

## **DATA PROTECTION ACT 1998**

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

#### **MONETARY PENALTY NOTICE**

To: Better for the Country Ltd

Of: 265-269 Kingston Road, Wimbledon, London, SW19 3NW

1. The Information Commissioner ("Commissioner") has decided to issue Better for the Country Limited ("the Company") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to a serious contravention of Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR") by the Company.
2. This notice explains the Commissioner's decision.

#### **Legal framework**

3. The Company, whose registered office is given above (Companies House registration number: 09609018), is the person stated in this notice to have instigated the transmission of unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

4. Regulation 22 of PECR states:

- “(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.
- (2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.
- (3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—
- (a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;
  - (b) the direct marketing is in respect of that person’s similar products and services only; and
  - (c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.
- (4) A subscriber shall not permit his line to be used in contravention of paragraph (2).”

5. 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)).
6. "Electronic mail" is defined in regulation 2 (1) PECR as "any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient and includes messages sent using a short message service".
7. Section 55A of the DPA (as amended by the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2011 and the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2015) states:

"(1) The Commissioner may serve a person with a monetary penalty 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."

8. 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.
9. PECR implements European legislation (Directive 2002/58/EC) aimed at the protection of the individual's fundamental right to privacy in the electronic communications sector. PECR was amended for the purpose of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches PECR so as to give effect to the Directives.

### **Background to the case**

10. The Company campaigns for the UK to leave the European Union, formerly under the name The Know and now as Leave.EU. As part of that campaign, it sent unsolicited directed marketing text messages in the following terms:

"Hello, it's Richard from The Know. Text YES to support our fight to leave the EU or see <http://goo.gl/sOS9DU> for more info. Reply STOP to opt-out".

"Hello, it's Liz from The Know. Text YES to support our fight to leave the EU or see <http://goo.gl/86G6Mp> for more info. Reply STOP to opt-out".

"Hello, we're contacting you from The Know. Text YES to support our fight to leave the EU or see <http://goo.gl/6Sbnlv> for more info. Reply STOP to opt-out".

11. Mobile phone users can report the receipt of unsolicited marketing text messages to the GSMA's Spam Reporting Service by forwarding the message to 7726 (spelling out "SPAM"). The GSMA is an organisation that represents the interests of mobile operators worldwide. The Commissioner is provided with access to the data on complaints made to the 7726 service.
12. Between 1 May 2015 and 7 October 2015, 134 complaints were made to the 7726 service about the receipt of unsolicited direct marketing text messages sent by the Company. In the same period 6 complaints were made direct to the Commissioner.
13. Attached at Annex 2 is a spreadsheet detailing the 134 complaints made by individual subscribers to the 7726 service. Attached at Annex 3 is a spreadsheet detailing the 6 complaints made direct to the Commissioner.
14. On 9 October 2015 the Commissioner wrote to the Company, providing copies of the spreadsheets containing details of the complaints made and asking a number of questions about its compliance with PECR. The Company was warned that the Commissioner could issue civil monetary penalties up to £500,000 for PECR breaches.
15. The Company replied on 30 October 2015 and explained that some of text messages had been sent to individuals who had registered as supporters of the campaign on the Company's website. However, the remainder were sent to individuals whose details had been obtained

from a third party data supplier. The Company explained that the data obtained from the third party supplier was “double opt-in consented for government and local government marketing”. The Company provided the following examples of the consent that had been relied on:

“By providing us with your details and agreeing to our terms and conditions you have given us and our carefully selected partners permission to send you offers by email, post or SMS and from time to time to telephone you. We may also share your details with our partners in order to improve the relevance of the offers that they wish to send you. These offers may relate to utilities, retail products & services, travel, leisure, insurance, finance, real estate, telecoms, gambling, home improvements, health, automotive, legal services, or local & national government ...”

“By entering your email you consent to xxxx and its partners, sending you information and offers on products and/or services that may be of interest to you via email, SMS, telephone or direct mail. These offers may relate to utilities, retail products & services, travel, leisure, insurance, finance, real estate, telecoms, gambling, home improvements, health, automotive, legal services or local & national government”.

16. The Company subsequently confirmed that it had sent a total of 501,135 text messages between 1 May 2015 and 7 October 2015 to individuals whose details had been obtained from the third party supplier.
17. The Commissioner has made the above findings of fact on the balance of probabilities.

18. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by the Company and, if so, whether the conditions of section 55A DPA are satisfied.

**The contravention**

19. The Commissioner finds that Company has contravened regulation 22 of PECR.
20. The Commissioner finds that the contravention was as follows:
21. Between 1 May 2015 and 7 October 2015, the Company used a public telecommunications service for the purposes of instigating the transmission of 501,135 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
22. "Consent" within the meaning of regulation 22(2) requires that the recipient of the electronic mail has notified the sender that he consents to messages being sent by, or at the instigation of, that sender. Indirect, or third party, consent can be valid but only if it is clear and specific enough.
23. In this case the Commissioner is satisfied that the Company did not have the consent, within the meaning of regulation 22(2), of the 501,135 subscribers to whom it had sent unsolicited direct marketing text messages.
24. The Commissioner is satisfied that the Company was responsible for this contravention.

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

**Seriousness of the contravention**

26. The Commissioner is satisfied that the contravention identified above was serious. This is because in a five month period the Company sent a total of 501,135 direct marketing text messages to subscribers without their consent. This resulted in 140 complaints being made.
27. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

**Deliberate or negligent contraventions**

28. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that the Company actions which constituted that contravention were deliberate actions (even if the Company did not actually intend thereby to contravene PECR).
29. The Commissioner considers that in this case the Company did not deliberately contravene regulation 22 of PECR in that sense.
30. The Commissioner had gone on to consider whether the contraventions identified above were negligent. First, he has considered whether the Company knew or ought reasonably to have known that there was a risk that these contraventions would occur. He is satisfied that this condition is met, given that the Company relied heavily on direct marketing due to the nature of its campaign, and the fact that the



issue of unsolicited text messages was widely publicised by the media as being a problem.

31. Furthermore, the Commissioner has published detailed guidance for those carrying out direct marketing explaining their legal obligations 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. In particular it states that organisations can generally only send marketing texts to individuals if that person has specifically consented to receiving them.
32. It is therefore reasonable to suppose that the Company knew or ought reasonably to have known that there was a risk that these contraventions would occur.
33. Second, the Commissioner has gone on to consider whether the Company failed to take reasonable steps to prevent the contraventions.
34. 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. Organisations should take extra care to ensure that the consent is sufficiently clear and specific if using a bought-in list to send marketing texts or emails.
35. It is not acceptable to rely on assurances of indirect consent without undertaking proper due diligence. Such due diligence might, for example, include checking the following:
  - How and when was consent obtained?

- Who obtained it and in what context?
  - What method was used – eg was it opt-in or opt-out?
  - Was the information provided clear and intelligible? How was it provided – eg behind a link, in a footnote, in a pop-up box, in a clear statement next to the opt-in box?
  - Did it specifically mention texts, emails or automated calls?
  - Did it list organisations by name, by description, or was the consent for disclosure to any third party?
  - Is the seller a member of a professional body or accredited in some way?
36. A reputable list broker should be able to demonstrate that the marketing list for sale is reliable by explaining how it was compiled and providing full details of what individuals consented to, when and how. If the seller cannot provide this information, a buyer should not use the list.
37. In this case the Company relied upon contractual assurances from its third party data supplier that the necessary consent had been obtained for sending unsolicited direct marketing text messages. However, the Commissioner does not consider that the Company undertook sufficient due diligence. In the circumstances, the Commissioner is satisfied that the Company failed to take reasonable steps to prevent the contraventions in this case.
38. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

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

39. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A(1) DPA have been met in this case. He is also satisfied that section 55A(3A) and the procedural rights under section 55B have been complied with.
40. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out his preliminary thinking. In reaching his final view, the Commissioner has taken into account the representations made by the Company on this matter.
41. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
42. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.
43. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited marketing texts 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. The issuing of a monetary penalty will reinforce the need for businesses to ensure that they are only texting those who consent to receive marketing.
44. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

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

45. The Commissioner has taken into account the following **mitigating features** of this case:
- The Company fully co-operated with the Commissioner's investigation.
  - There is a potential for damage to the Company's reputation.
46. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£50,000 (fifty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

### **Conclusion**

47. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **9 June 2016** 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.
48. If the Commissioner receives full payment of the monetary penalty by **8 June 2016** the Commissioner will reduce the monetary penalty by 20% to **£40,000 (forty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
49. 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.
50. Any notice of appeal should be received by the Tribunal within 28 days  
of the date of this monetary penalty notice.
51. Information about appeals is set out in Annex 1.
52. 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.
53. 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 9<sup>th</sup> day of May 2016

Signed .....

Simon Entwisle  
Deputy Commissioner & Deputy Chief Executive Officer  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

## **ANNEX 1**

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

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

1. Section 48 of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice or variation notice has been served a right of appeal to the (First-tier Tribunal) General Regulatory Chamber (the 'Tribunal') against the notice.
  
2. If you decide to appeal and if the Tribunal considers:-
  - a) that the notice against which the appeal is brought is not in accordance with the law; or
  - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.
  
3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

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

  - a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.

- b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state: -
- a) your name and address/name and address of your representative (if any);
  - b) an address where documents may be sent or delivered to you;
  - c) the name and address of the Information Commissioner;
  - d) details of the decision to which the proceedings relate;
  - e) the result that you are seeking;
  - f) the grounds on which you rely;
  - 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 (General Regulatory Chamber) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).



