

**DATA PROTECTION ACT 1998**

**SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

**MONETARY PENALTY NOTICE**

To: TFLI Limited

Of: 3<sup>rd</sup> Floor, Adelphi Mill, Grimshaw Lane, Bollington, Macclesfield,  
SK10 5JB

1. The Information Commissioner ("Commissioner") has decided to issue TFLI Limited 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. TFLI Ltd, whose registered office is given above (companies house registration number: 08424810), is the person stated in this notice to have transmitted unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR. TFLI Ltd was incorporated on 28 February 2013.
4. Regulation 22 of PECR provides that:

“(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 device 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 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 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. TFLI Limited is a finance broker which markets financial products through the use of SMS text messages. The marketing campaigns are based upon personal data provided by third party affiliate companies.
11. TFLI Limited came to the attention of the Commissioner due to a significant number of complaints about the receipt of unsolicited SMS text messages. Between 24 November 2015 and 8 June 2016, 789 complaints were received via the 7726 reporting tool, 3 complaints were made via the Commissioner's online reporting tool, and one complaint emailed directly to the Commissioner, from individuals who had received marketing texts from TFLI Limited.
12. The Commissioner subsequently undertook an investigation which revealed that between 24 November 2015 and 8 June 2016, TFLI Limited instigated the transmission of approximately 1,218,436 unsolicited marketing texts promoting a loan website, of which 1,190,534 were received. The content of the message in each case was almost identical and was as follows:

*"Need funds today? Loans from ;100 - ;1500, spread the re-payments over 1 - 12 months. Click <http://btln.co/KiPLveR0n> now. 2OptOut Reply STOP <TFLI>"*

When followed, the link contained in the message took recipients to a loan website.

13. As part of the Commissioner's investigation she asked TFLI Limited to provide evidence of the consent relied on to instigate text marketing to each individual that had made a complaint.
14. In response, TFLI Limited provided the Commissioner with details of its screening and checking process for its affiliates, together with details of its standard data purchase agreement. The Commissioner also conducted an analysis of the opt-in privacy policies relating to each website that collected that data which was eventually used by TFLI Limited in its marketing campaign.
15. Following a review of this information the Commissioner observed that the due diligence processes of TFLI Limited place the emphasis for data quality and compliance with regulations firmly with the data supplier rather than themselves. They seek to reinforce this (and indemnify themselves from any issues arising from the use of the data) with the use of contractual obligations. The due diligence form used places an emphasis on the working practices of the data supplier rather than the quality of the data, how and where it was obtained and whether it is fit for purpose.
16. In relation to the privacy policies on websites which collect the source data, use of the websites are conditional upon the data subject's consent to electronic marketing, and as such, consent to marketing is compulsory. In one instance, an affiliate used the guise of telephone

surveys in relation to finance applications that required the applicant to be marketed as a condition of acceptance. The use of "selected third parties" and generic marketing sectors offers no clarity to data subjects about who may market them, and marketing requirements are often contained in privacy policies or terms and conditions, and therefore not immediately apparent.

17. In addition to the complaints made as detailed above (paragraph 11), TFLI confirmed that 79,380 stop requests were also generated during the period in question.
18. The Commissioner has made the above findings of fact on the balance of probabilities.
19. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by TFLI Limited and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

20. The Commissioner finds that TFLI Limited has contravened regulation 22 of PECR. The Commissioner finds that the contravention was as follows:
21. Between 24 November 2015 and 8 June 2016 TFLI Limited instigated the transmission of approximately 1,190,534 unsolicited communications over a public electronic communications network by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

22. Organisations cannot generally send electronic marketing texts unless the recipient has notified the sender that they consent to such texts being sent by, or at the instigation of, that sender.
23. Consent must be freely given, specific and informed, and involve a positive indication signifying the individual's agreement.
24. Consent will not be "informed" if individuals do not understand what they are consenting to. Organisations should therefore always ensure that the language used is clear, easy to understand, and not hidden away in a privacy policy or small print. Consent will not be valid if individuals are being asked to agree to receive marketing from "similar organisations", "partners", "selected third parties" or other similar generic description. Further, consent will not be valid where an individual is presented with a long, seemingly exhaustive list of general categories of organisations.
25. The Commissioner is satisfied that the consent relied on by TFLI Limited was not sufficiently informed and therefore it did not amount to valid consent for the purposes of regulation 22 PECR.
26. The Commissioner is satisfied that TFLI Limited 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.

29. This is because TFLI Limited sent 1,218,436 direct marketing texts to individuals without their consent, of which 1,190,534 were received, resulting in 793 complaints to the Commissioner.
30. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

**Deliberate or foreseeable contravention**

31. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that TFLI Limited's actions which constituted that contravention were deliberate actions (even if TFLI Limited did not actually intend thereby to contravene PECR).
32. The Commissioner considers that in this case TFLI Limited did not deliberately contravene regulation 22 of PECR.
33. The Commissioner went on to consider whether the contraventions identified above were negligent. First, she has considered whether TFLI Limited 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.
34. Furthermore, the Commissioner has published detailed guidance for those carrying out direct marketing explaining their legal obligation 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.

35. It is therefore reasonable to suppose that TFLI Limited knew or ought reasonably to have known that there was a risk that these contraventions would occur.
36. Second, the Commissioner considered whether TFLI Limited failed to take reasonable steps to prevent the contraventions.
37. Reasonable steps could have included seeking appropriate guidance on the rules in relation to electronic direct marketing and ensuring the consent on which it sought to rely on was valid.
38. In this case, TFLI Limited had contracts in place with its affiliates, however these sought to transfer the responsibility of obtaining adequate consent away from TFLI Limited, and inadequacies in its own due diligence processes led to a failure to identify that the consents relied upon were insufficient for the purposes of a text campaign by TFLI Limited. In the circumstances, the Commissioner is satisfied that TFLI Limited failed to take reasonable steps to prevent the contraventions.
39. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

**The Commissioner's decision to impose 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(3) and the procedural rights under section 55B have been complied with.

41. The latter has included the issuing of a Notice of Intent dated 21 November 2017 in which the Commissioner set out her preliminary thinking. TFLI Ltd received the Notice of Intent on 22 November 2017 and the date for receipt of representations has now passed.
42. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
43. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending or instigating of unsolicited marketing emails 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.

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

44. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£80,000 (eighty thousand pounds)**.

#### **Conclusion**


45. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **8 February 2018** 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.

46. If the Commissioner receives full payment of the monetary penalty by **7 February 2018** the Commissioner will reduce the monetary penalty by 20% to **£64,000 (Sixty four thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
47. 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.
48. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
49. Information about appeals is set out in Annex 1.
50. 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.

51. 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 8th day of January 2018

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 (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)).