

**The Privacy and Electronic Communications (EC Directive) Regulations
2003 as amended**

Monetary Penalty Notice

Dated: 24 July 2014

**Name: Reactiv Media Limited trading as Discover Finance and
Consumer Helpline**

**Registered Office: The Warehouse, Gas Works Lane, Elland, West
Yorkshire HX5 9HJ**

Statutory framework

1. This monetary penalty 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").
2. Reactiv Media Limited, whose registered office is given above (Companies House Registration Number: 06252030) is the person stated in this Notice of Intent to have used a public electronic communications service to make unsolicited calls for the purpose of direct marketing contrary to regulation 21 of PECR.
3. 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

(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.”

Background

8. Reactiv Media Limited trading as Discover Finance and Consumer Helpline (“RML”) is a business engaged in making telephone calls to consumers for the purpose of direct marketing.
9. OFCOM is the Office of Communications established by section 1 of the Office of Communications Act 2002 to facilitate the regulation of communications. 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 Limited (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 the TPS for a fee and then receive monthly a list of numbers on that register.
10. It is a fundamental requirement of PECR, and well-known in the direct marketing industry, that a consumer’s consent must have been notified to the company before it makes direct marketing telephone calls to that consumer if the consumer is registered with the TPS. Therefore, it is a necessary step for businesses involved in telesales to make arrangements to ensure that they do not make direct marketing calls to those consumers who have subscribed to the TPS, unless the business holds records showing that those consumers have given their informed consent to that business to receive such calls.

14. The Commissioner's office received a letter in response dated 8 February 2013 which had been delayed due to a problem with the postal system. The letter stated that RML had been the victims of a fraudulent scam with unknown individuals purporting to be RML or Discover Finance. The Commissioner's office was referred to RML's website which contained a warning to members of the public to be vigilant and report the scam to the police. RML also asked the Commissioner's office for further details of the complaints so that they could investigate this matter further.
15. The Commissioner's office sent a letter to RML dated 2 April 2013 acknowledging RML's explanation regarding a scam but asking for clarification bearing in mind their responses to the TPS which clearly accepted that the calls were made by RML. The letter also requested the full list of telephone numbers used by RML for marketing purposes. A response was required within 28 days of the date of this letter.
16. During this time, a third party information notice was served on a telecommunications provider in relation to a calling line identification number 01422387713 ("CLI"). This CLI was at position 9 of the November monthly threat assessment compiled by the Commissioner's office. On 11 April 2013, a response was provided by the telecommunications provider identifying RML as the allocated subscriber of this line together with a further breakdown of over 300 CLI's allocated to RML.
17. The Commissioner's office then received a letter from RML dated 7 May 2013 explaining that they were finding it difficult to link the case reference number ("ENF048113") to the TPS complaints. They further explained that when RML receive a complaint on the TPS website, they tick the box showing that RML have prior consent and that evidence is available should it be required. However, all the details of the case then disappear from the TPS website so that RML are unable to establish what ENF048113 relates to from the TPS website.
18. The Commissioner's office sent a letter in response to RML dated 10 May 2013 explaining that the case reference number is simply a reference number used by the case management system to identify individual cases. Further, that the TPS system is not linked to that of the Commissioner's office.
19. A breakdown of the TPS complaints between November 2012 and February 2013 was also provided to RML which clearly identified the company's response that they had prior consent from the recipients of the calls and that evidence was available if required. RML were then requested to provide full responses to the letters from the Commissioner's office dated 16 January 2013 and 2 April 2013 within 21 days failing which an

complaints was a complaint on the Commissioner's case management system and 119 were received via the Snap Survey on-line reporting tool. These complaints were all made by individual subscribers who were registered with the TPS.

27. The following are examples of four complaints received by the Commissioner via the Snap Survey among the 120 referred to in paragraph 26 above:

- "I have been receiving calls from RML saying that they are a consumer helpline for some reason. I have never...heard of them. They have been calling for over three weeks now, every day or every other day. When I have received the call I have advised as of day one that I am on the preferential callers list and for them to take me off of their calling list. Today after many days of asking to speak to a supervisor did the caller pass me to one, the supervisor is named [REDACTED] so I was told and he has said he would remove my number, as every other person that had called has advised me before him. This is now fast becoming a nightmare as sometimes they call both in the morning as well as the evening. I have advised them that I am disabled and that these calls are just making my situation worse as I have no peace. I beg of you to please find out why I am receiving these calls and for them to please stop calling my home. Thank you."
- "They called on my mobile number. This is a work mobile number for the fire service and I am employed at [REDACTED]. The sarcastic tone used when I advised that I had no loans was what annoyed me, and also the questioning which was assumptive and aggressive. The script was designed to back people in to a corner and I was annoyed as I know that my elderly parents would find this a difficult call to answer."
- "I am receiving up to six calls, such as this one, a day. I have severe breathing difficulties (a condition I have had since childhood) and it now takes considerable effort to reach the handset and talk on the phone. Not only that, I want the line kept clear in case of emergencies. I have signed up to the TPS, so why is this happening?"
- "This call was received by my mother who has dementia and it caused her distress. She is registered with the TPS."

- (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."

Definitions

- 31. The term "person" applies to limited companies as well as individuals. It is defined in Schedule 1 of the Interpretation Act 1978 as follows:
 - " 'Person' includes a body of persons corporate or unincorporate".
- 32. The following are defined in Regulation 2 (1) of PECR :
 - (a) The term "public electronic communications service" is defined as having the meaning given in section 151 of the Communications Act 2003 which states that it means any electronic communications service that is provided so as to be available for use by members of the public.
 - (b) The term, "individual" is defined as, "a living individual and includes an unincorporated body of such individuals;"
 - (c) The term, "subscriber" is defined as, "a person who is a party to a contract with a provider of public electronic communications services for the supply of such services;"
 - (d) The term "call" is defined as "a connection established by means of a telephone service available to the public allowing a two-way communication in real time;"
 - (e) The term, "direct marketing" is defined in the Act at section 11 as "the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals."

40. Therefore the Commissioner is satisfied that the case meets the seriousness threshold.

Likely to cause substantial damage or substantial distress (S55A (1) (b))

41. The Commissioner is satisfied that the contravention is of a kind likely to cause substantial damage or substantial distress as required by section 55 (1)(b) because of the large numbers of individuals who have complained about these unsolicited calls and the nature of some of the complaints they gave rise to.
42. Although the distress in every individual complainant's case may not always have been substantial, the cumulative amount of distress suffered by the large numbers of individuals affected, coupled with the distress suffered by some individuals, some receiving multiple calls means that overall the level was substantial.
43. When looking at the meaning of "substantial" in terms of the levels of distress, the Commissioner has had regard to section 2, page 14 of his Guidance. This says that the Commissioner considers that "if damage or distress that is less than considerable in each individual case is suffered by a large number of individuals the totality of the damage or distress can nevertheless be substantial".
44. The Commissioner is satisfied that the above evidence shows not only that the unsolicited marketing calls are of a kind "likely to cause substantial distress" as required by section 55, but that in fact they have, in the case of some particular individual complainants, actually done so.

Deliberate

45. Any company engaged in making telephone calls to consumers for the purpose of direct marketing should be aware of the law surrounding this activity. In the Commissioner's view, RML acted deliberately in using or instigating the use of a public telecommunications system for the purposes of making unsolicited calls for direct marketing purposes. There is evidence provided by some of the complainants to suggest that RML were aware they were contravening regulation 21 of PECR but continued with this unlawful practice.

Failed to take reasonable steps to prevent the contravention (S55A (3) (b))

50. RML's business is reliant upon direct marketing to consumers. It is a fundamental requirement of PECR that TPS registered numbers have to be suppressed and that consent is required from consumers who are TPS registered before marketing calls can be made to them.
51. RML has provided no evidence of any formal policies and procedures in place for the staff to follow to ensure they know how to comply with PECR. RML should have been able to demonstrate that they had effective systems in place to prevent the breaches of PECR.
52. The Commissioner is therefore satisfied that section 55A (3)(b) of the Act applies in that during the period of complaint RML failed to take reasonable steps to prevent the contravention.

Aggravating features the Commissioner has taken into account in determining the amount of a monetary penalty

53. Nature of the contravention:
- Some of the complainants said that despite informing the caller that they did not want to receive calls they nevertheless continued to receive them
 - RML failed to provide adequate company information
54. Effect of the contravention:
- There were repeated invasions of privacy and distress for individuals
 - Individuals were deprived of their rights under DPA/PECR
55. Behavioural issues:
- Minimal engagement with the ICO and no requested information provided including evidence of consent
56. Impact on RML:
- RML is a private organisation within a competitive direct marketing industry where continuous breaches of PECR could create an unfair advantage.

a monetary penalty notice will not impose undue financial hardship on an otherwise responsible person.

Amount of the monetary penalty

61. The Commissioner considers that the contravention of PECR is **serious** and that the imposition of a monetary penalty is appropriate. Further that a monetary penalty in the sum of **£50,000** (Fifty thousand pounds) is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Payment

62. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by 27 August 2014 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.

Early payment discount

63. If the Commissioner receives full payment of the monetary penalty by 26 August 2014 the Commissioner will reduce the monetary penalty by 20% to £40,000 (Forty thousand pounds). You should be aware that if you decide to take advantage of the early payment discount you will forfeit your right of appeal.

Right of Appeal

64. There is a right of appeal to the (First-tier Tribunal) General Regulatory Chamber against:
- a. the imposition of the monetary penalty

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

- 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.
5. 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.
6. 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.
7. 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)). Also Article 7 of the Data Protection (Monetary Penalties) Order 2010 (SI 2010/910), s.49 of, and Schedule 6 to, the Data Protection Act 1998 have effect in relation to appeals for PECR as they have effect in relation to appeals under the DPA, s.48(1).