

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Digital Growth Experts Limited

Of: International House, 12 Constance Street, London E16 2DQ

1. The Information Commissioner ("Commissioner") has decided to issue Digital Growth Experts Limited ("DGE") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to a serious contravention of Regulations 22 and 23 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. DGE, whose registered office is given above (Companies House Registration Number: 12373841) 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. Regulation 23 of PECR states that "A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail –
 - (a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed;
 - (b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided
 - (c) where that electronic mail would contravene regulation 7 of the Electronic Commerce (EC Directive) Regulations 2002; or
 - (d) where that electronic mail encourages recipients to visit websites which contravene that regulation."
6. 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)).
7. Consent is defined in the European Directive 95/46/EC as "*any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed*".
8. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".

9. 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".
10. "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".
11. 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."
12. 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.

13. 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.
14. 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

15. 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 this data is incorporated into a Monthly Threat Assessment (MTA) used to ascertain organisations in breach of PECR.
16. DGE is a company which was incorporated on 20 December 2019, originally under the name of 'Motorhome Brokers Limited'. The name of the company was changed to its present form on 12 February 2020. It is not suggested for the purpose of this Notice that the name change was related to this contravention.

17. DGE first came to the attention of the Commissioner following a number of complaints being received via the 7726 reporting tool; the messages received by the complainants promoted a 'Zoono' brand hand sanitising product, which the messages specifically claimed was "effective against coronavirus".
18. 'Zoono.io' is a website which was set up by DGE to market 'Zoono' brand products. The website suggests that it is part of the DGE "community", and provides DGE's contact details for consumer queries.
19. An initial investigation letter was sent to DGE on 14 April 2020 raising some preliminary concerns with DGE's PECR compliance, and requesting details of the volumes of messages sent to subscribers, and sources of data for the recipients of those messages.
20. In its response of 27 April 2020, DGE explained that it sells a range of products through the 'Zoono.io' website, and online marketplaces under the trading name of 'Zoono.io'. In addition, it stated that its marketing messages are sent through the 'Voodoo SMS' platform, with approximately 1,076 messages having been sent between 12 February 2020 and 16 April 2020. It was claimed that data had been sourced using "website lead capture" and from a 'collated list' of telephone numbers related to previous interactions with the company's online marketplace sales page. In its explanation for the complaints made to the 7726 service, DGE stated that "it may be that these users did not use the STOP link and presume they were unaware that their numbers had been used for subsequent marketing purposes". The response also confirmed that, in light of the ICO's initial investigation letter, DGE had taken steps to register with the ICO.
21. Whilst it is noted that the complaints made to the 7726 service showed messages which did not offer an 'opt out' function, DGE appeared to

suggest that its initial texts to the complainants, and to subscribers more generally, would have offered this function. In any event, DGE stated that it could not demonstrate that the complainants in the reported incidents had provided consent to receive direct marketing.

22. Subsequent correspondence from DGE was unclear as to the details of precisely how it obtained the data of the individuals to whom it would send direct marketing messages, save to say that some were sent to individuals who had expressed an interest in online marketplace and social media offers. DGE's Director specifically advised that he has had an 'eBay' account since 2003, and had collated mobile phone numbers from that. It was subsequently claimed that data collected from this 'eBay' account was that of individuals who had interacted with offers on the Director's personal page within the last 24 months. With regards to the data obtained via social media, the Director later confirmed that he would use the data of individuals who had expressed an interest in receiving a free sample of hand sanitiser via 'lead generation type adverts'.
23. DGE was asked to further clarify the total volume of messages sent by the organisation, noting that the most recently provided figures had increased somewhat from the 1,076 messages proposed at the outset of the Commissioner's investigation. DGE's response did not supply the requested information.
24. In an effort to establish the precise volumes of the messages sent by DGE, a third party information notice ("3PIN") was sent to 'Bulk SMS Limited', the company responsible for the running of Voodoo SMS, the platform through which DGE had sent its messages. The response indicated that between 29 February 2020 and 30 April 2020 there had in fact been 17,241 text messages sent by DGE. Of these, 16,190 text messages had been delivered to subscribers.

25. Over the course of the investigation, DGE was unable to provide evidence of consent for any of the messages delivered to subscribers over the relevant period of 29 February 2020 to 30 April 2020.
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 regulations 22 and 23 of PECR by DGE and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

28. The Commissioner finds that DGE contravened regulations 22 and 23 of PECR.
29. The Commissioner finds that the contravention was as follows:
30. The Commissioner finds that between 29 February 2020 and 30 April 2020 there were 16,190 direct marketing text messages received by subscribers. The Commissioner finds that DGE transmitted the direct marketing messages sent, contrary to regulation 22 of PECR.
31. The Commissioner is satisfied that the contravention could have been higher, with a total of 17,241 text messages being sent over the relevant time.
32. DGE, as the sender 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.

33. In this instance DGE have been unable to evidence any such consent, instead providing unclear and inconsistent explanations for its practices and the means by which it obtains the data used for its direct marketing. Indeed, from the information provided, and as far as the Commissioner can determine, it appears that DGE has relied on data scraped from an online marketplace account belonging to its Director, which he had operated since 2003, albeit claiming that the data used was obtained only over the previous 24 months. There is no evidence that valid consent had been obtained from any of the individuals whose data had been used in this way, or that any of the individuals had any previous relationship with DGE whatsoever.
34. DGE also used data obtained via social media advertisements which purported to offer free samples of a product to individuals, and then automatically opted them in to receiving direct marketing. From the evidence provided, it does not appear that individuals were advised that their data would be used for this purpose, nor were individuals given a simple means of refusing the use of their contact details for this purpose.
35. Neither of the above methods of data collection constitutes adequate means of obtaining valid consent, and nor would DGE be able to avail itself to regulation 22(3) PECR (the "soft opt-in").
36. DGE stated that some of its marketing texts were sent to individuals who had previously expressed an interest in 'eBay' offers on the Director's account page. It is however, in the Commissioner's view, simply not possible that individuals whose data has been held on the Director's own 'eBay' account since 2003, or even those who may have expressed an interest in unrelated products on this account within the previous 24 months, could have provided valid consent to receive

direct marketing text messages from DGE in relation to hand sanitiser many years later. Indeed, it is unlikely that such individuals would have any knowledge of DGE, which is likely not to have even been incorporated at the time they expressed an interest in offers on the Director's own page. Rather, it appears to the Commissioner that this data has been harvested from records of past auctions involving the Director regarding unrelated products, and used by DGE for the purposes of reaching as many people as possible in relation to its own hand sanitiser marketing campaign.

37. The Commissioner is further satisfied that, in any event, DGE cannot rely on the 'soft opt-in' exemption provided by Regulation 22(3) PECR for the purposes of the messages sent to individuals with whom the Director of DGE has a prior transaction history. The soft opt-in exemption firstly requires that the person sending or instigating the electronic mail, i.e. DGE, had 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. There has been no evidence provided that any of the recipients, some of whom the Director has confirmed would have provided details to him years earlier, had entered into a sale, or negotiations for a sale, with DGE; regulation 22(3) PECR therefore cannot apply.
38. In short, DGE has provided no evidence in respect of this data set to support a reliance on Regulation 22(3) PECR, or any evidence to demonstrate valid consent whatsoever.
39. In terms of those individuals who had signed up to receive a sample of hand sanitiser through social media platforms, DGE initially provided some unspecific information as to how data would be collected. It has since been confirmed that individuals would enter their name and telephone number through one of these lead generation type adverts

and would be required to agree to two privacy policies (Facebook's and that of 'Zoono.io'). The individual would then receive a text to their phone with a voucher code which they would need to separately input on 'Zoono.io'; they would pay postage and receive their free sample. However, upon entry of their details at the data collection stage, and whether or not individuals chose to redeem the voucher code, individuals were automatically, and without notice, opted in to receive direct marketing messages from DGE, with multiple messages potentially being sent to them.

40. Such means of obtaining consent cannot be valid, since the 'consent' being relied on cannot, at the very least, be said to have been freely given; nor can individuals be said to have been given a genuine choice as to whether or not they would wish to receive direct marketing when signing up to a free sample of the hand sanitiser.
41. Furthermore, the 'soft opt-in' exemption cannot be relied on for these individuals since the act of applying for a free sample cannot be said to be a 'sale' or 'negotiation of a sale'. In any event, it appears that DGE would send marketing to all individuals who provided their details in this way, and not just those who may have chosen to redeem the voucher for the free sample. Such subsequent direct marketing would fail to meet the criteria of Regulation 22(3)(a) PECR.
42. In addition, from the evidence provided it is clear that the individuals had not, at the point their data was collected, been given a simple means of refusing the use of their contact details for direct marketing; accordingly, DGE's direct marketing would also fail to meet the criteria of Regulation 22(3)(c) PECR
43. Again, DGE has been unable to demonstrate any evidence of consent to send direct marketing messages to those individuals whose data was

obtained via social media offers, nor can it rely on Regulation 22(3) PECR.

44. The Commissioner further notes that the messages do not make clear that they are being sent by and on behalf of DGE, rather they either do not reference a sender at all or alternatively refer to 'Zoono' which is a product name and is not a registered trading name of DGE. DGE obtained permission to market Zoono products from Zoono Holdings Limited, a separate and distinct entity.
45. It is also apparent that a large proportion of the messages received by subscribers did not contain an option for recipients to opt-out of future marketing messages.
46. The Commissioner is satisfied from the evidence she has seen that DGE has contravened Regulation 22 PECR for the 16,190 direct marketing messages received by subscribers
47. Furthermore, the Commissioner is satisfied that the actions of DGE have contravened regulation 23 PECR.
48. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

49. The Commissioner is satisfied that the contravention identified above was serious. This is because between 29 February 2020 and 30 April 2020 a confirmed total of 16,190 direct marketing messages were received by subscribers. These messages contained direct marketing material for which subscribers had not provided adequate consent.

50. DGE scraped data from an eBay page which had been used by its Director dating back to 2003, although it is claimed that only data collected in the previous 24 months was used; and harvested the data of individuals who had applied for a free sample of its product without giving them the opportunity to select whether they would wish to receive subsequent direct marketing messages. DGE has failed to provide any evidence of valid consent for any of the 16,190 direct marketing messages received by subscribers. Furthermore, the messages sent by DGE failed to identify itself as the sender, and largely failed to provide recipients with the means to opt out of future direct marketing.
51. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

52. The Commissioner has considered whether the contravention identified above was deliberate.
53. The Commissioner does not consider that DGE deliberately set out to contravene PECR in this instance.
54. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
55. Firstly, she has considered whether DGE 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 since the

issue of unsolicited text messages have been widely publicised by the media as being a problem.

56. 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 messages to individuals if that person has specifically consented to receiving them.
57. It is therefore reasonable to suppose that DGE should have been aware of its responsibilities in this area.
58. Secondly, the Commissioner has gone on to consider whether DGE failed to take reasonable steps to prevent the contraventions. Again, she is satisfied that this condition is met.
59. Such reasonable steps in these circumstances could have included putting in place appropriate systems and procedures to ensure that it had the specific consent of those to whom it had sent marketing text messages; and adequately recording the source of the data used and evidence of any consent obtained.
60. Instead, DGE relied almost entirely on data obtained via 'eBay' by its Director over a sustained period in relation to the auctions of unrelated products, including from a time before DGE had even been incorporated; these individuals had no relationship with DGE. That data was then used to create a marketing list, and used by DGE to initiate a text message campaign to sell its own products. DGE has provided no evidence that any of the recipients had provided valid

consent. Equally, in terms of the data procured from social media advertisements, DGE has failed to produce any evidence that the individuals who received its direct marketing had provided, or had even been capable of providing, valid consent. Furthermore, those individuals had not been advised that their data would be used for the purpose of direct marketing, and had not been given the opportunity to opt out.

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

The Commissioner's decision to issue a monetary penalty

63. The Commissioner has also taken into account the following **aggravating features** of this case:
 - The marketing, relating to hand sanitiser suggested by DGE to be effective against COVID-19, sought to capitalise on the current pandemic;
 - The marketing was carried out for the purpose of profiteering and financial gain; the Commissioner notes in particular the registration of the 'zoonio.io' domain on 15 February 2020 and apparent shift towards marketing hand sanitiser at a time when demand had soared owing to the health crisis;
 - The Director, having operated various businesses using similar marketing methods, should be familiar with the means by which to carry out lawful direct marketing. Those methods were not followed;

- The Commissioner has found the information provided by the Director over the course of the investigation to be unreliable and unclear.
64. 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.
 65. 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 DGE on this matter.
 66. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
 67. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
 68. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited marketing text messages 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.

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

The amount of the penalty

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

Conclusion

71. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **23 October 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.
72. If the Commissioner receives full payment of the monetary penalty by **22 October 2020** the Commissioner will reduce the monetary penalty by 20% to **£48,000 (forty eight thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
73. 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.

74. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
75. Information about appeals is set out in Annex 1.
76. 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.
77. 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 22nd day of September 2020

Andy Curry
Head 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 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)).