

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Flybe Limited

Of: New Walker Hangar, Exeter International Airport, Clyst Honiton,
Exeter, EX5 2BA

1. The Information Commissioner ("Commissioner") has decided to issue Flybe Limited ("Flybe") 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 Flybe.
2. This notice explains the Commissioner's decision.

Legal framework

3. Flybe, whose registered office is given above (Companies House registration number: 02769768), 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. The term “soft opt-in” is used to describe the rule set out in in Regulation 22(3) of PECR. In essence, an organisation may be able to e-mail its existing customers even if they haven’t specifically consented to electronic mail. The soft opt-in rule can only be relied upon by the organisation that collected the contact details.
8. 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.”
9. 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.
10. 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

11. Flybe Limited (“Flybe”) is a large regional airline carrier, based in Exeter.
12. In August 2016 Flybe sent an e-mail to an individual titled “Are your details correct?” advising them to amend any out of date information and update any marketing preferences. This e-mail also instructed that by updating their preferences they may be entered into a prize draw.

13. Following receipt of the e-mail the individual made a complaint to the Commissioner explaining that they had previously opted out of marketing e-mails from Flybe. The Commissioner wrote to the Company on 27 October 2016, providing details of the complaint made. Flybe were warned that the Commissioner could issue civil monetary penalties of up to £500,000 for PECR breaches.
14. Flybe were informed that it was the Commissioner's view that organisations cannot e-mail an individual to consent to future marketing messages. That e-mail would be in itself sent for the purposes of direct marketing, and so is subject to the same rules as other marketing e-mails.
15. Flybe explained that it had sent 3,662,973 "Are your details correct?" e-mails to unique e-mail addresses as a one off communication on 15 August 2016. However, Flybe indicated that whilst this number of direct marketing e-mails was attempted only 3,333,940 were successfully received.
16. Flybe use a third party agent to distribute bulk e-mails. These agents hold their customer database and maintain the list of opt in and opt out individuals for direct marketing purposes. The standard practice of the agent is to only send out e-mails to opted in customers. On this occasion Flybe requested that its agent send e-mails to customers who had previously explicitly opted out of direct marketing by Flybe for data cleansing purposes. Two buttons were included within the body e-mail, one simply updating the customers preferences and the other updating the preferences and entering the competition.

17. When asked how many of the 3,333,940 e-mails were sent to opted out customers, Flybe confirmed that this applied to all customers who were sent the "Are your details correct?" e-mail on 15 August 2016.
18. Flybe were consequently unable to evidence that the individuals to whom e-mails had been sent had consented to receipt of the messages.
19. The Commissioner has made the above findings of fact on the balance of probabilities.
20. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by Flybe and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

21. The Commissioner finds that Flybe has contravened regulation 22 of PECR.
22. The Commissioner finds that the contravention was as follows:

On 15 August 2016, Flybe instigated the transmission of 3,333,940 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

23. As the instigator of the e-mails, it was the responsibility of the Flybe to ensure that sufficient consent had been acquired.

24. "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.
25. In this case the Commissioner is satisfied that Flybe did not have the consent, within the meaning of regulation 22(2), of the 3,333,940 subscribers to whom it had instigated the sending of unsolicited direct marketing e-mails.
26. The Commissioner is satisfied that Flybe was responsible for this contravention.
27. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

28. The Commissioner is satisfied that the contravention identified above was serious. This is because on 15 August 2016 Flybe sent a total of 3,333,940 direct marketing e-mails to subscribers without their consent.
29. Flybe were aware that the e-mail was being sent to individuals who, according to their records, had previously indicated that they did not consent to receive direct marketing.
30. In addition, Flybe also instigated the sending of a further 329,033 marketing e-mails. Although these were not received by individuals it

evidences an attempt to send large volumes of marketing e-mails to individuals without consent to do so.

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

Deliberate or negligent contraventions

32. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that the Flybe's actions which constituted that contravention were deliberate actions (even if Flybe did not actually intend thereby to contravene PECR).
33. The Commissioner considers that in this case Flybe did deliberately contravene regulation 22 of PECR.
34. Flybe were aware that the e-mail was being sent to individuals who, according to their records, had previously indicated that they did not consent to receive direct marketing. Individuals have a right to opt out of receiving direct marketing and as soon as they have clearly said they wish not to receive it organisations must stop.
35. Flybe had sufficient knowledge of their requirements under the DPA and PECR and were aware of the Commissioners direct marketing guidance. Whilst it was aware of these requirements, this did not prevent Flybe from consciously continuing with their e-mail campaign to customers who had explicitly opted out of receiving direct marketing.
36. 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 e-mail, by post, or by fax. In particular it states that organisations can generally only send marketing e-mails to individuals if that person has specifically consented to receiving them from the sender. Flybe were unable to evidence to the Commissioner that the individuals to whom the e-mails had been sent had consented to receipt of the e-mails as it was sent to only those customers who had specifically opted out of direct marketing.

37. The Commissioner's direct marketing guidance is clear that organisations cannot e-mail or text an individual to ask for consent to future marketing messages. That e-mail or text is itself sent for the purpose of direct marketing and will be subject to the same rules as other marketing texts and e-mail. The guidance also stresses that organisations should keep clear records of what an individual has consented to, and when and how this consent was obtained, so that they can demonstrate compliance in the event of a complaint.
38. In the circumstances, the Commissioner is satisfied that Flybe failed to take reasonable steps to prevent the contraventions in this case.
39. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

40. 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.

41. The latter has included the issuing of a Notice of Intent dated 1 February 2017, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made by Flybe on this matter.
42. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
43. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
44. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited marketing e-mails 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 e-mailing those who consent to receive marketing.
45. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

56. The Commissioner has considered the likely impact of a monetary penalty on Flybe. She has decided that Flybe has access to

sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.

57. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£70,000 (seventy thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

58. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **19 April 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.
59. If the Commissioner receives full payment of the monetary penalty by **18 April 2017** the Commissioner will reduce the monetary penalty by 20% to **£56,000 (fifty six thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
60. There is a right of appeal to the First-tier Tribunal (Information Rights) against:
- (a) the imposition of the monetary penalty and/or;
 - (b) the amount of the penalty specified in the monetary penalty notice.

61. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.

62. Information about appeals is set out in Annex 1.

63. The Commissioner will not take action to enforce a monetary penalty unless:

- the period specified within the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;
- all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and
- the period for appealing against the monetary penalty and any variation of it has expired.

64. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Dated the 20th day of March 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)).