

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Tempcover Ltd

Of: Second Floor,
Admiral House,
Harlington Way,
Fleet,
Hampshire,
England, GU51 4BB

1. The Information Commissioner ("the Commissioner") has decided to issue Tempcover Ltd ("Tempcover") 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. Tempcover, whose registered office address is given above (Companies House Registration Number: 09923259) 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. Section 122(5) of the Data Protection Act 2018 ("DPA18") defines direct marketing as *"the communication (by whatever means) of advertising or marketing material which is directed to particular individuals"*. This definition also applies for the purposes of PECR (see regulation 2(2) PECR and paragraphs 430 & 432(6) to Schedule 19 of the DPA18).
6. At the material time, consent was defined by reference to the concept of consent in Regulation 2016/679 ("the GDPR"): regulation 8(2) of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019. Article 4(11) of the GDPR sets out the following definition: *"'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her"*.
7. Recital 32 of the GDPR materially states that *"When the processing has multiple purposes, consent should be given for all of them"*. Recital 42 materially provides that *"For consent to be informed, the data subject should be aware at least of the identity of the controller"*. Recital 43 materially states that *"Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case"*.
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. 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.
12. Section 55A of the DPA (as applied to PECR cases by Schedule 1 to PECR, as variously amended) 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.
14. 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.
15. PECR were enacted to protect the individual's fundamental right to privacy in the electronic communications sector. PECR were subsequently amended and strengthened. The Commissioner will interpret PECR in a way which is consistent with the Regulations' overall aim of ensuring high levels of protection for individuals' privacy rights.
16. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the DPA18: see paragraph 58(1) of Schedule 20 to the DPA18.

Background to the case

17. Mobile phone users can report the receipt of unsolicited marketing text messages to the Mobile UK's Spam Reporting Service by forwarding the message to 7726 (spelling out "SPAM"). Mobile UK is an organisation that represents the interests of mobile operators across the UK. 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.
18. Tempcover operate within the financial sector as a provider of short-term motor insurance.

19. In May 2020, from analysing the information within the MTA, the Commissioner was able to ascertain that between 1 November 2019 and 18 May 2020 there were a total of 13 complaints received from which Tempcover could be identified; of these, 12 were made via the 7726 service, and 1 was made directly to the Commissioner. The content of the complaints contained text to the following effect¹:

"Still Driving Occasionally? Get 10-25 Off Temporary Insurance & Only Pay for What You Need: <http://m0r.at/ipuT&C>: <http://m0r.at/ipv> OptOut txt PKLT to 88802"

"Plan Your Travel Under New Lockdown Driving Rules & Get Â£10-Â£25 off Temporary Insurance: <http://m0r.at/ineT&C>: <http://m0r.at/inf> OptOut: txt PKLT to 88802"

"Driving Less? Get the Cover You Need, When You Need It & Save Â£10-Â£25 on Temporary Insurance: <http://m0r.at/idPT&C>: <http://m0r.at/idQ> OptOut txt PKLT to 88802"

20. By following the links within the messages, an individual would be directed to Tempcover's website.
21. The Commissioner sent an initial investigation letter to Tempcover on 26 May 2020, outlining concerns regarding its compliance with PECR, and asking a series of questions in relation to its direct marketing text message campaigns. The Commissioner specifically sought details regarding Tempcover's practices between 26 May 2019 and 26 May 2020.

¹ This list is non-exhaustive

22. Tempcover provided a response on 11 June 2020, confirming that it uses the Calling Line Identity ("CLI"): '07860021976' to send its direct marketing text messages, although it advised that the message would appear to subscribers as being sent specifically from the named entity: 'Tempcover'.
23. It was confirmed that between 26 May 2019 and 26 May 2020 there were a total of 1,905,776 direct marketing text messages sent by Tempcover². In advising how many of those messages had been received by subscribers, Tempcover advised that its retention policy allowed it to access only the relevant data between 26 November 2019 and 26 May 2020; from this it could determine that 1,148,247 text messages were successfully received by subscribers.
24. Tempcover advised that it obtained the data which it used for its direct marketing campaigns directly from individuals who would use its website to obtain a quote or to buy temporary insurance. Tempcover advised that it provides individuals with a clear link to its privacy policy and terms & conditions which state the following:

"By submitting your information to the Tempcover Site ("Our Site") you are consenting to the processing of your information by us and our agents in accordance with this Privacy Policy.

By obtaining a quote from us, you consent to Tempcover contacting you, by email and/or SMS, with details of our new products, services and promotions. You can opt out from this at any time by contacting us on

² Tempcover advised that its "SMS marketing programme" had actually commenced in August 2019.

contactus@tempcover.com or following the 'unsubscribe/opt-out' link in your email or SMS."

25. Tempcover went on to advise the Commissioner that "[b]efore proceeding to the data capture part of the quote process, the customer must click a button which says 'AGREE AND CONTINUE' to show their acceptance in proceeding to the quote page knowing that we will process their data in accordance with our privacy policy and terms of business, which they have been provided access to".
26. Tempcover advised that it operates an internal suppression list, which is "updated in real-time".
27. Tempcover confirmed that, in relation to PECR training, any new starters which join its 'Marketing and Customer Operations & Compliance Departments' receive a PECR training pack to ensure their understanding of the regulations. In specific response to the Commissioner's request for any policies or procedures regarding Tempcover's responsibilities under PECR, it advised:

"Prior to going live with our first outbound SMS campaign in August 2019, we conducted a Legitimate Interest Assessment. We walked through the Purpose Test, Necessity Test and Balancing, before deciding whether we could rely on legitimate interest for the processing of customers contact details to send them SMS marketing communications. This assessment was conducted by our Head of Customer Operations & Compliance, who had previously spent considerable time on the ICO website researching how to conduct LIA's. The assessment was then shared with and reviewed by our Data Protection Officer (DPO) and the Marketing Department to ensure we were all in agreement with the result of the assessment; that we could

rely on the grounds of legitimate interest for processing customer contact data for SMS communications.”

28. It is apparent from Tempcover’s response and from the contents of its PECR training materials that at the time which an individual provided their details, they were not provided with a separate option to either opt-in to or opt-out of direct marketing. Rather, Tempcover used an individual’s mandatory agreement to the site’s terms and conditions / privacy policy as the basis on which to conduct its direct marketing campaign, acting under the belief that it could rely on ‘legitimate interest’.
29. As it appeared from Tempcover’s response that it would also transmit direct marketing emails in addition to text messages, on 10 July 2020 the Commissioner sent an email with further enquiries to Tempcover, specifically seeking details regarding its email marketing campaign, and further information regarding its text message campaign.
30. Tempcover responded on 23 July 2020 and explained that between 26 May 2019 and 26 May 2020 it sent a total of 29,156,023 emails, and that, of those, 28,822,172 were successfully delivered to a recipient.
31. Tempcover also provided a file containing details of the body of the direct marketing text messages and the body of the direct marketing emails which were sent between 26 May 2019 and 26 May 2020. The Commissioner is satisfied that the content of the direct marketing messages which were sent by Tempcover constitutes direct marketing within the definition of 122(5) DPA18.
32. Tempcover also confirmed an increase in the frequency of its marketing in response to the Covid-19 pandemic, specifically stating:

"We increased the frequency of SMS marketing from once per week to twice per week on the 6th April 2020. Due to the Covid:19 crisis, we saw a shift in our customer demand weighted from the weekend towards the start of the working week, this is why we decided to include an additional send on a Monday. This was a reflection of the lockdown conditions where leisure travel was minimised, and key workers moved away from public to private transport."

33. On 5 August 2020 the Commissioner sent further correspondence to Tempcover advising of concerns with Tempcover's compliance with PECR, and asking for confirmation of any steps which Tempcover may be taking to ensure future compliance with the legislation.
34. Tempcover responded on 12 August 2020 and advised of a range of measures which were currently being implemented to ensure future compliance with PECR, amongst which would be a separate button allowing individuals to select their marketing preferences at the point of consent being obtained.
35. The Commissioner has made the above findings of fact on the balance of probabilities.
36. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by Tempcover and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

37. The Commissioner finds that Tempcover contravened regulation 22 of PECR.
38. The Commissioner finds that the contravention was as follows:
39. The Commissioner finds that between 26 May 2019 and 26 May 2020 there were 1,905,776 unsolicited direct marketing text messages sent by Tempcover, of which 1,148,247 were confirmed to have been received by subscribers.
40. The Commissioner also finds that between 26 May 2019 and 26 May 2020 there were 29,156,023 unsolicited direct marketing emails sent by Tempcover, of which 28,822,172 were confirmed to have been received by subscribers.
41. Accordingly, the Commissioner finds that between 26 May 2019 and 26 May 2020 there were 29,970,419 unsolicited direct marketing messages received by subscribers.
42. The Commissioner finds that Tempcover transmitted those direct marketing messages, contrary to regulation 22 of PECR.
43. Tempcover, 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 either it held valid consent to send those messages, or that the soft opt-in applied.
44. In this instance Tempcover sent unsolicited direct marketing messages to subscribers who had entered their details on Tempcover's website with a view to obtaining a quote for insurance. Tempcover failed to provide these subscribers with an opportunity to opt-out of direct

marketing when first obtaining their details, and essentially made agreement to marketing a condition of service. For this reason, the consent to receive unsolicited direct marketing messages cannot be said to have been 'freely given'.

45. Furthermore, by agreeing to use Tempcover's service, individuals were automatically opted in to receiving both unsolicited direct marketing emails and SMS messages, without the ability to specify which, if any, of the types of communication they may be willing to receive. In this sense, the subscriber was not given an active choice, and the consent relied on cannot be said to be sufficiently 'specific'.
46. For the above reasons, Tempcover cannot therefore be said to have held valid consent.
47. In terms of whether the soft opt-in could apply, the Commissioner would observe that Tempcover appeared to have obtained the contact details for its intended recipients in the course of a sale (or negotiation for a sale) of a product/service; it did not rely on bought-in lists. Further, it appeared that Tempcover used the unsolicited direct marketing as a way of marketing only its own similar products/services. It is likely therefore that Tempcover would be able to satisfy the requirements of Regulation 22(3)(a) and 22(3)(b) PECR.
48. However, it is clear that whilst Tempcover met the criteria of Regulation 22(3)(a) and 22(3)(b) PECR, it failed to provide individuals with a simple means of refusing the use of their contact details for direct marketing at the time that the details were initially collected, and therefore Tempcover is unable to satisfy the requirements of Regulation 22(3)(c) PECR. Accordingly, it cannot rely on the soft opt-in as all three criteria are required to have been met.

49. Whilst Tempcover has previously sought to claim a reliance on 'Legitimate Interest' as justification for the transmission of its unsolicited direct marketing messages, it is the case that 'Legitimate Interest' is not a lawful basis upon which a person can rely for the purposes of PECR. As explained previously, such messages can only be sent with valid consent, or where the soft opt-in applies.
50. The Commissioner is satisfied from the evidence he has seen that Tempcover did not have the necessary valid consent for the 29,970,419 direct marketing messages received by subscribers, nor could it rely on the soft opt-in exemption.
51. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

52. The Commissioner is satisfied that the contravention identified above was serious. This is because between 26 May 2019 and 26 May 2020 a confirmed total of 29,970,419 direct marketing messages were received by subscribers, having been sent by Tempcover. These messages contained direct marketing material for which subscribers had not provided valid consent, furthermore, for the reasons explained above, the Commissioner is satisfied that Tempcover cannot rely on the soft opt-in exemption.
53. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

54. The Commissioner has considered whether the contravention identified above was deliberate. The Commissioner does not consider that Tempcover deliberately set out to contravene PECR in this instance.
55. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
 56. Firstly, he has considered whether Tempcover knew or ought reasonably to have known that there was a risk that these contraventions would occur. This is not a high bar, and he is satisfied that this condition is met, not least given that the issue of unsolicited direct marketing messages have been widely publicised by the media in recent years as being a problem.
 57. 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, electronic marketing messages to individuals if that person has specifically consented to receiving them. The guidance also provides a full explanation of the soft opt-in exemption. In addition, the Commissioner has published detailed guidance on consent under the GDPR. In case organisations remain unclear on their obligations, the Commissioner operates a telephone helpline. ICO communications about previous enforcement action where businesses have not complied with PECR are also readily available.

58. The Commissioner is further assured that Tempcover knew or ought reasonably to have known that there were risks inherent in its direct marketing activities given that during the investigation the Commissioner was provided with copies of Tempcover's own training materials which made specific reference to PECR, and the need for compliance with the legislation.
59. It is therefore reasonable to suppose that Tempcover should have been aware of its responsibilities in this area.
60. Secondly, the Commissioner has gone on to consider whether Tempcover failed to take reasonable steps to prevent the contraventions. Again, he is satisfied that this condition is met.
61. Tempcover failed to ensure that it held valid consent for the direct marketing messages which it sent, or that it met the necessary criteria to rely on the soft opt-in provisions of Regulation 22 PECR. Reasonable steps in this instance would have included providing potential customers with a simple ability to opt out of unsolicited direct marketing at the point which their details were taken.
62. There is no evidence that Tempcover sought to obtain independent legal advice, or advice from the Commissioner, prior to engaging in its direct marketing campaign, as would be reasonable to do, particularly given the gravity of the marketing campaign that it embarked upon.
63. In the circumstances, the Commissioner is satisfied that Tempcover failed to take reasonable steps to prevent the contraventions.

64. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

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

- The Commissioner finds that Tempcover would have benefitted financially from its unlawful actions.
- Tempcover's own guidance refers to the steps necessary to comply with PECR. That Tempcover is alleged within this Notice to have contravened Regulation 22 PECR would suggest that it failed to take steps to adhere to its own guidance.

66. The Commissioner has taken into account the following **mitigating feature** of this case:

- Tempcover has made changes to its practices in light of the Commissioner's investigation, and now allows subscribers the ability to opt out of unsolicited direct marketing at the point which consent is obtained.

67. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. He is also satisfied that the procedural rights under section 55B have been complied with.

68. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out his preliminary thinking. In reaching his final

view, the Commissioner has taken into account the representations made by Tempcover on this matter.

69. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
70. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.
71. The Commissioner has considered the likely impact of a monetary penalty on Tempcover. He has decided on the information that is available to him that Tempcover has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
72. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited direct 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 unsolicited direct marketing.
73. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

74. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£85,000 (eighty-five thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

75. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **9 March 2022** 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.
76. If the Commissioner receives full payment of the monetary penalty by **8 March 2022** the Commissioner will reduce the monetary penalty by 20% to **£68,000 (sixty-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.
77. 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.
78. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
79. Information about appeals is set out in Annex 1.

80. 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.

81. 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 7th day of February 2022

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 he ought to have exercised his 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: 0203 936 8963
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)).