

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Costelloe and Kelly Limited

Of: 8 Huxley Drive, Bramhall, Stockport, Cheshire, SK7 2PH

1. The Information Commissioner ("Commissioner") has decided to issue Costelloe and Kelly 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. Costelloe and Kelly Limited, whose registered office is given above (companies house registration number: 09033798), 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. Costelloe and Kelly Limited is described in its registration with companies house as a 'marketing agency'.
11. Between 1 June 2017 and 31 July 2017 Costelloe and Kelly Limited undertook a text direct marketing campaign, via a third party marketing platform, promoting funeral plans. A third party provided the source data used to conduct the campaign.
12. Between 1 June 2017 and 31 July 2017 Costelloe and Kelly Limited instigated the transmission of approximately 283,533 unsolicited marketing texts promoting the products. Of these, 265,395 text messages were delivered, and 18,138 failed.
13. Whilst some of the messages named Costelloe and Kelly Limited, the majority used the name 'Future Planning'. The messages were all very similar and ended 'To opt out text ABNY to 88802'.
14. As at 23 October 2017, 60 complaints about the marketing messages had been received by the Spam Reporting System '7726'. As a result of these complaints the Commissioner undertook an investigation, during

which she raised enquiries about how Costelloe and Kelly Limited ensured it had the consent of its customers to send the marketing texts, and also about their procedures and processes for undertaking due diligence in relation to direct marketing.

15. Her investigation revealed that Costelloe and Kelly Limited relied upon consent obtained by its data provider, and carried out little or no due diligence checks on the data to ensure appropriate consent. In respect of the data source, the provider collected personal data through a 'collecting customer information campaign'. It did not specifically name Costelloe and Kelly Limited, listing only 'partners' or similar generic descriptions in its 'opt-in' statement.
16. The Commissioner has made the above findings of fact on the balance of probabilities.
17. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by Costelloe and Kelly Limited and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

18. The Commissioner finds that Costelloe and Kelly Limited has contravened regulation 22 of PECR. The Commissioner finds that the contravention was as follows:
19. Between 1 June 2017 and 31 July 2017 Costelloe and Kelly Limited instigated the transmission of approximately 265,395 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.

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

Seriousness of the contravention

26. The Commissioner is satisfied that the contravention identified above was serious.

27. This is because Costelloe and Kelly Limited instigated the transmission of 283,533 direct marketing texts over a two month period to subscribers without their consent, of which 265,395 were received, resulting in 60 complaints to the Spam Reporting System '7726'.
28. The majority of the text messages did not contain the name of the sender.
29. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or foreseeable contravention

30. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that Costello and Kelly Limited's actions which constituted that contravention were deliberate actions (even if Costelloe and Kelly Limited did not actually intend thereby to contravene PECR).
31. The Commissioner considers that in this case Costelloe and Kelly Limited did not deliberately contravene regulation 22 of PECR.
32. The Commissioner went on to consider whether the contraventions identified above were negligent. First, she has considered whether Costelloe and Kelly Limited knew or ought reasonably to have known that there was a risk that these contraventions would occur.
33. Costelloe and Kelly Limited engaged in a text messaging campaign promoting funeral plans provided by a third party. As the instigator of the text messages, and the fact that the issue of unsolicited calls and texts has been widely publicised by the media as being a problem, they

should be familiar with the legislation specifically relating to this industry and apply it accordingly.

34. 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.
35. It is therefore reasonable to suppose that Costelloe and Kelly Limited knew or ought reasonably to have known that there was a risk that these contraventions would occur.
36. The Commissioner has also considered whether Costelloe and Kelly 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, Costelloe and Kelly Limited sourced its data, and was reliant upon consent provided by, a third party. Costelloe and Kelly Limited did not undertake any or any sufficient due diligence in relation to the consents relied upon and so failed to identify that they did not provide sufficient fair processing information to indicate that subscribers would receive direct marketing texts from Costelloe and Kelly Limited.
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)DPA and the procedural rights under section 55B have been complied with.
41. The latter has included the issuing of a Notice of Intent dated 5 March 2018 in which the Commissioner set out her preliminary thinking.
42. The Commissioner has considered whether, in the circumstances she should exercise her discretion so as to issue a monetary penalty. In reaching her final view, the Commissioner has taken into account representations made by Costelloe and Kelly Limited on this matter.
43. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

The amount of the penalty

44. The Commissioner has taken into account the following **aggravating features** of this case:
- The text messages did not identify Costelloe and Kelly Limited as the sender;
 - There is evidence of a lack of due diligence on the part of Costelloe and Kelly Limited which could have identified inadequate privacy policies, thereby preventing the contraventions;
45. The Commissioner has also taken into account the following **mitigating factors**:

- Costelloe and Kelly Limited has fully co-operated with the Commissioner throughout her investigation;
 - There have been no further complaints relating to marketing communications sent by Costelloe and Kelly Limited since the Commissioner's investigation;
 - Costelloe and Kelly Limited does not routinely engage in marketing campaigns. This is the first occasion the company has been brought to the Commissioner's attention, and the directors and officers have not been linked to any other contraventions of the Regulations previously.
 - Costelloe and Kelly Limited terminated the marketing campaign in August 2017.
46. 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.
47. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£19,000 (Nineteen thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

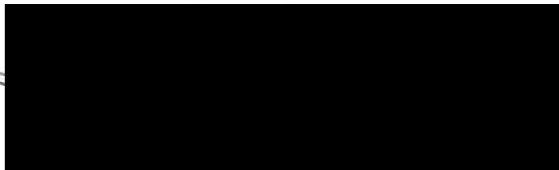
48. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **28 May 2018** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.
49. If the Commissioner receives full payment of the monetary penalty by **25 May 2018** the Commissioner will reduce the monetary penalty by 20% to **£15,200 (Fifteen thousand, two hundred pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
50. 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.
51. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
52. Information about appeals is set out in Annex 1.
53. 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.

54. 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 25th day of April 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 (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)).