

## **DATA PROTECTION ACT 1998**

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

#### **MONETARY PENALTY NOTICE**

To: Onecom Limited

Of: Onecom House, 4400 Parkway, Whiteley, Fareham, PO15 7FJ

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

#### **Legal framework**

3. Onecom, whose registered office is given above (Companies House registration number: 04031272), 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. Regulation 23 of PECR states:

“A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail –

- (a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed; or
- (b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided.”

6. 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)).

7. “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”.

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. Organisations cannot send, or instigate the sending, of marketing text messages unless the recipient has notified the sender that he consents to messages being sent by, or at the instigation of, that sender.

12. Consent must be freely given, specific and informed, and involve a positive indication signifying the data subject's agreement. Indirect, or third party, consent can be valid but only if it is clear and specific enough.
13. Whilst organisations can generally only send marketing texts where they have the consent of the recipient to do so, there is an exception to this rule for existing customers known as the 'soft opt-in'. This means that organisations can send marketing texts if:
  - they have obtained the contact details in the course of a sale (or negotiations for a sale) of a product or service to that person;
  - they are only marketing their own similar products or services; and
  - they gave the person a simple opportunity to opt out of the marketing, both when first collecting the details and in every message after that.
14. Organisations must not disguise or conceal their identity in any marketing text messages, and must provide a valid contact address for individuals to opt-out of receiving further text messages.
15. 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.

16. Between 26 October 2015 and 2 June 2016, 1050 complaints were made to the 7726 service, or direct to the Commissioner, about the receipt of unsolicited direct marketing text messages relating to mobile phone upgrades. The text messages were in the following form:

"3 Account holder, UPGRADE EARLY & receive a FREE TABLET! 1st come 1st served! CALL NOW on 01952 235833, Text ONEOPTOUT to 87007 to optout, T&Cs apply"

"EE account holder: Upgrade early and receive a FREE SMARTWATCH for Christmas! Limited availability, 1st come 1st served! CALL NOW 01952 235830"

"EXISTING VODAFONE customer: LAST CHANCE! CALL NOW to receive your FREE SMARTWATCH! 1st come 1st served, CALL NOW 03300 245480 Txt ONEOPTOUT to 87007 to optout"

"O2 Account holder, UPGRADE EARLY & receive a FREE TABLET! 1st come 1st served! CALL Onecom NOW on 01489 567019, Text ONEOPTOUT to 87007 to optout, T&Cs apply"

17. Of the 1050 messages complained about, 944 did not identify Onecom as the sender. However, the Commissioner is satisfied that all of the 1050 text messages were sent by Onecom.
18. The data used by Onecom for sending the marketing text messages had been obtained from various sources: (i) data acquired through the acquisition of other businesses; (ii) data obtained by Onecom from its own customers; and (iii) data obtained from third party data suppliers.
19. Onecom could not provide any evidence to the Commissioner as to the source of the data used to send the 1050 text messages. Further,

Onecom was unable to provide evidence that it had consent to send those text messages or that it could rely on the 'soft opt-in'.

20. Onecom confirmed that it had sent 3,284,908 text messages between 1 October 2015 and 31 March 2016. Of these, 2,796,075 had been received by the recipient. However, it was unable to say how many of these text messages were "marketing" messages and how many were "service" messages.
21. Since these matters were brought to Onecom's attention by the Commissioner, the company has implemented a number of remedial measures to ensure compliance with PECR. Since March 2016 it has sent no direct marketing text messages to individuals who are not customers and has received no further complaints about the receipt of such messages.
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 Onecom and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

24. The Commissioner finds that Onecom has contravened regulation 22 of PECR.
25. The Commissioner finds that the contravention was as follows:
26. Between 26 October 2015 and 2 June 2016, Onecom used a public telecommunications service for the purposes of transmitting at least

1050 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

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

### **Seriousness of the contravention**

29. The Commissioner is satisfied that the contravention identified above was serious. This is because Onecom sent at least 1050 marketing text messages to subscribers without their consent.
30. Given that Onecom had actually sent 3,284,908 text messages between 1 October 2015 and 31 March 2016, of which 2,796,075 had been received, it is likely that the scale of the contravention was significantly higher.
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 Onecom's actions which constituted that contravention were deliberate actions (even if Onecom did not actually intend thereby to contravene PECR).

33. The Commissioner considers that in this case Onecom did not deliberately contravene regulation 22 of PECR.
34. The Commissioner went on to consider whether the contravention identified above was negligent. First, she has considered whether Onecom knew or ought reasonably to have known that there was a risk that these contraventions would occur. She is satisfied that this condition is met, given that the issue of unsolicited text messages has been widely publicised by the media as being a problem.
35. 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 from the sender or the 'soft opt-in' rule applies. It also makes it clear that particular care must be taken when relying on "indirect consent" and that it is not acceptable to rely on assurances given by third party suppliers without undertaking proper due diligence. Finally it notes that an organisation may be at risk of enforcement action if it cannot provide evidence that it had the necessary consent to send marketing text messages.
36. It is therefore reasonable to suppose that Onecom knew or ought reasonably to have known that there was a risk that these contraventions would occur.
37. Second, the Commissioner considered whether Onecom failed to take reasonable steps to prevent the contraventions.

38. Reasonable steps in these circumstances could have included putting in place appropriate systems and procedures to ensure that it had the specific consent of those to whom it had sent marketing text messages; adequately recording the source of the data used and evidence of any consent obtained, if any; undertaking appropriate due diligence in respect of any data obtained from third parties and / or acquired businesses.
39. In this case the Commissioner is satisfied that Onecom failed to take reasonable steps to prevent the contraventions.
40. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

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

41. 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.
42. 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 Onecom on this matter.
43. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
44. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.

45. 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 unsolicited direct marketing text messages are only sent to those who have consented to the receipt of such messages from the sender. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

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

46. The Commissioner has taken into account the following **mitigating features** of this case:

- Onecom have stopped sending marketing texts and taken a number of remedial steps to ensure future compliance.

47. The Commissioner has also taken into account the following **aggravating features** of this case:

- Onecom contravened regulation 23 of PECR in that it did not (at the very least in 944 of the 1050 text messages complained of) identify the person on whose behalf the messages were sent.

48. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£100,000 (one hundred thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

**Conclusion**

49. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **13 June 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.
50. If the Commissioner receives full payment of the monetary penalty by **12 June 2017** the Commissioner will reduce the monetary penalty by 20% to **£80,000 (eighty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
51. 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.
52. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
53. Information about appeals is set out in Annex 1.
54. 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.

55. 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 11<sup>th</sup> day of May 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 (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)).