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Monetary Penalty Notice

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I Want That Ltd

Unit A, 5 Colville Road
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DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: AMS Marketing Limited

Of: 116 South Coast Road, Peacehaven, East Sussex BN10 8SP

1. The Information Commissioner ("Commissioner") has decided to issue AMS Marketing Limited ("AMS Marketing") 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. AMS Marketing (Companies House Reference: 09967423), whose registered office is given above, is the person (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. AMS Marketing first came to the attention of the Commissioner when a particular CLI was identified in the ICO's 'September – October 2017 Threat Assessment' for live calls. Enquiries were made by the Commissioner to the Telecommunications Provider, Hostcomm Limited ("Hostcomm"), who identified AMS Marketing as the user of the CLI and provided further details about their account.
14. On 15 November 2017 a letter setting out the Commissioner's concerns about AMS Marketing's compliance with PECR was sent to the organisation, requesting copies of call scripts, due diligence procedures, and proof of consent for the complaints that had been received.
15. A number of extensions were provided for AMS Marketing to provide this information, however no substantive response was received until 19 January 2018 when the Commissioner was told that it was thought none of the CLIs or complaints logged appeared to relate to AMS Marketing.
16. The Commissioner engaged in further correspondence with Hostcomm who, on 25 January 2018, provided a copy of a Service Agreement Order form signed by one of AMS Marketing's directors, and invoices confirming multiple payments by AMS Marketing for services rendered.

17. These documents were relayed to AMS Marketing and on 2 February 2018 AMS Marketing accepted that it had utilised the services of Hostcomm, and that the CLIs identified were indeed attributable to them, but stated that the "cold calling" had ceased prior to receipt of the Commissioner's first investigatory letter of 15 November 2017.
18. In light of information received from Hostcomm which showed calls continued to be made beyond November 2017 the Commissioner engaged in further correspondence to AMS Marketing, receiving a response on 12 February 2018 to say that it had dramatically reduced in size since 21 December 2017, and that since that time no further unsolicited direct marketing calls had been made.
19. AMS Marketing was still to provide the information that had been requested by the Commissioner on 15 November 2017, and on 26 February 2018 they stated that they would be unable to do so.
20. AMS Marketing did confirm that they purchased data lists from third parties, but that no TPS checks on that data were carried out by them, and that it would not be possible to attribute the complaints to a particular data set since records about the suppliers were not kept for longer than three months.
21. Enquiries made against the TPS register established that in the period of 1 October 2016 to 31 December 2017 a total of 75,649 connected unsolicited direct marketing calls were made by AMS Marketing to subscribers who had previously registered with the TPS so as not to receive such calls.
22. Analysis of the complaints made to the TPS regarding unsolicited calls from AMS Marketing identified that 71 complaints were received between 1 October 2016 and 31 October 2017.

23. In addition, an interrogation of the ICO's on-line reporting tool showed that a further 32 complaints had been received between 1 October 2016 and 31 October 2017 from individuals who were registered with the TPS but had received unsolicited direct marketing calls from AMS Marketing.

24. The following are examples of complaints received via the ICO's online reporting tool and the TPS:

- *"Called about fraudulent accident claim. Caller hung up when asked how my number was found. I'm registered with the TPS so these calls are illegal."*
- *"They knew my name and address and claimed that I was legally owed circa £1800 for a non-fault traffic accident. I asked what the option not to pursue was, but they said I would still receive calls; even if not from them. I advised them that I don't give personal details over the phone and they hung up..!"*
- *"Saying we had an accident and they can help with compensation. Asked for my daughter who has actually not been driving long so I find it very stressful and disturbing until I realise it's an unsolicited call."*
- *"A minor accident 8 years ago, trying yet again to persuade us to claim compensation despite being with [sic] Tps and asking them [sic] repeatedly not to ring us."*
- *"Claimed I had reported having a car accident a few months ago, which is false."*

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

The contravention

27. The Commissioner finds that AMS Marketing contravened the following provisions of PECR:
28. AMS Marketing has contravened regulation 21 of PECR.
29. The Commissioner finds that the contravention was as follows:
30. Between 1 October 2016 and 31 December 2017, AMS Marketing used a public telecommunications service for the purposes of making 75,649 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. The Commissioner has established that within this time, a total of 103 complaints were made to the TPS / Commissioner between 1 October 2016 and 31 October 2017.
31. The Commissioner is also satisfied for the purposes of regulation 21 that the 75,649 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 AMS

Marketing to receive calls.

32. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

33. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by AMS Marketing arising from the organisation's activities over a 15 month period, and this led to a significant number of unsolicited direct marketing calls being made to subscribers who were registered with the TPS, and a substantial number of complaints being made as a result.
34. The 75,649 unsolicited direct marketing calls made between 1 October 2016 and 31 December 2017 have been made from CLIs allocated to AMS Marketing. These calls were not screened against the TPS register, nor is there any evidence of consent being provided to AMS Marketing from the individual subscribers. There is no evidence of any due diligence checks being carried out, or any proof to show that contracts were in place to ensure the data's veracity upon purchase.
35. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

36. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that AMS Marketing's actions which constituted that contravention were

deliberate actions (even if AMS Marketing did not actually intend thereby to contravene PECR).

37. The Commissioner considers that in this case AMS Marketing did not deliberately contravene regulation 21 of PECR in that sense.
38. The Commissioner has gone on to consider whether the contravention identified above was negligent.
39. First, she has considered whether AMS Marketing 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 AMS Marketing relied heavily on direct marketing due to the nature of its business, the way in which it sourced its data, and the fact that the issue of unsolicited calls has been widely publicised by the media as being a problem.
40. 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. It is therefore reasonable to suppose that AMS Marketing should have been aware of its responsibilities in this area.
41. Secondly, the Commissioner has gone on to consider whether AMS Marketing failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met.

42. Reasonable steps in these circumstances would have included ensuring that AMS Marketing could evidence consents relied upon to make marketing calls; having in place a contractual arrangement with its third party data suppliers to ensure that the data being purchased met the required threshold for valid consent, and to be able to at least link the data provided with its respective provider; screening the data against the TPS register; and ensuring that it had in place an effective and robust suppression list.
43. Organisations buying marketing lists from third parties must make rigorous checks to satisfy themselves that the third party has obtained the personal data it is using fairly and lawfully, and that they have the necessary consent.
44. It is not acceptable to rely on assurances of indirect consent without undertaking proper due diligence. Such due diligence might, for example, include checking the following:
- How and when was consent obtained?
 - Who obtained it and in what context?
 - What method was used – eg was it opt-in or opt-out?
 - Was the information provided clear and intelligible? How was it provided – eg behind a link, in a footnote, in a pop-up box, in a clear statement next to the opt-in box?
 - Did it list organisations by name, by description, or was the consent for disclosure to any third party?
 - Is the seller a member of a professional body or accredited in some way?
45. In this case AMS Marketing relied upon non-contractual assurances from its third party data suppliers that the necessary consent had been

obtained for the making of unsolicited direct marketing calls. In doing so, the Commissioner does not consider that AMS Marketing undertook sufficient due diligence. It did not, for example, make proper enquiries as to the basis on which the data it had bought was said to be "opted-in".

46. It is further noted that one of AMS Marketing's data suppliers had been subject to enforcement action by the Commissioner as recently as March 2017. Had AMS Marketing carried out reasonable checks they would have discovered this and could have taken the relevant steps to ensure the compliance of any data purchased.
47. The Commissioner is satisfied that AMS Marketing failed to take reasonable steps to prevent the contravention.
48. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

49. 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.
50. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. The Commissioner has received no representations from AMS Marketing in response to the Notice of Intent, despite being invited to serve the same.
51. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

52. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
53. 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.
54. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

55. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£100,000 (one hundred thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.
56. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **29 August 2018** 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.

57. If the Commissioner receives full payment of the monetary penalty by **28 August 2018** the Commissioner will reduce the monetary penalty by 20% to **£80,000 (eighty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
58. 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.
59. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
60. Information about appeals is set out in Annex 1.
61. 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.

62. 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 27th day of July 2018.

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)).