

**DATA PROTECTION ACT 1998**

**SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

**MONETARY PENALTY NOTICE**

To: Royal Mail Group Limited

Of: 100 Victoria Embankment, London, EC4Y OHQ

1. The Information Commissioner ("Commissioner") has decided to issue Royal Mail Group Limited ("RMG") 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. RMG, whose registered office is given above (companies house registration number: 04138203), 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.
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. RMG is the UK's designated Universal Postal Service Provider ("DUPSP").
11. On 5 September 2017, following receipt of a complaint, the Commissioner instigated an investigation into RMG's electronic marketing practices. The complainant in question had explained that although they had previously opted out of receiving marketing messages, they had received an email from RMG on 10 July 2017 outlining a new price promotion for postage bought online for parcels sent by 2<sup>nd</sup> class post.
12. In response to the Commissioner's enquiries, RMG confirmed on 20 September 2017 that the complainant had opted out of receiving marketing messages, however it considered the email to be a service message and not marketing, stating "for the email in question, relating to a reduction in price for 2<sup>nd</sup> Class Medium Parcels purchased online, it was considered appropriate to inform all current online users of this change in price".

13. RMG further explained that under the Postal Services Act 2011, it has a regulatory obligation to publish information "in such a manner as will ensure reasonable publicity for it".
14. RMG informed the Commissioner that two sets of emails were sent, two to customers who had opted in to receive marketing, and two to customers who had opted out, comprising an initial email and a follow up. It advised that the messages differentiated in style and content depending on whether the customer was opted in or out.
15. On 10 July 2017 RMG instigated the transmission of 170,680 initial emails to opted out customers, of which 164,044 were received. On 17 July 2017 RMG instigated the transmission of 168,410 follow up emails to opted out customers, of which 162,970 were received. The combined totals for opted out customers for both dates are 339,090 emails sent, and 327,014 received.
16. During her investigation the Commissioner asked RMG to provide copies of all emails sent to both opted in and opted out customers, and asked for an explanation as to the specific section of the Postal Services Act which required RMG to communicate price changes. RMG responded on 28 September 2017 stating it relied upon DUPSP Condition 1.10.1 to send out price information messages to customers. This condition states:

*"The universal service provider shall notify OFCOM and the Consumer Advocacy Bodies of, and publish in such a manner as will ensure reasonable publicity for it –*

- (a) the brand names of the services it provides with a view to meeting its obligations under DUSP 1.6 and 1.7;*
- (b) the terms and conditions of those services (including prices); and*

(c) any proposed change to the information in (a) and (b), at least one month in advance of the date on which it is to be implemented.

17. RMG also provided copies of the emails which had been sent to both opted in and opted out customers. The initial email stated:

"Dear ....

**Notification of price promotion for 2<sup>nd</sup> Class Medium Parcels, purchased online.**

*Between 17<sup>th</sup> July to 16<sup>th</sup> October you will be able to send a 2<sup>nd</sup> Class Medium Parcel online for **£6.29\***. This represents a saving of **over 50% from the original price of £13.75.***

*Second Class Signed For, Medium Parcels will cost £7.29, reduced from £14.75.*

*\*2<sup>nd</sup> Class Medium Parcels purchased online (61cms, 46cms, 46cms).  
2kgs to 5 kgs.*

*Available online only from 17/07/17 to 16/10.17."*

The follow up email stated:

"Dear ....

**Online price promotion for 2<sup>nd</sup> Class Medium Parcels is now live.**

*You can now send a Medium Parcel between 2kgs and 5 kgs for **£6.29\***  
Between 17<sup>th</sup> July and 16<sup>th</sup> October the online price to send a 2<sup>nd</sup> Class Medium Parcel has reduced to **£6.29 from £13.75.***

*Second Class Signed For, Medium Parcels now cost £7.29, reduced from £14.75.*

*\*2<sup>nd</sup> Class Medium Parcels purchased online (61cms, 46cms, 46cms).  
2kgs to 5 kgs.*

*Available online only from 17/07/17 to 16/10.17."*

18. The Commissioner considers that whilst RMG distinguished between opted in and opted out customers in terms of which message was sent, the phrasing used and style of the message sent to opted out customers meant that it constituted marketing and not simply a service message.
19. The Commissioner has made the above findings of fact on the balance of probabilities.
20. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by RMG and, if so, whether the conditions of section 55A DPA are satisfied.

**The contravention**

21. The Commissioner finds that RMG has contravened regulation 22 of PECR. The Commissioner finds that the contravention was as follows:
22. On 10 July 2017 and 17 July 2017, RMG instigated the transmission of a combined total of 327,014 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.
23. 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. Consent must be freely given, specific and informed, and involve a positive indication signifying the individual's agreement.
24. In this case RMG knew that the emails were being sent to customers who had specifically opted out from receiving marketing from RMG.

25. The Commissioner is therefore satisfied that RMG did not have consent for the purposes of regulation 22 PECR.
26. The Commissioner is satisfied that RMG 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 RMG sent 339,090 direct marketing emails to customers without their consent, of which 327,014 were received, resulting in one complaint to the Commissioner.
30. The emails were specifically written for customers who had not opted in to receive marketing communications, however it is clear that the messages were marketing, which compounds the serious nature of the breach, as RMG failed to distinguish between service messages and marketing communications.
31. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

**Deliberate or foreseeable contravention**

32. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that RMG's actions which constituted that contravention were deliberate



actions (even if RMG did not actually intend thereby to contravene PECR).

33. RMG was fully aware that the customers had not consented to receive marketing material but felt that the content of the messages did not constitute marketing. The Commissioner considers that in this case RMG did not deliberately contravene regulation 22 of PECR.
34. The Commissioner went on to consider whether the contraventions identified above were negligent. First, she has considered whether RMG knew or ought reasonably to have known that there was a risk that these contraventions would occur.
35. RMG's role as DUPSP means that it should be well aware of all laws and regulations which bind it. It was aware that individual customers who had opted out of marketing should not receive marketing communications, and stated so in its response to the Commissioner dated 20 September 2017. RMG also have a robust suppression system in place to ensure opted out customers do not receive marketing communications, as detailed in the same response.
36. 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.
37. The key issue in this case is RMG's argument that that the email is a service message. Prior to sending the price update emails, RMG was aware that the customers had previously opted out of receiving marketing materials, and RMG tailored this email to opted out

customers believing the content was not marketing. It is clear that the content is marketing, and given RMG's status as DUPSP they should be aware of the restrictions in place regarding the language in email communications.

38. It is therefore reasonable to suppose that RMG knew or ought reasonably to have known that an email of this nature would constitute direct marketing, and by sending it to individuals who had previously opted out of receiving direct marketing would be a contravention of Regulation 22.
39. The Commissioner has also considered whether RMG failed to take reasonable steps to prevent the contraventions.
40. RMG was aware of its obligations under PECR and confirmed that it sent 339,090 marketing emails (of which 327,014 were received) to individual customers who had not consented to receive these messages.
41. RMG have procedures in place to prevent customers who have not consented to receive direct marketing emails from receiving such messages, and a dedicated team responsible for customer communications and service changes, however in this instance these procedures and processes were not sufficient to prevent a contravention.
42. RMG do have a regulatory obligation as the DUPSP to publicise information relating to price changes, however the price change in question is a promotion rather than a permanent change to the postal services prices and so does not qualify as service information which would be exempt from PECR regulations. Reasonable steps could have included alternative methods of communicating the price offer with

their customers in a lawful way, for example a notice on their website, yet it specifically chose to send out marketing emails to its customers. Furthermore, the use of more appropriate content and phrasing within the emails could have avoided what was intended to be a service message becoming marketing.

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

**The Commissioner's decision to impose 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(3) and the procedural rights under section 55B have been complied with.
45. The latter has included the issuing of a Notice of Intent dated 5 February 2018 in which the Commissioner set out her preliminary thinking. RMG received the Notice of Intent on 7 February 2018.
46. The Commissioner received a response from RMG on 2 March 2018 in which it stated it did "not wish to make any representations as to the amount of the fine that has been proposed and we accept the decision".
47. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
48. The Commissioner has taken into account the following **mitigating features** of this case:
- This was an isolated incident with no other complaints received by the Commissioner;

- RMG has reviewed and improved its controls for messages of this type to ensure that only appropriate content is included in any future communications.
49. 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. This is an opportunity to reinforce the need for businesses to ensure that they are only sending marketing emails in compliance with PECR.

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

50. Taking into account all of the above, the Commissioner has decided that the amount of the penalty is **£12,000 (twelve thousand pounds)**.

#### **Conclusion**

51. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **4 May 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.
52. If the Commissioner receives full payment of the monetary penalty by **3 May 2018** the Commissioner will reduce the monetary penalty by

20% to **£9,600 (Nine thousand, six hundred pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

53. 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.

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

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

56. 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.

57. 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 3rd day of April 2018

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)).