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Information Commissioner's Office

**DIRECT CHOICE HOME
IMPROVEMENTS LTD FINED £50,000**

Monetary Penalty Notice

TEL: 0843 005 9576*

TPS Services

Telephone: 0843 005 9576*

Fax: 0844 774 8411

www.tpsservices.co.uk

TPS Checker

Telephone: 0844 774 8410*

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DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Direct Choice Home Improvements Limited

Of: Unit 20, Clarion Court, Llansamlet, Swansea, West Glamorgan, SA6
8RF

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

Legal framework

3. The Company, whose registered office is given above (Companies House registration number: 06677187), is the person stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for direct marketing purposes contrary to regulation 21 of PECR.
4. Regulation 21 of PECR states:

“(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.

(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.”

5. 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 Telephone Preference Service (“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.

6. “Individual” is defined in regulation 2(1) of PECR as “a living individual and includes an unincorporated body of such individuals”.
7. 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)).
8. Section 55A of the DPA (as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 and the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2015) states:

“(1) The Commissioner may serve a person with a monetary penalty 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.”

9. 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.
10. 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 PECR so as to give effect to the Directives.

Background to the case

11. The Company provides and installs home improvement products such as doors, windows, conservatories, kitchens and bathrooms.
12. The ICO first wrote to the Company in June 2014 following a number of complaints having been made about unsolicited direct marketing telephone calls. As the volume of complaints was relatively low, the Commissioner decided that he would provide the Company with advice and guidance on compliance with PECR rather than take regulatory action at that time. However, the Company was warned that the Commissioner could issue monetary penalties up to £500,000 for PECR breaches.

13. Despite this, in May 2015 the Company was in the top 20 list of companies about which the TPS received the most complaints. The Commissioner therefore wrote to the Company on 15 July 2015 providing a list of the complaints made to the TPS in May 2015 and asking for evidence that it had the consent of the subscribers to make those calls. The Company was also asked to explain what steps it intended to take to reduce the number of complaints made. The Commissioner again warned the Company that he could issue monetary penalties of up to £500,000 for PECR breaches.
14. During a subsequent telephone conversation, the Company maintained that, despite the fact that they had been sent to its registered office address and by email, the Commissioner's letters had not been received. On 26 August 2015 the Commissioner sent further copies of his letters to the Company's trading address.
15. On 3 September 2015 the Company replied to the Commissioner by returning a copy of the list of TPS complaints simply marked with the name of the third party who had supplied it with the data it had used to make marketing calls. During a further telephone conversation, the Company explained that it had received assurances from the third party that the data provided had been screened against the TPS register. The Commissioner explained that it was the Company's responsibility to ensure that it did not make unsolicited direct marketing calls to TPS subscribers. It was not acceptable to rely on assurances from third party providers without undertaking proper due diligence.
16. On 3 September 2015 a further letter was sent to the Company at its trading address, repeating the request for evidence that it had the consent of the subscribers to make the calls and to explain the steps it

intended to take to reduce the number of complaints made. The Company was also asked for a copy of the contract and any other relevant correspondence between it and the third party that had supplied the marketing list. No response was received from the Company.

17. Between 29 April 2015 and 29 September 2015, 167 complaints were made about unsolicited direct marketing calls made by the Company. 118 of those complaints were made to the TPS, with a further 49 made direct to the ICO. All of these complaints were made by individual subscribers who were registered with the TPS. Spreadsheets containing details of these complaints are attached at Annexes 1 and 2.
18. When the TPS receives a complaint, it contacts the organisation complained about and invites it to explain why the call was made. This provides an opportunity for the organisation to explain to the TPS that, for example, it did not make the call or that it had the consent of the subscriber to make the call. Of the 118 occasions on which the TPS contacted the Company, it did not respond to the TPS on 33 occasions. On the remaining 85 occasions, the Company replied "For list screening", giving the name of the third party which had supplied it with the marketing list.
19. The following are examples of some of the comments made by individuals who have complained to the ICO:

"Concerned that my wife who is disabled was in trouble. Only close friends and scammers call on this phone, will disconnect service when my contract ends."

"Frustration that I have received yet ANOTHER cold call - 3rd. in as many days. At least they didn't want to speak to my long dead parents this time."

"Wanted to speak to [redacted] - my mother who has been dead for over SIX years. This a the latest in a number of calls from this firm asking to speak to one of my dead parents (MY father ahs [sic] been dead for over 13 years!) In fact the last time was only FIVE days ago. Every time they "apologise" and say my phone details will be removed but clearly they aren't OR this firm is deliberately harassing me because I say I'll report the to the ICO."

"I feel DESPERATELY upset by continuing to have these calls. It is bad enough receiving calls for my dead parents. But this one was particularly upsetting only 5 days after their last call. PLEASE help me and get them to stop before I start to feel really depressed again. Thank you."

20. The Commissioner has made the above findings of fact on the balance of probabilities.
21. 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

22. The Commissioner finds that the Company contravened regulation 21 of PECR.

23. The Commissioner finds that the contravention was as follows:
24. Between 29 April 2015 and 29 September 2015, the Company used a public telecommunications service for the purposes of making 167 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.
25. The Commissioner is also satisfied for the purposes of regulation 21 that the 167 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.
26. The Commissioner is therefore satisfied that the Company was responsible for this contravention.
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 the Company arising from its activities 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.

29. The Company was in the top 20 list of companies about which the TPS received the most complaints in May, July, September and November 2015.
30. Some complainants allege that the Company made repeat calls to them even though they had asked for their number to 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 the Company's actions which constituted that contravention were deliberate actions (even if the Company did not actually intend thereby to contravene PECR).
33. The Commissioner considers that in this case the Company did not deliberately contravene regulation 21 of PECR.
34. The Commissioner has gone on to consider whether the contraventions identified above were negligent.
35. First, he has considered whether the Company 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. The Company has been aware of its obligations under PECR since at least June 2014

when it was first contacted by the ICO. The TPS also contacted the Company on each occasion a complaint was made to it which should have made the Company aware of the risk that these contraventions would occur. It is therefore reasonable to suppose that the Company should have been aware of their responsibilities in this area.

36. Second, the Commissioner has gone on to consider 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. Given the volume of complaints received, it is clear that the Company failed to take those steps.
37. The Company was provided with numerous opportunities to provide both the ICO and TPS with an explanation for the contraventions but failed to do so other than to say it had purchased its marketing list from a third party.
38. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

39. 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.

40. The latter has included the issuing of a Notice of Intent dated 15 January 2016, 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.
41. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
42. 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.
43. 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.
44. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

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

- There is a potential for damage to the Company's reputation which may affect future business.

46. The Commissioner has 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.
- There was a failure to fully cooperate with the Commissioner.

47. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£50,000 (fifty thousand pounds)**.

Conclusion

48. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by 20 April 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.

49. If the Commissioner receives full payment of the monetary penalty by 19 April 2016 the Commissioner will reduce the monetary penalty by 20% to **£40,000 (forty thousand pounds)**. However, you should be

aware that the early payment discount is not available if you decide to exercise your right of appeal.

50. 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.
51. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
52. Information about appeals is set out in Annex 1.
53. 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.
54. 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 21st day of March 2016

Signed

Stephen Eckersley
Head of Enforcement
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;
 - 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)).