

ico.

Information Commissioner's Office

**ICO FINE COLD CALL
ELIMINATION LTD £75,000**

Monetary Penalty Notice
(with key areas highlighted for easy reading)

TEL: 0843 005 9576*

TPS Services

Telephone: 0843 005 9576*
Fax: 0844 774 8411
www.tpsservices.co.uk

TPS Checker

Telephone: 0844 774 8410*
Fax: 0844 774 8411
www.tpschecker.co.uk

I Want That Ltd
Unit A, 5 Colville Road
Acton, London, W3 8BL

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*Calls cost 5p per minute plus your phone company's access charge.

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: **Cold Call Eliminations Ltd**

Of: Suite 1 Metro House, Northgate, Chichester, West Sussex, PO19 1BE

1. The Information Commissioner ("Commissioner") has decided to issue Cold Call Eliminations Ltd ("Company") 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 by the Company.
2. This notice explains the Commissioner's decision.

Legal framework

3. This notice is issued by virtue of regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR") as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2004 and by the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2011 ("PECR 2011").

4. PECR came into force on 11 December 2003 and revoked the Telecommunications (Data Protection and Privacy) Regulations 1999. PECR adopted Part V entitled, "Enforcement", and Schedules 6 and 9 of the DPA. By virtue of regulation 31(2) of PECR the Commissioner was made responsible for the enforcement functions under PECR.
5. On 26 May 2011, PECR 2011 amended regulation 31 of PECR to adopt sections 55A to E of the DPA and introduced appropriate adaptations to those sections. This was the applicable law in force at the time of the contravention.
6. 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)).
7. The Company, whose registered office is given above (Companies House registration number: 08388416), 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.
8. 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.

9. 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.”

10. 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.”
11. Under regulation 26 of PECR, OFCOM 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 OFCOM to carry out this role. Businesses who wish to carry out direct marketing by telephone can subscribe to TPS for a fee and receive from them monthly a list of numbers on that register.
12. Under section 55A (1) of the DPA as adapted by PECR 2011 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,
 - (b) the contravention was of a kind likely to cause substantial damage or substantial distress, and
 - (c) 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 –

(i) that there was a risk that the contravention would occur, and

(ii) that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but

(b) failed to take reasonable steps to prevent the contravention.”

13. 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.

14. 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

15. The Company's business involves calling individual subscribers to market a call blocking device and service to stop unsolicited calls.
16. In November 2013 the Company was identified by the ICO as being the subject of a large number of complaints about unsolicited marketing calls.
17. On 16 December 2013 the ICO wrote to the Company to explain that the ICO could issue civil monetary penalties up to £500,000 for PECR breaches. The letter informed the Company that the ICO and the TPS had received complaints from individual subscribers in relation to unsolicited calls. They were asked a number of questions about their compliance with PECR.
18. On 6 January 2014 the ICO received a response from the Company explaining that it purchased data from a third party and did not itself screen that data against the TPS. The Company suggested that it would be putting in place additional procedures to ensure that there was a reduction in the complaints made regarding unsolicited marketing calls.
19. The Company was subsequently placed under a period of monitoring for 3 months. During this time a large number of complaints continued to be made about the Company. On 13 August 2014 the director of the Company attended a meeting at the ICO to discuss the Company's compliance with PECR. A further period of monitoring subsequently took place between September and November 2014 which saw a small but insignificant drop in the complaints made to the TPS about the Company.

20. Between 14 June 2013 and 31 March 2015, the ICO received 46 complaints about the Company via the ICO's online reporting tool. All of these complaints were made by individual subscribers who were registered with the TPS.
21. The following are examples of the complaints received by the ICO:
- "Caller pressed (i.e. conned) an elderly lady to take a subscription to a product called Pro Call Blocker which appears to be the equivalent of the (free) TPS for which she is already registered. Lady was distressed when this came to light (found by the family) and is out of pocket financially Family trying to take action to recover the money."
 - "My father is 85 years old and recently lost his wife of 60 years. He doesn't understand where companies like this get his personal information from to cold call him. They are also trying to extract £85 to allegedly block cold calls. I believe they are preying on old people and they are holding and processing personal data in contradiction to the Data Protection Act."
 - "This was made to my 75 year old mother and they had all her details regarding her bank. She felt like she was being forced into it and she actually said yes. I have since call the company and cancelled the purchase. This is a company cold calling people to stop cold calls???"
 - "Gave the impression until challenged that they were in fact the TPS although they did not state they were - the way they put forward the reason they were going to upgrade me gave me the impression that they were the TPS - until challenged, when they stated a cost element that is when they said they were not the

TPS - feel as though they were trying to trick me in to this upgrade as I believe had I not asked if they were the TPS then they would not have told me."

- "The call was received by my 82 year old mother who lives alone and is suffering with ovarian cancer. These people target elderly vulnerable people who believe what they are told. Thankfully my mother rang me to check it out before proceeding. On the internet I have found numerous references to this company all complaining about their marketing techniques."
- "This company has 'conned' my mother out of £84.99 for an unnecessary service ... my parents are 87 and 86 respectively; my father is suffering from dementia."
- "I am looking after my elderly mother who has terminal cancer. She initially answered and I could see I needed to intervene as I could hear the sales guy not giving up. I took the phone and asked him who he was and what he wanted. He got quite annoyed that I had intervened and I told him we were not interested. We get endless calls and my mother has to be watched not to give out her details. These kinds of calls are very stressful at a time we don't need it. We are registered with the TPS and have been for over a year - it makes no difference at all, as we receive a dozen calls a day from various cold callers. Please do something and stop this blight on my mum's last days. Thank you."
- "I was unsure what the call was about and I am elderly. I don't understand technological talk but I ended up agreeing to a purchase I didn't need because the sales person was able to

convince me to buy it. My daughter and a friend have been trying to resolve the problem for me.”

- “Over a period of a few months my mother has received increased nuisance calls. Then in the first week of February she received more than one call from Cold Call Elimination Ltd, the caller said they were from BT and could prevent nuisance calls. My mother is clear that she did not agree to anything and did not give any bank details (I am 95% certain that she didn't), but then she received a letter from Cold Call Elimination Ltd that confirmed a service being provided and setting up a direct debit for £84.99 per month for a 'platinum service'. My mother's bank were concerned about how the bank details had been obtained, and they agreed to close the account and set up a new one. Luckily we spotted it in time but this is despicable and most likely fraudulent. The bank can't progress because we stopped it before anything was taken and it was not therefore a fraud on the bank? My mother will be 86 soon, and has been badly shaken. It has also taken considerable time to sort it all out. My mother has been badly shaken by the experience and it has affected her self-confidence. The call and subsequent direct debit letter has caused me significant time to sort out and protect my mother. We are still very worried about where the bank information came from, although we have closed the account.”
22. **Between 14 June 2013 and 31 March 2015, the TPS received 336 complaints about the Company. The TPS referred all of those complaints to the Company and also notified the ICO.**
23. Attached at Annex 2 is a spreadsheet detailing the 336 complaints made by individual subscribers to the TPS. This list includes the subscribers' names and telephone numbers together with the date and

time of the call (under the headings, 'complaint date' and 'complaint time') and the date that the complaint was processed by the TPS.

24. The explanations provided by the Company to the TPS for making these calls is as follows:
- On 190 occasions – no reason was given.
 - On 49 occasions – human error.
 - On 41 occasions – programming error.
 - On 36 occasions - misdialled.
 - On 10 occasions – the subscriber was opted in.
 - On 5 occasions – called prior to screening.
 - On 2 occasions – processing error.
 - On 3 occasions – not called.
25. The Company was in the Top 20 list of companies about which the TPS received the most complaints about in July 2014, January 2015 and February 2015.
26. The Commissioner has made the above findings of fact on the balance of probabilities.
27. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by the Company and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

28. The Commissioner finds that the Company contravened the following provisions of PECR:

29. The Company has contravened regulation 21 of PECR.
30. The Commissioner finds that the contravention was as follows:
31. Between 14 June 2013 and 31 March 2015, the Company used a public telecommunications service for the purposes of making 382 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 OFCOM in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR.
32. The Commissioner is also satisfied for the purposes of regulation 21 that 382 complaints were made by 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 the Company to receive calls.
33. The Commissioner is satisfied that the Company was responsible for this contravention.
34. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

35. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by the Company arising from its activities over a long period of time and these led to a large number of complaints about unsolicited direct marketing calls to the TPS and the ICO. In addition, it is reasonable to suppose that considerably more calls were made by the Company because those who went to the trouble to complain are

likely to represent only a proportion of those who actually received calls.

36. False and misleading statements were made as to the identity of the business and the nature of the product or service provided. Many of the calls were made to elderly and vulnerable subscribers. Bank details were obtained from some of the subscribers under duress. The contravention was also exacerbated by the fact that the Company was itself making unsolicited calls to TPS subscribers.
37. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Contraventions of a kind likely to cause substantial damage or substantial distress

38. The relevant features of the kind of contravention are:
39. 365 individual subscribers received unsolicited marketing calls that they had not consented to. The number could have been far higher. False and misleading statements were made as to the identity of the business and the nature of the product or service provided. Many of the calls were made to elderly and vulnerable subscribers. Bank details were obtained from some of the subscribers under duress. The contravention was also exacerbated by the fact that the Company was itself making unsolicited calls to subscribers.
40. The Commissioner considers that the contravention identified above had the following potential consequences:

41. The contravention would cause distress to the subscribers who received the unsolicited marketing calls from the Company. This is supported by the large numbers of individuals who have complained about these calls and because of the nature of some of the complaints they gave rise to.
42. The Commissioner considers that the distress described above was likely to arise as a consequence of the kind of contravention. In other words, the Commissioner's view is that there was a significant and weighty chance that a contravention of the kind described would have such consequences.
43. The Commissioner also considers that such distress was likely to be substantial, having regard to the extent of the contravention and its nature. The likely distress was certainly more than trivial.
44. The Commissioner has also given weight to the number of affected individuals. The Commissioner considers that even if the distress likely to have been suffered by each affected individual was less than substantial, the cumulative impact would clearly pass the threshold of "substantial". In addition, given the number of affected individuals, it was inherently likely that at least a small proportion of those individuals would have been likely to suffer substantial distress on account of their particular circumstances. For example, an elderly or vulnerable subscriber is pressurised into providing their bank details in the expectation that the Company has official standing and can actually stop the unsolicited calls.
45. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

46. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that the Company's actions which constituted that contravention were deliberate actions (even if the Company did not actually intend thereby to contravene PECR).
47. The Commissioner considers that in this case the Company did not deliberately contravene regulation 21 of PECR in that sense.
48. The Commissioner has gone on to consider whether the contraventions identified above were negligent. First, he has considered whether the data controller knew or ought reasonably to have known that there was a risk that these contraventions would occur. He is satisfied that this condition is met, given that the Company relied heavily on direct marketing due to the nature of its business, and the fact that the issue of unsolicited calls was widely publicised by the media as being a problem. It is therefore reasonable to suppose that they should have been aware of their responsibilities in this area.
49. The Company has been aware of its obligations under PECR since at least 16 December 2013 when the ICO first raised its concerns with them. Since that date the ICO has provided the Company with clear advice about the requirements of PECR, both in writing and in person. The TPS also contacted the Company 336 times regarding complaints which should have made the Company aware of the risk that that these contraventions would occur.

50. Complaints continued to be received by the TPS and the Commissioner even after the ICO's letters and the Company's assurances.
51. Second, the Commissioner has considered whether the Company knew or ought reasonably to have known that those contraventions would be of a kind likely to cause substantial distress. He is satisfied that this condition is met, given that the Company knew that individual subscribers were complaining about calls they were receiving and that the recipients of those calls had asked not to receive them. This demonstrates that the Company knew of the risk of contraventions. They therefore ought to have known that it was only a matter of time before substantial distress to the recipients of the calls was likely to be caused.
52. Third, the Commissioner has considered whether the Company failed to take reasonable steps to prevent the contraventions. Again, he is satisfied that this condition is met. Reasonable steps in these circumstances would have included carrying out due diligence checks, screening the data against the TPS register/its own suppression list and providing the Company's telesales staff with written procedures and training regarding the requirements of PECR and how to comply with them. The Company failed to take those steps.
53. The Commissioner is therefore satisfied that condition (c) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

54. 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.

55. The latter has included the issuing of a Notice of Intent dated 27 July 2015, in which the Commissioner set out his preliminary thinking. In reaching his final view, the Commissioner has taken into account the representations made in response to that Notice of Intent, as well as those made in other correspondence from the Company.
56. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
57. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty. He has taken into account the Company's representations made in response to the Notice of Intent and in other correspondence on this matter.
58. 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.
59. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

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

- The Company fully co-operated with the Commissioner's investigation.
- There is a potential for damage to the Company's reputation which may affect future business.

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

- The Company may obtain a commercial advantage over its competitors by generating leads from unlawful marketing practices.
- False and misleading statements have been made during calls.
- Elderly and vulnerable individuals have been misled into purchasing services from the Company.

62. **Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is £75,000 (seventy five thousand pounds).**

Conclusion

63. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by 15 October 2015 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.

64. If the Commissioner receives full payment of the monetary penalty by 14 October 2015 the Commissioner will reduce the monetary penalty by 20% to **£60,000 (sixty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
65. 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.
66. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
67. Information about appeals is set out in Annex 1.
68. 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.

69. 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 14th day of September 2015

Signed

David Smith
Deputy Information Commissioner
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;
- d) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
 - e) 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)).