

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Bizfella Limited

Of: Metropolitan House, Station Road, Cheadle Hulme, Cheadle, Cheshire,
England, SK8 7AZ

1. The Information Commissioner ("the Commissioner") has decided to issue Bizfella Limited ("Bizfella") 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. Bizfella, whose registered office is given above (Companies House Registration Number: 09219302) is the organisation stated in this notice to have instigated the transmission of unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
4. Regulation 22 of PECR states:

- "(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.*
- (2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.*
- (3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—*
- (a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;*
 - (b) the direct marketing is in respect of that person's similar products and services only; and*
 - (c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.*
- (4) A subscriber shall not permit his line to be used in contravention of paragraph (2)."*

5. Section 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. Consent in PECR is defined, from 29 March 2019, 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. 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 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.
15. 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

16. Bizfella is an FCA registered credit broker that trades under various names including Cash Carrot and Pixie Loans. As part of its business, Bizfella operated a number of websites including a Cash Carrot website and a Pixie Loans website.
17. Individuals can submit loan applications on the websites operated by Bizfella (including the Cash Carrot and Pixie Loans websites). These applications are then passed to Bizfella's panel of lenders to be approved or declined.
18. Bizfella came to the Commissioner's attention from monitoring complaints received via the 7726 spam text reporting service. 904 complaints had been submitted through the 7726 service and two further complaints were received by the Commissioner directly. These

complaints related to two differently worded SMS messages that referred to Cash Carrot. The text of the SMS messages was as follows:

- i. "CASH CARROT UPDATE Still want a loan {firstname}? You're OK to apply for £400+ Any credit status alright. See www.Cash-Carrot.net/a 669%RAPR opt-out.cc 1/3.

2/3 Warning: Late repayments can cause you serious money problems. For help, got to [REDACTED] Bizfella Ltd is an independent credit broker, not a lender.

3/3 Representative example/e £400 borrowed for 90 days. Total amount repayable is £561.92 in 3 monthly instalments of £187.31. Interest charged is £161.92, interest rate 161.9% (variable). Representative 669% APR"; and

- ii. "{firstname} it's [REDACTED] at Cash Carrot. You're OK to apply for MONEY TODAY. No fees, ANY credit alright. Visit www.Cash-Carrot.net/f 669%RAPR opt-out.cc 1/3

2/3 Warning: Late repayments can cause you serious money problems. For help, got to [REDACTED] Bizfella Ltd is an independent credit broker, not a lender.

3/3 Representative example/e £400 borrowed for 90 days. Total amount repayable is £561.92 in 3 monthly instalments of £187.31. Interest charged is £161.92,

interest rate 161.9% (variable). Representative 669% APR.”

19. Those SMS messages included the URL www.Cash-Carrot.net which led to a landing page that referred to a [REDACTED] and then re-directed to www.cashcarrot.co.uk. The website at www.cashcarrot.co.uk stated that cashcarrot.co.uk was a trading style of Bizfella.
20. Following initial contact by the Commissioner, Bizfella confirmed that it owned the website www.cashcarrot.co.uk and clarified that [REDACTED] [REDACTED] “provides the SMS platform we use for sending out text messages”.
21. On 15 July 2020, the Commissioner sent to Bizfella an investigation letter along with a copy of the complaints received through the spam text reporting service or received by the ICO directly. The investigation letter explained that the Commissioner had concerns about Bizfella’s compliance with PECR and requested that, within 21 days, Bizfella provide various information.
22. On 29 July 2020, Bizfella replied to the Commissioner. The further information provided included:
 - a. Bizfella took over the domain www.cashcarrot.co.uk on 14 August 2019.
 - b. In the period 15 July 2019 to 15 July 2020, 1,250,600 SMS messages were sent to 133,957 records.
 - c. Because the SMS messages were sent via a third-party SMS platform (owned by [REDACTED]), Bizfella do not have access to the delivery reports. However, the SMS platform had

informed Bizfella that, on average, 60% of the messages are delivered, such that 750,360 SMS messages would have been delivered.

- d. "All the data we use is our own, that has been captured through individuals applying on one of our websites for our service, loan brokering for HCSTC (high cost short term credit loans or payday loans). We contacted our customers via SMS as part of the brokering service they requested when applying with us, in helping them find a loan."
- e. "Text messages we send are in relation to the individual's application with us to help them obtain HCSTC Finance...All individuals who have been sent a SMS/text message promoting cashcarrot.co.uk, which is one of Bizfella's HCSTC loan brokering websites, have ticked 1st party box authorising us, as a credit broker, to contact them via SMS, email or phone in relation to their application. This is clearly stated in the statement before submitting the application and is the brokering service they have applied for."
- f. The "main consent statement" on all of the Bizfella operated websites was as follows:

"By submitting your information, you confirm that you provided accurate financial information and considered potential future income and outgoings in determining your ability to repay. Ticking this box also indicates that you have read, understand, and agree to the terms of our Privacy Policy and Terms & Conditions of Use, and authorize your information to be shared with select lending partners, credit brokers and financial savings products, and for them to

contact you by SMS, email and automated voice messaging in relation to the applications.

██████████ and ██████████ may combine, analyse and profile my information and pass their knowledge on to other organisations for the purposes of tracing, providing important information or returning assets to me. Your data may also be used for debt recovery, fraud prevention, to support the assessment of credit risk, pricing and affordable payments. If you do not want your data to be used in this way please [click here](#)."

- g. "Our contact with these individuals is part of the service we provide as a credit broker, which we attempt to find them the type of loan they have applied for...To provide our customers with the best service as a loan broker, we may contact them to apply through one of our websites again so we can process their application with our panel of lenders, as the result may be different on that occasion."
- h. "138,000 individuals were sent SMS text message over a period of 7 months. These generated 14,181 applications on cashcarrot.co.uk."
- i. The 906 complaints are from 419 individuals.
- j. Only 4 of the 419 individuals clicked on the link to opt-out in the SMS message.

- k. "This was a trial using SMS to continue helping customers with our broker service, we did not know it was making complaints and have now ceased this SMS campaign."
23. On 17 August 2020, the Commissioner wrote to Bizfella requesting further information.
24. On 3 September 2020, Bizfella replied to the Commissioner. The further information provided included:
- a. "Our data retention policy is outlined in the Data Use Policy...in that policy it says:
'Date from the first opt-in may be used for up to two years after the application's submission, to continue helping the applicant find a loan – which is what they applied for. Contact will be dependent on changes to the lender panel, lending products, accept rates, repayment terms'".
 - b. "Lending accept criteria and our lender panel changes constantly, and although someone may be declined today, they could be accepted next week or next month. If they continue to be declined, we may contact them asking if they still want help finding a loan."
 - c. "We re-contact customers to ask if they are looking for finance and wish for us to continue acting as their loan broker, by applying through us again... 310 out of the 419 individuals [who reported the SMS messages as spam] made one or more additional applications in the time period July 2019 to July 2020.

25. On 18 September 2020, the Commissioner wrote to Bizfella requesting further information.
26. On 2 October 2020, Bizfella replied to the Commissioner. The further information provided included:
 - a. "Of the 1,250,600 SMS messages sent, [REDACTED] has now confirmed that 623,752 were delivered".
 - b. "Of the 133,957 records sent an SMS, 1865 had their data collected from Cashcarrot.co.uk. The other 132,092 individuals had applied via our other credit broker websites and were contacted via the 'soft opt-in' rule – 'similar products or services'."
 - c. "Information is obtained from an individual making an application on one of our websites and agreeing to the opt-in/consent box before they submit this information to us."
 - d. "We only send direct marketing that relates to their application, where they ask us to act as their credit broker to help them find a loan."
 - e. "All data collected via our credit broker websites, which Cash Carrot is one, all contain the same opt-in boxes and consent wording, privacy policy and service."
 - f. "The wording at the point of opt-in/consent is clear...in that lenders and credit brokers will contact them in connection with the application they are submitting. If lenders and credit brokers cannot contact the individual, we cannot provide the

service they are asking for. The individual can choose not to go ahead, if they wish not to be contacted.”

27. On 20 October 2020, the Commissioner wrote to Bizfella requesting further information.
28. On 28 October 2020, Bizfella replied to the Commissioner and suggested that a meeting be arranged. That meeting took place on 13 November 2020.
29. At the 13 November 2020 meeting, Bizfella stated:
 - a. The websites used to collect the data used to SMS messages are primarily the Cash Carrot and Pixie Loans websites “but there are four or five others that may be used as well”.
 - b. SMS messages were not sent to “blanket people” but only to those who had applied for the service through the website. If Bizfella cannot contact individuals it cannot provide its services.
 - c. As well as contacting individuals who have had loan applications refused, Bizfella may also contact individuals again when their loan matures.
 - d. The consent statement relied on by Bizfella is that set out at paragraph 22(f) above and constitutes “first party consent”.
 - e. Without first agreeing to the first party consent statement, the individual could not proceed with the loan application.
 - f. The websites operated by Bizfella also contained a third party consent statement. The individual could proceed with the loan

application without agreeing to the third party consent statement.

- g. SMS messages may also be sent under the soft opt-in rule. This allowed SMS messages in relation to Cash Carrot to be sent to individuals who had applied for loans on other websites operated by Bizfella, such as Pixie Loans.

30. At the 13 November 2020 meeting it was explained to Bizfella that nothing in the main consent statement relied on by Bizfella told individuals that they would continue to receive marketing updates sent by Bizfella. Bizfella responded that individuals who apply for loans know the sector and so know that they will be contacted again.

31. In an email of 16 November 2020, Bizfella stated:

- a. Bizfella did not start sending out SMS messages until 15 November 2019.
- b. The SMS communications sent to individuals were actually 3 linked messages, the second of which referred to Bizfella Limited such that the recipient would know that Cash Carrot was part of Bizfella.

32. Bizfella also provided the Commissioner with a copy of its updated consent statement.

33. On 17 November 2020, the Commissioner provided advice in relation to the updated consent statement including that Bizfella may wish to avoid using a combination of opt-in and opt-out boxes.

34. On 19 November 2020, the Commissioner wrote to Bizfella requesting further information.

35. On 2 November 2020, Bizfella replied to the Commissioner and stated:

"Of the 133,957 records sent an SMS, 1865 (929 delivered) had their data collected from Cashcarrot.co.uk. The other 132,092 individuals (65,781 delivered) had applied via our other credit broker websites and were contacted via the 'soft opt-in' rule i.e. we sent them service messages

...

The opt-in statement stated 'you authorise you information to be shared with select lending partners, credit brokers, and financial saving products, and for them to contact you by SMS, email and automated voice messaging in relation to this application'.

There are two parts of this opt-in statement we used to confirm we had the correct consent to contact the customers:

1. It states 'credit brokers' as one of the parties with whom data will be shared. We are a credit broker and they would be contacted by a credit broker. Pixie Loans and Cash Carrot are both credit broker web sites.
2. It states they would be contacted 'in relation' to the application. The SMS 'Service' messages sent related to that application for a loan i.e. are you still wanting a loan.

Customers need to tick and opt-in to this statement, as without opt-in to this statement we can not provide our service to them.

..."

36. On 26 November 2020, the Commissioner wrote to Bizfella requesting further information.
37. On 10 December 2020, Bizfella replied to the Commissioner and stated:
- a. "We have third and first party opt-in for 1156 of the 1865 individuals [who had applied for a loan on the Cash Carrot website] (575 delivered messages). 708 individuals (354 delivered messages) only ticked the first party opt-in."
 - b. "We have third and first party opt-in for 84,458 of the 132,092 individuals [who had applied for a loan on the Pixie Loans website] (42,099 delivered messages). 47,634 individuals (23,682 delivered messages) only ticked the first party opt-in."
 - c. "Of the 419 individuals that report SPAM, we have third party opt-in for 295 (70%) of these individuals. Our opt-in statement for first and third party is clear and is not misleading."
 - d. "I have supplied the information you have requested however, the information is NOT relevant to Bizfella contacting its own customers, even though a high percentage give third party - opt-in."
38. On 13 January 2021, the Commissioner wrote to Bizfella requesting further information.
39. On 29 January 2021, Bizfella replied to the Commissioner and stated:
- a. "I do not have access to the deliverable break down by number and have assumed based on % overall third party opt-ins. I can

only give the number of individuals sent a message, as to whether they had third party opt-in – 133,957 records sent a message; 66,710 records % assumed delivered. 85,614 of the records sent a message we had third party opt-in; 42,674 records % assumed delivered.

b. There were two versions of the SMS messages that had been sent out. The text of those messages was provided and is set out at paragraph 18 above.

40. On 6 April 2021, the Commissioner wrote to Bizfella as follows:

“I understand that both of the text message scripts include “You’re OK to apply for” and then either ‘money today’ or a value of money. Are these texts sent out at generic intervals or are there any checks done that indicate that the individual will be successful in obtaining a loan if they apply when they get the text message? If there are any checks done or there is a process for determining when individuals should apply for a loan I’d be grateful if you could explain what these are.”

41. On 23 April 2021, Bizfella replied to the Commissioner stating:

“Please refer to my previous response of 3rd September 2020: As a credit broker they have applied for our service, we enquire at intervals if they wish for us to help find them finance:

- We work with lenders on a ‘real-time’ basis, which means the customer has to be present whilst their application is being submitted. To do this the individual has to visit one of our sites and make an application.

- Lending accept criteria and our lender panel changes constantly, and although someone may be declined today, they could be accepted next week or next month. If they continue to be declined, we may contact them asking if they still want help finding a loan.

- Individuals apply for loans that start from 1 month up to 5 years and we have found that if they are accepted for a loan, they often will apply for another when one is satisfied.

- We re-contact customers to ask if they are looking for finance and wish for us to continue acting as their loan broker, by applying through us again.

In addition to the above, we contact individuals if we see lenders are being more open to accepting applications and they have the minimum matching criteria, based on the information they provided in their previous applications.

No credit checks are performed, as this is against FCA regulation as we are a broker not a lender.”

42. On 27 April 2021, an end of investigation letter was sent to Bizfella confirming that the Commissioner’s investigations were complete and that consideration would now be given to whether formal enforcement action was appropriate.
43. In response to a request by the Commissioner for further information, on 9 July 2021 Bizfella stated that it no longer operated the Cash Carrot website.

44. On 26 July 2021, complaints research was conducted to establish whether further complaints had been made after the sending of the investigation letter. That research identified that there has been a further 27 complaints made via the 7726 spam text service in relation to SMS messages referring to Cash Carrot. These SMS message were received between 16 July 2020 and 14 July 2021.
45. The Commissioner has made the above findings of fact on the balance of probabilities.
46. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by Bizfella and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

47. The Commissioner finds that Bizfella contravened regulation 22 of PECR.
48. The Commissioner finds that the contravention was as follows:
49. The Commissioner finds that between 15 November 2019 and 15 July 2020 Bizfella instigated the sending of 224,550 unsolicited direct marketing SMS messages that were received by subscribers contrary to regulation 22 of PECR.
50. Bizfella is required to ensure that it is acting in compliance with the requirements of regulation 22 of PECR, and to ensure that valid consent was obtained, or that the soft opt-in requirements were met, to send those messages had been acquired.

51. For consent to be valid it is required to be "freely given", by which it follows that if consent to marketing is a condition of subscribing to a service, the organisation will have to demonstrate how the consent can be said to have been given freely.
52. Consent is also required to be "specific" as to the type of marketing communication to be received, and the organisation, or specific type of organisation, that will be sending it.
53. Consent will not be "informed" if individuals do not understand what they are consenting to. Organisations should therefore always ensure that the language used is clear, easy to understand, and not hidden away in a privacy policy or small print. Consent will not be valid if individuals are asked to agree to receive marketing from "similar organisations", "partners", "selected third parties" or other similar generic description.
54. Bizfella is an FCA registered credit broker that trades under various names including Cash Carrot and Pixie Loans. As part of its business, Bizfella operates a number of websites including a Cash Carrot website and a Pixie Loans website.
55. Individuals can submit loan applications on the Cash Carrot and Pixie Loans websites which applications are then passed to Bizfella's panel of lenders to be approved or declined.
56. Individuals made loan applications through one or more of the websites operated by Bizfella including the Cash Carrot website and the Pixie Loans website. Bizfella subsequently sent or arranged to be sent an SMS message to inform the relevant individual of the outcome of the loan application. That first text message can properly be said to be solicited. However, following the initial SMS message, Bizfella then instigated the sending of direct marketing messages to those individuals, for up to the

next two years, to encourage them to again apply for a loan through the Cash Carrot website. Such direct marketing messages could only be lawfully sent if consent had been given for the same or the soft opt-in rule was satisfied.

57. Bizfella relied on a statement (referred to as the "main consent" statement) and tick box that was included on the Cash Carrot and Pixie Loans websites at the time that the individuals applied for the initial loan as constituting consent and/or satisfying the soft opt-in rule. That statement provided:

"By submitting your information, you confirm that you provided accurate financial information and considered potential future income and outgoings in determining your ability to repay. Ticking this box also indicates that you have read, understand, and agree to the terms of our Privacy Policy and Terms & Conditions of Use, and authorize your information to be shared with select lending partners, credit brokers and financial savings products, and for them to contact you by SMS, email and automated voice messaging in relation to the applications.

██████████ and ██████████ may combine, analyse and profile my information and pass their knowledge on to other organisations for the purposes of tracing, providing important information or returning assets to me. Your data may also be used for debt recovery, fraud prevention, to support the assessment of credit risk, pricing and affordable payments. If you do not want your data to be used in this way please click here."

58. Individuals could only proceed to submit their loan application if they ticked the box signifying acceptance of the above statement.

59. The Commissioner has considered the “consents” obtained and, for the reasons explained below, is concerned that in each case there are issues as to whether the consents can be said to have been freely given, specific and informed. The Commissioner is also concerned that the soft opt-in rule was not satisfied.
60. Valid consent requires an individual to be given real choice and control. The statement on the Cash Carrot and Pixie Loans websites did not give the individuals any meaningful option but to tick the box signifying acceptance as, in the absence of so doing, the individuals could not submit their loan applications.
61. Further and in any event, the statement on the websites referred to contact “in relation to the applications”. The subsequent SMS messages sent to the individuals did not relate to the loan application that they had submitted but instead were sent to encourage those individuals to make further loan applications. Further, the statement did not sufficiently inform the individuals that they would receive marketing messages or ask them whether they wanted to receive marketing messages.
62. The soft opt-in rule requires the individual to have been given a simple means of refusing the use of his contact details. However, the statement on the websites did not give the individuals any meaningful option but to tick the box signifying acceptance as, in the absence of so doing, the individuals could not submit their loan applications. Nor was there any other simple means of refusing the use of their contact details.
63. Bizfella stated that 623,752 SMS messages were delivered to 133,957 individuals during the contravention period. Bizfella further stated that 48,342 (or 36%) of the 133,957 individuals had ticked only the “main consent” statement. 36% of the 623,752 SMS messages delivered is 224,550, which is therefore the best estimate of the volume of SMS

messages delivered to individuals who had ticked only the main consent statement. This statement was, for the reasons explained above, not sufficient to satisfy the consent or soft opt-in requirements.

64. The Commissioner is therefore satisfied from the evidence he has seen that Bizfella did not have the necessary valid consent and the soft opt-in rule was not satisfied in relation to the 224,550 direct marketing messages received by subscribers.
65. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

66. The Commissioner is satisfied that the contravention identified above was serious. This is because between 15 November 2019 -15 July 2020 (that is an 8 month period), 224,550 direct marketing messages were sent, or instigated to be sent, by Bizfella. These messages contained direct marketing material for which subscribers had not provided valid consent and in relation to which Bizfella cannot rely on the soft opt-in exemption.
67. Further, the direct marketing messages were sent to encourage individuals who had not actively requested renewed contact to submit a further loan application. Despite Bizfella not being aware of the individuals' financial circumstances, the message told the individuals they were "OK to apply for a loan today".
68. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

69. The Commissioner does not consider that Bizfella deliberately set out to contravene PECR in this instance.
70. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
 71. Firstly, he has considered whether Bizfella knew or ought reasonably to have known that there was a risk that these contraventions would occur. He is satisfied that this condition is met for the following reasons:
 72. 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. The guidance also provides a full explanation of the "soft opt-in" exemption. The Commissioner has also published detailed guidance on consent under the GDPR. In case organisations remain unclear on their obligations, the ICO operates a telephone helpline. ICO communications about previous enforcement action where businesses have not complied with PECR are also readily available.
 73. It is therefore reasonable to suppose that Bizfella should have been aware of its responsibilities in this area.

74. Secondly, the Commissioner has gone on to consider whether Bizfella failed to take reasonable steps to prevent the contraventions. Again, he is satisfied that this condition is met.
75. If Bizfella wished to engage in direct marketing by electronic mail, it could and should have ensured that its consent capture mechanism properly enabled consent to be separately given or withheld for direct marketing communications, and that the privacy information provided was specific and clear as to what sort of communications would be sent and for what purpose. That was simply not done in the present case.
76. Further, Bizfella could have sought advice either from the Commissioner or from an independent legal advisor in relation to the basis on which it proposed to send its unsolicited direct marketing but failed to do so.
77. In the circumstances, the Commissioner is satisfied that Bizfella failed to take reasonable steps to prevent the contraventions.
78. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

79. The Commissioner has taken into account the following aggravating features of this case:
 - There has been deliberate action for financial or personal gain: in that Bizfella sent out the SMS messages as part of a deliberate marketing campaign intended to increase its customer base and profit.

- Advice or guidance has been ignored or not acted upon: in that the Commissioner has published detailed guidance for those carrying out direct marketing explaining their legal obligations under PECR and yet that guidance has not been acted upon by Bizfella.
80. The Commissioner did not consider that there were any mitigating factors in this case.
81. 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.
82. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out his preliminary thinking and invited Bizfella to make representations in respect of this matter. In reaching his final view, the Commissioner has taken into account the representations made by Bizfella on this matter.
83. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
84. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.
85. The Commissioner has considered the likely impact of a monetary penalty on Bizfella. He has decided on the information that is available to him that a penalty remains the appropriate course of action in the circumstances of this case.

86. 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 direct marketing, or where the soft opt-in requirements can be met.
87. The Commissioner has also had regard to the factors set out in s108(2)(b) of the Deregulation Act 2015 and to the Regulatory Action Policy.

The amount of the penalty

88. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£30,000 (thirty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

89. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **6 May 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.

90. If the Commissioner receives full payment of the monetary penalty by **5 May 2022** the Commissioner will reduce the monetary penalty by 20% to **£24000 (twenty four thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
91. 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.
92. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
93. Information about appeals is set out in Annex 1.
94. 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.
95. 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 6 April 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)).