

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Unite the Union

Of: 128 Theobalds House, Holborn, London, WC1X 8TN.

1. The Information Commissioner ("**Commissioner**") has decided to issue Unite the Union ("**Unite**") with a monetary penalty under section 55A of the Data Protection Act 1998 ("**DPA**"). The penalty is being issued because of a serious contravention of regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003, as amended ("**PECR**").
2. This notice explains the Commissioner's decision.

Legal framework

3. Unite the Union, is an independent trade union registered with the Certification Officer in accordance with the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992. It is the organisation stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for the purpose 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 given their consent to that company to receive such 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)-(5) provide:

"(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 Telephone Preference Service Ltd (“**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 (“**DPA 2018**”) defines direct marketing as “the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals”. This definition also applies for the purposes of PECR (see regulation 2(2) PECR and paragraphs 430 & 432(6) to Schedule 19 of the DPA 2018).
9. Consent in PECR is defined by reference to the concept of consent in the General Data Protection Regulation 2016/679 (“the **GDPR**”):

regulation 8(2) of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019.

Article 4(11) of the GDPR sets out the following definition of consent of the data subject as meaning “any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her”.

10. Recital 32 of the GDPR materially states that “When the processing has multiple purposes, consent should be given for all of them”. Recital 42 materially provides that “For consent to be informed, the data subject should be aware at least of the identity of the controller”. Recital 43 materially states that “Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case”.
11. “Individual” is defined in regulation 2(1) of PECR as “a living individual and includes an unincorporated body of such individuals”.
12. 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”.
13. 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.

14. 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.
15. 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.
16. 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

17. Unite is an independent trade union. It came to the attention of the Commissioner in February 2020 when complaints about unsolicited

direct marketing calls received in January 2020 were consolidated into a "Direct Marketing Monthly Threat Assessment" report compiled by the Information Commissioner's Office ("**ICO**"). Two complaints from subscribers registered with the TPS were made about Unite in relation to life insurance marketing calls. Further investigations revealed an additional 25 complaints which had been made directly to the Commissioner via her online reporting tool.

18. On 12 March 2020, the Commissioner sent an initial investigation letter to Unite, setting out her concerns about the organisation's compliance with PECR, attaching details of some of the complaints received by her, and requesting information about its business and marketing activities which would assist in her investigation.
19. Unite responded on 27 April 2020, advising the Commissioner it did not "run or promote a business", nor did it have customers. It obtained all of its personal data directly from members either when they made an online application to join Unite, by completing a hard copy membership application form (the contents of which were then uploaded to their membership system), or by changing or adding to their personal contact data after joining via their online account, calling the helpline or contacting one of Unite's various offices.
20. In response to the Commissioner's request for evidence of consent to receiving marketing calls, Unite advised the Commissioner it did not make unsolicited marketing calls; only calls updating members on the "services and benefits available to them under their union membership via Unite's membership helpline." Unite said this was a requirement in line with its Rule Book which governed membership of the trade union. The calls were undertaken by a third party processor, in accordance

with members' communication preferences. It added that the third party operated TPS screening.

21. Unite said its membership communication system acted as an internal suppression list. Members set their communication preferences when joining the Union and could change them at any time either by logging into their membership record via Unite's website, or by telephoning Unite.
22. The Commissioner obtained a screenshot of the communication preferences presented to Unite members at the point of joining the union online:

"We may use the details provided by you to contact you at your home address, by telephone, SMS or email in order to provide information specific to being a member of Unite the Union, including union activities, campaigns, services and/or benefits. If you wish in the future to opt-out of receiving information about any individual member benefit or service or change how we communicate with you, then you should visit the MyUnite website <https://myunite.unitetheunion.org/login> or contact your regional office. For full details as to how Unite will process your data please see Unite the Union's up to date privacy notice [HERE](https://unitetheunion.org/legal-information/privacy-policy) (<https://unitetheunion.org/legal-information/privacy-policy>) or contact your regional office for a copy."

23. The Commissioner noted that whilst individuals were told how to opt-out of receiving information, they were not given the option to opt-in to specific means of communication in relation to specific types of "services and/or benefits". There was no option for individuals to agree to electronic direct marketing from third parties, to select which

third parties, if any, they might wish to be contacted by, or to select the method by which they might consent to being contacted.

24. In response to the Commissioner's request for an explanation for nine of the complaints received by her, Unite did not agree with all the information provided by the case officer, stating that four of the calls did not connect to the subscriber and one call involved a matter unrelated to life insurance. Unite accepted the remaining four calls were to numbers registered with the TPS and should have been picked up by its third party processor through its TPS screening. In later correspondence, Unite explained this was a result of human error, and that the third party had changed their practices to ensure it did not happen again. Unite did not address the point that TPS screening would only have been necessary if it accepted the calls constituted direct marketing.
25. Unite provided details of its employee online interactive data protection training and said that staff were trained to "utilise PECR compliant principles when sending emails to members regarding any union activities." A copy of Unite's email guidance was attached, and included a link to the Commissioner's "Guide to PECR". An equivalent guide was not produced in relation to making telephone calls.
26. The Commissioner wrote to Unite again on 5 May 2020, requesting the sections of Unite's Rule Book governing calls about life insurance, and the telephone script used for making such calls.
27. On 27 May 2020, Unite responded, highlighting the following rules from its Rule Book:

"2.1 The objects of the Union shall be:

...

2.1.10 To provide such financial and other benefits and legal assistance to members as may be specified in these rules.

...

2.1.12 To communicate information to members about union activities, campaigns, services and/or benefits, so as to encourage participation and further these objects.

...

4.9 The Executive Council may provide, agree and permit other organisations to provide to members and their households insurance, financial, legal, consumer and other services and products and loyalty or other similar schemes and Unite may provide by direct mailing or otherwise to members concerning such services, products and schemes."

28. Unite also provided a copy of their "Unite Life Financial Protection - Awareness Script" for calls to members regarding life insurance. Whilst Unite maintained they were contractually obliged to provide the information, members were given the option to find out more about the life insurance on three separate occasions. The script was written in a marketing style, offering "NEW benefits" and a "free life insurance and protection review" with the opportunity to "save money". The script was in the form of a flow chart, with the ultimate objective of transferring members to a United Life advisor through whom they could purchase life insurance.
29. Whilst Unite maintained these were not marketing calls, complainants believed them to be so, stating the callers were "*trying to sell me health care / insurance*"; "*marketing for life insurance*"; "*trying to sell me insurance*".

30. The complaints made to the Commissioner indicate that not only did Unite make initial calls in breach of PECR, but also continued to call individuals who had specifically asked not to be contacted:

- *"I have repeatedly asked the company to remove me from their marketing lists, have had confirmations that they have done so and yet I am still receiving calls. It's incredibly annoying."*
- *"Caller had already been instructed not to call but called again."*

31. The Commissioner sought details of the volume of life insurance calls during the period 11 March 2019 to 11 March 2020. Unite responded, explaining seven telephone numbers were used to make 1,385,522 calls, of which 726,853 connected. Subsequent screening against the TPS register showed of these connected calls, 57,665 were to individuals registered with the TPS for not less than 28 days.

32. Following a request from the Commissioner, Unite provided a copy of its contract with its third party processor showing Unite to be the instigator of the marketing calls. The contract required the third party processor to provide the following data processing services on behalf of Unite:

"2.2.6 Telephoning members regarding subscription arrears and alternative Union membership schemes / rates and services available to members

...

3.3 The Service Provider will process the Union Data only in accordance with documented instructions from the Union (which may be specific instructions or instructions of a general nature) as required by the services that the Service Provider provides to the Union."

33. The Commissioner is satisfied Unite was the instigator of the marketing calls relating to life insurance.
34. The Commissioner has made the above findings of fact on the balance of probabilities.
35. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by Unite and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

36. The Commissioner finds that Unite contravened regulation 21 of PECR.
37. The Commissioner finds that the contravention was as follows:
38. Between 11 March 2019 and 11 March 2020, Unite used a public telecommunications service for the purposes of making 57,665 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.
39. The Commissioner is also satisfied for the purposes of regulation 21 that these 57,665 unsolicited direct marketing calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls, and they had not given their prior consent to Unite to receive calls. These calls resulted in a total of 27 complaints over the period of contravention.

40. The Commissioner is satisfied that these calls constituted direct marketing as defined by section 122(5) of the DPA 2018 because each of the calls encouraged members to have a “free life insurance and protection review” from a third party whose business was to sell life insurance.
41. Unite stated on a number of occasions that it did not make unsolicited marketing calls. It considered any calls were made in accordance with its Rule Book which required Unite to “notify members of the services and benefits that fall within their union membership and any changes to those terms.” The Commissioner has rejected this suggestion because the Unite rules cannot override the statutory protection afforded by PECR Regulation 21.
42. For consent to be valid it is required to be “freely given”, by which it follows that if consent to marketing is a condition of subscribing to a service, the organisation will have to demonstrate how the consent can be said to have been given freely.
43. Consent is also required to be “specific” as to the type of marketing communication to be received, and the organisation, or specific type of organisation, that will be sending it.
44. Consent will not be “informed” if individuals do not understand what they are consenting to. Organisations should therefore always ensure that the language used is clear, easy to understand, and not hidden away in a privacy policy or small print. Consent will not be valid if individuals are asked to agree to receive marketing from “similar organisations”, “partners”, “selected third parties” or other similar generic description.
45. The Commissioner is satisfied the consent relied upon by Unite is insufficient for the purposes of Regulation 21. Individuals were broadly

informed that their personal information may be used to contact them in relation to services and/or benefits. This is insufficient to inform an individual about what they can expect the marketing to consist of and consent must be informed to be valid. From the information provided at the point of sign up, Unite automatically opt individuals in to contact about the “services and/or benefits”. This is not a positive opt in to receive marketing by any particular method and resultantly valid consent is not obtained for the purpose of making marketing calls to individuals registered with the TPS for not less than 28 days.

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

Seriousness of the contravention

47. The Commissioner is satisfied that the contravention identified above was serious. This is because there were multiple breaches of regulation 21 by Unite arising from the organisation’s activities over a twelve-month period, resulting in 57,665 unsolicited direct marketing calls to subscribers who were registered with the TPS. These 57,665 unsolicited calls led to a total of 27 complaints being made to the Commissioner over the period of contravention.
48. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

49. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner’s view, this means that Unite’s actions which constitute that contravention were deliberate

actions (even if Unite did not actually intend thereby to contravene PECR).

50. The Commissioner does not consider that Unite deliberately set out to contravene PECR in this instance.
51. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
 52. Firstly, she has considered whether Unite knew or ought reasonably to have known that there was a risk that this contravention would occur. She is satisfied that this condition is met.
 53. The Commissioner has published detailed guidance for companies carrying out marketing explaining their legal requirements under PECR. This guidance explains the meaning of direct marketing and the circumstances under which organisations are able to carry out marketing over the phone, by text, by email, by post or by fax. It states that live calls must not be made to subscribers who have told an organisation that they do not want to receive calls; or to any number registered with the TPS, unless the subscriber has specifically consented to receive calls. The Commissioner has also published detailed guidance on consent under the GDPR. 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. It is therefore reasonable to suppose that Unite should have been familiar with its responsibilities in this area. Unite demonstrated an

awareness of PECR, telling the Commissioner it trained employees to use “PECR compliant principles when sending emails”.

55. 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 Unite would have received a notification from the TPS for each of the complaints being made in this case. That there were two complaints made to the TPS over the period of the contravention should have made Unite aware of the risk that such contraventions may occur and were indeed occurring.
56. Secondly, the Commissioner has gone on to consider whether Unite failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met.
57. Unite failed to familiarise itself sufficiently with the requirements of PECR so as to identify direct marketing calls. It had miscategorised its calls by not recognising that the calls about life insurance constituted marketing, despite having TPS screening in place, which would only be necessary for marketing calls. Whilst Unite was able to produce emailing guidance for its employees which contained a link to the Commissioner’s Guide to PECR, there was no corresponding guidance for making telephone calls to members.
58. The Commissioner’s direct marketing guidance makes clear that organisations must undertake rigorous checks to satisfy themselves they have the necessary consent before instigating direct marketing. If Unite had properly undertaken the customer journey then it seems reasonable to think that it would have realised that, at the point of consent, it was not possible for individuals to provide specific, informed and freely given consent to receive direct marketing calls from Unite.

59. Complainants also complained of reoccurring calls and therefore it was also incumbent on Unite to ensure that an effective suppression system was in place for individuals who did not wish to be contacted.
60. Given the volume of calls and complaints, it is clear that Unite failed to take sufficient reasonable steps to prevent the contravention.
61. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

62. The Commissioner has taken into account the following **aggravating features** of this case:
 - Advice or guidance on direct marketing and in particular, the making of marketing calls was ignored or not acted upon. Such guidance is freely available on the ICO website. The ICO Helpline is also available for organisations who may require clarity in their practices.
63. The Commissioner has also taken into account the following mitigating features of this case:
 - The Commissioner noted the remedial action taken by Unite as soon as the contravention was highlighted. Changes were made to Unite's data processor's screening process to ensure future compliance with PECR.
64. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. She is

also satisfied that the procedural rights under section 55B have been complied with.

65. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking, and invited Unite to make representations in response.
66. In reaching her final view, the Commissioner has received and considered representations in response to the Notice of Intent dated 26 August 2021. This included the submission of a copy of its processor's internal employee training/guidance regarding PECR.
67. The Commissioner remains satisfied that a monetary penalty notice is an appropriate course of action.
68. The Commissioner has considered the likely impact of a monetary penalty on Unite. She has decided on the information that is available to her, that Unite has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship. She does not consider that this conclusion is altered by the effects of the current Covid-19 pandemic.
69. 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. The issuing of a monetary penalty will reinforce the need for businesses to ensure that

they are only telephoning consumers who specifically have not objected to receiving calls.

70. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty. She has decided that a monetary penalty is an appropriate and proportionate response to the finding of a serious contravention of regulation 21 of PECR by Unite.
71. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

72. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£45,000 (forty five thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

73. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **25 November 2021** 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.
74. If the Commissioner receives full payment of the monetary penalty by **24 November 2021** the Commissioner will reduce the monetary penalty by 20% to **£36,000 (thirty six thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

75. 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.
76. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
77. Information about appeals is set out in Annex 1.
78. 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.
79. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Dated the 25th day of October 2021.

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 she ought to have exercised her 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)).