

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Honda Motor Europe Limited t/a Honda (U.K.)

Of: Cain Road, Bracknell, Berkshire, RG12 1HL

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

Legal framework

3. Honda, whose registered office is given above (Companies House registration number: 00857969), 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. Honda Motor Europe Limited (“Honda”) is responsible for the sale of Honda products in the United Kingdom, including cars and motorbikes. It also coordinates Honda's operations in Europe.
12. Between 1 May 2016 and 22 August 2016 Honda sent a large number of e-mails to individuals titled “would you like to hear from Honda?” in order to clarify the marketing preferences of those individuals they were uncertain of. This e-mail was sent to those individuals on the database where no “opt in” or “opt out” information was held.

13. Following receipt of the e-mail an individual made a complaint to the Commissioner. The Commissioner wrote to the Company on 6 July 2016, providing details of the complaint made. Honda was warned that the Commissioner could issue civil monetary penalties of up to £500,000 for PECR breaches.
14. Honda explained that it had sent the e-mail, not with the purpose of marketing, but as a service e-mail, to ensure that they were maintaining their compliance with the data protection principles relating to the retention of personal data and direct marketing. They stated that in particular, the e-mail was aimed to ensure that they were not keeping any personal data on their marketing lists for longer than was reasonably necessary and that any opt ins received from customers were both current and correct. It further said that only those individuals who positively opted in, in response to their e-mail, have been retained on their marketing lists.
15. Honda obtains the personal data of individuals and their specific preferences for direct marketing purposes in a number of ways: at the point of order through an authorised dealer; at the point of sale for the majority of their products through an authorised dealer; via Honda's own website; during promotional events where customers can sign up to marketing or upon the completion of a disclaimer form relating to activities operating at the event.
16. Each authorised dealer is an individual corporate entity and does not form part of the Honda Group. All dealers are expected to adhere to Honda's Data Management Policy and Guidelines containing template wording for dealers to use when obtaining privacy consents from their customers, to ensure that they can be specifically contacted by Honda.

The template provides for the specific methods of direct marketing communication that the individual would prefer and that the customers are happy for this consent to extend to Honda.

17. Customer data can be input on to Honda's central customer database by the authorised dealers. The relevant consents for marketing and an individual's marketing preferences are also recorded onto the database.
18. Honda explained that due to a design flaw in the software portal some dealers, when inputting data, had confirmed that an individual had agreed to direct marketing but had either failed to complete the actual marketing preferences field relating to that individual or had placed an 'X' rather than a yes or no answer in the applicable field. This was because a yes or no completion of the preferences field was not mandatory.
19. The Commissioner asked further questions of Honda and informed them that the Commissioner considered that the e-mails constituted direct marketing.
20. Honda was unable to evidence that the individuals to whom e-mails had been sent had consented to receipt of the messages.
21. The Commissioner was provided with information that between the period 1 May 2016 and 22 August 2016 "would you like to hear from Honda?" e-mails had been sent to 343,093 individuals. However, Honda indicates that whilst this number of direct marketing e-mails was attempted only 289,790 were successfully received.

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

The contravention

24. The Commissioner finds that Honda has contravened regulation 22 of PECR.
25. The Commissioner finds that the contravention was as follows:

Between 1 May 2016 and 22 August 2016, Honda instigated the transmission of 289,790 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

26. As the instigator of the e-mails, it was the responsibility of Honda to ensure that sufficient consent had been acquired.
27. "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. The soft opt-in rule can only be relied upon by the organisation that collected the contact details.
28. In this case the Commissioner is satisfied that Honda did not have the consent, within the meaning of regulation 22(2), of the 289,790

subscribers to whom it had instigated the sending of unsolicited direct marketing e-mails.

29. The Commissioner is satisfied that Honda was responsible for this contravention.
30. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

31. The Commissioner is satisfied that the contravention identified above was serious. This is because Honda sent a total of 289,790 direct marketing e-mails to subscribers without their consent.
32. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

33. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that Honda's actions which constituted that contravention were deliberate actions (even if the Company did not actually intend thereby to contravene PECR).
34. The Commissioner considers that in this case Honda did not deliberately contravene regulation 22 of PECR.
35. The Commissioner went on to consider whether the contraventions identified above were negligent. First, she has considered whether

Honda knew or ought reasonably to have known that there was a risk that these contraventions would occur. The Commissioner is satisfied that this condition is met. Honda sent the e-mail to establish the marketing preferences of individuals who, according to their records, had previously indicated some form of marketing consent but it was not clear on what those preferences were. This also extended to those individuals for whom Honda had no marketing preference details but who were present on their database as they had made contact with Honda, or an authorised dealer, at some point in time.

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. Honda 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.
37. It is therefore reasonable to suppose that Honda knew or ought reasonably to have known that there was a risk that these contraventions would occur.
38. Second, the Commissioner considered whether Honda failed to take reasonable steps to prevent the contraventions.
39. In this case the Commissioner considers that Honda were aware that the database records for individuals to whom the e-mail was directed

did not contain details of their specific preferred marketing preferences. Honda had sufficient knowledge of their requirements under the DPA and PECR and were aware of the Commissioner's direct marketing guidance.

40. 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. Whilst it was aware of these requirements, this did not prevent Honda from continuing with their e-mail campaign.
41. Furthermore, even when Honda was informed by the Commissioner in her initial correspondence of its obligations under PECR they took no immediate remedial steps to comply with Regulation 22. They continued to send the direct marketing e-mails until the Commissioner expressly advised them to cease sending them to individuals where they had no evidence of consent or those individuals had previously opted out.
42. In the circumstances, the Commissioner is satisfied that the Company failed to take reasonable steps to prevent the contraventions in this case.
43. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

44. 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.
45. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made by the Company on this matter.
46. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
47. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
48. 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.
49. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

50. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£13,000 (thirteen thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

59. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **20 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.
60. If the Commissioner receives full payment of the monetary penalty by **19 April 2017** the Commissioner will reduce the monetary penalty by 20% to **£10,400 (ten thousand four hundred pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
61. 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.

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

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

64. 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.

65. 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)).