

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Newday Limited

Of: 7 Handyside Street, London, England, N1C 4DA

1. The Information Commissioner ("Commissioner") has decided to issue Newday 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. Newday Limited, whose registered office is given above (companies house registration number: 07297722), is the organisation (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. Newday Limited was incorporated on 28 June 2010.
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. Newday Limited is a provider of financial products and services which conducts its marketing through contractual arrangements with selected marketing affiliates.
11. Between 6 April 2015 and 23 January 2017 Newday Limited, via its appointed affiliates, instigated the transmission of approximately 48,096,988 unsolicited marketing emails, promoting Newday Limited's products, of which 93% (equating to 44,730,198) were received by individual subscribers.
12. The emails were sent to individuals who had subscribed to sixteen websites operated by Newday Limited's affiliates.
13. Between 6 April 2015 and 23 January 2017 the Commissioner received 48 complaints from individuals who had received marketing emails from Newday Ltd.
14. As a result the Commissioner undertook an investigation, during

which she considered copies of contracts between Newday Limited and its affiliates, and also conducted a review of the affiliate websites. Her investigation has revealed that in respect of each affiliate website, the information provided to subscribers about marketing did not specifically name Newday Limited or any of its trading styles, and only listed "third parties", "sponsors", "partners", "affiliates" or similar generic descriptions. Furthermore the majority of the websites did not provide subscribers with the opportunity to opt out of third party marketing. For those which provided a 'soft opt-in' the information was not always readily available and did not allow subscribers to specify means of receipt.

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

The contravention

17. The Commissioner finds that Newday Limited has contravened regulation 22 of PECR. The Commissioner finds that the contravention was as follows:
18. Between 6 April 2015 and 23 January 2017 Newday Limited, via its affiliates, instigated the transmission of approximately 48,096,988 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.
19. Organisations cannot generally send marketing emails unless

the recipient has notified the sender that they consent to such emails being sent by, or at the instigation of, that sender.

20. Consent must be freely given, specific and informed, and involve a positive indication signifying the individual's agreement.
21. 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.
22. The Commissioner is satisfied that the consent relied on by Newday Limited was not sufficiently informed and therefore it did not amount to valid consent for the purposes of regulation 22 PECR.
23. The Commissioner is satisfied that Newday Limited was responsible for this contravention.
24. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

25. The Commissioner is satisfied that the contravention identified above was serious.
26. This is because Newday Limited, via its affiliate marketers, sent

48,096,988 direct marketing emails to subscribers without their consent, of which 44,730,198 were received, resulting in 48 complaints to the Commissioner. Newday Limited has stated that the volume of emails sent could be higher but they were unable to verify with all affiliates, the total number sent.

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

Deliberate or foreseeable contravention

28. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that Newday Limited's actions which constituted that contravention were deliberate actions (even if Newday Limited did not actually intend thereby to contravene PECR).
29. The Commissioner considers that in this case Newday Limited did deliberately contravene regulation 22 of PECR in that sense because it deliberately instigated the mass sending of marketing emails to individual subscribers whilst relying upon invalid consent obtained by third party affiliates. As the instigator of the email it was the responsibility of Newday Limited to ensure valid consent had been obtained prior to its transmission.
30. 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.

31. It is therefore reasonable to suppose that Newday Limited knew or ought reasonably to have known that there was a risk that these contraventions would occur.
32. The Commissioner has also considered whether Newday Limited failed to take reasonable steps to prevent the contraventions.
33. 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.
34. In this case, Newday Limited had contracts in place with its affiliates to ensure that emails are only sent to individuals who have consented to receive marketing from Newday Limited. However, Newday Limited did not review the websites used by affiliates so failed to identify that they did not provide sufficient fair processing information to indicate that subscribers would receive direct marketing emails from Newday Limited. Furthermore, it would appear from the Commissioner's investigation that Newday Limited did not know the details of all of the websites used by their affiliates.
35. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to impose a monetary penalty

36. 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.

37. The latter has included the issuing of a Notice of Intent dated 13 November 2017 in which the Commissioner set out her preliminary thinking. Newday Limited received the Notice of Intent on 14 November 2017 and the date for receipt of representations has now passed.
38. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
39. The Commissioner's underlying objective in imposing a Monetary Penalty Notice is to promote compliance with PECR. The sending or instigating of automated marketing calls 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. This is an opportunity to reinforce the need for businesses to ensure that they are only sending automated marketing calls in compliance with PECR.
40. The Commissioner has also taken into account the following **aggravating features** of this case:
- There is evidence of a lack of due diligence on the part of Newday Limited which could have identified inadequate privacy policies, thereby preventing the contraventions;
 - There is evidence of a loss of control of data by Newday Limited leaving individuals to become exposed to high volumes of unsolicited marketing emails.
41. For these reasons the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

42. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£230,000 (two hundred and thirty thousand pounds)**.

Conclusion

43. 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.
44. If the Commissioner receives full payment of the monetary penalty by **7 February 2018** the Commissioner will reduce the monetary penalty by 20% to **£184,000 (One hundred and eighty 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.
45. 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.
46. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.

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

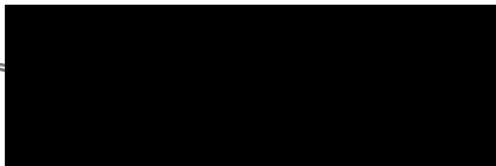
48. The Commissioner will not take action to enforce a monetary penalty unless:

- 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.

49. 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)).