

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Hamilton Digital Solutions Limited

Of: 20-22 Wenlock Road, London, N1 7GU

1. The Information Commissioner ("Commissioner") has decided to issue Hamilton Digital Solutions Limited ("HDSL") 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. HDSL, whose registered office is given above (Companies House Registration Number: 08063662), is the organisation 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. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".
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. The term "soft opt-in" is used to describe the rule set out in Regulation 22(3) of PECR. In essence, an organisation may be able to contact its existing customers by electronic mail 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.
9. Section 55A of the DPA (as amended by the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2011 and the Privacy and Electronic Communications (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,

(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.”

10. 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.
11. 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

12. 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.
13. Consent must be a freely given, specific and informed indication signifying the individual's agreement.

14. Consent will not be specific if individuals are asked to agree to receive marketing messages from "selected third parties", "trusted partners" or other similar generic description.
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 and this data is incorporated into a Monthly Threat Assessment (MTA) used to ascertain organisations in breach of PECR.
16. Between 1 April 2016 and 9 May 2016, 595 complaints were made to the 7726 service about the receipt of unsolicited direct marketing text messages sent by HDSL.
17. The content of the text messages was reported as follows:

"FRIDAY CASH! Borrow ;350 for ;4.57 per week - Available TODAY! Click <http://offa.xyz/27FY6> to arrange NOW. 1270%RepAPR292%Int or StoptoOptOut"

"GREAT NEWS!! You're APPROVED to apply. Get ;500 TODAY over 6mths. Go to <http://offa.xyz/TzDPq> to confirm payout. 1270%RepAPR292%Int or replySTOPtoEnd"

"Need cash?? Borrow Â£500 for Â£6.03 p/wk. Repay over 1-24Mths. Click <http://offa.xyz/jBC70> for Money TODAY. 1270%RepAPR292%Int or STOPtoEnd"
18. The Commissioner wrote to HDSL on 18 May 2016 setting out her concerns regarding HDSL's compliance with PECR, specifically with Regulation 22, and requesting evidence of consent relied upon for the text messages sent to each of the complainants.

19. HDSL responded on 3 June 2016 to explain that the text messages had not originated from HDSL (Referred to in the organisation's correspondence as 'Hamilton Finance Solutions Limited', that being the previous company name of HDSL between 30 April 2015 and 20 December 2016), rather they had been sent by a second company who would act as an 'introducer' of customers to HDSL (Hereafter referred to as 'Introducer A').
20. HDSL indicated that they would carry out an "extensive due diligence exercise" with each new introducer, including a review of the permissions held; its 'privacy policy'; consents; and data sources.
21. This exercise was conducted with 'Introducer A' and deemed satisfactory by HDSL in March 2016 and would, in light of the Commissioner's involvement, be carried out again during June 2016 in an attempt to ensure DPA/PECR compliance.
22. The Commissioner wrote again to HDSL to indicate that, as the instigator of the text message campaign, they rather than 'Introducer A' would be responsible for the complaints received. Therefore she would require evidence of consent for the text messages sent; a copy of the contract between HDSL and 'Introducer A'; evidence of the "extensive due diligence exercise"; and details of the commission paid to 'Introducer A' for their business.
23. On 17 June 2016 a further response was received from HDSL, indicating that the company whom they had named as the introducer previously had in fact been named as the originator of the text messages in error, and that it was actually a Belize based company (Hereafter referred to as 'Introducer B') who had sent the text messages

24. HDSL indicated that 'Introducer B' did not operate as a marketing agent instructed by HDSL, nor would they operate under any instruction from HDSL. Furthermore, they would have sole discretion as to whether they would market HDSL's products, and would do so only to those within their database who have provided the appropriate permissions. A commission would be paid by HDSL in respect of all successful product purchases.
25. HDSL indicated that the "extensive due diligence" that they would carry out with all new introducers was undertaken with 'Introducer B' via telephone. Further to this a file was sent to HDSL from 'Introducer B' containing details of the databases it had access to, and details of the privacy policies utilized. The details provided were reviewed and deemed by HDSL to be compliant with DPA/PECR requirements.
26. HDSL included within their response to the Commissioner of 17 June 2016 details of the consent relied upon for the direct marketing that had been provided by 'Introducer B'. The consent relied upon was found by the Commissioner to have been acquired on URLs including: *www.ukprize.co.uk*; *http://www.swooosh.co.uk*; *www.premieroffersdirect.co.uk*; and *http://purplepayday.co.uk*.
27. Further information was requested from HDSL on 5 July 2016 to assist with the Commissioner's enquiries, including: invoices from 'Introducer B' for sending the messages; bank statements showing payments to 'Introducer B'; details of calls made, including the numbers; and confirmation of the personal contact at 'Introducer B'. HDSL provided a response to these questions by way of correspondence dated 26 July 2017.
28. The Commissioner wrote to HDSL on 19 September 2016 to say that the evidence put forward in previous correspondence by HDSL was

insufficient for the purposes of Regulation 22 PECR to show that the necessary clear and specific consent had been obtained, and that if HDSL had undertaken sufficient due diligence this would have become apparent to them.

29. HDSL subsequently instructed solicitors to represent them and to provide submissions to the Commissioner as to their compliance with the regulations.
30. HDSL's solicitors provided submissions to the Commissioner via correspondence dated 6 December 2016 as to HDSL's position, specifically that they did not deem HDSL to be the instigator of the text messages; and that the Commissioner had failed to evidence that HDSL did not have consent. HDSL's solicitors confirmed that between 1 April 2016 and 19 September 2016 a total of 156,250 text messages had been sent.
31. The submissions put forward demonstrate an ongoing misconception as to the solicitors', and particularly HDSL's, understanding of a Data Controller's obligations under PECR.
32. The Commissioner has made the above findings of fact on the balance of probabilities.
33. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by HDSL and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

34. The Commissioner finds that HDSL has contravened regulation 22 of PECR.
35. The Commissioner finds that the contravention was as follows:
36. Between 1 April 2016 and 19 September 2016, HDSL used a public electronic telecommunications service for the purposes of instigating the transmission of 156,250 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
37. "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.
38. In this case the Commissioner is satisfied that HDSL did not have the consent, within the meaning of regulation 22(2), of the 156,250 subscribers to whom it had instigated the sending of unsolicited direct marketing text messages. The Commissioner is satisfied that the exception afforded under regulation 22(3) would not apply in this instance.
39. The Commissioner is satisfied that HDSL was responsible for this contravention.
40. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

41. The Commissioner is satisfied that the contravention identified above was serious. This is because between the dates of 1 April 2016 and 19 September 2016, HDSL sent a total of 156,250 direct marketing text messages to subscribers without their consent which, between the periods of 1 April 2016 and 9 May 2016, resulted in 595 complaints.
42. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

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

46. 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. 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.
47. It is therefore reasonable to suppose that HDSL knew or ought reasonably to have known that there was a risk that these contraventions would occur.
48. Second, the Commissioner considered whether HDSL failed to take reasonable steps to prevent the contraventions.
49. 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.
50. 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?

51. In this case the HDSL 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 HDSL undertook sufficient due diligence. It did not, for example, make proper enquiries as to the basis on which the data it had bought was said to be “opted-in”. Had it done so, it should have been clear that HDSL did not have consent to instigate the sending of unsolicited direct marketing text messages.
52. In the circumstances, the Commissioner is satisfied that HDSL failed to take reasonable steps to prevent the contraventions.
53. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner’s decision to issue a monetary penalty

54. 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.

55. 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.
56. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
57. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
58. 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.
59. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The Amount of the penalty

60. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£45,000 (forty five thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

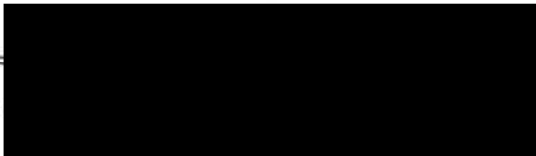
61. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **19 December 2017** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.
62. If the Commissioner receives full payment of the monetary penalty by **18 December 2017** the Commissioner will reduce the monetary penalty by 20% to **£36,000 (thirty 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.
63. 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.
64. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
65. Information about appeals is set out in Annex 1.
66. 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.

67. 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 16th day of November 2017

Signed

A large black rectangular box redacting the signature of Stephen Eckersley.

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)).