



# Services

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Information Commissioner's Office

# ICO FINE IT PROTECT LTD £40,000

## Monetary Penalty Notice

**TEL: 0843 005 9576\***

### TPS Services

Telephone: 0843 005 9576\*

Fax: 0844 774 8411

[www.tpsservices.co.uk](http://www.tpsservices.co.uk)

### TPS Checker

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

**DATA PROTECTION ACT 1998**

**SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

**MONETARY PENALTY NOTICE**

To: IT Protect Ltd

Of: 34, Stoneage Close, Bognor Regis, West Sussex PO22 9QN

1. The Information Commissioner ("Commissioner") has decided to issue IT Protect Ltd ("IT Protect") 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 IT Protect.
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. IT Protect, whose registered office is given above (Companies House registration number: 08746708), 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.
6. 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.
7. 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."

8. 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.”

9. 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 the TPS for a fee and receive from them monthly a list of numbers on that register.

10. 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)).

11. 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.”

12. 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.
13. 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**

14. IT Protects' business involves making unsolicited marketing calls to elderly subscribers in order to sell a call blocking device to "stop" unwanted marketing calls.
15. Between 6 April 2015 and 16 May 2016, the ICO received 35 complaints about IT Protect via the ICO's online reporting tool. All of these complaints were made by individual subscribers who were registered with the TPS.
16. Some of those individual subscribers complain that the calls were misleading because the callers gave the impression that they were calling on behalf of BT. Some of the callers also preyed on the elderly.
17. The following are examples of the complaints received by the ICO:

- "Alleged to be calling from BT to block unwanted calls at a cost of 45 pence a week. When challenged and questioned he rang off".
- "He sold me a call blocking device. I am elderly and my hearing is poor, and because I had only recently complained about nuisance calls and the man knew my address and appeared to know about my complaint, I assumed he was from BT. I can't remember whether he actually claimed to be from BT or not".
- "He claimed to be working with BT (despite my repeated questions about whether he worked for BT he never said that, just "working with"). He said the TPS didn't work and wanted to sell me a call blocker. I insisted I wouldn't buy anything over the phone but asked for it in writing – to my surprise he sent it! I can pay £84.99 for the privilege – I don't want it but did want their details to report to them. They seem devoid of any sense of irony in ringing a number registered with TPS (a couple of months ago) to sell a nuisance call blocker!"
- "Distressed as a pensioner, annoyed and frightened to answer the phone".
- "I answered the call on behalf of my elderly father. First she asked for my deceased mother and then my father. I informed her I am their daughter. She then asked if he was registered with the TPS. I confirmed he was. I was then asked for £1.80 a month to stop phone calls. I informed her that the TPS was a free service. She said they only filter 10% of calls. I laughed and told her no chance. She hung up. Their number showed up and I took note of it. My father has dementia and probably would have

followed their instructions”.

- “My wife was extremely distressed that she had been pressured into giving her credit card number over the phone and I am annoyed that she fell for this scam and more so that the company called despite our being registered not to receive cold calls”.
18. Between 6 April 2015 and 16 May 2016, the TPS received 122 complaints about IT Protect. The TPS referred all of those complaints to IT Protect and also notified the ICO. IT Protect did not respond to the TPS on 69 occasions.
  19. On 1 March 2016, the ICO wrote to IT Protect to explain that the ICO could issue civil monetary penalties up to £500,000 for PECR breaches. The letter informed IT Protect that the ICO and the TPS had received complaints from individual subscribers in relation to unsolicited calls. IT Protect was asked a number of questions about its compliance with PECR.
  20. The ICO received a response from IT Protect explaining that it purchases opt-in data from a third party company. IT Protect understood that the recipients of the calls had opted-in as a result of being notified via a telephone message from the third party company that IT Protect (and other organisations) might call them in future.
  21. IT Protect further explained it then uses those details to call individual subscribers to market its products and services. However, IT Protect hadn't carried out any due diligence checks to ensure that they had given their consent to IT Protect to receive such calls.



22. The Commissioner has made the above findings of fact on the balance of probabilities.
23. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by IT Protect and, if so, whether the conditions of section 55A DPA are satisfied.

**The contravention**

24. The Commissioner finds that IT Protect contravened the following provisions of PECR:
25. IT Protect has contravened regulation 21 of PECR.
26. The Commissioner finds that the contravention was as follows:
27. Between 6 April 2015 and 16 May 2016, IT Protect used a public telecommunications service for the purposes of making 157 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.
28. The Commissioner is also satisfied for the purposes of regulation 21 that 157 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 IT Protect to receive calls.
29. The Commissioner is satisfied that IT Protect was responsible for this contravention.

30. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

**Seriousness of the contravention**

31. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by IT Protect arising from its activities over a 12 month period, and this led to a significant number of complaints about unsolicited direct marketing calls to the TPS and the ICO.
32. In addition, it is reasonable to suppose that considerably more calls were made by IT Protect because those who went to the trouble to complain are likely to represent only a proportion of those who actually received calls.
33. Individual subscribers have complained to the ICO that the calls were misleading because the callers gave the impression that they were calling on behalf of BT. Some complainants allege that IT Protect preyed on the elderly.
34. The contravention was exacerbated by the fact that IT Protect was making unsolicited marketing calls to elderly subscribers to sell them a call blocking device to “stop” unwanted marketing calls.
35. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

**Deliberate or foreseeable contravention**

36. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that IT Protects' actions which constituted that contravention were deliberate actions (even if IT Protect did not actually intend thereby to contravene PECR).
37. The Commissioner considers that in this case IT Protect did not deliberately contravene regulation 21 of PECR in that sense.
38. The Commissioner has gone on to consider whether the contravention identified above was negligent.
39. First, she has considered whether IT Protect 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 IT Protect relied heavily on direct marketing due to the nature of its business, 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 guidance for companies relying on indirect consent. This guidance states that "You should be very careful when relying on indirect consent (consent originally given to a third party). You must make checks to ensure that the consent is valid and specifically covers your marketing. Generic consent covering any third party is unlikely to be enough."
41. The TPS also contacted IT Protect 122 times regarding complaints which should have made IT Protect aware of the risk that that these contraventions would occur. IT Protect did not respond to the TPS on 69 occasions.

42. It is therefore reasonable to suppose that IT Protect should have been aware of its responsibilities in this area.
43. Third, the Commissioner has gone on to consider whether IT Protect 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 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. It is not acceptable to rely on assurances of indirect consent without undertaking proper due diligence. Organisations must ensure that consent was validly obtained, that it was reasonably recent and that it clearly extended to them specifically or to organisations fitting their description.
45. IT Protect is unable to provide sufficient evidence that it had undertaken appropriate due diligence in this case. The Commissioner is therefore satisfied that IT Protect failed to take reasonable steps to prevent the contravention.
46. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

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

47. 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 section 55A (3A) and the procedural rights under section 55B have been complied with.

48. The latter has included the issuing of a Notice of Intent dated 14 September 2016, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made by IT Protect on this matter.
49. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
50. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
51. 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.
52. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

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

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

- There is a potential for damage to IT Protects' reputation which may affect future business.
54. The Commissioner has taken into account the following **aggravating features** of this case:
- IT Protect may obtain a commercial advantage over its competitors by generating leads from unlawful marketing practices.
55. The Commissioner has considered the likely impact of a monetary penalty on IT Protect. She has decided that IT Protect has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
56. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£40,000 (forty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

### **Conclusion**

57. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **14 February 2017** 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.
58. If the Commissioner receives full payment of the monetary penalty by **13 February 2017** the Commissioner will reduce the monetary penalty by 20% to **£32,000 (thirty two thousand pounds)**. However, you should be aware that the early payment discount is not

available if you decide to exercise your right of appeal.

59. 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.
60. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
61. Information about appeals is set out in Annex 1.
62. 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.
63. 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 ~~11<sup>th</sup>~~ day of January 2017

Signed

Stephen Eckersley  
Head of Enforcement  
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 (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:

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 (Information Rights) 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)).