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Monetary Penalty Notice

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DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: H.P.A.S. Limited t/a Safestyle UK

Of: Style House, 14 Eldon Place, Bradford, West Yorkshire, BD1 3AZ

1. The Information Commissioner ("Commissioner") has decided to issue H.P.A.S. Limited t/a Safestyle UK ("HPAS") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to a serious contravention of regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by HPAS.
2. This notice explains the Commissioner's decision.

Legal framework

3. HPAS, whose registered office is given above (Companies House registration number: 02777148), 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

(a) 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.

Background to the case

12. HPAS' business involves making marketing calls to subscribers in order to sell its products and services including windows and doors to homeowners.
13. Between 1 May 2015 and 31 December 2016, the Commissioner received 264 complaints about unsolicited direct marketing calls made by the Company. Of those, 178 complaints were made to the TPS, with a further 86 made direct to the Commissioner. All of these complaints were made by individual subscribers who were registered with the TPS and/or they had not given their prior consent to HPAS to receive calls.
14. Some of those individual subscribers complained that they received repeated unsolicited calls and that their opt out requests were being ignored. In addition, the complaints indicate that HPAS continued to call people who had previously had windows fitted by them or received quotes from them many months and years previously.
15. The following are examples of the complaints received by the Commissioner:
 - "3 calls about windows I said I wasn't interested the 3rd call he said we had asked him to call back in 2 weeks he had a recording of the call not true [sic]".
 - "We had windows fitted by Safestyle 3 years ago. They call us every so often. Monday we got a call saying that a sales reps

was in our area. I told them not to contact us again, we are senior citizens and cannot afford any more work. They called again and again despite the fact that I had told them we weren't interested".

- "Just cannot get through to them to remove my number from their database but they obviously haven't. This harassment has been going on for over five years now. I want it to stop".
- "I am disabled and pretty much housebound and he kept saying persistently that he was sending a rep around the next day. Makes me anxious as I kept saying no".
- "I have made several formal complaints to Safestyle windows which I have not received any reply from. I was told on numerous accounts that my number is blocked but I still receive calls from them. This is incredibly frustrating as the information I am continuing to receive is incorrect and it has made me extremely angry that they have not listened".

16. On 18 January 2016, the Commissioner wrote to HPAS to explain that the ICO could issue civil monetary penalties up to £500,000 for PECR breaches. The letter informed HPAS that the Commissioner and the TPS had received complaints from individual subscribers in relation to unsolicited calls. HPAS was asked a number of questions about its compliance with PECR.

17. The Commissioner received a response from HPAS explaining that it only cavasses existing customers and enquirers who have provided their number requesting a quotation to follow up on interest expressed.

18. HPAS further explained that it does not screen against the TPS as that would prevent it from contacting customers who are registered but who have nonetheless invited contact for quotation and sales purposes. It indicated that it operates a suppression list and adds the telephone numbers of anybody asking not to be called again. It also advised that it was revisiting the way it conducted marketing in order to improve its practice and procedures.
19. The Commissioner directed HPAS to her Direct Marketing Guidance and informed it: -
- That HPAS must ensure that it was able to substantiate that individuals have consented to be called by keeping clear records;
 - In the event that they could not provide clear and recent evidence of consent they must TPS screen prior to any calls being made;
 - In order to comply with the fifth data protection principle it must ensure that it had an adequate retention policy;
 - Consent does not last forever. HPAS cannot rely on an individual's consent to call them on an ongoing basis simply because they asked for quote;
 - If an individual contacts HPAS for a quote but takes their business elsewhere HPAS could not continue to call them as they will not have consented to receive direct marketing calls from them in the future.
20. HPAS underwent three periods of monitoring to determine whether there was a suitable reduction in the number of complaints being recorded. However, despite the HPAS's assurances of their continued commitment to preventing unwanted contact with their customers, complaints at an unacceptable level continued to be

received by the Commissioner.

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 HPAS and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

23. The Commissioner finds that HPAS contravened the following provisions of PECR:
24. HPAS has contravened regulation 21 of PECR.
25. The Commissioner finds that the contravention was as follows:
26. Between 1 May 2015 and 31 December 2016, HPAS used a public telecommunications service for the purposes of making 264 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.
27. The Commissioner is also satisfied for the purposes of regulation 21 that 264 complaints were made by subscribers who had registered with the TPS at least 28 days prior to receiving the calls and/or they had not given their prior consent to HPAS to receive calls.

28. The Commissioner is therefore satisfied that HPAS was responsible for this contravention.
29. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

30. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by HPAS arising from its activities over a 19 month period, and this led to a significant number of complaints about unsolicited direct marketing calls to the TPS and the Commissioner.
31. In addition, it is reasonable to suppose that considerably more calls were made by HPAS because those who went to the trouble to complain are likely to represent only a proportion of those who actually received calls.
32. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

33. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that the HPAS's actions which constituted that contravention were deliberate actions (even if HPAS did not actually intend thereby to contravene PECR).

34. The Commissioner considers that in this case HPAS did not deliberately contravene regulation 21 of PECR in that sense.
35. The Commissioner has gone on to consider whether the contravention identified above was negligent.
36. First, she has considered whether HPAS 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 HPAS 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.
37. 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.
38. The TPS contacted HPAS on each occasion a complaint was made to it which should have made HPAS aware of the risk that these contraventions would occur. It is therefore reasonable to suppose that HPAS should have been aware of its responsibilities in this area.
39. Third, the Commissioner has gone on to consider whether HPAS failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met. Reasonable steps in these

circumstances would have included ensuring that it could evidence consents relied upon to make marketing calls and screening the data against the TPS register/its own effective suppression list.

40. The Commissioner repeatedly advised HPAS of its obligations under PECR in her correspondence over a 12 month period. HPAS was also subject to three separate periods of complaints monitoring yet failed to take steps deemed reasonable by the Commissioner to adequately minimise the volume of complaints.
41. The Commissioner is therefore satisfied that HPAS failed to take reasonable steps to prevent the contravention.
42. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

43. 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 (3A) and the procedural rights under section 55B have been complied with.
44. The latter has included the issuance 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 HPAS on this matter.
45. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

46. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
47. 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.
48. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

49. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£70,000 (seventy thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

50. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **31 August 2017** 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 **30 August 2017** the Commissioner will reduce the monetary penalty by 20% to **£56,000 (fifty six 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 31st day of July 2017

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 (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)).