

DATA PROTECTION ACT 1998**SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER****MONETARY PENALTY NOTICE**

To: Rain Trading Limited

Of: Ardeifi, New Street, Lampeter, Ceredigion, United Kingdom SA48 7AL

1. The Information Commissioner ("Commissioner") has decided to issue Rain Trading Limited ("RTL") 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.
2. This notice explains the Commissioner's decision.

Legal framework

3. RTL, whose registered office is given above (Companies House Registration Number: 09124867) 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 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), (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 set up to carry out this role. 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 11(3) of the DPA 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)).
9. Under section 55A (1) of the DPA (as amended by PECR 2011 and the Privacy and Electronic Communications (Amendment) Regulations

2015) the Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that –

"(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person, and

(b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person –

(a) knew or ought to have known that there was a risk that the contravention would occur, but

(b) failed to take reasonable steps to prevent the contravention."

10. 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.

11. PECR implemented European legislation (Directive 2002/58/EC) aimed at the protection of the individual's fundamental right to privacy in the electronic communications sector. PECR were amended for the purpose of giving effect to Directive 2009/136/EC which amended and

strengthened the 2002 provisions. The Commissioner approaches the PECR regulations so as to give effect to the Directives.

12. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of Part 9, Schedule 20 of that Act).

Background to the case

13. RTL first came to the attention of the Commissioner in October 2018, when a particular Caller Line Identity ("CLI") was identified in the ICO's 'Monthly Threat Assessment' as being a CLI used by one of the organisations responsible for generating the most complaints for that month via the TPS.
14. The Commissioner served a Third Party Information Notice ("3PIN") on the Communications Service Provider ("CSP") for that CLI in order to establish the identity of its subscriber. The Commissioner also sought details as to any other CLIs being used by that subscriber over a prescribed period.
15. The CSP responded to confirm that the CLI quoted belonged to RTL (Trading name: 'Intelligent Home Energy'), and that between the period of 1 January 2018 and 29 November 2018 (the "relevant period") there were 31 CLIs allocated to the organisation, but only 10 were in use. Specifically:

01438546103; 01727292023; 01733618107; 01799336003;
01865659136; 01892307105; 03332125741; 03332127621;
03332127628; 03332129316.

16. The Commissioner carried out a thorough search of the complaints logged against those CLIs between 1 January 2018 and 29 November 2018 to both the TPS and the Commissioner's Online Reporting Tool ("ORT"). A total of 99 complaints were logged.
17. Some of the complaints received by the Commissioner, and the TPS, contained comments such as the following:
 - "You need new loft insulation". Quite an aggressive man, refused to divulge the source of his 'information' and claimed that TPS and GDPR didn't apply to him."
 - "Salesperson "John" had my home address and name and claimed that I "qualified for loft insulation". When I asked for his comps-any [sic] and other details he was in quite a hurry to remove me from his call DB. Was aware of TPS, but claimed his "data was 15 yeas [sic] old" as if that didn't apply."
 - "Very concerning that this man knew our name and was prepared to argue back that he was above the law regarding data protection and cold calling."
 - "It interrupted what I was doing, it wasted my time, it busied my private line and prevented others from contacting me, it annoyed me and it raised my blood pressure..."
 - "This was 25 minutes after I received another call from this company, who are still calling me almost daily! Both times asking for [REDACTED]. The first person actually spoke to me and I asked to be removed from their lists, which he said they would do! The second person hung up on

me when I said that I wasn't █████. This company are infuriating and causing a great deal of nuisance."

18. The Commissioner sent an initial investigation letter to RTL on 8 January 2019 setting out her concerns regarding their compliance with PECR, and asking a number of questions in respect of their practices and policies.
19. RTL responded on 11 February 2019 with its response to the Commissioner's initial queries. In brief, RTL explained that it uses 7 CLIs (although the duration of this usage was neither requested, nor provided); that the data it used for the purposes of its direct marketing had been purchased "under contract" from two third party data providers; that consent was not recorded; that any due diligence checks were thought to have been carried out by the third party data providers and that there was accordingly no system in place to allow RTL to run the data against the TPS register or internal suppression lists. Furthermore, whilst there had been verbal communications with staff in respect of lawful contact with customers, no written procedures were in place.
20. The correspondence did concede a level of naivety on the part of RTL, and advised of a willingness to work with the Commissioner to ensure future compliance. The correspondence also referenced a number of remedial measures that RTL intended to implement, including options for recording consent; the introduction of a pre-supplier contract to ensure the veracity of data being purchased; and the implementation of staff training and software to allow TPS-screening, amongst other changes.

21. The Commissioner issued a further letter on 12 February 2019 requesting information in respect of these proposed changes, and copies of the existing contracts with the third party data providers.
22. The subsequent response from RTL revealed that there were in fact no existing contracts, and instead provided a copy of a purchase order, and an invoice for data purchase, neither of which gave any written assurances to RTL as to any due diligence which had been carried out against the data.
23. The response also failed to provide any additional information with regards to the proposed internal changes referred to in RTL's earlier response of 11 February 2019, rather it was stated that RTL had now dismissed all staff, and that no further calls were being made. All training and induction of new staff had also been suspended. The response repeated the claim that the third party data providers were deemed to be a "competent source", and therefore no checks on the data had been carried out by RTL.
24. The Commissioner proceeded to serve a further 3PIN on the CSP on 25 March 2019 to establish the volume of connected calls made from the 10 CLIs the CSP had previously confirmed as being used by RTL over the relevant period.
25. The figures provided to the Commissioner were then relayed to the TPS to establish how many of the numbers dialled belonged to subscribers who had been registered with the TPS, and the dates of their registration.
26. In its response, the TPS confirmed that from the CLIs provided there had been 320,558 outbound calls made to subscribers, of which 270,774 were made to subscribers who had been registered with the TPS for not less than 28 days at the time they received a call.

27. The Commissioner is satisfied that these 270,774 calls were all made for the purposes of direct marketing as defined by section 11(3) DPA.
28. The Commissioner has made the above findings of fact on the balance of probabilities.
29. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by RTL and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

30. The Commissioner finds that RTL contravened regulation 21 of PECR.
31. The Commissioner finds that the contravention was as follows:
32. Between 1 January 2018 and 29 November 2018, RTL used a public telecommunications service for the purposes of making 270,774 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 almost 100 complaints being made to the TPS and the Commissioner.
33. The Commissioner is also satisfied for the purposes of regulation 21 that these 270,774 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 RTL to

receive calls.

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

Seriousness of the contravention

35. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by RTL arising from the organisation's activities over an 11 month period, and this led to a substantial number of unsolicited direct marketing calls being made to subscribers who were registered with the TPS, and a significant number of complaints being made as a result.
36. The 270,774 unsolicited direct marketing calls made between 1 January 2018 and 29 November 2018 were made from CLIs which were being used by RTL. This information has been obtained from RTL's CSP and is reasonably relied upon by the Commissioner. These calls were not screened against the TPS register, nor is there any evidence of consent being provided to RTL from the individual subscribers. There is no evidence of any contractual terms between RTL and their data providers, or of any due diligence checks being carried out to ensure the veracity of the data being obtained. In short, RTL have failed to provide the Commissioner with any evidence to demonstrate an intention to comply with PECR.
37. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

38. The Commissioner has considered whether the contravention identified above was deliberate.
39. The Commissioner does not consider that RTL deliberately set out to contravene PECR in this instance.
40. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
 41. Firstly, she has considered whether RTL 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, given that RTL relied apparently entirely on direct marketing due to the nature of its business, and the fact that the issue of unsolicited calls has been widely publicised by the media as being a problem. Given that it set out to embark on a direct marketing campaign, RTL should reasonably have sought to familiarise itself with the relevant legislation.
 42. 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 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.
43. The Commissioner's direct marketing guidance also 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 consent. The Commissioner has been provided with no evidence that any such checks were undertaken, rather RTL claim to have been assured of the data's veracity at the point of purchase but have failed to carry out any of their own checks. This would fail to satisfy the Commissioner's requirement for due diligence, guidance for which is provided within the Commissioner's publicly available Direct Marketing Guidance.

44. 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 RTL would have received a notification from the TPS for each of the complaints being made in this case. That there were 70 complaints made to the TPS alone over the period of the contravention should have made RTL aware of the risk that such contraventions may occur, and were indeed occurring.
45. It is therefore reasonable to suppose that RTL should have been aware of its responsibilities in this area.
46. Secondly, the Commissioner has gone on to consider whether RTL failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met. Reasonable steps in these circumstances may have included asking its third party data providers for evidence that the subscribers had consented to receiving calls from RTL, screening the data against the TPS register itself regardless of any assurances that might have been given by the providers of the data, and ensuring that it had in place an effective and robust suppression

list. Given the volume of calls and complaints, it is clear that RTL failed to take those steps.

47. There is also no evidence that, prior to the Commissioner's intervention, RTL sought to consult the Commissioner's guidance, or to familiarise itself with the relevant legislation. By its own admission RTL did not seek to undertake any steps to ensure the integrity of the data it was purchasing, and has provided no evidence that the protection and privacy of subscribers was factored into the purchase of data with its providers. Additionally, it does not appear that there were any written policies in place for staff, nor was there anything contractual in place between RTL and its data providers. RTL have explained these omissions away as 'naivety' on its part, however the Commissioner takes the view that such a reckless approach towards compliance with the law falls far short of the expected standard, and cannot be said to be anything other than negligent.
48. The Commissioner takes the view that RTL failed to take reasonable steps to prevent the contravention.
49. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

50. The Commissioner has taken into account the following aggravating features of this case:
 - The complaints received via the Commissioner's ORT and the TPS demonstrate that subscribers suffered rude, antagonistic and potentially

intimidating behaviour from the callers, which is likely to have added to the level of distress suffered;

- The lack of any kind of internal suppression list suggests that repeated calls could have been made to subscribers.
51. The Commissioner has taken into account the following mitigating feature of this case:
- The company has since ceased its live marketing calls.
52. 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.
53. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made by RTL on this matter.
54. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
55. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
56. 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 want to receive these calls.

57. For these reasons, the Commissioner's has decided to issue a monetary penalty in this case.

The amount of the penalty

58. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£80,000 (eighty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

59. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **3 September 2020** 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.
60. If the Commissioner receives full payment of the monetary penalty by **2 September 2020** the Commissioner will reduce the monetary penalty by 20% to **£64,000 (sixty 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.

61. 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.
62. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
63. Information about appeals is set out in Annex 1.
64. 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.
65. 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 3rd day of August 2020.

Andy Curry
Head of Investigations
Information Commissioner's Office
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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

Email: grc@justice.gov.uk

Telephone: 0300 123 4504

- 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)).