

**DATA PROTECTION ACT 1998**

**SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

**MONETARY PENALTY NOTICE**

To: Boost Finance Limited

Of: 65 Compton Street, London, EC1V 0BN

1. The Information Commissioner ("Commissioner") has decided to issue Boost Finance Limited ("BFL") 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 grounds for the Commissioner's decision to issue a monetary penalty and takes account of the evidence and submissions provided by BFL in response to the Commissioner's Notice of Intent to issue a monetary penalty.

**Legal framework**

3. BFL, whose registered office is given above (companies house registration number: 09244571), 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. BFL is a lead generator within the finance sector whose main business source is biddable media, but which also conducts marketing through contractual arrangements with selected marketing affiliates.
11. As evidenced by information provided by BFL to the Commissioner, between 1 January 2017 and 20 September 2017, BFL trading as findmeafuneralplan.com, instigated via its appointed affiliates the transmission of approximately 4,396,780 unsolicited marketing emails promoting funeral plans. The Commissioner accepts BFL's submission that this marketing campaign ceased on 20 September 2017 and not 7 November 2017, as detailed in the Commissioner's Notice of Intent. However, this does not materially affect the Commissioner's decision, given that the average calls made per month would in fact increase as a result of the slightly shorter time period over which the total amount of calls were made.

12. The emails were sent to individuals who had subscribed to a number of websites operated by BFL's affiliates.
13. As at 7 November 2017 the Commissioner had received 6 complaints from individuals who had received marketing emails promoting funeral plans from BFL. BFL submitted that there were only 4 complaints as two were duplicated. The Commissioner's view is that a small reduction in the number of complaints does not materially affect her decision, given that the primary basis for the contravention in this case is the number of emails made by BFL.
14. As a result of complaints received, the Commissioner undertook an investigation, during which she considered information provided by BFL in relation to its affiliates as evidence that it had consent to send the emails, and also conducted a review of the affiliate websites. Her investigation has revealed that in respect of all but one affiliate website, the information provided to subscribers about marketing, whilst in some cases making generic mention of pre-paid funeral plan providers, did not specifically name BFL or any of its trading styles, and only listed "sponsors", "related partners", "selected marketing partners" or similar generic descriptions. In respect of the website which named a trading style of BFL, this information was embedded in a very lengthy list of organisations from whom individual subscribers may expect to receive marketing communications.
15. 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.

16. In conclusion the Commissioner considers that BFL relied upon inadequate, generic, vague, misleading, tiered and incomplete personal data collection methods and privacy statements as a way of obtaining consent to send direct marketing emails.
17. Nothing provided by BFL in its submissions to the Commissioner has persuaded her to depart from her preliminary view as set out in her Notice of Intent. In particular, additional evidence produced during the course of submissions has failed to persuade the Commissioner that it had valid consent to send the marketing emails, or conducted adequate due diligence in relation to its affiliates.
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 BFL and, if so, whether the conditions of section 55A DPA are satisfied.

**The contravention**

20. The Commissioner finds that BFL has contravened Regulation 22 of PECR. The Commissioner finds that the contravention was as follows:
21. Between 1 January 2017 and 20 September 2017 BFL, via its affiliates, instigated the transmission of approximately 4,396,780 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 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.

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 BFL 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 BFL 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 BFL, via its affiliate marketers, sent approximately 4,396,780 direct marketing emails to subscribers without their consent, over a period of 9 months resulting in complaints to the Commissioner.

30. Indeed, the Commissioner's own statutory guidance in relation to PECR states that "making a large number of marketing calls based on recorded messages or sending large numbers of marketing text messages to individuals who have not consented to receive them [...] is likely to constitute a serious contravention of the Regulations". The situation here is analogous in that large numbers of marketing emails were sent to individuals who had not consented to receive them.
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 BFL's actions which constituted that contravention were deliberate actions (even if BFL did not actually intend thereby to contravene PECR).
33. The Commissioner considers that in this case BFL did not deliberately contravene regulation 22 of PECR in that sense.
34. The Commissioner has gone on to consider whether the contravention identified above was negligent.
35. First, she has considered whether BFL knew or ought reasonably to have known that there was a risk that this contravention would occur. She is satisfied that this condition is met, given that BFL relied heavily on direct marketing due to the nature of its business.



36. BFL is registered with the ICO as a data controller and as such should be aware of the Regulations. As the instigator of the email it was the responsibility of BFL to ensure valid consent had been obtained prior to its transmission. Indeed, BFL's statement that it carried out stringent checks on its marketing affiliates would indicate that it was aware of the risk of contravention of PECR.
37. 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.
38. Furthermore, the issue of unsolicited marketing has been widely publicised by the media as being a problem, particularly where the subject matter of the marketing (funeral plans in this case) may be perceived as sensitive.
39. It is therefore reasonable to suppose that BFL knew or ought reasonably to have known that there was a risk that these contraventions would occur.
40. The Commissioner has also considered whether BFL failed to take reasonable steps to prevent the contraventions.
41. 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.
42. In this case it is clear that BFL relied heavily upon its affiliates to ensure compliance with the PECR. Whilst BFL states that it carried out stringent checks on its affiliates, a review their websites would have

identified that they did not provide sufficient fair processing information to indicate that subscribers would receive direct marketing emails from BFL, a course of action which BFL failed to take. The Commissioner considers that its policy of taking retrospective action only when it became apparent that its affiliates were not adhering to PECR or had negative reviews in the marketplace, demonstrates that any checks made were not being performed prior to any marketing activity taking place.

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

**The amount of the penalty the Commissioner intends to impose**

44. The Commissioner has taken into account the following **aggravating features** of this case:

- There is evidence of a lack of due diligence on the part of BFL which could have identified inadequate privacy policies, thereby preventing the contraventions;
- There is evidence of a loss of control of personal data by BFL leaving individuals to become exposed to high volumes of unsolicited marketing emails. Indeed, BFL informed the Commissioner during her investigation that as its email marketing campaigns were conducted by third party marketing companies on a performance basis they had no control over the volume of messages sent.
- The sensitive nature of the emails meant there was potential for high detriment;

- BFL continues to operate under other live trading names conducting marketing campaigns for other sectors.
45. The Commissioner has also taken into account the following **mitigating factors**:
- BFL has ceased its funeral planning marketing campaign.
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.

### **Conclusion**

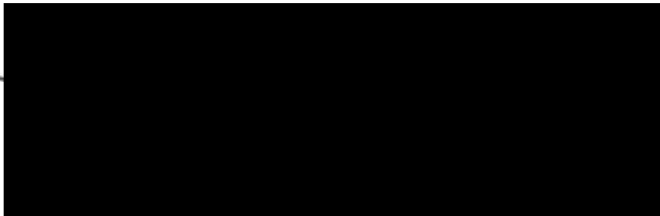
47. Taking into account all of the above, the Commissioner has decided that the amount of **£90,000 (ninety thousand pounds)** is reasonable and proportionate.
48. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **6 November 2018** at the latest. The monetary 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 **5 November 2018** the Commissioner will reduce the monetary penalty by 20% to **£72,000 (seventy two thousand 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
54. the period for appealing against the monetary penalty and any 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 October 2018

Signed



Stephen Eckersley  
Director of Investigations  
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)).