Eco Spray. In doing so, the Commissioner has given careful consideration to the representations made by Eco Spray in response to the Notice of Intent. However, the Commissioner has decided that a penalty nevertheless remains the appropriate course of action in the circumstances of this case.
55. 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 have specifically indicated that they do not object to receiving such calls.

56. For these reasons, the Commissioner has decided to issue a monetary penalty.

The amount of the penalty

57. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£100,000 (one hundred thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

58. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by 24 June 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.
59. If the Commissioner receives full payment of the monetary penalty by 23 June 2022 the Commissioner will reduce the monetary penalty by 20% to **£80,000 (eighty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
60. 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.

61. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
62. Information about appeals is set out in Annex 1.
63. 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.
64. 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 24th day of May 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)).