

- (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. Mobile 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 in the UK. The

Commissioner is provided with access to the data on complaints made to the 7726 service and this data is used to identify organisations in breach of PECR.

17. FIL operate within the financial sector providing advice and services to businesses and individuals that are facing financial and operational problems. FIL have three directors: Matthew Andrew Kay, Christopher Kenneth Parry, and Daniel Taylor.
18. FIL first came to the attention of the Commissioner through analysis of 7726 data. The following is an example of a message that was forwarded to 7726.

“Hi Gavin Unfortunately your loan application has been declined. However, the good news is that you do appear to qualify for a debt relief plan that can consolidate all of your debts into one manageable payment and even write off up to 85%! Please click the link below to find out how much you can write off: <https://tinyurl.com/4jcyjep65All> Advice is free and Confidential. Kind Regards Fortis Debt Advice Or opt-out at vsms.co/GB” (Sic)
19. In response to the complaints identified, the Commissioner commenced an investigation against FIL, with a view to determining whether the SMS marketing conducted by FIL was compliant with the Privacy and Electronic Communication (EC Directive) Regulations 2003 (PECR).
20. Initial investigations included gathering information from FIL’s website at www.fortisinsolvency.co.uk. On 26 July 2021 screenshots were taken of FIL’s About Us page, Home Page and Privacy Policy.

21. As the complaints against FIL were generated over a 12 month period, this investigation considered the period 26 July 2020 to 26 July 2021 to gather a complete picture of FIL's SMS marketing practices.
22. This investigation found that between 26 July 2020 to 26 July 2021, 810 complaints had been recorded on the 7726 system. Over this same period no complaints were recorded on the ICO's Online Reporting Tool system. All messages sent during this period included a link to FIL's website and instructions on how the individual could opt-out of further marketing.
23. On 18 August 2021, an initial investigation letter was sent to FIL which outlined the Commissioner's concern's regarding FIL's compliance with regulation 22 of PECR. This letter also requested that FIL provide information in relation to FIL's direct marketing practices and evidence of consent relied upon to market to individuals who had submitted a complaint.
24. On 13 September 2021, FIL provided its response which stated that during the period between July 2020 and July 2021:
 - FIL sent a total of 410,235 SMS to credit broker leads, of which 381,871 were delivered.
 - FIL sent a total of 223,888 SMS to non-credit broker leads, of which 215,482 were delivered (NB FIL stated that this figure includes SMS to clients actively starting their Individual Voluntary Arrangement ('IVA') journey and those that had an approved IVA).

25. On 8 March 2022, the Commissioner wrote to FIL requesting further information regarding the volume of non-credit broker leads, specifically confirmation of the total number of SMS that were sent and successfully delivered to leads provided by [REDACTED] ([REDACTED]), a third party who provided leads to FIL. On 16 March 2022, FIL informed the ICO that of the total SMS that were sent to non-credit broker leads, 148,119 had been sent to leads provided by [REDACTED], of these, 145,610 had been successfully delivered.
26. FIL went on to confirm that the data used to send marketing messages was made up of data captured from a number of sources, data captured directly from customers is done so when a customer visits one of FIL's websites:
- **www.fortisinsolvency.co.uk**: this was one of two main websites used by FIL to capture personal data from individuals. This website has a dedicated page for the personal services that FIL provides which also includes a description of IVAs. FIL's contact telephone number and a link to request a call back is also provided on this page. No opt-in/opt-out to marketing is provided on this page however any contact with FIL would have to be initiated by the individual and therefore any further contact would be viewed as solicited communications under PECR.
 - **www.fortisdebtadvice.co.uk**: this was the second of two main websites operated by FIL to capture personal data. This website's main page is dedicated to debt solutions and contains reviews and testimonies from previous customers who have used FIL's services. A link on this page titled 'Find My Solution' takes the customer through a series of questions, requesting information about the individual's personal circumstances. At the end of this

process the individual is presented with a notification which states "Great News! We can help..." the individual is then asked to enter their contact details to see their results. Below the submit button the following statement is provided:

"By submitting this form and based on your requirements you agree we can contact you by phone, email and SMS and to our Privacy Policy."

No opt-in/opt-out to marketing is provided on this page, however, any contact with FIL would have to be initiated by the customer and therefore any further contact would be viewed as solicited.

- **www.debt-made-simple.co.uk:** this offers IVAs and Debt Management Plans ('DMP') with one of FIL's trusted partners. After selecting the option to "Speak To Us Now" the individual is then taken to a page which contains a chatbot style interaction which requests further information about the individual's personal circumstances. Before the individual enters their details, they are asked to accept the website's privacy policy. No opt-in/opt-out to marketing is provided on this page however any contact with FIL would have to be initiated by the customer and therefore any further contact would be viewed as solicited. However, marketing communications sent by third party organisations to individuals who have submitted their details on this website would be viewed as non-compliant due to the failure to obtain consent.
- **www.bigcleverdad.co.uk:** Big Clever Dad is a trading style of FIL which again offers IVAs and DMPs with one of FIL's trusted partners. After selecting the option to 'Get A Free Debt

Assessment' the individual is again taken to a page containing a chatbot style interaction which requests further information about the individual's personal circumstances. Before the individual enters their details, they are asked to agree to the website's standard terms and privacy policy. No opt-in/opt-out to marketing is provided on this page however any contact with FIL would have to be initiated by the customer and therefore any further contact would be viewed as solicited.

27. FIL explained that when data was obtained directly from customers on their website, individuals were asked to complete a data form. FIL states that this form specifically asked how the individual would like to be contacted i.e., SMS, Email, Telephone. FIL stated that prior to clicking submit the individual was asked whether they had read and agreed to FIL's Terms and Conditions and Privacy Policy.
28. After reviewing the websites owned and operated by FIL, the Commissioner found that individuals entered their details into these websites to obtain either a quote or further information regarding ways to deal with their debt. As the individuals were entering their details and actively requesting this information, any communications made to these individuals regarding debt management would be viewed as solicited marketing and therefore fall outside of PECR. As such, for the purposes of this investigation the Commissioner was not concerned with the communications sent by FIL to those individuals who have entered their details directly into websites owned and operated by FIL.
29. Further information provided by FIL indicated that data is also obtained from three third party websites:

- [REDACTED]
- [REDACTED]
- [REDACTED]

30. These third-party websites are owned and operated by two organisations, [REDACTED] and [REDACTED]. On 29 September 2021, a letter was sent to FIL requesting a breakdown of SMS volumes dependent on third party suppliers. FIL responded on 12 October 2021 stating that between 26 July 2020 and 26 July 2021, 410,235 SMS were sent using leads supplied by [REDACTED]. During this same period 148,119 SMS had been sent to leads supplied by [REDACTED].
31. FIL broke down these complaints further to indicate where the source of the complainant's data had been obtained. Of these complaints, 13 had been generated from data obtained from FIL's own websites, 15 complaints had been generated from data obtained from [REDACTED] [REDACTED] and 795 complaints generated from data obtained from [REDACTED]
32. In their 13 September 2021 correspondence, FIL claimed:
- "Fortis contracts with third parties who collect specific consent to allow their customers details to be passed on to us. Fortis implements a Data Sharing Agreement and a separate (or sometimes combined) commercial contract. We ensure we carry out due diligence on all third parties who provide customer data to Fortis for processing".*

33. To evidence this consent capture, FIL provided the Commissioner with walkthroughs of the data collection process alongside privacy policies for each of the following organisations: [REDACTED]

[REDACTED] FIL breaks these organisations down into Credit Brokers and Non-Credit brokers, with [REDACTED] being identified as the former whilst [REDACTED] the latter.

34. From the information provided in the walkthroughs for [REDACTED] [REDACTED] the individual inputs their information into these websites to obtain either a loan or further information on how to write off their current debt. However, throughout this process of data collection the messaging appeared to indicate that any further interaction will be with the owner of the website. The only example provided which indicates that these services will be provided by third-party organisations is the last paragraph on [REDACTED] online form which states that:

"One of our debt relief partners will give you a super quick chat about your circumstances, and will then offer the best solutions available to you".

35. However, this information is only presented to the individual after they have submitted their contact details and completed the online form. Furthermore, all three websites stated that this information would be provided via telephone, no mention is made of communications being made via SMS.

36. As such, the Commissioner is satisfied that from the information provided by FIL, at no point during the data collection process, which occurred on [REDACTED] and [REDACTED] [REDACTED] websites, was there an opportunity to opt in or out of receiving marketing.
37. Although the walkthroughs provided by FIL at the beginning of this investigation evidenced screenshots of [REDACTED] [REDACTED] privacy policy without FIL listed as trusted third party, this now appears to have been corrected in the current version of the policy. However, [REDACTED] privacy policy remains unchanged and does not currently list FIL as a third party.
38. As such, the Commissioner is of the opinion that this indicates that even if valid consent had been obtained by these organisations, FIL would still have failed to obtain valid indirect consent to market to these individuals due to not being listed as a third-party organisation, therefore making it improbable that a customer would anticipate their details being passed to FIL.
39. FIL refuted the sending of marketing messages and maintained that the messages sent were solicited by the individual and would therefore not fall under PECR. However, the Commissioner's investigation found that the individuals entering their details into third party websites were not sufficiently informed that by doing so they were requesting solicited marketing from FIL. As such these messages would be viewed as unsolicited marketing messages, therefore falling under the rules that govern PECR specifically Regulation 22.
40. The Commissioner has made the above findings of fact on the balance of probabilities.

41. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by FIL and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

42. The Commissioner finds that FIL contravened regulation 22 of PECR.
43. The Commissioner finds that the contravention was as follows:
44. The Commissioner finds that between 26 July 2020 and 26 July 2021 there were 558,354 direct marketing SMS messages sent with 527,481 received by subscribers. The Commissioner finds that FIL transmitted those direct marketing messages, contrary to regulation 22 of PECR.
45. FIL, 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.
46. 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.
47. 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.

48. 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.
49. In this instance the Commissioner is satisfied that the websites owned and operated by ██████████ failed to obtain appropriate consent for third party marketing.
50. Consequently, the Commissioner is therefore satisfied from the evidence he has seen that FIL did not have the necessary valid consent for the 527,481 direct marketing messages received by subscribers.
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 July 2020 and 26 July 2021, a confirmed total of 558,354 direct marketing messages were sent by FIL of which 527,481 were delivered. These messages contained direct marketing material for which subscribers had not provided valid consent, furthermore the Commissioner is satisfied that FIL cannot rely on the soft opt-in exemption.
53. Additionally, the contravention has been further compounded by the fact that the individuals FIL is marketing to, as most of the services

appear directed to individuals who are in debt, are likely to contain a high number of financially vulnerable individuals. By directing marketing to these individuals, it could signify the potential profiteering from those vulnerable individuals.

54. Further, the volume of complaints to the 7726 SPAM Reporting Service (810) is a strong indicator that the actions of FIL created some degree of nuisance which caused certain individuals to submit a complaint.
55. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

56. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that FIL's actions which constituted that contravention were deliberate actions (even if FIL did not actually intend thereby to contravene PECR).
57. The Commissioner does not consider that FIL deliberately set out to contravene PECR in this instance.
58. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
 59. Firstly, he has considered whether FIL 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, given that FIL were aware of PECR and had been compliant to a certain level but had not

fully executed the details in order to operate within the law. The organisation clearly identified itself in their SMS messaging.

60. 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.
61. It is therefore reasonable to suppose that FIL should have been aware of its responsibilities in this area.
62. Secondly, the Commissioner has gone on to consider whether FIL failed to take reasonable steps to prevent the contraventions. Again, he is satisfied that this condition is met.
63. The Commissioner produces clear guidance via its website on the rules of direct marketing. In addition, the Commissioner operates a helpline should organisations require further clarification or assistance with specific enquiries. The Commissioner has also published details of penalties issued for breaches of PECR for several years. The Commissioner's investigations found that FIL's policies showed an

awareness of PECR. As such, it would have been reasonable to expect FIL to make clear steps to comply with the relevant regulation.

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

The Commissioner's decision to issue a monetary penalty

66. The Commissioner has taken into account the following aggravating feature of this case:
 - The Commissioner's investigation has found that since the commencement of the investigation into FIL there have been 8,353 complaints submitted to the 7726 reporting service relating to direct marketing SMS sent by FIL. These complaints continued after 18 August 2021 when the Commissioner initially notified FIL of its investigation. However, the Commissioner has been only able to confirm that 810 complaints definitely fell into the scope of the contravention.
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 FIL 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 FIL. In doing so, the Commissioner has given careful consideration to the representations made by FIL in response to the Notice of Intent. However, the Commissioner has decided that a penalty nevertheless remains the appropriate course of action in the circumstances of this case.
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 direct marketing.
73. In making his decision, the Commissioner has also had regard to the factors set out in s108(2)(b) of the Deregulation Act 2015; including: the nature and level of risks associated with non-compliance, including the risks to economic growth; the steps taken by the business to

achieve compliance and reasons for its failure; the willingness and ability of the business to address non-compliance; the likely impact of the proposed intervention on the business, and the likely impact of the proposed intervention on the wider business community, both in terms of deterring non-compliance and economic benefits to legitimate businesses.

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

The amount of the penalty

75. 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

76. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **27 July 2023** 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.
77. If the Commissioner receives full payment of the monetary penalty by **26 July 2023** the Commissioner will reduce the monetary penalty by 20% to **£24,000 (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.

78. 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.
79. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
80. Information about appeals is set out in Annex 1.
81. 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.
82. 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 27th day of June 2023

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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)).