

**DATA PROTECTION ACT 1998**

**SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

**MONETARY PENALTY NOTICE**

To: Making it Easy Ltd

Of: Unit 7, Erskine House, 1 North Avenue, Clydebank, G81 2DR

1. The Information Commissioner ("Commissioner") has decided to issue Making it Easy Ltd ("MIEL") 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. MIEL, whose registered office is given above (companies house registration number: SC555654), 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 Telephone Preference Service Limited (“TPS”) is a limited company set up by the Commissioner 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. 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 (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.”

9. “Direct marketing” is defined in section 11(3) of the DPA 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)).

10. Section 55A of the DPA (as amended by the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2011 and the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2015) states:

“(1) The Commissioner may serve a person with a monetary penalty if the Commissioner is satisfied that –

- (a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person, and
- (b) subsection (2) or (3) applies.

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

(3) This subsection applies if the person –

- (a) knew or ought to have known that there was a risk that the contravention would occur, but
- (b) failed to take reasonable steps to prevent the contravention.”

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 implements European legislation (Directive 2002/58/EC) aimed at the protection of the individual's fundamental right to privacy in the electronic communications sector. PECR was amended for the purpose of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches PECR so as to give effect to the Directives.
13. 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**

14. MIEL is an organisation which promotes itself on its website as a boiler replacement and repair specialist.
15. MIEL first came to the attention of the Commissioner when a number of complaints were identified within a monthly ICO report regarding direct marketing calls made by an organisation using the name 'Heating Advice Centre', or variants thereof. Within those complaints, a range of calling line identifier numbers ("CLI's") were presented.
16. Enquiries with the communications service provider ("CSP") for those CLI's confirmed that the subscriber was MIEL, and it provided a full list

of CLI's allocated to MIEL. The CSP also provided call volumes and call detail records ("CDR") which revealed that the first of the CLIs was activated on 2 May 2018. The CDR's also demonstrated that, using the allocated CLI's, MIEL attempted over 2 million calls between 2 May 2018 and 12 September 2018.

17. Compilation of an initial list of complaints at that time showed that from CLI's registered to MIEL, there had been 136 complaints to the TPS, and 52 to the ICO, between May and October 2018.
18. Out of the total complaints directly attributable to MIEL, no complainant was able to correctly identify the organisation instigating the call. The majority of the complainants identified some variation of 'Heating Advice Centre', a name not listed as a trading name of MIEL either with the ICO or the FCA. Many of the complainants referred to being unable to identify the underlying company despite further probing.
19. Examples of complaints are as follows:

*"My boiler is not very old Spoke to the manager He couldn't give me the main office switchboard number, suggested I dial 1471. I have Calling Line ID and the number on my phone was [REDACTED] [This is a live number and ringing it, it is answered in Glasgow, although 0121 is Birmingham] he couldn't give me a website URL and there is no Website that I can find"*

*"I cannot find any company details for this number. They claim to be National Heating Advisory Service,"*

*"They call themselves the Heating Advice Centre and all speak with Scottish accent despite the CLI being forwarded being a Swansea STD code....they give [REDACTED] as the number to call them back on which is always engaged"*

*"Said calling from National Heating Advisory Centre - I asked for physical address and the female agent stated based in West George Street, Glasgow"*

*"Got put through to a manager who confirmed business name but couldn't give me their phone number because they use various numbers. Got number from 1471 later"*

20. On 14 November 2018 the Commissioner wrote to MIEL setting out her concerns regarding its compliance with PECR. The letter provided evidence of the complaints that had been received, and requested specific information in relation to the calls made, including sources of data used, trading names used in calls and evidence of any consent being relied on to make direct marketing calls.
21. A substantive response was received from MIEL dated 5 December 2018, in which it listed the CLI's it used and identified the purpose of each. 10 out of 17 CLI's listed were confirmed to be utilised for 'canvassing' i.e. the initial marketing call. The information provided by MIEL showed that the CLI's were geographic to areas where the marketing was conducted. A call script was also provided which confirmed MIEL's use of the name 'Heating Advice Centre' in its calls.
22. MIEL advised the Commissioner that it purchased the data used to make calls from a third party provider. It later confirmed it did not hold a contract with its data supplier because it was an 'if/when purchase'. MIEL stated that it did not screen its data against the TPS register, nor could it evidence consent for the calls it made, explaining 'this would be from our data company, we would rely on our data company to have screened the complainants identified in the appendices' and 'we were not aware that any of our numbers were registered with the TPS as our data company does all the screening'. MIEL did state however that it held an in-house suppression list.
23. It was readily apparent to the Commissioner from the response that there were no arrangements or contracts in place with the third party data providers at the time of the contravention to ensure the veracity of the data being purchased.

24. MIEL informed the Commissioner that it would commence screening data against the TPS register in future, and went onto explain that it had been working as an 'opt in call centre through web' from September 2018. Despite this, it was apparent from the Commissioner's investigation that as at December 2018, MIEL continued to make marketing calls, and complaints continued to be received. MIEL explained this by stating it continued to make calls during a transitional period whilst the opt-in call centre became fully operational. The Commissioner has however noted that since her investigation a further 10 complaints were received during January and February 2019, and one further complaint in March 2019 which would indicate that MIEL has not entirely ceased making direct marketing calls, nor screened its data against the TPS register as promised.
25. Further detailed analysis of the CDR's supplied by MIEL confirmed that between 14 May 2018 and 17 December 2018 1,098,503 connected calls were made, of which 1,067,293 could be attributed to direct marketing.
26. Enquiries of the TPS revealed that of those 1,067,293 marketing calls, 853,769 were to CLI's that had been registered with the TPS for more than 28 days. This represented 80% of all marketing calls made.
27. Further analysis of complaints attributed to calls made to TPS registered numbers by MIEL during the period 14 May to 17 December 2018 indicated that a total of 144 were made to the TPS and 53 to the ICO.



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 regulations 21 & 24 of PECR by MIEL and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

30. The Commissioner finds that MIEL contravened regulations 21 & 24 of PECR.
31. The Commissioner finds that the contravention was as follows:
32. Between 14 May 2018 and 17 December 2018 MIEL used a public telecommunications service for the purpose of making 853,769 unsolicited calls for direct marketing purposes to subscribers where the number allocated in respect of the line called 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.
33. The Commissioner is also satisfied for the purposes of regulation 21 that these calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls and had not given their prior consent to MIEL to receive calls.
34. In respect of those calls, the Commissioner is satisfied for the purposes of regulation 24 that whilst a valid CLI was presented, it did not allow subscribers to identify the caller, because the company name provided (as evidenced by the call script) was not a trading name of MIEL, and despite further probing, vague, false or misleading information was provided by MIEL to subscribers.

35. The Commissioner is satisfied that MIEL was responsible for the contravention.
36. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

**Seriousness of the contravention**

37. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulations 21 & 24 by MIEL's activities over a 7 month period, and this led to a significant number of complaints about unsolicited direct marketing calls to the TPS and the ICO.
38. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met

**Deliberate or foreseeable contravention**

39. The Commissioner has considered whether the contravention identified above was deliberate.
40. The Commissioner considers that in this case MIEL did not deliberately seek to contravene PECR in that sense, albeit the Commissioner considers the attempted concealment of the correct company name, as supported by its call script, was a deliberate act on the part of MIEL.
41. The Commissioner has therefore gone on to consider whether the contraventions identified above were negligent. First, she has considered whether MIEL knew or ought reasonably to have known that there was a risk that these contraventions would occur. She is satisfied

that this condition is met, given that the issue of unsolicited marketing calls has been widely publicised by the media as being a problem. Furthermore, the Commissioner has published detailed guidance for those carrying out direct marketing explaining their legal obligations under PECR. This guidance gives clear advice regarding the requirements of consent for direct marketing and 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.

42. MIEL is registered with the ICO which demonstrates some awareness of its duties under PECR.
43. Second, the Commissioner considered whether MIEL failed to take reasonable steps to prevent the contraventions.
44. Reasonable steps in these circumstances would have included ensuring that MIEL could evidence consents relied upon to make marketing calls where these were based upon purchased data; having in place a contractual arrangement with any third party data supplier to ensure that the data being purchased met the required threshold for valid consent; screening data against the TPS register; ensuring that it had in place an effective and robust suppression list; correctly identifying itself as the caller and providing subscribers with an opportunity to opt out. MIEL failed to take any of these steps and the Commissioner considers there was no good reason for MIEL's failure to do so.
45. In the circumstances, the Commissioner is satisfied that MIEL failed to take reasonable steps to prevent the contraventions.

46. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

**The Commissioner's decision to impose a monetary penalty**

47. 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 section 55A(3) and the procedural rights under section 55B have been complied with.
48. The latter has included issuing a Notice of Intent dated 11 June 2019 in which the Commissioner set out her preliminary thinking. The Commissioner received confirmation of special delivery by Royal Mail on 12 June 2019. A copy Notice was also emailed to MIEL on 11 June 2019.
49. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
50. Despite informing MIEL of its entitlement to make representations, the Commissioner has received no representations in response to the Notice of Intent, the deadline for receipt of which having passed.
51. The Commissioner has taken into account the following aggravating factors:
- Whilst MIEL states that it has operated an 'opt in call centre through web' from September 2018 the Commissioner has continued to receive complaints from subscribers who are TPS registered which would suggest that MIEL has continued to make

unsolicited direct marketing calls in contravention of PECR.

Indeed, further investigation revealed that between September and December 2018 MIEL has made 297,761 calls from its marketing CLI's to subscribers whose numbers were registered with the TPS for more than 28 days. In that time, a further 11 complaints have been received.

- The Commissioner has taken into account MIEL's use of CLI's geographical to the areas being marketed; if the subscriber believes that it is a local call it increases the likelihood of call connection.
- MIEL has provided inconsistent and misleading responses to the Commissioner throughout her investigation, in particular in relation to marketing calls made prior to May 2018. For instance, MIEL initially informed the Commissioner that it had no prior CSP, despite the Commissioner having identified previous complaints attributable to MIEL, yet later conceded that it did have a prior CSP through which marketing calls were made. The issue of complaints about MIEL identified by the Commissioner remains unanswered.
- The current director's lack of compliance with PECR, and their relationship with a currently disqualified director; the director who resigned in June 2017 is known to the ICO and has also been the director of at least four companies which have been found to have PECR-related complaints recorded against them.
- The total lack of any due diligence procedures or screening conducted on the data, which in the Commissioner's view go beyond mere negligence.

52. The Commissioner has also taken into consideration the following

mitigating factor:

- There has been a small reduction in the number of complaints since the period of the contravention.

53. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The making or instigating of automated marketing calls is a matter of significant public concern. A monetary penalty in this case should act as a general encouragement towards compliance with the law, or at least as a deterrent against non-compliance, on the part of all persons running businesses currently engaging in these practices. This is an opportunity to reinforce the need for businesses to ensure that they are only making marketing calls in compliance with PECR.

#### **The amount of the penalty**

54. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£160,000 (One hundred and sixty thousand pounds)**.

#### **Conclusion**

55. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **30 August 2019** 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.

56. If the Commissioner receives full payment of the monetary penalty by **29 August 2019** the Commissioner will reduce the monetary penalty


by 20% to **£128,000 (One hundred and twenty eight thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

57. 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.
58. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
59. Information about appeals is set out in Annex 1.
60. 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
61. the period for appealing against the monetary penalty and any 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 31<sup>st</sup> day of July 2019

Signed

  
Stephen Eckersley  
Director 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 48 of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice or variation notice has been served a right of appeal to the First-tier Tribunal (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:

GRC & GRP Tribunals  
PO Box 9300  
Arnhem House  
31 Waterloo Way  
Leicester  
LE1 8DJ

a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.

b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.

4. The notice of appeal should state:-

- a) your name and address/name and address of your representative (if any);
- b) an address where documents may be sent or delivered to you;
- c) the name and address of the Information Commissioner;
- d) details of the decision to which the proceedings relate;
- e) the result that you are seeking;
- f) the grounds on which you rely;
- g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
- h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.

5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.

6. The statutory provisions concerning appeals to the First-tier Tribunal (Information Rights) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).