

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

DATED 1 APRIL 2014

Name: Amber UPVC Fabrications Ltd

Registered Office: 181-183 Summer Road, Erdington, Birmingham, B23 6DX

Statutory framework

1. Amber UPVC Fabrications Ltd, whose registered office is given above (Companies House Registration Number: 03013390) 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 the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR") as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2004 and by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 ("PECR 2011").
2. 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 Data Protection Act 1998 (the "Act"). By virtue of regulation 31(2) PECR the Information Commissioner (the "Commissioner") was made responsible for the enforcement functions under PECR.

3. Under section 40 subsection 1 of the Act as adopted by PECR and with the specific adaptations to that subsection set out in Schedule 1 of PECR, if the Commissioner is satisfied that a person has contravened any of the requirements of PECR the Commissioner may serve him with an enforcement notice requiring him to comply with the requirements in question.

Background

4. Amber UPVC Fabrications Ltd, trading as and hereafter referred to as Amber Windows, manufactures, fits, and sells replacement windows, doors, porches, and conservatories throughout the Midlands. Amber Windows' business involves direct marketing to consumers by telephone.
5. It is a fundamental requirement of PECR, and well-known in the direct marketing industry, that a consumer's consent must have been notified to the company before it makes direct marketing telephone calls to that consumer if the consumer is registered with TPS. Therefore, it is a necessary step for businesses involved in telesales to make arrangements to ensure that they do not make direct marketing calls to those consumers who have subscribed to TPS, unless the business holds records showing that those consumers have given their informed consent to that business to receive such calls.

6. It is also a necessary step for a business involved in direct marketing to register with the TPS to ensure that the business has access to a monthly update of the TPS list as new numbers are registered daily by consumers. Furthermore, the business should hold a 'suppression list' of those consumers who have informed it directly that they do not wish to receive direct marketing calls.
7. Between 26 May 2011 and 30 April 2013, ("period of complaint") the TPS received 513 (five hundred and thirteen) complaints from individuals registered with them who had received unsolicited direct marketing calls from Amber Windows. In addition, during the period of complaint, the Commissioner received 21 complaints about unsolicited marketing calls to individual subscribers registered with the TPS. Of the 21 complaints received by the Commissioner, 10 were also duplicated in the list of 513 complaints referred to the TPS, leaving a total of 11. The total number of complaints about Amber Windows made by individual subscribers to both TPS and the Commissioner during the period of complaint is therefore 513 plus 11 which makes a total of 524.
8. Each of the 524 complainants had registered their number with the TPS at least 28 days prior to receiving the calls. None had previously notified Amber Windows that they were willing to receive calls from them.
9. Between 28 July 2012 and 11 April 2013 the Commissioner engaged in correspondence with Amber Windows whose Company Secretary responded on behalf of the company. Despite the Commissioner's letters explaining the legal position and warning of his powers of enforcement, Amber Windows' responses did not to persuade the Commissioner that the company was taking any reasonable steps to comply with Regulation 21.

10. Between April 2013 and August 2013 there have been a further 123 complaints made to the TPS about Amber Windows. In addition the Commissioner received a further 20 complaints.
11. A Preliminary Notice was served on Amber Windows on 14 October 2013. The Commissioner received written representations from Amber Windows in a letter dated 4 November 2013 in response to that Preliminary Notice. The Commissioner has considered the written representations made by Amber Windows when deciding whether to serve this enforcement notice.

Breaches of Regulation 21

12. The relevant provision of PECR is Regulation 21 paragraph (1) (a) and (b) which provides that,

“..a person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where-
 - (a) the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or
 - (b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26.”
13. The Commissioner is of the view that Amber Windows has contravened Regulation 21 of PECR.

14. The Commissioner has considered, as he is required to do under section 40(2) of the Act, as adapted by Schedule 1 of PECR, when deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage. The Commissioner has considered that it is unlikely that actual damage has been caused in this instance.

15. In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of his powers under section 40 of the Act, he requires that Amber Windows shall take the following steps within 35 days of the date of this Notice:

Neither use, nor instigate the use of a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where the called line is that of :

- a) a subscriber who has previously notified Amber Windows that such calls should not be made on that line ; and /or

 - b) a subscriber who has registered their number with the TPS at least 28 days previously and who has not notified Amber Windows that they do not object to such calls being made.
16. There is a right of appeal against this Notice to the First-tier Tribunal (Information Rights), part of the General Regulatory Chamber. Information about appeals is set out in the attached Annex 1.

17. Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Notice is sent. Information about appeals is set out in the attached Annex 1.

Dated 1 April 2014

Signed:

David Smith
Deputy Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Regulation 31 of PECR adopted Part V of the Data Protection Act 1998 headed 'Enforcement' (subject to modifications imposed by Schedule 1 of PECR). This includes Section 48 which gives any person upon whom an enforcement notice or an information notice has been served a right of appeal to the First-tier Tribunal (General Regulatory Chamber) (the "Tribunal") against the notice.

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

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

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

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

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

GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

a) The notice of appeal should be served on the Tribunal within 28 days of the date on which notice of the Commissioner's decision was served on or given to you.

b) If your notice of appeal is late the Tribunal will not accept it unless it is of the opinion that it is just and right to do so by reason of special circumstances.

c) If you send your notice of appeal by post to the Tribunal, either in a registered letter or by the recorded delivery service, it will be treated as having been served on the Tribunal on the date on which it is received for dispatch by the Post Office.

4. The notice of appeal should state:

- a) your name and address;
- b) the decision which you are disputing and the date on which the notice relating to such decision was served on or given to you;
- c) the grounds of your appeal;
- d) whether you consider that you are likely to wish a hearing to be held by the Tribunal or not;
- e) if you have exceeded the 28 day time limit mentioned above the special circumstances which you consider justify the acceptance of your notice of appeal by the Tribunal; and
- f) an address for service of notices and other documents on you.

In addition, a notice of appeal may include a request for an early hearing of the appeal and the reasons for that request.

5. By virtue of section 40(7), an enforcement notice may not require any of the provisions of the notice to be complied with before the end of the period in which an appeal can be brought and, if such an appeal is brought, the notice need not be complied with pending the determination or withdrawal of the appeal. However, section 40(7) does not apply where the notice contains a statement that the Commissioner considers that the notice should be complied with as a matter of urgency.
6. Section 48(3) provides that where an enforcement notice contains a statement that the notice should be complied with as a matter of urgency then, whether or not you intend to appeal against the notice, you may appeal against –
- (a) the Commissioner's decision to include the statement in the notice, or
 - (b) the effect of the inclusion of the statement as respects any part of the notice.
7. 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.

8. 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 the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 Statutory Instrument 2009 No. 1976 (L.20).