

**ico.**

Information Commissioner's Office

**CHECK POINT CLAIMS LTD  
FINED £250,000**

**Monetary Penalty Notice**

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## DATA PROTECTION ACT 1998

### SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

#### MONETARY PENALTY NOTICE

To: Check Point Claims Ltd

Of: C/O Marshall Peters Limited, Heskin Hall Farm Wood Lane, Heskin,  
Chorley, Lancashire, England, PR7 5PA

1. The Information Commissioner ("the Commissioner") has decided to issue Check Point Claims Ltd with a monetary penalty under section 55A of the Data Protection Act 1998 ("the DPA"). The penalty is being issued because of a serious contravention of regulation 19 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by Check Point Claims Ltd ("CPCL").
2. This notice explains the Commissioner's decision.

#### **Legal framework**

3. CPCL, whose registered office is given above (companies house registration number: 07693783), is the person stated in this notice to have used an automated calling system for the purpose of sending or instigating automated marketing calls contrary to regulation 19 of PECR.
4. Regulation 19 of PECR provides that:

“(1) A person shall neither transmit, nor instigate the transmission of, communications comprising recorded matter for direct marketing purposes by means of an automated calling system except in the circumstances referred to in paragraph (2).

(2) Those circumstances are where the called line is that of a subscriber who has previously notified the caller that for the time being he consents to such communications being sent by, or at the instigation of, the caller on that line.

(3) A subscriber shall not permit his line to be used in contravention of paragraph (1).

(4) For the purposes of this regulation, an automated calling system is a system which is capable of—

(a) automatically initiating a sequence of calls to more than one destination in accordance with instructions stored in that system; and

(b) transmitting sounds which are not live speech for reception by persons at some or all of the destinations so called.”

5. 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 –

(a) in relation to a communication to which regulations 19 (automated calling systems) and 20 (facsimile machines) apply, the particulars mentioned in paragraph (2)(a) and (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.”

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

“(1) 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.

7. 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.
8. 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 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.

### **Background to the case**

9. In June 2015, the Commissioner's office identified that a number of complaints had been received about the receipt of **automated marketing calls relating to hearing loss claims**. The recorded message did not identify the sender or instigator of the call. However, on further investigation it was discovered that two of the CLI's identified by the complainants were allocated to CPCL.
10. On 9 September 2015, the Commissioner's office wrote to CPCL to ask a number of questions about its compliance with regulations 19 and 24 of PECR. It was also warned that the Commissioner could issue civil monetary penalties up to £500,000 for PECR breaches.

11. On 1 October 2015, the Commissioner's office received a response from CPCL stating that it had purchased "opted-in" data from a data provider. CPCL was also unaware of the requirement to comply with regulation 24 of PECR.
12. On 8 October 2015, the Commissioner's office wrote to CPCL again to explain that in order to comply with regulation 19 of PECR, consent must be obtained from the subscriber before they could send or instigate an automated marketing call. It was also explained that the steps taken by CPCL were insufficient because the calls could only be made with such consent. CPCL was asked to provide further details of the consents relied on to send or instigate the calls.
13. On 6 November 2015, CPCL provided the evidence it had obtained from its data provider consisting of eight "time stamps". CPCL also confirmed that it had stopped sending voice broadcast messages. The Commissioner's office responded to CPCL on the same day to confirm that it had not provided sufficient evidence that the recipients of the automated marketing calls had consented to receive them.
14. The relevant communications service provider confirmed that CPCL sent or instigated 17,565,690 automated marketing calls between 30 March 2015 and 30 September 2015, although the calls were connected to approximately 6,388,122 subscribers.
15. Between 30 March 2015 and 30 September 2015, the Commissioner's office received 248 complaints about automated marketing calls made from the CLI's allocated to CPCL. The gist of the complaints was that the calls were sent at inconvenient times such as evenings and weekends, often repeatedly and that the complainants had not worked

in a noisy environment as claimed in the recorded message. During this period, the TPS also received 50 complaints about CPCL.

16. The Commissioner has made the above findings of fact on the balance of probabilities.
17. The Commissioner has considered whether those facts constitute a contravention of regulation 19 of PECR by CPCL and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

18. The Commissioner finds that CPCL contravened regulation 19(1) and (2) of PECR.
19. The Commissioner finds that the contravention was as follows:

Between 30 March 2015 and 30 September 2015, CPCL sent or instigated 6,388,122 automated marketing calls to subscribers without their prior consent.

20. The Commissioner is satisfied that CPCL was responsible for this contravention.
21. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

### **Seriousness of the contravention**

22. The Commissioner is satisfied that the contravention identified above was serious. This is because CPCL sent or instigated 6,388,122 automated marketing calls between 30 March 2015 and 30 September 2015 to subscribers without their prior consent, resulting in 248 complaints to the Commissioner's office and 50 complaints to the TPS.
23. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

**Deliberate or foreseeable contravention**

24. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that CPCL's actions which constituted that contravention were deliberate actions (even if CPCL did not actually intend thereby to contravene PECR).
25. The Commissioner considers that in this case CPCL did deliberately contravene regulation 19 of PECR in that sense.
26. The Commissioner has 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 marketing material can only be transmitted via an automated system with the prior consent of the subscriber.
27. Whilst CPCL may not have deliberately set out to cause distress, it did deliberately send or instigate automated marketing calls on a massive scale to subscribers.



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

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

29. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A(1) DPA have been met in this case. He is also satisfied that section 55A(3A) and the procedural rights under section 55B have been complied with.
30. The latter has included the issuing of a Notice of Intent dated 17 March 2016, in which the Commissioner set out his preliminary thinking. CPCL did not make any representations in response to the Notice of Intent. In reaching his final view, the Commissioner has taken into account the representations made in other correspondence on this matter.
31. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
32. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.
33. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending 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 sending automated marketing calls in compliance with PECR.

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

**The amount of the penalty**

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

- CPCL has confirmed that it will not be running a similar marketing campaign.
- CPCL co-operated with the Commissioner's investigation.
- There is a potential for damage to CPCL's reputation which may affect future business.

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

- CPCL attempted to send or instigate a further 11,177,568 automated marketing calls during the period of complaint that were not connected.
- CPCL may obtain a commercial advantage over its competitors by generating leads from unlawful marketing practices.

37. The Commissioner has also taken into account the fact that the Company has contravened regulation 24 of PECR in that it did not identify the person who was sending or instigating the automated marketing calls and provide the address of the person or a telephone number on which he can be reached free of charge.

38. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£250,000 (Two hundred and fifty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

### **Conclusion**

39. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **10 June 2016** 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.
40. If the Commissioner receives full payment of the monetary penalty by **9 June 2016** the Commissioner will reduce the monetary penalty by 20% to **£200,000 (Two hundred thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
41. 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.
42. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.

43. Information about appeals is set out in Annex 1.
44. 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.
45. 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 11<sup>th</sup> day of May 2016

Signed .....

Stephen Eckersley  
Head of Enforcement  
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) General Regulatory Chamber (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 he ought to have exercised his 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)).