NCN: **[2023] UKFTT 454 (GRC)**
Case Reference: **EA/2021/0052/FP**

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: Remote video hearing

Heard on: 14 September 2021 and 14 October 2021
Decision given on: 31 May 2023

Before

TRIBUNAL JUDGE LYNN GRIFFIN
TRIBUNAL MEMBER MIKE JONES
TRIBUNAL MEMBER JEAN NELSON

Between

RANCOM SECURITY LIMITED

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: Mr Rohan Singh
For the Respondent: Leo Davidson of counsel

Decision: The appeal is Dismissed

Substituted Decision Notice: not applicable

REASONS

1. Rancom Security Limited ("Rancom") appeal against a monetary penalty notice ("MPN") imposed by the Information Commissioner for contravention of regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003

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("PECR") in the sum of £110,000. Rancom is a home security business aimed primarily at the domestic market, it installs alarms and provides a monitoring service.

2. Over the course of one year, between 1 June 2017 and 31 May 2018, the Information Commissioner received 94 complaints about unsolicited direct marketing calls made by Rancom. Of those, 66 complaints had been referred via the TPS, and 28 had been made direct to the Commissioner. All of the complainants were registered with the TPS. These complaints were about calls made by Rancom as part of a direct marketing telephone campaign in respect of which 565,344 calls were made to TPS registered numbers.

3. The Appellant has provided no evidence that the TPS-registered subscribers who received unsolicited calls had consented to receive those calls. The company sought to rely on a number of explanations that it was submitted explained a "large number" or "very large number" of the 565,344 calls.

4. We have concluded that the Information Commissioner's decision to impose an MPN was in accordance with law and that the penalty imposed was appropriate and proportionate. The Information Commissioner exercised her discretion appropriately.

The hearing and the evidence

5. The hearing was conducted by video hearing on 14 September 2021. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way. I apologise to the parties for the time it has taken to promulgate this decision which was taken in October 2021.

6. We were provided with a bundle of 752 pages including indices, supplemental documents and skeleton arguments accompanied by a bundle of authorities.

7. Mr Hosking, one of the company directors at the time of the contravention gave oral evidence.

8. The case could not be completed on the allocated day because the tribunal wished to receive further evidence in the form of documents referred to by Mr Hosking that were said to substantiate his evidence but were not in the bundle. The case was adjourned and directions made for the filing of those documents and closing submissions. Those further documents were received and submissions exchanged in writing. Then panel convened in private session thereafter to consider the material with which they had been provided and to take our decision on 14 October 2021.

9. The panel notes that on 17 September 2021 (following the hearing on 14 September 2021), there had been a change in the status of the Appellant. Mr Hosking has ceased to be on record as the person with significant control of the company, being replaced by a limited company.

The legal framework

10. This appeal is brought under s.55B(5) Data Protection Act 1998 ("DPA 1998") against a Monetary Penalty Notice ("MPN") issued by the Commissioner. The notice was issued due to a contravention of the regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").

11. A contravention of regulation 21 occurs if a person makes an unsolicited direct marketing call to a number registered on the Telephone Preference Service ("TPS") register for 28 days or more unless the caller has obtained consent. That consent must be freely given, specific, informed and unambiguous, which requires that it by demonstrated by "active" behaviour: see Planet49 GmbH C-673/17 (ECLI:EU:C:2019:801).

12. Section 49(1) DPA 1998 sets out the test to be applied on appeal as follows

    (1) If on an appeal under section 48(1) 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 shall allow the appeal or substitute such other notice or decision as could have been served or made by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

    (2) On such an appeal, the Tribunal may review any determination of fact on which the notice in question was based.

13. The Tribunal conducts a full-merits hearing, considering the substance of the contravention rather than the procedure of the Commissioner's investigation, see <u>Central London Community Healthcare NHS Trust v Information Commissioner</u> [2013] UKUT 0551 (AAC).

14. PECR implements Directive 2002/58/EC ("the E-Privacy Directive"). Regulation 21(1)-(5) relevantly states:

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

    …

    (b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26.

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

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

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

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

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

and

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

15. Consent is defined in Article 4(11) of 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*".

16. A "subscriber" is defined in regulation 2(1) of PECR as "*a person who is a party to a contract with a provider of public electronic communications services for the supply of such services".*

17. Regulation 26 PECR provides:

(1) For the purposes of regulation 21 the Commissioner shall maintain and keep up-to-date, in printed or electronic form, a register of the numbers allocated to subscribers, in respect of particular lines, who have notified the Commissioner or, prior to 30th December 2016, OFCOM that they do not for the time being wish to receive unsolicited calls for direct marketing purposes on the lines in question.

…

(3) On the request of–

(a) a person wishing to make, or instigate the making of, such calls as are mentioned in paragraph (1), or

(b) a subscriber wishing to permit the use of his line for the making of such calls, for information derived from the register kept under paragraph (1), the Commissioner shall, unless it is not reasonably practicable so to do, on the payment to the Commissioner of such fee as is, subject to paragraph (4), required by the Commissioner, make the information requested available to that person or that subscriber.

18. The Commissioner discharges the duty in regulation 26 through the TPS. People wishing to make direct marketing calls may subscribe to the TPS and receive periodic updates so that they can avoid calling numbers on the register and thereby avoid acting unlawfully under regulation 21(1)(b).

19. The definition of direct marketing is in s.122(5) DPA 18, which applies to the PECR by virtue of regulation 2(2) - "*communication (by whatever means) of any advertising or marketing material which is directed to particular individuals*".

20. Section 55A DPA 1998 (as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 and the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2015) relevantly provides:

    "(1) 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."*

21. Penalties issued under that power are capped at £500,000.

22. The provisions of the DPA 1998 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.

23. In Leave.EU Group Ltd & another v Information Commissioner [2021]UKUT 26 (AAC), one of the emails had prompted only two complaints. The Upper Tribunal stated that *"the volume of complaints cannot be a reliable let alone determinative metric for deciding whether there has been a PECR breach, given that subscribers have easier default options than lodging a formal complaint with the Commissioner"*.

<u>The facts</u>

24. Rancom Security Ltd are a company registered at Companies' House which was incorporated on 20 February 2003. At the material time there were 2 directors one of whom, Mr Hosking, was acting as company secretary. During the relevant period Rancom had approximately 10,000 customers.

25. Between 1 June 2017 and 31 May 2018, 565,344 telephone calls were made from Rancom's phone line to TPS-registered numbers. The Information Commissioner received 94 complaints about unsolicited direct marketing calls made by Rancom. Of those, 66 complaints had been referred via the TPS, and 28 had been made direct to the Commissioner. All of the complainants were registered with the TPS.

26. The complaints included the following comments:

    a. *"The caller asked for confirmation of my name and address, then proceeded to say that due to an increase in false home security alarms in my area the police no longer responded to them. Then he said somebody will be in my area to advise on 'home security."*

    b. *"I was very annoyed that someone was targeting my mother with lies in the hope she would buy something from them. She told them the first time that she wasn't interested but they phoned twice more. She is anxious about them phoning again. "*

    c. *"Our phone is registered with TPS and is ex-directory, how did he get our phone number. He knew my wife 's name and that he knew the street that we lived in. Also claiming that he was doing a security check. It is of course very worrying that he had our details without our permission. After looking the phone number it is very worrying that that this company is targeting older people. "*

    d. *"Promoting security service offer in 'my area'. When I mentioned that I was registered with the Telephone Preference Service, the lady told me that if I had registered for the free' service they were still allowed to call me. When I complained she became aggressive and would not stop reading from what appeared to be a prepared script. I hung up."*

27. In June and July 2017, the Information Commissioner had drawn the company's attention to her Guidance on several occasions.

28. On 3/7/18 the Information Commissioner notified Rancom of her concerns and attached the complaints and a list of 22 questions. Rancom were asked to provide evidence of consent for the calls. Rancom's response indicated that it had purchased the telephone numbers from third parties. At that stage Rancom asserted that it had carried out no due diligence or screening of the numbers that it had been supplied with. Later Rancom was to contradict this assertion with a suggestion that they screened approximately 10% of the data against the TPS register.

29. Further correspondence was exchanged between the Information Commissioner and Rancom throughout August through the autumn until December, the Commissioner extending the deadlines for receipt of the responses on more than one occasion.

30. On 10 December 2018 Rancom confirmed that during the relevant year it had made *"in the region of 1,043,669 calls, but they are unable to ascertain how many of these calls were for marketing purposes"*. It was suggested that many of the calls identified by the

Information Commissioner might have emanated from different companies that shared Rancom's telephone facilities, but we do not accept that suggestion, see below.

31. Further correspondence followed during which Rancom provided what it described as a fair processing notice provided to individuals who personally provided their own data and a "Rolling telemarketing Contract" between it and the provider of the majority of the data it purchased. The latter was neither signed nor dated. Further documents said to be scripts for market research calls were not attached.

32. Two of the contracts relied on by Rancom expressly disclaimed any warranty that the data would be accurate and excluded liability on the supplier for "any inaccuracy, incompleteness or other error in the Data".

33. The "scripts" were provided at a later date they read as follows

Market Research Script
Project Improvement

Good Morning/Afternoon is that Mr/Mrs ....

My Name is Will Bailey, I'm calling you from Rancom Security who are a national provider of monitored alarms.

I am sorry to disturb you, but we are carrying out market research to decide whether or not to change our business from a police monitored alarm service to a Private Guarded Response.

Would you be happy to answers some questions in relation to market research? We are not trying to sell you anything at all but just trying to find out about the perception of police monitored systems and private guarded systems.

[if the customer is happy to answer questions, then proceed].

1. Do you have or have you ever had a police monitored alarm system?
2. Did you ever have an activation or emergency? If so, can you provide details of the activation or emergency?
3. If so, what was the response time from the police?
4. Do you have or have you ever had a privately monitored alarm system?
5. Did you ever have an activation or emergency of that system? If so, can you provide details of the activation or emergency?
6. If so, what was the response time from the private guarded agency?
7. Do you consider that service that provided a private guarded response to be more of a premium service than a police responded system?
8. If you were offered a system with a private guarded response at the same price as a police responded system, would you regard that as being (a) better value and (b) a better system?

Thank you very much for your assistance today. We very much value your input

WHY SHOULD YOU HAVE A LOOK AT THIS MONITORED ALARM SYSTEM!

1. **ITS FREE TO HAVE A LOOK, NOT GOING TO COST TO HAVE A LOOK**
2. **NO OBLIGATION AT ALL, NOT COMMITED TO ANYTHING AT ALL! YOU ARE IN CONTROL.**
3. **THE EQUIPMENT IS FREE THROUGH THE CAMPAIGN SO YOU DON'T PAY FOR THE EQUIPMENT AND IT WOULD NORMALLY COST OVER £1,000 YOURS WILL BE GIVEN TO YOU**
4. IT'S THE ONLY EQUIPMENT AROUND THAT GUARANTEE'S YOU AN IMMEDIATE RESPONSE FROM THE POLICE, FIRE & MEDICAL SERVICES
   or
5. IT'S AN AUTOMATED RESPONSE SYSTEM & GETS YOU AN IMMEDIATE RESPONSE IN THE EVENT OF A FIRE BURGLARY OR MEDICAL MOMENT AND IT WILL ALSO PROTECT YOUR HOME WHEN YOU ARE NOT THERE! or
6. IT IS THE ONLY EQUIPMENT THAT THE EMERGENCY SERVICES HAVE SAID THEY ARE OBLIGED TO ATTEND TO AS IT IS A MONITORED ALARM; THEY KNOW THERE HAS BEEN AN INCIDENT BECAUSE OF THE MONITORING.
   or
7. THIS WILL PROTECT YOU, YOUR FAMILY & YOUR HOME IN THE EVENT OF A FIRE, BURGLARY OR MEDICAL EMERGENCY AND WILL BE OF ASSISTANCE IN THAT EMERGENCY.
8. HOME INSURANCE – REDUCTIONS!
9. 2 WAY VISABLE/AUDIO SYSTEM SO YOU CAN SPEAK TO SOMEBODY

OBJECTION TO NOT INTERESTED ETC, ETC

We will discuss at length buying a new widescreen TV or perhaps a new car eve[r] few years, or even discuss where we will go on holiday this year. But what we won't do is sit down and discuss upgrading our security at home, which is madne[ss] when it will be the most expensive thing you've ever bought and it's where you and your family live – who are priceless and your ultimate concern like mine is t[o] me.

So it is an opportunity for you/your family to have a look at the possibilities of upgrading your security or putting some equipment in place if you don't have any and this is now the only system that gets you that automatic response from all the emergency services as and when you/your family need them and your home too.

FACTS & STATISTICS FROM POLICE & FIRE SERVICES AND AN ARGUMENT TO NOT INTERESTED

1. Prevention is better than cure,
95% of people go on to put this system in place **AFTER** an incident

	2. **Police figures reveal a burglary happens every 40 seconds in the U.K.** Nobody has ever been a victim of an aggravated burglary with this system in place

34. The text of the first script is inconsistent with the text of the complaints received. The first is undated and the second dated 24/03/2017. Neither mentions market research. No completed surveys were provided to us.

35. On 30/4/2019 the Information Commissioner reminding Rancom that the company bore the onus of showing that the calls made were not unsolicited, i.e. that consent had been provided and with further queries about the assertion that other parties were using the same phone line as the company. The Information Commissioner again extended the deadlines for the provision of this information and four reminders were sent before a response was eventually received on 24 June 2019.

36. That response asserted that the evidence requested could not be provided as the database within which it was held had been corrupted due to ransomware. Mr Hosking said in his evidence that there were no records of the research or minutes of the meetings about that research because they had all been on approximately 30 computers that had a computer virus meaning they lost all customer information going, he went on to say that members of staff had left the company and taken the results with them. We do not accept the suggestion that other persons were using the telephone line nor the suggestion that evidence could not be provided, see below.

37. The Notice of Intent to issue a monetary penalty was sent to Rancom on 12 October 2020.

38. On 14 October 2020 Rancom responded suggesting that the Information Commissioner had failed to take account of material it had provided, complaining about the length of the investigation and referring to asserted financial hardship. The Information Commissioner requested supporting evidence in relation to the financial position on 20/10/2020.

39. Unaudited accounts for year ending 30 April 2018 were provided and later also accounts for the year ending 30 April 2020 which showed that the company was trading in a deficit of £940,128 and an operating loss for the year of £334,000. This was down from a profit of £41,142 in the year ending 30 April 2019 and this change was due to in part to a revaluation of intangible assets resulting in a loss of over half a million pounds as well as to a larger operating loss. The wage bill had increased over £300,000 pounds to over 1 million pounds and the directors' salaries had been increased to over £200,000; an increase in the accounts of £90,000. At the time of the contravention there were 2 directors, the second director had resigned on 2 March

2020. The unaudited accounts for the year ended 30 April 2020 show Rancom to be insolvent on a balance sheet basis.

40. On 19 January 2021 the Information Commissioner decided to issue the final MPN.

41. In 2010 the Commissioner had issued an enforcement notice against the Appellant company (under its previous name, Direct Response Security Systems Limited). The company had acknowledged the Guidance and committed to screen the data against the TPS itself; nevertheless, on its own case it did not do so for more than approximately 10% of the data.

The Issues in the case

42. The central issue is whether the MPN is in accordance with law or whether the Tribunal considers the Commissioner ought to have exercised her discretion differently.

43. The issues within that overarching question for the Tribunal are

    a. The contravention: did the Appellant contravene regulation 21 of PECR?

    b. Seriousness: was the contravention 'serious'?

    c. Deliberate or negligent contravention: was the contravention made deliberately (section 55A(2) DPA 1998) or in circumstances where the Appellant ought to have known that there was a risk that the contravention would occur but failed to take reasonable steps to prevent it (negligence) (section 55A(3) DPA 1998)?

    d. Quantum: if the requirements of section 55A DPA 1998 are met, was the Respondent correct to impose a monetary penalty in the sum of £110,000.

The Grounds of Appeal and Appellant's submissions

44. The grounds of appeal are that

    a. There was no contravention of PECR as alleged or at all

    b. If there was a contravention it was not necessary to impose a monetary penalty

    c. Any contravention was not deliberate but negligent

    d. The penalty imposed was disproportionate

    e. The investigation and process adopted by the respondent was unfair and flawed.

45. Rancom suggested via submissions relying on the evidence of Mr Hosking that a "very large number of calls" were made for reasons

a. unconnected with selling products such as
    i. customers themselves (for customer care calls, activations, services, upgrades etc)
    ii. keyholders (who may change on a regular basis)
    iii. people who are registered as responders in the case of activation of medical alarms
    iv. next of kin and people who may hold powers of attorney
    v. personal calls made by staff

   or

b. calls made by other businesses using Rancom's phone line

   or

c. a significant market research project.

Analysis and conclusions

46. We determined the issues with reference to the facts we have found proved and within the legal framework set out above.

47. We have found that this is not a case where procedural deficiencies were "*so flagrant, the consequences so severe, that the most perfect of appeals or re-hearings will not be sufficient to produce a just result*' ' per Lord Wilberforce in Calvin v Carr [1980] AC 574 and see also Leave.EU at paragraphs [23] and [113]—[116]. The Information Commissioner's investigation was thorough, and gave the Appellant more than ample opportunity to provide evidence about each of the concerns raised by the regulator. This tribunal has conducted a full merits rehearing of the substance of the appeal.

48. It is not in dispute that 565,344 calls were made from the Appellant's phone line to TPS-registered numbers We have considered the explanations tendered on behalf of Rancom and have concluded that none of these satisfactorily explain the situation. We note that Rancom has provided no evidence of the number of calls that would fall within any or all of the explanations it seeks to rely upon.

Calls unconnected with selling products

49. We do not accept the suggestion made on behalf of the appellant company that the large volume of calls is explained by calls made for personal or business reason apart from direct marketing. Rancom assert they have 10,000 customers. Even assuming five calls to both keyholders for each account in the course of a year, being 100,000 calls, this would leave hundreds of thousands of calls unexplained (465,344).

50. Looking at this from the perspective of employees making calls, if the average number of employees (60) made 10 personal calls on each working day of the year (253) this would amount to only 151,800 and even if they did so on every single day of the year this would not explain all the unexplained calls. The use of the company's business lines for personal reasons to the extent claimed by Rancom appears to us to be implausible given the diversion of time and resource that would be incurred were it to be true.

51. This explanation tendered by the appellant company effectively relies on the assumption that every such customer, key holder or family member or call by a staff member happened to have been to a TPS subscriber and thus should be regarded as part of the 565,344 calls if it is to be successful. This is implausible and unevidenced.

52. However, the total number of calls from the one line in issue in this case included a further 286,048 calls to subscribers who had not been TPS-registered for 28 days, and thus not falling within the context of the contravention but giving a total of 851,392 calls.

53. None of these assertions are evidenced by Rancom and we do not accept that the calls are explained in the ways claimed by the company whether those claims under this head are taken individually or as a whole.

<u>Calls made by other businesses using Rancom's phone line</u>

54. We do not accept Rancom's suggestion that many of the calls identified by the Information Commissioner might have emanated from different companies that shared Rancom's telephone facilities. If that was right this would not necessarily assist the company as it demonstrates a lack of control over the use of electronic communications for which they were responsible. The calls indisputably originated from Rancom's telephone lines. Regulation 21(2) prohibits persons from permitting their line to be used in contravention of that prohibition.

55. Rancom has made unsubstantiated claims in this regard; in its letter of 21 February 2019, it claimed that "at least a quarter to half of the calls are likely to have emanated from these companies". Then on 24 June 2019, it said that "up to about half of all outgoing calls were made by these organisations and not by Rancom". The suggestion was that there were no formal contracts in place to cover that usage and no evidence in support of the assertion was provided to the tribunal.

56. Rancom suggests the lack of corroborative evidence is due to the corruption of computer records. We do not accept the suggestion that other persons were using the

telephone line nor the suggestion nor that evidence could not be provided due to corruption of a database or computer virus. Even if some evidence had been corrupted there were alternative sources of evidence. If other companies or persons were using the telephone line we would have expected it to be a simple matter for that to be evidenced via the receipt of contributions towards the costs or with confirmation from those other users. No bank statements were produced nor other documentation to sustain this explanation, even when the tribunal gave further opportunity for evidence to be produced after the hearing.

57. As to the computer virus/corruption of a database, Mr Hosking had suggested that all the 30 computers infected with a virus were wiped and since that time the company has backed up its systems. Contracts were kept in hard copy according to Mr Hosking and every call was recorded, he also said the company had consent forms. The tribunal asked to be directed to where we could view the contracts with companies using the phone lines and the consent forms in the bundle and Mr Hosking did not know. He then suggested the consent forms would have been destroyed in accordance with data protection procedures.

58. The tribunal was provided with information after the oral hearing but before it took its decision this included a report from a company that had dealt with an incident with a computer at Rancom, said to be ransomware. The incident was logged at 29.06.2017 3:05pm and resolved 02.07.2017 4:56pm. We note that report shows that the issue was that a person opened a malicious email from a source that appeared genuine, this launched a virus that then spread to the network and other workstations. This was resolved as follows

 "1. Removed all workstations from network & powered them down
 2. Shut down the "Alarm Master" server to prevent any chance that the "Alarm Master" database be corrupted
 3. Installed Manage Engine auditing software to pinpoint the source of the attack
 4. Dispatched Engineers to the Rancom Security site to expedite recovery process
 5. Unable to verify that our most recent backup of the Rancom Security data (from the evening of the 28th June 2017) was un-infected.
 6. Checked for last Disaster Recovery test for this client – this was on 19th June 2017
 7. Deployed a temporary imaging server on site to rebuild all devices and servers.
 8. Initiated Office 365 migration via PST migration to avoid a costly Exchange rebuild.
 9. Flattened all workstations and rebuilt them utilising the Imaging server."

 This report suggests that the Alarm Master database was not corrupted, computers were rebuilt and that the system was being backed up. This contradicts the evidence given to us by Mr Hosking.

Calls made for market research

59. Rancom suggest that the calls were not direct marketing but were market research or what Mr Hosking called an "awareness campaign". No satisfactory evidence has been produced of the scope of the research being undertaken nor of the outcome. We reject the evidence of Mr Hosking about the purpose of the calls and to the effect that family members made complaints because they may have misinterpreted what their elder relatives told them, this assumes that older people are incapable of properly understanding or communicating what is being said to them and does not explain what was said in those complaints, nor the number of complainants putting the same interpretation on the calls received.

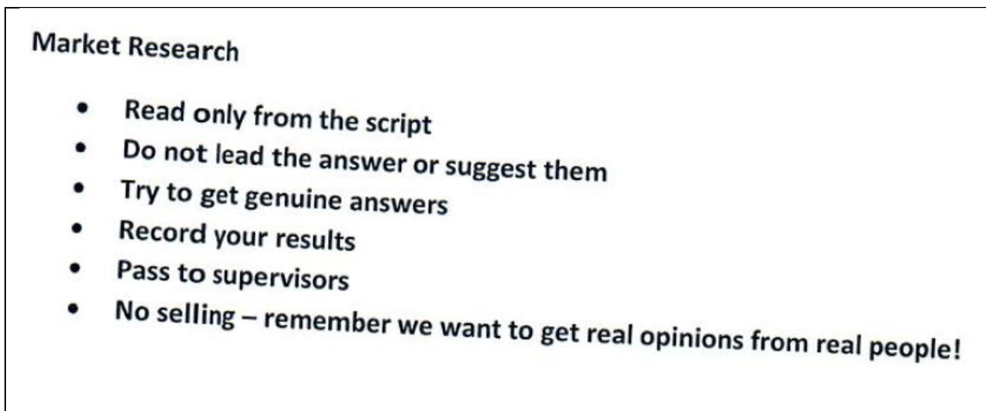
60. The evidence from the complaints about what was said during the calls, the aggressive tone of those calls and the volume and duration of the period over which they were made is inconsistent with the calls being part of bona fide market research.

61. Furthermore, multiple calls to the same number would not be necessary in those circumstances. The schedules show multiple calls to the same number.

62. The scripts provided by the company in an effort to sustain this suggestion do not support it but show that the calls did include advertising material and therefore included information which was being communicated for direct marketing purposes. Moreover, the supposed market research element of the script was inconsistent and unfocused.

63. Rancom relies on training documents to support the suggestion that the calls were for this purpose.

64. A training record dated 19/5/2017 was provided for the same employee whose training had begun on or before 5 October 2016, this record suggests that Mr Hosking "would be" providing training on TPS and the requirements of PECR to the employee and there is a later document dated 26 May 2017 headed PECR training part 2 which tells the employee


Market Research

- Read only from the script
- Do not lead the answer or suggest them
- Try to get genuine answers
- Record your results
- Pass to supervisors
- No selling – remember we want to get real opinions from real people!

65. This is accompanied by a "market research training document", this suggests that each person called would be asked for a preference of whether they would prefer police to respond to their alarm or a guard. It says "you are not allowed to call TPS as this is a survey" and instructs the employee not to book an appointment. We note the reference to data being handed in at the end of a shift to the supervisor from which we infer that this was in hard copy, this is consistent with another document dated 7/8/17 which talks about data research sheets having to be handed in to Mr Hosking by 10am on a Monday and then destroyed after 28 days.

66. A document dated 5 November 2018 states that "Rob and Ant" were in charge of the "large survey" and that the market research showed that 71% were in favour of private guarding. This analysis would have been based on answers to question 7 on the script "*Do you consider that serve that provided a private guarded response to be more of a premium service than a police responded system? (sic)*".

67. At one stage the company suggested market research calls were not recorded but later sought to criticise the respondent for not having produced any recordings. However, these were Rancom's calls and they were in the best position to evidence them in support of their own position and did not do so. We have not been provided with any recordings or transcripts of calls, the script tells us nothing about what was actually said.

68. Whereas the complaints received detail the substance and tone of the calls made, recounting selling tactics such as offering to advise on home security or discuss product options, including references to them being "in the area" and demonstrate a pattern of direct marketing by Rancom, frequently featuring the warning that the emergency services will fail to respond to an alarm.

69. Mr Hosking suggested that as a result of the market research the company had changed its business model to introduce what it called private guarding. It is

submitted by the company that the timing shows this change of model following the research. However, we find the lack of any analysis or business planning or company records, to indicate that the real reason for the calls was for marketing purposes for the new business model. This is consistent with the text of the complaints which have repeated references to the non-responsiveness of the police in an attempt to sell a system which relies on private security rather than police response.

70. We have not seen the outcome of the market research beyond the assertion that the results showed 71% in favour of private guarding. Indeed in cross-examination Mr Hosking seemed to suggest that the only question where data was actually collected was question 7, which is an indication that the "survey" was not genuine.

71. Even if parts of an individual call could be said to have an alternative purpose, that would not prevent a contravention from being committed in another part of the same call. The Upper Tribunal has made it clear that the definition of "direct marketing" cannot be avoided by packaging the advertising material among or adjacent to some other purpose of communication. Even if the market research itself were genuine, and sincerely acted upon to develop business policy, that would not automatically legitimise the campaign if there were also an unsolicited promotional element being communicated electronically.

72. We have found that the calls made by Rancom as part of its so called "market research" were for the purposes of direct marketing as defined in s.122(5) DPA 18, being "communication (by whatever means) of any advertising or marketing material which is directed to particular individuals".

73. Rancom accepts that between 1 June 2017 and 30 May 2018 that it carried out direct selling by telephone and that it is likely that some calls were erroneously made to TPS registered numbers. It has not been suggested that any consent was provided or sought for the calls made by the company.

74. We find that the 94 calls about which complaints were received were made for direct marketing purposes and that they were made in contravention of Regulation 21 PECR.

75. We have decided that it was appropriate to impose a monetary penalty, on Rancom because

    a. the contravention was serious;

    b. the Appellant knew or ought to have known that there was a risk that the contravention would occur; and

c. it failed to take reasonable steps to prevent the contravention.

76. Seriousness: We are satisfied that condition (a) from section 55A (1) DPA is met.

77. We have concluded that the contravention was serious in the light of the following
    a. There were 94 complaints made but that number must be seen in the context of a large direct marketing campaign. It is more likely than not in these circumstances that the actual number of affected subscribers is higher. The volume of complaints is not determinative of whether there has been breach nor the seriousness of the contravention which must be judged against all the circumstances.
    b. The 94 complaints are set in a context of 565,344 calls.
    c. The complaints described the distressing and aggressive nature of some calls.
    d. There were multiple calls to the same number despite explicit requests not to, contrary to Rancom's assertions of an effective suppression list.

78. Deliberate or negligent contravention: There is no suggestion that the contravention was deliberate. In considering whether Rancom acted negligently as opposed to deliberately the requirements of section 55A(3) DPA 1998 apply.

79. We have concluded that Rancom knew or ought to have known that there was a risk that the contravention would occur: Rancom accepts that between 1 June 2017 and 30 May 2018 that it carried out direct selling by telephone and that it is likely that some calls were erroneously made to TPS registered numbers. Albeit that our findings above are not accepted.

80. However, Rancom do not accept that any marketing calls were made deliberately or negligently. They rely on training they have provided and contracts they have entered into but this must be seen in the context of the fact that Rancom's attention had been drawn to the issue by the Information Commissioner in June and July 2017 and in 2010 the Commissioner had issued an enforcement notice against the Appellant company (under its previous name, Direct Response Security Systems Limited). The company had acknowledged the Guidance and committed to screen the data against the TPS itself. However even on its own case it did not do so for more than approximately 10% of the data.

81. We were provided with an example of training records of one employee. The first document is dated 5/10/2016. This makes it clear that the training being provided was to do with the costs of installation. This is clearly related to sales of the system rather than market research. Another record dated 7/11/16 for the same employee does not mention market research either. There is a third record for same employee dated 10 January 2017, once again this does not mention market research, nor does

one from 22 March 2017. A fourth document relating to the same employee dated 10 January 2017 states, inter alia "If an existing customer is on a TPS list please explain we are allowed to call them as they are our customer…". This suggests that the company was aware of its responsibilities as regards TPS subscribers.

82. Only one of the questions being asked in the "market research" was actually analysed, and the plan was clearly to call many people regardless of the purpose of the calls. Moreover guidance from the Information Commissioner is easily available. In such circumstances and in the light of previous enforcement proceedings adequate due diligence was imperative.

83. Rancom relied on having entered into contracts with those who supplied them with the data (the phone numbers). The company took no steps beyond a check of its suppression lists to ensure that communications made on its behalf were not unlawful. The claim that 10% of the numbers provided were checked against the TPS register is inconsistent with the fact that the company does not have a TPS licence and had they done so it would have been clear that many of the numbers were registered but there is no suggestion that this happened nor that there was a change in business practice as a result.

84. Furthermore in answer to questions from the tribunal Mr Hosking said that Rancom were not aware of how to check whether the data with which they had been provided was free from TPS subscribers and they relied on the person they were calling to tell them. This is inconsistent with the suggestion that contracts were entered into for the purposes of such checks being made and inconsistent with the suggestion that 10% of the data was checked.

85. Furthermore, the contracts relied on by Rancom between them and the suppliers of the data, expressly disclaimed any warranty that the data would be accurate and excluded liability on the supplier for any inaccuracy, incompleteness or other error in the data see contractual clause 6.1 at bundle page 103 and clause 14.1 on page 119.

86. Rancom stated in submissions that they had entered into a contract with a third company for the provision of data and Rancom verified that the system used by that company had a cloud based verification of numbers to be called against the TPS system. The contract included the appointment of a compliance officer and monitoring and purported to warranty the information. That company is said to have gone into liquidation. That "Rolling telemarketing Contract" between it and the provider of the majority of the data it purchased was neither signed nor dated and only produced later in the investigation.

87. Such a contract in itself does not absolve a company that makes direct marketing calls from responsibility to comply with PECR. Rancom asserted it checked 10% of the number provided to it by third party suppliers. Had any numbers been checked it is likely that this would have revealed that the numbers it was calling were TPS registered. This omission is significant given Rancom's previous contact with the Commissioner, including previous enforcement action in 2010. Furthermore, on 25 July 2017 within the relevant period, Mr Hosking (on behalf of the Appellant company) agreed with the Information Commissioner's assessment that it was unlikely to be acting in compliance with its obligations, and should be purchasing the TPS list directly rather than relying on third party suppliers. He committed to ensure that the Appellant would implement the Commissioner's recommendations. However, there is no record of the Appellant ever having obtained the list from TPS.

88. The argument made by Rancom about possible out-of-date lists of TPS subscribers has no force. The data relied on by the Commissioner was filtered to establish the number of calls made to numbers which were registered with the TPS at least 28 days before receiving a call" in accordance with Regulation 21(3) PECR. According to the Appellant, the data was refreshed every month which, if true, that would certainly have avoided any over-counting. However, that time-lag could not account for more than a tiny proportion of more than half a million calls.

89. We have concluded that Rancom new or ought to have known that there was a risk that the contravention would occur and failed to take reasonable steps to prevent the contravention. We are satisfied that condition (b) from section 55A (1) DPA is met.

90. We are satisfied in all the circumstances that the Information Commissioner did not exercise her discretion inappropriately when deciding to issue the MPN.

91. We then turned to consider the amount of the penalty. The purpose of a monetary penalty notice is not only to punish the contravention but also to deter others from engaging in similar behaviour. They form a deterrent against non-compliance and thus an encouragement towards compliance.

92. The Information Commissioner agrees that there had been no breach since 1 January 2019 until the date of the hearing, this does not mean that there should not be a penalty but any cessation of the contravening behaviour will be a factor to consider as to the amount of the penalty. This consideration led the information Commissioner to decide not to issue an enforcement notice.

93. Monetary penalties should not cause undue financial hardship but it could be said that is in their nature and purpose to cause hardship because they are a deterrent. In any event what is required is that the amount of the penalty is proportionate in all the circumstances.

94. The Information Commissioner adopted a starting point of £140,000. Taking into account the volume of calls and the period over which they were made as set out above, we find this is the appropriate starting point.

95. We turn then to decide whether the penalty should be increased or decreased in the light of any aggravating or mitigating factors. We have identified the following aggravating factors:

    (i) the impact of the contravention on the complainants, having regard to aggressive and misleading nature of the calls and repeat calls to the same individuals;

    (ii) the direct marketing was intended to generate business leads for financial gain; whether or not such gain or profit was, in fact made.

    (iii) a failure to follow publicly available advice easily accessible, without cost, on the Information Commissioner's website

    (iv) inconsistent responses during the Commissioner's investigation;

    (v) the pattern of poor regulatory compliance by the appellant company when in its previous name Direct Response Security Systems Limited the ICO issued an Enforcement Notice against that company in 2010 for similar contraventions of PECR to those detailed in this report.

96. The Information Commissioner increased the penalty to £170,000 in the light of those factors and we agree they are significantly aggravating and justify that increase.

97. We then considered whether there were any mitigating factors that point to a need for a decrease in the penalty. We have had regard to
    i. The cessation of direct marketing calls and lack of further complaints since 1 January 2019
    ii. The likely impact on the appellant company's financial position albeit full financial disclosure has not been made, eg no bank statements provided.

98. Bearing in mind the particular circumstances of this case we have found that the penalty should be reduced to £110,000.

99. Taking all this into account, we are satisfied that a penalty of £110,000 is reasonable, proportionate and dissuasive in all the circumstances of this case.

100. We conclude that the MPN was in accordance with the law and we do not consider that the Commissioner ought to have exercised her discretion differently. The MPN stands.

101. The appeal is dismissed.

Signed Tribunal Judge Lynn Griffin Date: 30 May 2023