

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Point One Marketing Ltd (previously Conservo Digital Ltd) trading as Stop the Calls

Of: Third Floor, 24 Westover Road, Bournemouth, Dorset BH1 2BZ

1. The Information Commissioner ("Commissioner") has decided to issue Point One Marketing Ltd (previously Conservo Digital Ltd) trading as Stop the Calls ("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: 8129602), 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 of PECR provides that:

“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 a service to arrange for the removal

of their details from the data provider's database to "stop" unsolicited calls.

16. Between 1 February 2014 and 31 March 2015, the ICO received 169 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. The calls were often repeated (sometimes on the same day) and suppression requests were not always acted upon by the Company.
17. The following are examples of the complaints received by the ICO:
 - "Very upset and angry that my mum, who has dementia, was talked into giving credit card details when it would have been obvious to the caller that she had dementia. This caused my mum distress because I had to explain why her debit card had to be cancelled and what she had done. This has caused both of us great distress. Had I not checked her call log and ... the number that had called her I would not have known it had happened at all."
 - "I was intimidated and shouted at by the call representative and would not explain how they got my number considering I was ex-directory."
 - "I found myself giving my credit details to the salesperson. I had just taken my medication (I am 75 years old) and wasn't thinking straight, my wife and son pointed out what I had done after the call ended and I called the company to cancel and ask for a refund (we will have to see if they actually refund) I am very distressed at what I did, giving my credit card details over the phone to a stranger. I am receiving calls from various companies

at least 4–5 times each day and I am now considering getting rid of the phone all together.”

- “I have been having cold calling problems for many years. I have an ex-directory number. I purchased their... nuisance call telephone system. I have blocked international numbers, numbers withheld or no number given. I also pay ... to stop these calls coming through. But they seem to get round these services. It's highly distressing. This call really frightened me because I got my debit card out of my wallet to pay the man for what I perceived was an ICO funded service to prevent the very calls I have been having the problem with; it was inferred that the person was an official from an independent organisation. My friend made enquiries and it appears the representation was false from the outset. How did this company get my number? What other information do they have about me?”
- “Initially I was shaking following the phone call due to the attitude of Now I am angry because out there are people who may believe that the company Stop these Calls are linked to the TPS and they could be persuaded that this company for a charge will stop all unwanted calls.”
- “I recognised the caller's voice and behaviour from a similarly aggressive sales call I had received several months ago, which followed an exactly similar line to the calls I received today to sell us the Stop These Calls service to stop nuisance calls. Yet they are making nuisance calls themselves. If someone of a nervous disposition was treated in this way, or someone vulnerable received such a call, they could easily be bullied into subscribing

to this service and would be distressed too by the representative's behaviour. They need to be stopped."

18. The Company was also in the Top 20 list of companies about which the TPS received the most complaints in March 2014. They continued to appear in that list in every month for the rest of 2014 and in January and February 2015.
19. Between 1 February 2014 and 28 February 2015, the TPS received 562 complaints about the Company. The TPS referred all of those complaints to the Company and also notified the ICO.
20. Attached at Annex 2 is a spreadsheet detailing the 562 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. In all cases, by virtue of the fact that the subscribers have placed their number on the TPS do not call list, the Company has breached regulation 21(1)(b) PECR by calling those numbers.
21. The explanations provided by the Company to the TPS for making these calls is as follows:
 - On 479 occasions - third party list was used for screening.
 - On 4 occasions - number was not called by them.
 - On 2 occasions – number was called before they were aware of PECR.
 - On 2 occasions - insufficient information has been provided.
 - On 1 occasion - complainant had agreed for an information pack to be sent to them.
 - On 1 occasion – number not called since September 2013.

- On 73 occasions – no response provided to the TPS.
22. On 30 October 2014, 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.
 23. On 6 November 2014, the ICO received a response from the Company explaining that they purchase opt-in data from a third party. They understood that the recipients of the calls had opted-in as a result of being notified via a telephone message from the third party that the Company (and other organisations) might call them in future.
 24. The Company further explained that they then use those details to call individual subscribers to market their products and services. However, they hadn't carried out any due diligence checks or screening against the TPS register to ensure that they had given their consent to the Company to receive such calls.
 25. On 7 November 2014, the ICO sent an email to the Company to explain that they were breaching regulation 21 of PECR by making these calls to individual subscribers without their prior consent. The ICO provided the Company with compliance advice and a link to the ICO's guidance on PECR.
 26. The Company was then placed under a period of monitoring for 3 months. The Company were still in the TPS Top 20 list in January and February 2015. The Company decided to obtain its opt-in data from another third party and the number of TPS complaints reduced to 14 in

March 2015. In April and May 2015, the number of TPS complaints was 49 and 14 respectively.

27. The Commissioner has made the above findings of fact on the balance of probabilities.
28. 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

29. The Commissioner finds that the Company contravened the following provisions of PECR:
30. The Company has contravened regulation 21 of PECR.
31. The Commissioner finds that the contravention was as follows:
32. Between 1 February 2014 and 31 March 2015, the Company used a public telecommunications service for the purposes of making 731 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.
33. The Commissioner is also satisfied for the purposes of regulation 21 that 731 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.

34. The Commissioner is satisfied that the Company was responsible for this contravention.
35. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

36. 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.
37. The Company was in the monthly Top 20 list of companies about which the TPS received the most complaints in March 2014. They continued to appear in that list in every month for the rest of 2014 and in January and February 2015.
38. The Company made repeat calls to subscribers (sometimes on the same day) even though they had asked for their number to be suppressed. The calls were also misleading because they sometimes gave the impression that "Stop the Calls" were calling on official business. Some of the callers were also rude and aggressive and they preyed on the elderly and vulnerable. Bank details were obtained from some of the subscribers under duress. The contravention was

exacerbated by the fact that the Company trading as "Stop the Calls" were themselves making unsolicited calls to subscribers.

39. 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

40. The relevant features of the kind of contravention are:
41. 731 individual subscribers received unsolicited marketing calls that they had not consented to. The number could have been far higher. The unsolicited marketing calls were often repeated and sometimes received on the same day. Requests to the Company to suppress a number were not always acted upon. The unsolicited marketing calls were also misleading because they sometimes gave the impression that "Stop the Calls" were calling on official business. Some of the callers were also rude and aggressive and they preyed on the elderly and vulnerable. Bank details were obtained from some of the subscribers under duress. The contravention was exacerbated by the fact that the Company trading as "Stop the Calls" were themselves making unsolicited calls to subscribers.
42. The Commissioner considers that the contravention identified above had the following potential consequences:
43. 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.

44. 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.
45. 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.
46. 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.
47. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

48. 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).

49. The Commissioner considers that in this case the Company did not deliberately contravene regulation 21 of PECR in that sense.
50. The Commissioner had 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.
51. The Company has also been aware of its obligations under PECR since at least 7 October 2014 when the ICO first raised its concerns with them. The TPS also contacted the Company 562 times regarding complaints which should have made the Company aware of the risk that that these contraventions would occur.
52. Complaints continued to be received by the TPS and the Commissioner even after the ICO's letters and the Company's assurances. Complainant's also asked the Company to stop calling them but despite this the Company continued to do so. The Company admitted to problems with the quality of the data they were using and yet persisted in using the same third party data provider until the ICO intervened.

53. 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.
54. 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.
55. The Commissioner is therefore satisfied that condition (c) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

56. 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.

57. The latter has included the issuing of a Notice of Intent dated 18 June 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.
58. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
59. 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.
60. 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.
61. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

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

- The Company fully co-operated with the Commissioner's investigation.
- Some remedial action has now been taken by the Company.
- There is a potential for damage to the Company's reputation which may affect future business.

63. 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.

64. 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

65. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by 7 September 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.

66. If the Commissioner receives full payment of the monetary penalty by 4 September 2015 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.
67. 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.
68. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
69. Information about appeals is set out in Annex 1.
70. 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.

71. 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 5th day of August 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)).