

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: British Telecommunications plc.

Of: 81 Newgate Street, London EC1A 7AJ

1. The Information Commissioner ("Commissioner") has decided to issue British Telecommunications plc ("BT") 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. BT, whose registered office is given above (Company House Reference: 01800000), 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. “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”.
7. 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 e-mail its existing customers 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.
8. 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."

9. 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.
10. 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.
11. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of Part 9, Schedule 20 of that Act).

Background to the case

12. BT came to the attention of the ICO following a complaint made by an individual who had alleged that he had received an unsolicited direct marketing email from BT in December 2015 promoting their 'My Donate' platform, having previously opted-out of receiving direct marketing.

13. The Commissioner opened an investigation in light of evidence contained within this complaint which suggested the same marketing email had been sent to BT's entire database, and the Commissioner contacted BT by way of an initial letter on 27 February 2017. The resulting correspondence revealed that only a portion of BT's customer base had in fact received a copy of this email, however it was disclosed that two further email campaigns had been launched (promoting charity initiatives under the monikers of 'Giving Tuesday' and 'Stand Up To Cancer') and the Commissioner sought further information from BT in respect of all three campaigns.
14. Regarding 'My Donate', BT explained that they felt this constituted a service message and was therefore outside of the remit of the rules regarding direct marketing. BT indicated that these emails did not contain an 'opt-out' link, and were sent to all customers who had consented to receiving direct marketing, and additionally to those who had not given explicit consent, or any consent at all.
15. With regards to 'Giving Tuesday' and 'Stand Up To Cancer' BT accepted that these emails promoted the aims of specific charities, and said that they were therefore only sent to customers who had opted-in to receiving such marketing.
16. For clarity BT confirmed that for the purposes of 'opting-in' they include not just those who have given explicit consent that they opt-in, but also those customers who have previously failed to specifically opt-out (with BT purportedly relying on the 'soft opt-in' exception).
17. Further investigations revealed that between the dates of 21 December 2015 and 23 December 2015, a total of 1,073,964 direct marketing emails relating to the 'My Donate' platform were sent to subscribers who had specifically opted-out of receiving direct marketing, of which

1,064,728 were delivered. A further 2,410,957 direct marketing emails relating to 'My Donate' were sent to those who failed to specifically opt-out, with 2,390,223 of these being delivered.

18. On 5 October 2016 a total of 825,484 direct marketing emails relating to 'Stand Up To Cancer' were sent to subscribers who had previously failed to specifically opt-out, with 819,788 of these being delivered.
19. On 29 November 2016 a total of 656,293 direct marketing emails relating to 'Giving Tuesday' were sent to subscribers who had previously failed to specifically opt-out, with 655,402 of these being delivered.
20. Therefore, between the dates of 21 December 2015 and 29 November 2016, BT delivered a total of 4,930,141 direct marketing emails to those subscribers who had either previously opted out of receiving such marketing, or had failed to specifically opt-out.
21. The Commissioner has made the above findings of fact on the balance of probabilities.
22. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by BT and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

23. The Commissioner finds that BT has contravened regulation 22 of PECR.
24. The Commissioner finds that the contravention was as follows:

25. Between 21 December 2015 and 29 November 2016, BT used a public electronic telecommunications service for the purposes of instigating the transmission of 4,930,141 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
26. "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.
27. Regulation 22(3) provides for a 'soft opt-in' exception to enable organisations to send marketing emails to existing customers however the Commissioner's Direct Marketing Guidance at paragraph 131 states that to rely on this exception the organisation must have obtained the contact details in the course of a sale of a product or service to that person; must only be marketing their own similar products and services; and must have given the person a simple opportunity to refuse/opt-out of the marketing.
28. Paragraph 44 of the Commissioner's Direct Marketing Guidance states that "Direct marketing is not limited to advertising goods or services for sale. It also includes promoting an organisation's aims and ideals. This means that the direct marketing rules in the DPA and PECR will apply to the promotional, campaigning and fundraising activities of not-for-profit organisations".
29. In all three of the campaigns, the Commissioner is of the view that the content of the messages falls within the definition of direct marketing as set out under Section 11(3) DPA.

30. The Commissioner is satisfied that BT did not have the consent of the 4,930,141 subscribers to whom it had sent unsolicited direct marketing emails. The Commissioner is satisfied that the exception afforded under regulation 22(3) would not apply in this instance.
31. The Commissioner is satisfied that BT was responsible for this contravention.
32. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

33. The Commissioner is satisfied that the contravention identified above was serious. This is because between the dates of 21 December 2015 and 29 November 2016, a total of 4,930,141 direct marketing emails were delivered by BT to subscribers without their consent.
34. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

35. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that BT's actions which constituted that contravention were deliberate actions (even if BT did not actually intend thereby to contravene PECR).

36. The Commissioner considers that in this case BT did not deliberately contravene regulation 22 of PECR.
37. The Commissioner went on to consider whether the contraventions identified above were negligent. First, she has considered whether BT 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 emails have been widely publicised by the media as being a problem. Moreover, it would be reasonable to expect an organisation of BT's size to be aware of their legal obligations in respect of its direct marketing.
38. 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 emails to individuals if that person has specifically consented to receiving them from the sender. The guidance also gives specific instructions to organisations seeking to rely on the 'soft opt-in' exception.
39. It is therefore reasonable to suppose that BT knew or ought reasonably to have known that there was a risk that these contraventions would occur.
40. Second, the Commissioner considered whether BT failed to take reasonable steps to prevent the contraventions.
41. Reasonable steps in these circumstances could have included putting in place appropriate systems and procedures to ensure that it had sent marketing emails only to those who had specifically consented to

receive such marketing; and putting in place adequate categorisation systems to ensure that they were not presuming consent of those subscribers who had not specifically opted-out.

42. In the circumstances, the Commissioner is satisfied that BT failed to take reasonable steps to prevent the contraventions.
43. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue 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 (3A) and the procedural rights under section 55B have been complied with.
45. 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 BT on this matter.
46. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
47. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
48. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending 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 emailing those who specifically consent to receive marketing.

49. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

50. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£77,000 (seventy seven thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

51. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **21 July 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 **20 July 2018** the Commissioner will reduce the monetary penalty by 20% to **£61,600 (sixty one 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 18th day of June 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 (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)).