

## **DATA PROTECTION ACT 1998**

### **SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

#### **MONETARY PENALTY NOTICE**

To: Superior Style Home Improvements Limited

Of: 49 Bethel Road, Llansamlet, Swansea, SA7 9QL

1. The Information Commissioner ("Commissioner") has decided to issue Superior Style Home Improvements Limited ("Superior Style") 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 ("PECR").
2. This notice explains the Commissioner's decision.

#### **Legal framework**

3. Superior Style, whose registered office is given above (companies house registration number:09375551), is the person 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. 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. Superior Style's business involves, in part, making unsolicited marketing calls to subscribers in order to generate UPVC installation leads.
14. Between 30 May 2017 and 30 April 2018, the ICO received 83 complaints about unsolicited direct marketing calls made by Superior Style. Of those, 63 complaints were made to the TPS, with a further 20 made direct to the Commissioner. All of these complaints were made by individual subscribers who were registered with the TPS.
15. The following are examples of the complaints received by the ICO:
  - "Asked is I was Mrs X. Or failing that if I was a householder. I asked if he wanted to speak to Mrs. N. X and he confirmed that he did. I pointed out forcefully that N X was my mother who had been dead for nine years, and his call had really upset me. He said "sorry" and started to try to interest me in whatever he was peddling anyway!!!!!!!!!! I asked if he was really trying to interest me after asking for a dead relative. He countered "How did I expect his firm to know she was dead for ten years as the firm had only been going for three years". I pointed out, forcefully, that his firm was required to only use up to date records and the number was registered with the TPS for many years - he wasn't interested..."

- "I'm chronically ill and disabled and was resting on the point of the call. My landline is unlisted and TPS registered."
  - "When told I was registered with TPS the guy didn't know what I was talking about! Told him that I didn't want his call and he seemed confused! Said he'd 'try' to get my number taken off their system. Told him I was reporting him. Seemed even more confused! His name was David."
  - "Called offering 'free home improvements'. Told never to call again and called half an hour later."
16. On 29 June 2018, the Commissioner wrote to Superior Style to explain that she could issue civil monetary penalties up to £500,000 for PECR breaches. The letter informed Superior Style that the Commissioner and the TPS had received complaints from individual subscribers in relation to unsolicited calls. Superior Style was asked a number of questions about its compliance with PECR.
17. The Commissioner received a response from Superior Style explaining that it generates leads via doorstep canvassing as well as by using a database purchased 'some time ago'. They had not purchased data from any third parties for over two years and had not screened the data they held against the TPS since its purchase, advising that they removed customer details once they were advised that the customer is registered with the TPS and do not contact them again.
18. Superior Style further explained in correspondence that it had been under the impression that their previous automated telephony provider would automatically suppress calls made to TPS registered numbers.

They became aware this was not the case after 25 June 2018. They have no evidence to support this belief and had no contract in place with its former telephony provider.

19. Superior Style stated that it purchased the data used from a third party company in September 2016. That company had purchased the data on their behalf from "another home improvement organisation". The third party has now gone into liquidation and therefore they are unable to ascertain from where the data was originally sourced or the consent the use of this data relied on. Superior Style conceded that they conducted no due diligence when the data was purchased before using it to make marketing calls.
20. The Commissioner's investigation revealed that at least 6 separate CLI's were being used to make unsolicited marketing calls. Call dialler records obtained for these numbers show that a total of 849,318 calls were made by Superior Style within the period of 30 May 2017 to 30 April 2018. This list was filtered to establish the number of calls made to numbers which were registered with the TPS, at least 28 days before receiving a call, to show that 518,771 such calls were made.
21. The Commissioner has made the above findings of fact on the balance of probabilities.
22. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by Superior Style and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

23. The Commissioner finds that Superior Style contravened regulation 21 of PECR.
24. The Commissioner finds that the contravention was as follows:
25. Between 30 May 2017 and 30 April 2018, Superior Style used a public telecommunications service for the purpose of making 83 unsolicited calls for direct marketing purposes to subscribers where the number allocated to the subscriber 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; and
26. 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 Superior Style to receive calls.
27. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

**Seriousness of the contravention**

28. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by Superior Style's activities over an 11 month period, and this led to a significant number of complaints about unsolicited direct marketing calls to the TPS and the Commissioner.
29. In addition, it is reasonable to suppose that the contravention could have been far higher because those who went to the trouble to



complain represent only a proportion of those who actually received calls.

30. Some complainants allege that Superior Style made repeat calls to them even though they had requested that their number be suppressed.
31. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

**Deliberate or negligent contraventions**

32. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that Superior Style's actions which constituted that contravention were deliberate actions (even if Superior Style did not actually intend thereby to contravene PECR).
33. The Commissioner considers that in this case Superior Style did not deliberately contravene regulation 21 of PECR in that sense.
34. The Commissioner has gone on to consider whether the contravention identified above was negligent.
35. First, she has considered whether Superior Style 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 Superior Style relied heavily 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.

36. Each time a complaint is made to the TPS, the TPS inform the company complained about. Superior Style would therefore have been aware that complaints were being made by TPS subscribers which should have prompted them to take steps to investigate the reasons for this and to address any deficiencies in their practices.
37. The number of calls made to TPS registered individuals accounts for 61% of the total call volume, this shows a disregard for the legislation surrounding the making of marketing calls and suggests that Superior Style made very little effort to screen the data they were using against the TPS.
38. 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.
39. Finally, the Commissioner has gone on to consider whether Superior Style failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met.
40. Reasonable steps in these circumstances would have included ensuring that Superior Style could evidence consents relied upon to make marketing calls; having in place a contractual arrangement with its third party data supplier to ensure that the data being purchased met the required threshold for valid consent; screening the data against the

TPS register and ensuring that it had in place an effective and robust suppression list.

41. In addition Superior Style have, during the course of the Commissioner's investigation, denied that several of the CLI's listed in the complaints were owned by them. This is despite clear evidence to the contrary including their telephony provider confirming that these CLI's were registered to Superior Style, at their business address and used their e-mail address as a contact. This shows a lack of care and attention in relation to how the company is operating and suggests they failed to take reasonable steps to prevent the contravention, repeatedly failing to acknowledge the contravention when challenged by the Commissioner.
42. The Commissioner is therefore satisfied that Superior Style failed to take reasonable steps to prevent the contravention.
43. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

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

44. 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)DPA and the procedural rights under section 55B have been complied with.
45. The latter has included the issuing of a Notice of Intent dated 1 April 2019 in which the Commissioner set out her preliminary thinking.
46. The Commissioner has considered whether, in the circumstances she should exercise her discretion so as to issue a monetary penalty. In

reaching her final view, the Commissioner has taken into account representations made by Superior Style dated 26 April 2019, 10 June 2019 and in other correspondence on this matter, however there is nothing contained therein to dissuade the Commissioner from her preliminary view.

47. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

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

48. 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.
49. Taking into account all of the above, the Commissioner has decided that the amount of the penalty is **£150,000 (One hundred and fifty thousand pounds)**

### **Conclusion**

50. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **4 October 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.

51. If the Commissioner receives full payment of the monetary penalty by **2 October 2019** the Commissioner will reduce the monetary penalty by 20% to **£120,000 (One hundred and twenty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
52. 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.
53. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
54. Information about appeals is set out in Annex 1.
55. 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.

56. 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 4<sup>th</sup> day of September 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 (General Regulatory Chamber) 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)).