

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Studios MG Limited

Of: 3 Shortlands, Shortlands, Hammersmith, London W6 8DA

1. The Information Commissioner ("Commissioner") has decided to issue Studios MG Limited ("SMG") 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. SMG, whose registered office is given above (Companies House Registration Number: 09417715) 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 22(3) of PECR states:

- "(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.
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. 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. 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."

13. 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.
14. 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.
15. 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

16. SMG have advised that they are a software design and build consultancy based in London.
17. SMG first came to the attention of the Commissioner after the reporting of an unsolicited email being received by a subscriber on 30 April 2020 advertising the sale of surgical masks. The unsolicited email identified

the sender as SMG, with a link directing recipients to the website 'surgicalmaskslondon.com'.

18. The Commissioner sent an initial investigation letter to SMG on 4 May 2020 which detailed her concerns regarding the complaint, and requested full details of SMG's direct marketing campaign, and evidence of any consent relied upon. Details of SMG's PECR policies and procedures were also requested.
19. SMG acknowledged receipt of the initial investigation letter on 4 May 2020, leaving a short voicemail stating that, in respect of the complainant, his data had been obtained from "a different campaign related to tennis".
20. SMG then provided a short substantive response to the Commissioner's letter on 5 May 2020. This response advised the Commissioner that a single email was sent out to a database of contacts which had been "gathered over the years". SMG confirmed that the email was sent to "around 8,000 people" but that the data had now been deleted so it could not be sure. In addition, SMG confirmed that its 'email marketing solution' ("platform provider") had also been cancelled. In response to the Commissioner's request for evidence of any consent being relied upon for the sending of the emails, SMG responded simply that it does not have any evidence of consent. No details of any PECR policies or procedures were provided.
21. Having received this response, the Commissioner on 5 May 2020 requested further information from SMG, in particular regarding the sources for the contacts in SMG's database, details of the type of business SMG conducts, and details of the exact number of emails sent. The Commissioner noted that SMG had also previously claimed

that the complainant's data had originally been obtained from a campaign 'related to tennis'; further details were requested about this.

22. SMG responded on 9 May 2020 advising that its database was gathered "via things like LinkedIn connections, events, people that emailed me, etc.". It also confirmed that is a small software design and build consultancy. In response to the request for the exact number of emails sent, SMG stated again that its account with its platform provider had been deleted, but that between 8,000 – 9,000 people (whose data was obtained from "several sources") would have been sent the email. SMG advised that "many of them were out of date and bounced" but provided no evidence of this. In relation to the origin of the complainant's data, SMG now advised that it did not know how it came to have the email address.
23. In an effort to confirm the precise volumes for the messages sent by SMG, the Commissioner on 13 May 2020 contacted the platform provider directly, however, to date a response has not been received.
24. On 20 May 2020 the Commissioner advised SMG that it should still be able to obtain the volumes from its platform provider, despite deletion of its account. The Commissioner asked that SMG also elaborates on its statement that its database consisted of data obtained from 'several sources'; to date, no response has been received.
25. On 5 June 2020 the Commissioner made a short enquiry with the complainant in this case to enquire as to how his details may have come into the possession of SMG. The complainant responded that day to advise that he had signed up to a now-defunct tennis website in 2015 ("<http://londontennis.co.uk/>"), and that he had subsequently received four emails from a separate organisation ('Aceify Limited', via "Aceify.me"), for which he had not signed up, offering similar services

to that website. The Commissioner is aware that the director of SMG is also a director of Aceify Limited (which operates "Aceify.me").

26. The Commissioner notes that of the two websites known to have been used by SMG for the purposes of its personal protective equipment sales, 'surgicalmasksuk.org' now appears to be inactive and redirects individuals to 'surgicalmaskslondon.com'. The price of the facemasks sold on that website have now almost halved from the price advertised at the outset of the Commissioner's investigation.
27. The Commissioner has made the above findings of fact on the balance of probabilities.
28. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by SMG and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

29. The Commissioner finds that SMG contravened regulation 22 of PECR.
30. The Commissioner finds that the contravention was as follows:
31. The Commissioner finds that on 30 April 2020 there was one direct marketing email received by a subscriber, capable of being evidenced by a complaint. The Commissioner finds that SMG transmitted the direct marketing message, contrary to regulation 22 of PECR.
32. SMG has confirmed however that between 8,000 to 9,000 such direct marketing emails were sent on 30 April 2020, but has failed to provide precise figures for those direct marketing messages that were received by subscribers.

33. SMG, 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.
34. In this instance SMG has stated only that it does not hold any evidence of consent for the individuals to whom it engaged in its one-day direct marketing campaign.
35. SMG has indicated that the data it used had been gathered over a number of years from various sources, including but not limited to "LinkedIn connections, events, [and] people who had emailed [the director]". It is apparent to the Commissioner that SMG's direct marketing campaign was therefore made possible by using data which had been scraped from various vaguely defined sources. SMG made no apparent effort to obtain consent for the direct marketing that it sent on 30 April 2020, and indeed it would appear from the account given by the complainant in this instance that data could have been harvested from sources which had previously sought to provide services as wide ranging as tennis tuition.
36. The Commissioner is further satisfied that SMG cannot rely on the 'soft opt-in' exemption provided by Regulation 22(3) PECR for the purposes of the messages sent. Whilst SMG state that data was obtained from several sources, it is itself a 'software design and build consultancy', and this would appear to bear no relation to the sale of personal protective equipment which SMG sought to conduct with its direct marketing messages on 30 April 2020.
37. In short, SMG has provided no evidence to support a reliance on Regulation 22(3) PECR, or any evidence to demonstrate valid consent whatsoever.

38. The Commissioner would also note that, upon receiving the Commissioner's initial investigation letter, SMG advised her that it had deleted its database, and its platform provider account, essentially removing any chance of accurately relaying to the Commissioner the total volume of messages delivered to affected subscribers. As such it is impossible to determine the total number of individuals whose privacy had been impacted by the actions of SMG.
39. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

40. The Commissioner is satisfied that the contravention identified above was serious. This is because on 30 April 2020, a confirmed total of one direct marketing message was sent by SMG, as evidenced by a complaint. This message contained direct marketing material for which the subscriber had not provided adequate consent.
41. The 'Information Commissioner's guidance about the issue of monetary penalties prepared and issued under section 55C(1) of the Data Protection Act 1998' makes clear that an objective approach will be taken in considering whether a serious contravention of PECR has taken place, and that a single breach may be sufficient to meet this threshold. The Commissioner is satisfied from the evidence before her that as many as 9,000 emails may have been sent on 30 April 2020 regarding the sale of facemasks for profit, however because of the actions of SMG in deleting the database, and cancelling its account with its platform provider following the initiation of the Commissioner's investigation, it is now not possible to calculate the full extent of the contravention. The fact that there was only a single complainant is not

necessarily reflective of the gravity of the potential breach, since it is reasonable to expect that only a very small proportion of those who receive an unsolicited direct marketing email for which they have not consented will take the necessary steps to report it, with the majority likely to either delete, or ignore it.

42. The domains used by SMG for its activities were registered on 23 March 2020, in line with the commencement of the COVID-19 lockdown period, and the Commissioner has taken the view that the direct marketing which SMG sought to carry out intended to capitalise on the health pandemic, and maximise business by using any data it could obtain to reach as many subscribers as possible.
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 SMG did deliberately contravene regulation 22 of PECR. It would appear that SMG, a 'software design and build consultancy', sought to profit from the current national health emergency by obtaining and selling personal protective equipment at a premium (as evidenced by the significant price reduction in its wares following the Commissioner's investigation). Whilst SMG has stated that it obtained data from several sources, it has not elaborated on this despite being asked to do so, and from the account of the complainant it would appear to be reasonable to suggest

that these sources include other businesses for which the director is also involved.

46. Further and in the alternative, the Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
47. Firstly, she has considered whether SMG 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 emails have been widely publicised by the media as being a problem. It is also apparent that SMG's director appears to have a significant background in the area of 'direct marketing', noting not least that he was previously the director of an organisation called 'Limetree Digital Marketing' (now dissolved). As such it is reasonable to expect that the director of SMG would have some knowledge of the laws surrounding direct marketing, and should be aware of the risks surrounding such activity.
48. Beyond the above, 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
49. It is therefore reasonable to suppose that SMG should have been aware of its responsibilities in this area.

50. Secondly, the Commissioner has gone on to consider whether SMG failed to take reasonable steps to prevent the contraventions. Again, she is satisfied that this condition is met.
51. 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 emails; and adequately recording the source of the data used and evidence of any consent obtained.
52. Instead, SMG have failed to provide any evidence of consent for the direct marketing messages sent to subscribers, indeed it appears reasonable to suggest that SMG engaged in its direct marketing campaign without giving any consideration at all to obtaining the valid consent of those individuals it sought to contact. It harvested its data from a variety of vaguely defined and wide ranging sources, some of which would appear to include other companies under the director's control, with the aim of advertising personal protective equipment for sale to as many individuals as possible at a time when the Government was in the process of implementing a national lockdown in response of the COVID-19 emergency. SMG failed to retain its database, indeed actively deleting it following the Commissioner's initial investigation letter; and cancelled its account with its platform provider, failing to respond to the Commissioner when she requested that SMG take further steps to clarify the volumes of the affected individuals.
53. In the circumstances, the Commissioner is satisfied that SMG failed to take reasonable steps to prevent the contraventions.
54. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

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

- The marketing, relating to the sale of personal protective equipment, sought to exploit and capitalise on the current pandemic;
- Given the timing of the registration of the relevant websites, the nature of the marketing, the scraping of data from a variety of sources with no attempt to obtain valid consent, and the clear divergence from its usual course of business, the Commissioner is of the view that the intention of the campaign was to profiteer from the COVID-19 pandemic;
- The director of SMG would appear to have significant experience in the digital marketing sector. Despite this, there has been a flagrant disregard for the privacy rights of the individuals for whom SMG sent direct marketing emails without any consent;
- SMG has not registered with the Commissioner's public data protection register;
- Upon receipt of the Commissioner's initial investigation correspondence it would appear that SMG deleted the relevant dataset and volumes, and closed its account with its platform provider. When later asked by the Commissioner to liaise with its platform provider to determine the figures for the affected subscribers, SMG simply failed to respond. In representations, SMG have claimed that its actions here were not an attempt to obstruct the Commissioner's investigation, but despite this it appears that no efforts have since been made to contact its platform provider or to now provide the requested figures;

- SMG stood to make significant financial gains from the sale of its personal protective equipment, which it would appear was being offered at an inflated price to maximise profit.
56. The Commissioner has also taken into account the following **mitigating feature** of this case:
- SMG has advised that it has stopped sending direct marketing emails.
57. 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.
58. 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 SMG on this matter.
59. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
60. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
61. The Commissioner has attempted to consider the likely impact of a monetary penalty on SMG, however, given the limited publicly available recent financial information and SMG's failure to provide any financial information beyond its 2019 figures, despite it being requested to do so, the Commissioner has been unable to obtain a true picture of SMG's ability to pay a penalty. The Commissioner would note however

that SMG has failed to demonstrate that it will suffer undue financial hardship in the event of a penalty.

62. 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.

The amount of the penalty

63. 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

64. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **6 November 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.
65. If the Commissioner receives full payment of the monetary penalty by **5 November 2020** 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.

66. 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.
67. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
68. Information about appeals is set out in Annex 1.
69. 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.
70. 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 6th day of October 2020

Andy Curry
Head of Investigations
Information Commissioner's Office
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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)).