

## **DATA PROTECTION ACT 1998**

### **SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

#### **MONETARY PENALTY NOTICE**

To: Koypo Laboratories Limited

Of: United House, North Road, London, N7 9DP

1. The Information Commissioner ("Commissioner") has decided to issue Koypo Laboratories Limited ("Koypo") 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. Koypo, whose registered office is given above (Companies House registration number: 10024201), 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. 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. The term “soft opt-in” is used to describe the rule set out in 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.
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 (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.”

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. Koypo is lead generator specialising in scientific customer acquisition. It utilises click to lead conversion systems to supply third parties with data leads obtained via its websites.
14. In February 2018 the Commissioner became aware of a number of complaints having being received by her about Koypo and its 'Simple PPI Claims' brand sending unsolicited marketing in the form of e-mails.
15. The Commissioner wrote to Koypo on 9 March 2018, providing details of the complaints made. The letter also requested information about the volume of e-mail marketing messages sent, the source of the data to send the e-mails and its evidence of consent to send the e-mails to the individuals who had made complaints. Koypo were warned that the Commissioner could issue civil monetary penalties of up to £500,000 for PECR breaches.
16. Koypo advised that they had not sent any e-mails during the period in question but had instead relied upon a network of 61 affiliates, and in some circumstances sub affiliates, to send marketing on its behalf. As they had not sent the e-mails directly they stated that they were unable to access volume information but provided a breakdown of 'click volumes' generated by each affiliate. They also advised that they were unable to access evidence of consent as they would require the original email to identify the affiliate it originated from. Their response also advised that Koypo had paused their email marketing campaigns.
17. It was clear to the Commissioner that Koypo were engaging in 'hosted marketing'. This term describes the practice of an organisation sending direct marketing e-mails to their own database, however the marketing material found in the email relates to a third party. Whilst the third party, in this case Koypo, is not the sender of these e-mails they are

the instigator and so would require explicit permission that the recipients want to receive these e-mails before they are sent.

18. Having reviewed Koypo's response the Commissioner requested further information on 23 March 2018 in order to discover the identity of the affiliates, volumes of e-mails sent and to again request evidence of consent in relation to the identified complaints. Responses received from Koypo on 4 April 2018 and 21 May 2018 advised that e-mails sent between 1 March 2017 and 31 March 2018 were sent by four affiliates on their behalf. During that time Koypo estimated that 22,056,029 e-mails had been sent by the affiliates. Koypo again told the Commissioner that they were unable to provide evidence of consent for the complaints received.
19. Koypo explained in further exchanges of correspondence with the Commissioner between July 2018 and May 2019 the due diligence requirements applied to their identified affiliates. They provided links to their affiliates privacy policies and fair processing information where available. They explained that they were unable to advise of the precise number of e-mails received by individuals from each affiliate. They instead provided bounce back rates for each affiliate, that is, the percentage of the e-mails sent which failed to be accepted by the end users server. Based on the rates provided a total estimated number of 21,166,574 marketing e-mails were received by individuals. This number was confirmed by Koypo on 20 May 2019.
20. The Commissioner reviewed the policies and information in place at the time of the contravention and identified that the websites where consent was obtained did not name Koypo or make it clear that user's may receive marketing about a PPI claims company. The sites relied on providing consent to 'third parties' and 'partners' however these were not tightly defined and were too general to demonstrate valid consent.

21. Koypo provided examples of e-mails sent by the affiliates which contained solely Koypo branding in the form of simplepicclaims.co.uk.
22. Koypo was consequently unable to evidence that the individuals to whom direct marketing messages had been sent had consented to receipt of the messages.
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 Koypo and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

25. The Commissioner finds that Koypo has contravened regulation 22 of PECR.
26. The Commissioner finds that the contravention was as follows:

Between 1 March 2017 and 31 March 2018, Koypo instigated the transmission of 21,166,574 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

27. Koypo, 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 sufficient consent had been acquired.

28. "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.
29. In this case the Commissioner is satisfied that Koypo did not have the consent, within the meaning of regulation 22(2), of the 21,166,574 subscribers to whom it had instigated the sending of unsolicited direct marketing messages.
30. The Commissioner is satisfied that Koypo was responsible for this contravention.
31. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

### **Seriousness of the contravention**

32. The Commissioner is satisfied that the contravention identified above was serious. This is because between 1 March 2017 and 31 March 2018 Koypo sent a total of 21,166,574 direct marketing messages to subscribers without their consent.
33. In addition, Koypo also instigated the sending of a further 889,455 marketing messages. Although these were not received by individuals, it evidences an attempt to send large volumes of marketing messages to individuals without consent to do so.
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 the Koypo's actions which constituted that contravention were deliberate actions (even if Koypo did not actually intend thereby to contravene PECR).
36. The Commissioner considers that in this case Koypo did not deliberately contravene regulation 22 of PECR in that sense.
37. The Commissioner had gone on to consider whether the contraventions identified above were negligent.
38. First, the Commissioner has considered whether Koypo knew or ought to reasonably have known that there was a risk that these contraventions would occur. She is satisfied that this condition is met given that Koypo is involved in a business reliant on direct marketing, and the fact that the issue of unsolicited messages has been widely publicised by the media as being a problem. In addition, Koypo have held a valid data protection register entry since 5 April 2016. They should therefore be aware of the Commissioner's available guidance and of their obligations under PECR.
39. 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 e-mail, by post, or by fax. In particular it states that organisations can generally only send marketing messages to individuals if that person has specifically consented to receiving them from the sender.

40. It is therefore reasonable to suppose that Koypo knew or ought reasonably to have known that there was a risk that these contraventions would occur.
41. Secondly, the Commissioner has gone on to consider whether Koypo failed to take reasonable steps to prevent the contraventions.
42. Organisations contracting with third parties to carry out marketing for them must make rigorous checks to satisfy themselves that the third party has obtained the data it is using fairly and lawfully, and that they have the necessary consent. Organisations must ensure that consent was validly obtained, that it was reasonably recent, and that it clearly extended to them specifically or to organisations fitting their description. It is not acceptable to rely on assurances of indirect consent without undertaking proper due diligence.
43. Indirect consent can be achieved in circumstances that are clear and specific enough, if a third party is specifically named at the point of data collection so that an individual would reasonably expect their data to be shared with or to receive marketing from a third party.
44. In this case Koypo was unable to provide evidence that it had undertaken appropriate due diligence in this case. The e-mails sent on behalf of Koypo contained only Koypo branding and do not explain who the sender is. It is therefore unclear to the individuals why they are receiving this marketing communication. For consent to be valid it must be freely given, specific and informed, an individual must know what they are consenting to and be given clear instruction on what that consent means.
45. Contracts in place between Koypo and its affiliates make no mention of data use or controls. When asked by the Commissioner to provide evidence of consent, Koypo were unable to retrieve it without the

specific e-mails sent to an individual. Whilst Koypo advised the Commissioner that they verify consent by asking their affiliates for opt in proofs at random times there is no written evidence of any other due diligence checks being carried out by Koypo.

46. The Commissioner's direct marketing guidance is clear that organisations should keep clear records of what an individual has consented to, and when and how this consent was obtained, so that they can demonstrate compliance in the event of a complaint.
47. In the circumstances, the Commissioner is satisfied that Koypo failed to take reasonable steps to prevent the contraventions in this case.
48. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

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

49. The Commissioner has taken into account the following mitigating feature of this case:
  - Koypo have advised the Commissioner that they have instructed a law firm to develop procedures with regards to the compliant handling of data.
  - Koypo have suspended their email marketing campaigns at present though they have not advised whether they intend to begin email marketing again.

50. The Commissioner has taken into account the following aggravating features of this case:
- The conduct of the business was being carried out to generate leads via affiliate marketing programming. Affiliates operate incentivised marketing where they are paid for results or leads generated, encouraging higher rates of unsolicited marketing.
  - Advice and guidance is published on the Commissioner's website and is also available through her advice services. There is also guidance and advice provided by trading bodies such as the Direct Marketing Association.
51. 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.
52. 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, Koypo submitted representations which were considered by the Commissioner when considering whether to exercise her discretion to issue a monetary penalty.
53. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
54. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.

55. The Commissioner has considered the likely impact of a monetary penalty on Koypo. She has decided on that information that is available to her, that Koypo has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
56. 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.
57. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

### **The amount of the penalty**

58. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£100,000 (One hundred thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

### **Conclusion**

59. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **4 September 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.

60. If the Commissioner receives full payment of the monetary penalty by **3 September 2020** the Commissioner will reduce the monetary penalty by 20% to **£80,000 (Eighty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
61. 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.
62. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
63. Information about appeals is set out in Annex 1.
64. 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.

65. 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 4<sup>th</sup> day of August 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](mailto: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)).