

## **DATA PROTECTION ACT 1998**

### **SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

#### **MONETARY PENALTY NOTICE**

To: Repair & Assure Ltd

Of: Suite C, Second Floor, Redhill Chambers, 2d, High Street, Redhill  
RH1 1RJ

1. The Information Commissioner ("Commissioner") has decided to issue Repair & Assure Ltd ("RAL") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is being issued because of a serious contravention of regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003.
2. This notice explains the Commissioner's decision.

#### **Legal framework**

3. RAL, whose registered office address is given above (Companies House Registration Number: 10539230), is the organisation stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for the purposes of direct marketing contrary to regulation 21 of PECR.
4. Regulation 21 applies to the making of unsolicited calls for direct marketing purposes. It means that if a company wants to make calls

promoting a product or service to an individual who has a telephone number which is registered with the Telephone Preference Service Ltd ("TPS"), then that individual must have given their consent to that company to receive such calls.

5. Regulation 21 paragraph (1) of PECR provides that:

"(1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where-

- (a) the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or
- (b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26."

6. Regulation 21 paragraphs (2), (3), (4) and (5) provide that:

"(2) A subscriber shall not permit his line to be used in contravention of paragraph (1).

(3) A person shall not be held to have contravened paragraph (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.

(4) Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such calls

being made on that line by that caller, such calls may be made by that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.

(5) Where a subscriber has given a caller notification pursuant to paragraph (4) in relation to a line of his—

(a) the subscriber shall be free to withdraw that notification at any time, and

(b) where such notification is withdrawn, the caller shall not make such calls on that line.”

7. Under regulation 26 of PECR, the Commissioner is required to maintain a register of numbers allocated to subscribers who have notified them that they do not wish, for the time being, to receive unsolicited calls for direct marketing purposes on those lines. The TPS is a limited company set up by the Commissioner to carry out this role. Businesses who wish to carry out direct marketing by telephone can subscribe to the TPS for a fee and receive from them monthly a list of numbers on that register.
8. Section 122(5) of the DPA 2018 defines direct marketing as “*the communication (by whatever means) of advertising material which is directed to particular individuals*”. This definition also applies for the purposes of PECR.
9. Consent is defined in Article 4(11) the General Data Protection Regulation 2016/679 as “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

10. Under section 55A (1) of the DPA (as amended by PECR 2011 and the Privacy and Electronic Communications (Amendment) Regulations 2015) the Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that –
- “(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person, and
- (b) subsection (2) or (3) applies.
- (2) This subsection applies if the contravention was deliberate.
- (3) This subsection applies if the person –
- (a) knew or ought to have known that there was a risk that the contravention would occur, but
- (b) failed to take reasonable steps to prevent the contravention.”
11. 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.
12. 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.

13. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of Part 9, Schedule 20 of that Act).

### **Background to the case**

14. RAL came to the attention of the Commissioner after the TPS received high volumes of complaints for unsolicited live marketing calls about washing machine warranties.
15. As the organisation named in the complaints, RAL was sent an initial investigation letter by the Commissioner on 11 January 2019 which detailed concerns with RAL's compliance with PECR and requested, amongst other things, the source of the data relied on for their direct marketing, and evidence of consent.
16. The response which followed advised that all of the data relied on by RAL for the purposes of its direct marketing was obtained from twelve third party data suppliers (the "data suppliers"). RAL also advised that it did not screen the data obtained against the TPS register; that the data was "direct opt-in", and listed the due diligence measures that it had in place to ensure the veracity of the data. The Commissioner was advised that these measures specifically involved spot checks of the data suppliers' call recordings with individuals through which the purported consent was obtained.
17. It was subsequently confirmed by RAL in correspondence from 1 March 2019 that the data obtained by the data suppliers was collected via

telephone marketing surveys. With individuals apparently providing consent to be contacted by RAL in the course of those surveys. Three sample call recordings were provided to demonstrate what individuals would be told at the point of consent being obtained. The questions asked in these surveys consisted primarily of the individual being asked for their washing machine's brand and age. Two of the three calls asked specifically if the individual was over 50 years old with the remaining call sample asking for the individual's age more generally.

18. Following further requests for information, on 4 June 2019 RAL provided three spreadsheets titled 'chain of consent', together with signed 'third party data agreements' with the data suppliers and copies of call scripts used by the data suppliers. Notably, none of the signed 'third party data agreements' are dated before 22 March 2019 which suggests that they were put in place after the Commissioner's initial contact with RAL in January 2019.
19. The Commissioner subsequently contacted RAL's Communications Service Provider ("CSP") to establish the volumes of answered calls made from CLIs from which there had been complaints about RAL's direct marketing. The CSP confirmed that all of the CLI's provided by the Commissioner were allocated to RAL between 00.01hrs on 1 January 2019 and 23:59hrs on 10 June 2019. The CSP was able to narrow the CLIs which were active over that period and supplied details of the Call Detail Records ("CDRs") which showed how many calls were made from those CLIs. The CDR information provided by the CSP was forwarded to the TPS to establish how many of the CDRs had been TPS registered for not less than 28 days at the time they received a call from RAL. The response indicated that between 2 January 2019 and 11 June 2019 there had been 1,103,292 calls made to numbers which had been registered with the TPS for not less than 28 days.

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

### **The contravention**

22. The Commissioner finds that RAL has contravened regulation 21 of PECR.
23. The Commissioner finds that the contravention was as follows:
24. Between 2 January 2019 and 11 June 2019, RAL used a public telecommunications service for the purposes of making 1,103,292 unsolicited calls to subscribers for direct marketing purposes to subscribers where the number allocated to the subscriber in respect of the called line was a number listed on the register of numbers kept by the Commissioner in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR.
25. The Commissioner is also satisfied for the purposes of regulation 21 that these 1,103,292 unsolicited direct marketing calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls, and they had not given their prior consent to RAL to receive calls.
26. The Commissioner is further satisfied that there were a total of 88 complaints to the TPS and ICO arising from these calls.

27. The content of the complaints included the following:

- *"My elderly mother was cold-called [...] from Repair & Assure regarding insurance for her washing machine. As her machine is very old, this made no sense to her. And as she had no recollection of ever dealing with this company before, she was very concerned that they already knew her name, address and telephone number. During the call, [name redacted] also asked my mother if she had a mobile, email or direct debit – all details of which my mother did not give. She terminated the call shortly after."*
- *"The caller, male, told me my washing machine manufacturer warranty was about to expire and they wanted to continue it with a 35% discount. I asked who the company were and he told me. I then said I didn't have any cover with them to continue with and he apologised for phrasing it like that. I then said I was registered with the TPS so he shouldn't be calling me and he said all I had to say was do I want the cover or not! I said no and that I would be reporting the call."*
- *"Caller enquired about Hotpoint washing machine that I do not own. I own a Zanussi. Prior to any sales pitch, I had informed the caller that he was breaking the rules/laws regarding restricted numbers and sales calls. He said he was not. I informed him that my number is on the TPS service and that by calling he was indeed breaching the law regarding this. He again attempted to continue the call at which point I put the phone down on him."*
- *"Caller wanted to talk about my washing machine! I told him that I did not have such a device and used the local launderette. He called me a liar. I told him I was TPS registered and I put the phone down. I had received a "silent call" from the same number earlier at 10:29,*



*which I have reported to Ofcom."*

28. The data used by RAL for the purposes of its direct marketing calls was obtained from its twelve data suppliers. To obtain its data, the data suppliers sought to carry out telephone surveys with individuals. RAL has attempted to provide evidence, albeit unclear evidence, to the Commissioner of how four of its twelve data suppliers obtained the data which they used for their initial survey calls, but has provided nothing for the remaining eight data suppliers used.
29. The Commissioner is satisfied that the calls carried out by the data suppliers are clearly for the intention of collecting data for use in future marketing campaigns (by organisations such as RAL). During these calls individuals would be asked to answer some 'household questions' or to give a 'valid opinion' on "leading UK brands". Once the individual agrees to participate in the survey they are asked to confirm their personal details, and then provide information regarding their washing machine. The Commissioner has been provided with some data supplier call samples and whilst RAL are mentioned briefly in the samples provided, the Commissioner is concerned that the way in which these consents were obtained renders it not sufficiently specific, informed or freely given.
30. The Commissioner's direct marketing guidance is very clear that informed consent cannot be established when an individual has been asked to agree to third party marketing prior to being informed who the third-party organisations actually are. In terms of the data supplier surveys, not only are the third parties provided after the apparent consent is obtained, but the data suppliers have conflated the agreement to marketing with a more veiled request to individuals to provide an 'opinion' or to answer 'household questions' about "UK

leading brands". This strategy of being deliberately opaque about the purpose of the call is misleading, and makes it difficult for anybody seeking to rely on that consent to demonstrate that the individuals could have known precisely what they were agreeing to when they agreed to answer some 'household questions'.

31. The Commissioner is further concerned that the 'third party data agreements' between RAL and the suppliers are not dated before 22 March 2019, suggesting that there were no such agreements in place prior to that date. The Commissioner has clear evidence that calls were being made at least as early as 2 January 2019 for the purposes of this contravention (with evidence of complaints being made significantly earlier) and since no evidence of valid consent has been provided, and RAL have confirmed that no TPS checks were undertaken prior to making its calls, the Commissioner has concluded that the 1,103,292 direct marketing calls were not made lawfully.
32. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

### **Seriousness of the contravention**

33. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of Regulation 21 by RAL arising from the organisation's activities between 2 January 2019 and 11 June 2019, and this led to over 1 million unsolicited direct marketing calls being made to subscribers who were registered with the TPS.
34. The 1,103,292 unsolicited direct marketing calls made between 2 January 2019 and 11 June 2019 were made from CLIs which were

being used by RAL. This information has been obtained from RAL's CSP and is reasonably relied upon by the Commissioner. These calls were not screened by RAL against the TPS register, rather RAL sought to rely on evidence of consent purportedly obtained by its data suppliers for the purposes of its direct marketing calls. The Commissioner is satisfied that the consent relied on is not valid.

35. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

**Deliberate or negligent contraventions**

36. The Commissioner has considered whether the contravention identified above was deliberate.
37. The Commissioner does not consider that RAL deliberately set out to contravene PECR in this instance.
38. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
39. Firstly, she has considered whether RAL knew or ought reasonably to have known that there was a risk that this contravention would occur. She is satisfied that this condition is met, given that RAL relied apparently entirely on indirect consent, without carrying out any independent TPS checks of its own, and the fact that the issue of unsolicited calls has been widely publicised by the media as being a problem.

40. The Commissioner has also published detailed guidance for companies carrying out marketing explaining their legal requirements under PECR. This guidance explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by email, by post or by fax. Specifically, it states that live calls must not be made to subscribers who have told an organisation that they do not want to receive calls; or to any number registered with the TPS, unless the subscriber has specifically consented to receive calls. It also makes it clear that particular care must be taken when relying on “indirect consent” and that it is not acceptable to rely on assurances given by third party suppliers without undertaking proper due diligence.
41. The Commissioner’s direct marketing guidance also makes clear that organisations acquiring marketing lists from a third party must undertake rigorous checks to satisfy themselves that the personal data was obtained fairly and lawfully, that their details would be passed along for direct marketing to the specifically named organisation in the case of live calls, and that they have the necessary consent. Whilst RAL have attempted to provide evidence of some due diligence, the Commissioner is concerned that these steps did not go far enough. RAL were notified by the TPS on each occasion that a complaint was received, with 67 of these being during the period of contravention and a further 75 outside of the period of contravention (from January 2018 – December 2018). The very existence of these complaints should have made RAL aware of the risk that such contraventions may occur, and were indeed occurring.
42. It is therefore reasonable to suppose that RAL should have been aware of its responsibilities in this area.

43. Secondly, the Commissioner has gone on to consider whether RAL failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met.
44. Organisations buying marketing lists from third parties, or contracting with third parties to carry out marketing for them, must make rigorous checks to satisfy themselves that the third party has obtained the personal data it is using fairly and lawfully, and that they have the necessary consent.
45. The way in which consent was obtained by the data suppliers is unlikely to be fair, and the consents themselves cannot be said to be valid in accordance with the Commissioner's extensive direct marketing guidance, however RAL appear content to have relied upon it without corroboration. Furthermore, RAL made no attempt to screen the data against the TPS register, nor is there any evidence that it sought advice from the Commissioner as to its intended practices.
46. The Commissioner takes the view that RAL failed to take reasonable steps to prevent the contravention.
47. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

#### **The Commissioner's decision to issue a monetary penalty**

48. The Commissioner has taken into account the following **aggravating feature** of this case:
  - There is evidence of complaints prior to, and beyond, the period of contravention, despite the Commissioner's involvement.

49. The Commissioner has also taken into account the following **mitigating feature** of this case:
- There is evidence that RAL sought to undertake some, albeit insufficient, steps of due diligence.
50. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. She is also satisfied that the procedural rights under section 55B have been complied with.
51. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made by RAL on this matter.
52. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
53. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
54. The Commissioner has considered the likely impact of a monetary penalty on RAL. She has decided on the information that is available to her, and on the particular circumstances of this case, that a penalty notice remains the appropriate course of action.
55. 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.

56. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

### **The amount of the penalty**

57. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£180,000 (one hundred and eighty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

### **Conclusion**

58. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **25 February 2021** 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.
59. If the Commissioner receives full payment of the monetary penalty by **24 February 2021** the Commissioner will reduce the monetary penalty by 20% to **£144,000 (one hundred and forty four thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

60. 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.
61. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
62. Information about appeals is set out in Annex 1.
63. 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.
64. 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 25<sup>th</sup> day of January 2021.

Andy Curry  
Head of Investigations  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

## **ANNEX 1**

### **SECTION 55 A-E OF THE DATA PROTECTION ACT 1998**

#### **RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER**

1. Section 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the 'Tribunal') against the notice.

2. If you decide to appeal and if the Tribunal considers: -

a) that the notice against which the appeal is brought is not in accordance with the law; or

b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

General Regulatory Chamber  
HM Courts & Tribunals Service  
PO Box 9300  
Leicester

LE1 8DJ

Telephone: 0300 123 4504

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

- 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 (Information Rights) are contained in section 55B(5) 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)).