

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Vote Leave Limited

Of: Portland, 25 High Street, Crawley, West Sussex RH10 1BG

1. The Information Commissioner ("Commissioner") has decided to issue Vote Leave Limited ("Vote Leave") 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. Vote Leave, whose registered office is given above (Company House Reference: 09785255), is the organisation 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 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. A "subscriber" is defined in regulation 2(1) of PECR as "a person who is a party to a contract with a provider of public electronic communications services for the supply of such services".
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. Mobile phone users can report the receipt of unsolicited marketing text messages to the GSMA's Spam Reporting Service by forwarding the message to 7726 (spelling out "SPAM"). The GSMA is an organisation that represents the interests of mobile operators worldwide. The Commissioner is provided with access to the data on complaints made to the 7726 service and can assess this data to ascertain organisations which may be carrying out activities in breach of PECR.

13. Between 1 January 2016 and 23 June 2016, 26 complaints were made to the 7726 service about the receipt of unsolicited direct marketing text messages. Between 18 June 2016 and 12 July 2016, 6 further complaints were made direct to the Commissioner using the ICO Online Reporting Tool.
14. It was apparent to the Commissioner that the content of the text messages received by subscribers promoted the aims of Vote Leave, with the majority of the messages containing a link to "voteleavetakecontrol.org", a website operated by Vote Leave.
15. The Commissioner identified the Caller Line Identity ("CLI") from which the text messages originated, and sent a Third Party Information Notice ("TPIN") to the Communications Service Provider of that CLI in order to confirm the identity of the sender.
16. The response to the TPIN identified another communications provider, 'Esendex', whom it appeared had acted as a facilitator for the sending of the direct marketing text messages using the aforementioned CLI.
17. It was disclosed by Esendex that a total of 212,355 text messages were sent using that CLI during the relevant timeframe (that being 1 January 2016 and 23 June 2016), with 196,154 of those being delivered.
18. Since the content of the messages promoted the aims of Vote Leave, on 11 September 2018 the Commissioner sent an initial letter to them regarding concerns about their Regulation 22 PECR compliance, and requesting evidence of the consent relied upon by Vote Leave for the marketing campaign which it appeared to have instigated.

19. A series of correspondence followed between the Commissioner and Vote Leave's legal representatives, with a response being forthcoming on 17 October 2018 in which it was stated that the direct marketing messages had actually been sent directly by Vote Leave, via Esendex's sister brand, 'TextMarketer'.
20. In explaining where the data used by Vote Leave for the marketing campaigns came from, it was claimed by Vote Leave's legal representatives that the data was obtained from enquiries which had come through on Vote Leave website; from individuals who had responded via text to promotional leaflets; and from entrants to a football competition. However, following the conclusion of the referendum campaign, Vote Leave deleted this data together with details of the CLIs used, the volume of messages sent, volume of messages received, and any evidence of consent relied upon to instigate messages to those individuals which had made a complaint.
21. Vote Leave were unable to provide any evidence of consent for any of the 196,154 messages which they accepted had been sent.
22. As a part of the Commissioner's wider investigations, an interview was conducted with a former Vote Leave employee who corroborated the account as detailed above provided by Vote Leave's legal representatives.
23. The Commissioner has made the above findings of fact on the balance of probabilities.
24. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by Vote Leave and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

25. The Commissioner finds that Vote Leave has contravened 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. 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".
28. 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.
29. The Commissioner therefore finds that the contravention was as follows:
30. Between 1 January 2016 and 23 June 2016, Vote Leave used a public electronic telecommunications service for the purposes of transmitting 196,154 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR. The Commissioner is of the view that Vote Leave were responsible for at least the instigation of those unsolicited communications.

31. In this case the Commissioner is not satisfied that Vote Leave has been able to demonstrate the requisite consent, within the meaning of regulation 22(2), of the subscribers whom had received the 196,154 unsolicited direct marketing text messages. The Commissioner has been provided with no evidence to suggest that the exception afforded under regulation 22(3) would apply in this instance.
32. The Commissioner is satisfied that Vote Leave was responsible for this contravention.
33. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

34. The Commissioner is satisfied that the contravention identified above was serious. This is because between the dates of 1 January 2016 and 23 June 2016, Vote Leave sent a total of 196,154 direct marketing text messages to subscribers without their consent. This resulted in 26 complaints being made. It is further noted that the Commissioner logged a further 6 complaints about unsolicited communications from Vote Leave between the period of 18 June 2016 and 12 July 2016.
35. The scale of the contravention could have been even larger as Vote Leave was in fact responsible for the sending of 212,355 direct marketing text messages.

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

Deliberate or negligent contraventions

37. The Commissioner has considered whether the contravention identified above was deliberate or, in the alternative, negligent.
38. The Commissioner considers that in this case Vote Leave did not deliberately contravene regulation 22 of PECR, but was negligent. In the Commissioner's view, this means that whilst Vote Leave was responsible for the transmission of direct marketing messages to subscribers, there is no evidence that they intended to breach PECR.
39. The Commissioner has therefore gone on to consider whether the contraventions identified above were negligent. First, she has considered whether Vote Leave 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, not least because the issue of unsolicited text messages has been widely publicised in the media as being a problem.
40. 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 texts to individuals if that person has specifically consented to receiving them from the sender. The Commissioner has previously directed Vote Leave to this guidance, and has given specific advice to them as to their legal duties under PECR.

41. The Commissioner is further persuaded that Vote Leave was aware of its legal obligations since in its application to register as a designated lead campaigner in the 2016 referendum, Vote Leave indicated that "... (they) only send marketing material to non-supporters within the terms of the Privacy and Electronic Communications (EC Directive) Regulations 2003 SI 2003/2426."
42. It is therefore reasonable to suppose that Vote Leave was aware of the existence of PECR, and knew or ought reasonably to have known that there was a risk that these contraventions would occur when engaging in direct marketing.
43. Second, the Commissioner considered whether Vote Leave failed to take reasonable steps to prevent the contraventions.
44. Reasonable steps in these circumstances could have included putting in place appropriate systems and procedures to ensure that it maintained records of the specific consent of those to whom it had sent marketing text messages; and adequately recording the source of the data used. Furthermore, it would be reasonable to have expected Vote Leave to take steps to retain details as to the CLIs used for its direct marketing, and volumes of the messages sent so as to be able to adequately address any subsequent queries as to the validity of its marketing.
45. In the circumstances, the Commissioner is satisfied that Vote Leave failed to take reasonable steps to prevent the contraventions.
46. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

47. 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 the procedural rights under section 55B have been complied with.
48. 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 Vote Leave on this matter.
49. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
50. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
51. The Commissioner has considered the likely impact of a monetary penalty on Vote Leave. She has decided on the information that is available to her, that Vote Leave has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
52. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited marketing texts 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 texting those who consent to receive marketing.

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

The amount of the penalty

54. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£40,000 (forty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty

Conclusion

55. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **19 April 2019** 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.
56. If the Commissioner receives full payment of the monetary penalty by **18 April 2019** the Commissioner will reduce the monetary penalty by 20% to **£32,000 (thirty 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.
57. 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.

58. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
59. Information about appeals is set out in Annex 1.
60. 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.
61. 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 19th day of March 2019

Signed ..

A solid black rectangular box redacting the signature of the Director of High Profile Investigations.

Andy White
Director of High Profile 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 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty 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:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
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 section 55B(5) 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)).