

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: OSL Financial Consultancy Limited

Of: 4 Bigby Green, Bigby, Barnetby, North Lincolnshire, DN38 6EE

1. The Information Commissioner ("Commissioner") has decided to issue OSL Financial Consultancy Limited ("OSL") 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. OSL, whose registered office is given above (Companies House Registration Number: 06810395) 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:

"23. 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."

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. 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*".
7. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".
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. "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".

10. 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."

11. 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.

12. 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.
13. 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

14. OSL operates under the trading name MortgageKey and is an independent broker providing mortgages and secured loans.
15. OSL first came to the attention of the Commissioner during the course of an investigation into scams and exploitative marketing surrounding the COVID-19 crisis. The investigation identified a number of complaints received via the Global System for Mobile Communications ("GSMA") spam reporting service about SMS sent by OSL, trading as MortgageKey.
16. An example of one of the SMS complained about is:
"Hi XXX I hope you are well, Its XXX from MortgageKey, you previously made a Buy to Let Purchase enquiry with us. Since the Pandemic Buy to Let rates have dropped to 1.19% if you are looking to purchase a Buy to Let property then please reply with a time that is convenient for you or alternatively please call us on 01482 306666 opt 1 and we will be free to speak with you. Kind Regards XXX MortgageKey"

17. The Commissioner initially contacted OSL by telephone on 18 June 2020 when the complaints and investigative process were discussed with one of OSL's Directors. The Director said that the source of the complaints were from remarketing SMS sent to old customers to drum up business due to COVID-19. The Commissioner was advised that OSL had a new website and privacy policy ready to launch. Further, OSL stated that it had previously had an issue with an email unsubscribe button not working in 2019 which had been reported to the ICO at that time (as the ICO helpline does not record calls this has not been corroborated).
18. Following this call the Commissioner sent an initial investigation letter to OSL on 18 June 2020 which detailed her concerns regarding the complaints and specifically OSL's compliance with Regulations 22 and 23 of PECR. The letter requested full details of OSL's direct marketing campaign, and evidence of any consent relied upon in respect of 33 complaints identified between 1 March 2020 and 18 June 2020.
19. OSL sent a response on 22 June 2020, confirming that during the period 18 June 2019 to 18 June 2020 it sent 174,342 direct marketing SMS messages (54,205 of which were sent during the period March to June 2020, being the focus of the Commissioner's investigation into COVID-19 related marketing). Information was also provided regarding an email sent to 129,939 customers on 17 October 2019 about the technical issue with the email unsubscribe button not working.
20. OSL provided information regarding the complaints including a record of "lead originally received" and "customer date/time replies". One of the complaints shows the lead having been originally received on 4 July 2019 and replying, in response to an SMS on 1 June 2020: *"For the 78th time, you have the wrong phone number for 'james'. I have told*

mortgagkey to delete this number numerous times. If I get one more message from message [sic] from mortgagekey I will report you to information commissioner". Three other complaints were shown as responding to previous SMS in 2019 with negative responses including one specific request to have their details removed.

21. OSL explained that it uses Google, Facebook and Bing to generate enquiries through its website and that "they have been doing this since 2015".
22. In response to the Commissioner's request for evidence of any consent being relied upon for the sending of the SMS, details of OSL's website were provided demonstrating where customer details were input together with a 'GET MY QUOTE' button. Next to this button was a paragraph which stated "By clicking 'GET MY QUOTE' you are agreeing to our Terms and Conditions and Privacy Policy". The paragraph provided a link to their Business Terms & Conditions and Privacy Policy which OSL stated "... gives the customer a choice before proceeding with MortgageKey".
23. OSL also stated its intention in respect of 'remedial work' to send an SMS to its database of 177,888 customers enquiring about their marketing preferences, whether they wished to remain opted in, and including an opt in/opt out box.
24. Having received this response the Commissioner on 25 June 2020 requested further information from OSL, including enquiries regarding customer journeys and email marketing. OSL were also advised that it should not carry out further direct marketing until the Commissioner's investigation was complete.

25. OSL responded on 28 June 2020 and included a statement, in regard to one particular customers journey, that OSL “used the opt in through the website so we have no further evidence of the opt in, *we take full responsibility for not having an opt in/opt out box* (emphasis added).” With regard to email marketing OSL confirmed that between the period 18 June 2019 to 18 June 2020 it sent 1,219,870 marketing emails, of which 755,780 were received.
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 OSL and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

28. The Commissioner finds that OSL contravened regulation 22 of PECR.
29. The Commissioner finds that the contravention was as follows:

Between 18 June 2019 to 18 June 2020 OSL transmitted 174,342 direct marketing SMS without consent, contrary to regulation 22.

30. OSL, 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. The ICO Direct Marketing Guidance¹ explains that in order to

¹ ICO Direct Marketing guidance <https://ico.org.uk/media/1555/direct-marketing-guidance.pdf>

rely on the soft opt-in, organisations must meet the following criteria:

- they have obtained the contact details in the course of a sale (or negotiations for a sale) of a product or service to that person;
- they are only marketing their own similar products or services; and
- they gave the person a simple opportunity to refuse or opt out of the marketing, both when first collecting the details and in every message after that.

31. In this instance OSL gathered personal data for marketing purposes when individuals contacted them via their website for a quote. At no point, when individuals entered their data, were they offered the option of either opting in or out of marketing, and so valid consent was not obtained at that time. The Commissioner is further satisfied that OSL cannot rely on the 'soft opt-in' exemption provided by regulation 22(3) PECR for the purposes of the messages sent on the basis that it failed to provide individuals with an opportunity to opt out of the marketing, either at the time the details were collected, or at any point subsequently.
32. The General Data Protection Regulations (GDPR)² which sit alongside the PECR, state that consent must be freely given, specific and informed and there must be an indication signifying agreement given 'by a statement or by a clear affirmative action'. The GDPR is clear that consent should not be bundled up as a condition of service unless it is necessary for that service. The ICO Direct Marketing guidance also recommends that organisations do not make consent to marketing a

² GDPR <https://gdpr-info.eu/>

condition of subscribing to a service unless they can clearly demonstrate how consent to marketing is necessary for the service and why consent cannot be sought separately.

33. In order to obtain a quote from OSL's website, individuals had to complete their details and were not provided with any option to consent to marketing, and so OSL made consenting to marketing a condition to obtaining a quote. Consenting to marketing is not necessary for the provision of a quote and consent should have been sought separately.
34. In short, OSL has provided no evidence to support a reliance on Regulation 22(3) PECR, or any evidence to demonstrate valid consent whatsoever.
35. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

36. The Commissioner is satisfied that the contravention identified above was serious. This is because between 18 June 2019 to 18 June 2020, a total of 174,342 direct marketing SMS were sent by OSL. The SMS contained direct marketing material for which the subscriber did not have adequate consent. In roughly a three and a half month period between 1 March 2020 to 18 June 2020, 33 complaints were received.
37. OSL informed the Commissioner that it had used the same marketing approach since 2015 and so it is reasonable to conclude that a significant number of SMS have been sent over that time, although the Commissioner does not have figures to support this.

38. 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. The Commissioner is satisfied from the evidence before her that in this case a substantial amount of SMS were transmitted over a period of 12 months, and potentially as far back as 2015. A proportionately small number of complaints 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 SMS for which they have not consented will take the necessary steps to report it, with the majority likely to either delete, or ignore it.
39. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

40. The Commissioner has considered whether the contravention identified above was deliberate.
41. The Commissioner considers that in this case OSL did not deliberately contravene regulation 22 of PECR.
42. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
43. Firstly, she has considered whether OSL 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 SMS and emails have been widely publicised by the media as being a problem. As a business relying heavily upon direct marketing it is reasonable to expect that the directors of OSL would have some knowledge of the laws surrounding direct marketing, and should be aware of the risks surrounding such activity.

44. It is noteworthy that OSL stated that it contacted the ICO in late 2019 regarding a problem with the unsubscribe option not working on their marketing emails, which would demonstrate at least some awareness at that time of the rules surrounding direct marketing.
45. 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
46. It is therefore reasonable to suppose that OSL should have been aware of its responsibilities in this area.
47. Secondly, the Commissioner has gone on to consider whether OSL failed to take reasonable steps to prevent the contraventions. Again, she is satisfied that this condition is met.
48. 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 SMS;

and adequately recording the source of the data used and evidence of any consent obtained. OSL could have used the event in late 2019 of the unsubscribe option on its emails failing to work as an opportunity to review its direct marketing practices more generally in order to ensure compliance with PECR, however OSL failed to do so.

49. In the circumstances, the Commissioner is satisfied that OSL 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 impose a penalty

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 section 55A(3)DPA and the procedural rights under section 55B have been complied with.
52. The latter has included issuing a Notice of Intent dated 12 October 2020 in which the Commissioner set out her preliminary thinking.
53. The Commissioner has considered whether, in the circumstances she should exercise her discretion so as to issue a monetary penalty. In reaching her final view, the Commissioner has taken into account representations made by OSL dated 4 November 2020 however there is nothing contained therein to dissuade the Commissioner from her preliminary view.
54. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

The amount of the penalty

55. The Commissioner has taken into account the following **aggravating features** of this case:
- Contrary to Regulation 23 of PECR, whilst the SMS sent by OSL did identify MortgageKey as the sender, they did not provide individuals with any means to opt-out or unsubscribe from future marketing.
 - It is apparent from the Commissioner's investigation that OSL also conducts direct marketing via email, and during the same contravention period as considered in this Notice, OSL sent 1,219,870 marketing emails, 755,780 of which were confirmed as received, in contravention of Regulation 22.
56. The Commissioner has considered the likely impact of a monetary penalty on OSL, however publicly available recent financial information is limited. Accordingly, OSL was invited on 9 November 2020 to provide financial representations including any evidence of financial hardship, particularly as a result of COVID-19. OSL responded on 10 November 2020, but documentation supplied was sparse and of limited assistance to the Commissioner in assessing OSL's current financial position. In view of OSL's lack of transparency and co-operation in relation to provision of financial documents, the Commissioner saw no evidence to dissuade her from her previous assessment.
57. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited marketing 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.

58. Taking into account all of the above, the Commissioner has decided that the penalty is **£50,000 (Fifty thousand pounds)**.

Conclusion

59. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **5 January 2021** 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 **4 January 2021** the Commissioner will reduce the monetary penalty by 20% to £40,000 (Forty 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 2nd day of December 2020

Andy Curry
Head of Investigations
Regulatory Supervision Service
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 48 of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice or variation 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:

GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

- a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.

- b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state: -
- a) your name and address/name and address of your representative (if any);
 - b) an address where documents may be sent or delivered to you;
 - c) the name and address of the Information Commissioner;
 - d) details of the decision to which the proceedings relate;
 - e) the result that you are seeking;
 - f) the grounds on which you rely;
 - g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
 - h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.
5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.
6. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 48 and 49 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)).