

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Avalon Direct Limited

Of: Unit A2 Brooke Court, Handforth Dean, Wilmslow, Cheshire SK9 3ND

1. The Information Commissioner ("Commissioner") has decided to issue Avalon Direct Limited ("ADL") 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. ADL, whose registered office is given above (Companies House Registration Number: 10646254) 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 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. 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. ADL came to the attention of the Commissioner following an article in the 'Mail on Sunday' newspaper on 19 November 2017 which alerted the Commissioner to allegations of unscrupulous sales and trading practices by an organisation called Plan My Funeral Avalon Limited ("PMFAL").
14. On 20 November 2017 a letter was sent to PMFAL setting out the Commissioner's concerns regarding the organisation's compliance with PECR in light of the media report, and also following earlier compliance advice which had been given to two of the directors of the company in respect of a separate investigation.
15. On 28 November 2017 PMFAL changed its name by resolution with Companies House to ADL. (For the purposes of this Notice, the organisation shall herewith be referred to as ADL, even for that period when it would have identified as PMFAL.)
16. On 11 December 2017 the Commissioner received a response from the representatives of ADL which explained a little about the corporate structure of ADL, and its subsidiaries. Furthermore, the letter provided some information regarding the way by which ADL had contracted with a lead provider to acquire leads for the purposes of its telesales marketing.

17. It was confirmed by ADL's representatives that there had been a total of 5,413,396 calls made between 1 March 2017 and 20 November 2017 using leads generated by their lead provider.
18. The Commissioner sent a further letter on 21 December 2017 to the representatives for ADL to request details of the websites from which the lead generator obtained the personal data used by ADL for their marketing. In addition, copies of the fair processing statements used by the lead generator were requested to demonstrate what individuals were told at the point when their data was obtained.
19. A response was received by the Commissioner on 15 January 2018 advising her of the websites used to gather the personal data used for ADL's campaign, and also providing copies of the fair processing statements used.
20. Consideration of these websites, and the fair processing notices relied upon, showed that neither ADL or PMFAL (which was the trading name by which the organisation operated at the material time) were adequately identified so as to constitute sufficient consent to engage in direct marketing calls.
21. The Commissioner wrote again to the representatives of ADL on 22 January 2018 requesting confirmation in respect of the call figures having noted discrepancies in some of the information which had previously been provided.
22. The Commissioner received a response on 16 February 2018 indicating that, although calls would have initially been made by ADL, if the call was not answered within the first few days, the individual's details would be called thereafter by a dialler system.

23. Subsequent correspondence advised the Commissioner that a total of 2,046,745 direct marketing calls were made on behalf of ADL to valid numbers, of which 134,142 were connected. ADL provided spreadsheets to evidence these call volumes.
24. TPS checks of the numbers dialled revealed that, of the 134,142 connected calls, 53,447 calls were made to TPS registered numbers, with 51,917 of those being to numbers registered with the TPS for not less than 28 days.
25. The Commissioner has made the above findings of fact on the balance of probabilities.
26. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by ADL and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

27. The Commissioner finds that ADL has contravened regulation 21 of PECR.
28. The Commissioner finds that the contravention was as follows:
29. Between 1 March 2017 and 20 November 2017, ADL used a public telecommunications service for the purposes of making 51,917 unsolicited calls to unique numbers 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.

30. The Commissioner is also satisfied for the purposes of regulation 21 that these 51,917 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 ADL to receive calls.
31. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

32. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by ADL arising from the organisation's activities over a 9 month period, and this led to a significant number of unsolicited direct marketing calls being made to subscribers who were registered with the TPS.
33. The 51,917 unsolicited direct marketing calls were not screened against the TPS register, nor is there any evidence of sufficient consent being provided to ADL or their lead generator from the individual subscribers. There is also no evidence of sufficient due diligence checks being carried out by ADL to ensure the veracity of the data being used.
34. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

35. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that ADL's actions which constituted that contravention were deliberate actions (even if ADL did not actually intend thereby to contravene PECR).
36. The Commissioner considers that in this case there is evidence that ADL did deliberately contravene regulation 21 of PECR.
37. The Commissioner considers that the making of the calls was a deliberate act and that the inadequacies outlined were more than matters of serious oversight. She has published detailed guidance for those carrying out direct marketing explaining their legal obligations under PECR. This guidance explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by e-mail, 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.
38. The Commissioner's direct marketing guidance also makes clear that organisations utilising 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.
39. The Commissioner notes that two of the directors of ADL at the time of the alleged contravention had previously been subject to a separate ICO investigation and that their company in that instance had received a civil monetary penalty in January 2018 for carrying out unsolicited

direct marketing. Furthermore, those same directors were also the directors of the lead generator utilised by ADL for the data collection in this present matter so it is reasonable to suppose that ADL had at least two directors who were conversant with their obligations under PECR.

40. Further and alternatively the Commissioner has also gone on to consider whether the contraventions identified above were negligent.
41. She has considered whether ADL 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 the way in which ADL sourced its data and the fact that the issue of unsolicited calls was widely publicised by the media as being a problem. It is reasonable to suppose that ADL should have been aware of their responsibilities in this area, particularly given the previous enforcement action taken against two of their directors for a breach of the same regulation.
42. Secondly, the Commissioner has gone on to consider whether ADL failed to take reasonable steps to prevent the contraventions. Again, she is satisfied that this condition is met. Reasonable steps in these circumstances would have included asking its lead generator for evidence that the subscribers had consented to receiving calls from ADL specifically, 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 the fact that repeat calls appear to have been made to TPS registered numbers without the appropriate consent, it is clear that ADL failed to take those steps.

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

The Commissioner's decision to issue a monetary penalty

44. The Commissioner has taken into account the following **mitigating features** of this case:

- The two directors whose organisation had previously been subject to separate ICO enforcement action have since been dismissed by ADL;
- There have been no complaints received by the ICO notwithstanding the conduct outlined in this Notice.

45. The Commissioner has also taken into account the following **aggravating features** of this case:

- The presence of two directors who were plainly aware of their obligations under DPA and PECR means that it is reasonable for the Commissioner to find that ADL as an organisation were acutely aware of the steps necessary to ensure valid consent for their direct marketing campaigns.
- The nature of the calls being made, i.e. regarding funeral planning, are reported to have been made to particularly vulnerable people and so whilst it is not a necessity of PECR that the requirements of damage and distress are met, it is a consideration which the Commissioner is obliged to bear in mind.

46. 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.
47. 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 ADL's legal representatives on this matter.
48. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
49. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
50. 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.

The amount of the penalty

51. 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

52. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **15 May 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.
53. If the Commissioner receives full payment of the monetary penalty by **14 May 2019** 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.
54. 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.
55. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
56. Information about appeals is set out in Annex 1.

57. 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.
58. 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 12th day of April 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 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

- 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)).