

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Decision Technologies Limited

Of: First Floor, High Holborn House, 52 – 54 High Holborn, London WC1V
6RL

1. The Information Commissioner (“Commissioner”) has decided to issue Decision Technologies Limited (“DTL”) 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. DTL, whose registered office is given above (Company House Reference: 05341159), 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. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".
7. "Electronic mail" is defined in regulation 2(1) of 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".
8. 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".
9. 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.”
10. 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.
11. 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.
12. 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

13. DTL, a price comparison and technology company, first came to the attention of the Commissioner during investigations into another organisation, [REDACTED], which had engaged in the sending of direct marketing on behalf of third parties. ‘Broadband

Choices', a trading name of DTL, was named by [REDACTED] as one of the third parties for whom direct marketing was being sent, and it was suggested that between 1 June 2017 and 1 June 2018 there had been in excess of 14 million messages sent by [REDACTED] on DTL's behalf. Given the concerns held by the Commissioner regarding the privacy policy of [REDACTED], an initial letter was sent to DTL on 20 November 2018 to investigate its compliance with PECR. This letter set out the Commissioner's concerns and requested details of DTL's policies and procedures.

14. DTL's response of 11 December 2018 confirmed that between 1 June 2017 and 1 June 2018 it had utilised the email marketing services of two organisations, (1) [REDACTED]; and (2) [REDACTED] (referred to collectively as the "Aggregators") who had themselves used a series of List Owners to engage in the actual sending of the direct marketing. These List Owners were [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; and [REDACTED] (referred to collectively as the "List Owners").
15. DTL confirmed that any due diligence on the data used by the List Owners was to be carried out by the Aggregators; furthermore, DTL had placed contractual obligations on the Aggregators to comply with all relevant legislation relating to email marketing.
16. The Commissioner sent a further letter to DTL on 18 January 2019 with some additional queries, including for clarity as to whether there was any direct relationship between DTL and the List Owners; the volume of messages sent by some of the List Owners on DTL's behalf; and details as to whether there had been any due diligence carried out by DTL itself beyond the implementation of contracts with the Aggregators.

17. In its response of 8 February 2019, DTL confirmed that its contracts are with the Aggregators, who themselves engage the List Owners to send the direct marketing. DTL have no direct dealings with the List Owners, and made no reference to any other form of due diligence carried out by itself.
18. The Commissioner was provided with a selection of privacy policies and fair processing notices for some, but not all, of the List Owners, and made independent efforts to locate the historic fair processing notices where they hadn't been provided.
19. [REDACTED]. They would obtain data both online and offline [REDACTED]; and do appear to offer online subscribers the option to opt-in to marketing by email and/or post. However, despite this, by agreeing to 'join' a subscriber is required to agree to the site's terms and conditions and privacy policy, which advise that a subscriber who "opts-in" will receive "information, offers and services" from a wide range of various sectors, and "[REDACTED] Partners", with no ability to select which, if any, of the sectors a subscriber would wish to receive marketing about. The offline sign-up methods do not provide subscribers with access to a privacy policy or with any information regarding [REDACTED] marketing sectors/partners, save to advise that subscriber information may be shared "*with a selected group of companies who also have services, free samples, offers and product information that may be of interest...*".
20. [REDACTED] via its [REDACTED] website which provides subscribers with [REDACTED], provides a marketing opt-in box, however as with [REDACTED], the sectors about which subscribers may receive marketing are varied, and it does not appear possible for subscribers to select which of the 30 listed sectors they would wish to

receive marketing about, suggesting that they will receive marketing for all. There does not appear to be any specific listing of companies from whom subscribers would receive direct marketing. The Commissioner has not been provided with the relevant Privacy Policy for [REDACTED] so the extent to which direct marketing may be mentioned within it is not clear.

21. [REDACTED], invites subscribers at the point of sign-up to agree to receive marketing covering 10 varied sectors, and the methods by which they may wish to receive this marketing (i.e. email, SMS etc). It does not appear that subscribers would have any ability though to select which of the sectors they may wish to receive marketing about, suggesting that any agreement must be to all sectors. Furthermore, whilst the inclusion of separate 'method' boxes appears to suggest that a subscriber could theoretically sign up to the website without agreeing to receive any marketing, there is confusingly a disclaimer beneath the sign-up box stating "*...to register and sign up for our newsletter without receiving any other advertising, please email [separate email address]*". Again, there does not appear to be any specific naming of companies from whom direct marketing will be sent, and having not been provided with the privacy policy (of which agreement is required) it is not clear whether direct marketing is referred to at all within it.
22. [REDACTED] obtained its data through its [REDACTED] competitions website. The Commissioner has examined the site's January 2018 fair processing notice, since an earlier fair processing notice is not available and was not provided. The January 2018 fair processing notice invites subscribers who elect to register with [REDACTED] to tick a box which states "*I consent to [REDACTED] registration page sponsors and 3rd party partners ... and their partners may contact me by email, phone, text or*

post with more interesting offers". A look at [REDACTED] sponsors from 15 September 2017 shows that DTL was not listed at the time. A further document was provided by DTL which shows a total of 27 various and wide ranging sectors about which subscribers may receive marketing, although there is no option to specify which of the sectors a subscriber may wish to receive marketing about. The Commissioner would note that it is not clear when this document, provided by DTL in the course of the Commissioner's investigation, was active on the [REDACTED] website.

23. A second box on the sign-up page is an agreement to [REDACTED] terms and conditions and privacy policy. This is likely to be a mandatory tick box although the Commissioner has not been provided with either the terms and conditions or the privacy policy in place at the time, and so cannot consider whether they make any reference to direct marketing from third parties.

24. [REDACTED], trading as [REDACTED], is an online discount website which invites subscribers at the point of sign-up to select their 'preferences' from a range of sectors, together with the methods by which they would wish to be contacted. However, despite any preferences selected, subscribers are required to agree to the privacy policy and the terms and conditions which state within them that "*[REDACTED] and the brands [subscribers] are introduced to... may periodically send... promotional emails about new products, special offers or other information which [REDACTED] or they think you may be interested in using the email address which you have provided"*, before listing a wide variety of sectors (albeit no named organisations) that the marketing may concern, noting that they bear little relation to the 'preferences' referred to previously. This would appear to suggest that agreement to direct marketing is therefore a condition of subscribing to [REDACTED] service, a view supported by the inclusion of a disclaimer on the

sign-up page, similar to [REDACTED], requiring a separate email to be sent to register "...without receiving any advertising promotions or offers...".

25. Using the information provided, the Commissioner has been able to determine that between 12 July 2017 and 23 May 2018, on DTL's behalf, there were 14,986,423 direct marketing emails received by subscribers; with a further 1,136,647 direct marketing emails estimated to have been received over the same period. The estimated figure comprises DTL's proposed volumes for two of the List Owners [REDACTED] based on network averages for the period, since it has been unable to provide definite figures.
26. The Commissioner has made the above findings of fact on the balance of probabilities.
27. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by DTL and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

28. The Commissioner finds that DTL has contravened regulation 22 of PECR.
29. The Commissioner finds that 12 July 2017 and 23 May 2018 there were 14,986,423 direct marketing emails received by subscribers; with a further 1,136,647 direct marketing emails estimated to have been received over the same period. The Commissioner finds that DTL instigated the transmission of the direct marketing emails sent, contrary to regulation 22 of PECR.

30. DTL, as the instigator of the direct marketing, is required to ensure that it is acting in compliance with the requirements of regulation 22 of PECR, and to ensure that valid consent to send those messages had been acquired.
31. "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.
32. Furthermore, the European Directive 95/46/EC defines consent as "any freely given specific and informed indication of his wishes by which a data subject signifies his agreement to personal data relating to him being processed"
33. The consents being relied on were obtained by the List Owners, who then sent direct marketing material on behalf of DTL. This constitutes reliance, by DTL, on "indirect consent".
34. The Commissioner's direct marketing guidance says "organisations need to be aware that indirect consent will not be enough for texts, emails or automated calls. This is because the rules on electronic marketing are stricter, to reflect the more intrusive nature of electronic messages."
35. However it does go on to say that indirect consent may be valid, but only if it is clear and specific enough. If categories of organisations are referred to then those categories must be tightly defined and the organisation wanting to use the consent must clearly fall within the description. Consent is not likely to be valid where an individual is presented with a long, seemingly exhaustive list of categories of organisations.

36. Furthermore, for consent to be valid it is required to be “freely given”, by which it follows that if consent to marketing is a condition of subscribing to a service, the organisation will have to demonstrate how the consent can be said to have been given freely. It is apparent that some of the List Owners appear to require agreement to marketing as a condition of service, or require subscribers to take further steps to opt-out following sign-up.
37. Consent is also required to be “specific” as to the type of marketing communication to be received, and the organisation, or specific type of organisation, that will be sending it. It is apparent that DTL is not named in any of the List Owners’ policies that the Commissioner has been provided with. Rather, there are long lists of general sectors, and references to ‘selected third parties’, which appear to the Commissioner to be too broad to demonstrate valid indirect consent. Only one of the five List Owners, [REDACTED], lists ‘comparison websites’ amongst its 16 named sectors.
38. 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 asked to agree to receive marketing from “similar organisations”, “partners”, “selected third parties” or other similar generic description.
39. The Commissioner has considered the consents obtained by each of the List Owners which sent direct marketing emails on DTL’s behalf, and is concerned that in each case there are issues regarding whether the consents can be said to be freely given, specific, and informed.

40. The Commissioner is therefore satisfied from the evidence she has seen that DTL did not have the necessary valid consent for the 14,986,423 direct marketing emails received by subscribers; or for the further estimated 1,136,647 direct marketing emails, for which it instigated transmission to subscribers.
41. The Commissioner is satisfied that DTL was responsible for this contravention and has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

42. The Commissioner is satisfied that the contravention identified above was serious. This is because between 12 July 2017 and 23 May 2018, a confirmed total of 14,986,423 direct marketing emails were instigated by DTL; with a further estimated 1,136,647 direct marketing emails also being received having been sent at DTL's instigation. These emails advertised marketing material for which subscribers had not provided adequate consent.
43. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

44. The Commissioner has considered whether the contravention identified above was deliberate.
45. The Commissioner considers that in this case DTL did not deliberately contravene regulation 22 of PECR.

46. The Commissioner has therefore gone on to consider whether the contraventions identified above were negligent. First, she has considered whether DTL 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. Furthermore, it would be reasonable to expect an organisation who is registered with the ICO to be aware of their obligations under PECR and to carry out sufficient steps to ensure compliance when engaging in the instigation of direct marketing.
47. Second, the Commissioner considered whether DTL failed to take reasonable steps to prevent the contraventions. The Commissioner has published detailed guidance for those carrying out direct marketing explaining their legal obligations under PECR. This guidance gives clear advice regarding the requirements of consent for direct marketing and 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, or instigate, marketing emails to individuals if that person has specifically consented to receiving them; and highlights the difficulties of relying on indirect consent for email marketing.
48. Reasonable steps could have included for instance carrying out the necessary due diligence checks to ensure that DTL were specifically named within the Privacy Policy of the five List Owners as the holder of the marketing lists. That they are not, and that 'comparison websites' as a sector was listed in just one of the five List Owners' policies, should have alerted DTL that there may be issues in demonstrating that subscribers were adequately informed. Furthermore, if they had completed the customer journey it would have been apparent that, in some cases, agreement to marketing was a condition of service, and

that subscribers often had no way of specifying the sectors they might wish to hear about, or the method by which they may wish to receive marketing. DTL advise that it relied wholly on a contractual agreement with the Aggregators as evidence of its due diligence, however the Commissioner is of the view that the reliance on indirect consent, and the more stringent checks that it requires of organisations, should have caused DTL to conduct its own checks into the veracity of the data being used by the List Owners, rather than to rely on assurances.

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

The Commissioner's decision to issue a monetary penalty

51. The Commissioner has taken the following aggravating factor into account:
 - DTL did not maintain its own records of its direct marketing activities, rather it relied on the Aggregators and List Owners to provide details of email volumes and to maintain effective management records.
52. The Commissioner has taken the following mitigating factor into account:
 - DTL have since changed their business model and have, since May 2018, ceased using the Aggregators and List Owners for the purposes of direct marketing.

53. 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.
54. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. Upon receiving the Notice of Intent, DTL advised the Commissioner that it did not intend to serve any representations.
55. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
56. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty
57. The Commissioner has considered the likely impact of a monetary penalty on DTL. She has decided on the information that is available to her, that DTL has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
58. 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 messaging those who specifically consent to receive marketing.

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

The amount of the penalty

60. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£90,000 (ninety thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

61. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **3 August 2020** 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.
62. If the Commissioner receives full payment of the monetary penalty by **31 July 2020** 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.
63. 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.

64. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
65. Information about appeals is set out in Annex 1.
66. 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.
67. 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 1st day of July 2020

Andy Curry
Head of Investigations (Civil)
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

Telephone: 0300 123 4504

Email: grc@justice.gov.uk

- 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)).