

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: UKMS Money Solutions Limited

Of: 201-204 Murdoch Chambers, 153a Corporation Street, Birmingham,
West Midlands, B4 6PH

1. The Information Commissioner ("Commissioner") has decided to issue UKMS Money Solutions Limited ("UKMS") 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") by UKMS.
2. This notice explains the Commissioner's decision.

Legal framework

3. UKMS, whose registered office is given above (Companies House registration number: 07365127), is the person 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 11(3) of the DPA defines "direct marketing" as "the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals". This definition also applies for the purposes of PECR (see regulation 2(2)).
6. "Electronic mail" is defined in regulation 2 (1) 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".
7. Section 55A of the DPA (as amended by the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2011 and the Privacy and Electronic Communications (Amendment) Regulations 2015) states:
- "(1) The Commissioner may serve a person with a monetary penalty if the Commissioner is satisfied that –
- (a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person,
 - (b) subsection (2) or (3) applies.
- (2) This subsection applies if the contravention was deliberate.
- (3) This subsection applies if the person –
- (a) knew or ought to have known that there was a risk that the contravention would occur,

(b) failed to take reasonable steps to prevent the contravention.”

8. 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.
9. PECR implements European legislation (Directive 2002/58/EC) aimed at the protection of the individual's fundamental right to privacy in the electronic communications sector. PECR was amended for the purpose of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches PECR so as to give effect to the Directives.

Background to the case

10. UKMS offers a service to people looking to claim compensation for mis-sold Payment Protection Insurance (“PPI”).
11. Mobile phone users can report the receipt of unsolicited marketing text messages to the GSMA's Spam Reporting Service by forwarding the message to 7726 (spelling out “SPAM”). The GSMA is an organisation that represents the interests of mobile operators worldwide. The Commissioner is provided with access to the data on complaints made to the 7726 service.
12. Between 6 April 2015 and 10 June 2015, 1405 complaints were made to the 7726 service about the receipt of unsolicited direct marketing

text messages sent by UKMS. In the same period 37 complaints were made direct to the Commissioner.

13. Attached at Annex 2 is a spreadsheet detailing the 1405 complaints made by individual subscribers to the 7726 service. Attached at Annex 3 is a spreadsheet detailing the 37 complaints made direct to the Commissioner.
14. On 11 June 2015 the Commissioner wrote to UKMS, providing copies of the spreadsheets containing details of the complaints made and asking a number of questions about its compliance with PECR. UKMS was warned that the Commissioner could issue civil monetary penalties up to £500,000 for PECR breaches.
15. UKMS replied on 6 July 2015 explaining that it purchased the data used to send the text messages from third party suppliers. UKMS stated that text messages were only sent to individuals who had opted-in to receive them.
16. On 13 July 2015 the Commissioner wrote to UKMS explaining that it was the responsibility of the person sending direct marketing text messages to ensure compliance with PECR irrespective of any assurances that may have been given by third party suppliers. The Commissioner also requested UKMS to provide evidence of the consent it relied on in respect of the 1442 individuals who had made complaints between 6 April 2015 and 10 June 2015.
17. UKMS subsequently informed the Commissioner that the consent wording relied on by its third party data providers was as follows:
"To receive offers, discounts and information about our competitions, promotions, updates and products either by sms, telephone or direct mail and including location based promotions, together with products

or services offered jointly with or on behalf of other organisations, please tick this box to opt in your contact information and confirm that you are age 18 years and over.”

18. UKMS also confirmed that it had sent a total of 1,320,000 direct marketing text messages between 6 April 2015 and 10 June 2015.
19. On 27 August 2015 the Commissioner wrote to UKMS to explain that the consent wording relied upon was not sufficient to amount to consent for the purposes of regulation 22 of PECR.
20. The Commissioner has made the above findings of fact on the balance of probabilities.
21. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by UKMS and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

22. The Commissioner finds that UKMS has contravened regulation 22 of PECR.
23. The Commissioner finds that the contravention was as follows:
24. Between 6 April 2015 and 10 June 2015, UKMS used a public telecommunications service for the purposes of transmitting 1,320,000 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

25. The Commissioner is satisfied that UKMS was responsible for this contravention.
26. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

27. The Commissioner is satisfied that the contravention identified above was serious. This is because UKMS sent a total of 1,320,000 direct marketing text messages to subscribers without their consent resulting in 1442 complaints being made.
28. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

29. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that UKMS's actions which constituted that contravention were deliberate actions (even if UKMS did not actually intend thereby to contravene PECR).
30. The Commissioner considers that in this case UKMS did not deliberately contravene regulation 22 of PECR in that sense.
31. The Commissioner has gone on to consider whether the contraventions identified above were negligent. First, he has considered whether UKMS 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 UKMS relied heavily on direct marketing due to the nature of its business, and the fact that the issue of unsolicited text messages was widely publicised by the media as being a problem. It is therefore reasonable to suppose that they should have been aware of their responsibilities in this area.

32. The Commissioner has published detailed guidance for those carrying out direct marketing explaining their legal obligations under PECR. This guidance 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 marketing texts to individuals if that person has specifically consented to receiving them.
33. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

34. 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 section 55A(3A) and the procedural rights under section 55B have been complied with.
35. The latter has included the issuing of a Notice of Intent dated 16 October 2015, in which the Commissioner set out his preliminary thinking. In reaching his final view, the Commissioner has taken into account the representations made in response to that Notice of Intent, as well as those made in other correspondence from UKMS.

36. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
37. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty. He has taken into account UKMS's representations made in response to the Notice of Intent and in other correspondence on this matter.
38. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited marketing texts 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 texting those who consent to receive marketing.
39. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

40. The Commissioner has taken into account the following **mitigating features** of this case:
- UKMS fully co-operated with the Commissioner's investigation.
 - There is a potential for damage to UKMS's reputation which may affect future business.

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

- UKMS may obtain a commercial advantage over its competitors by generating leads from unlawful marketing practices.

42. The Commissioner has considered the likely impact of a monetary penalty on UKMS. He has decided on the information that is available to him, that UKMS has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.

43. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£80,000 (eighty thousand pounds)**.

Conclusion

44. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by 18 December 2015 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.

45. If the Commissioner receives full payment of the monetary penalty by 17 December 2015 the Commissioner will reduce the monetary penalty by 20% to **£64,000 (sixty 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.

46. 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.
47. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
48. Information about appeals is set out in Annex 1.
49. 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.
50. 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 17th day of November 2015

Signed

Stephen Eckersley
Head of Enforcement
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice or variation notice has been served a right of appeal to the (First-tier Tribunal) General Regulatory Chamber (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:

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

 - a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.
 - b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state: -

- a) your name and address/name and address of your representative (if any);
 - b) an address where documents may be sent or delivered to you;
 - c) the name and address of the Information Commissioner;
 - d) details of the decision to which the proceedings relate;
 - e) the result that you are seeking;
 - f) the grounds on which you rely;
- d) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
 - e) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.
5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.
 6. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).