

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Xerpla Limited

Of: Kemp House, 152 City Road, London, EC1V 2NX

1. The Information Commissioner ("Commissioner") has decided to issue Xerpla Limited ("Xerpla") 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. Xerpla, whose registered office is given above (Companies House registration number: 08425773), 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 (EC Directive) (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, and

(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."

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. Xerpla offers design, advertising and marketing services.
11. Between 6 April 2015 and 20 January 2017 Xerpla transmitted 1,257,580 unsolicited direct marketing emails, promoting the products and services of third parties.
12. Those emails consisted of marketing material from a variety of organisations including providers of dog food, pet products, wine, motoring services, magazines, financial services, competitions, insurance, and boilers.
13. The emails were sent to individuals who had subscribed to two websites operated by Xerpla, www.yousave.co and www.headsyouwin.co.uk.

14. When subscribing to the YouSave website individuals were informed as follows:

"By submitting your details, you consent to receive our email newsletters and offers from and on behalf of our offer partners and from other similar third party online discount / deal providers, as well as to our processing of your information as outlined within our Privacy & Cookie Policy and Terms & Conditions. By submitting your details you confirm you have read, understood and consent to these in full."

15. The Privacy Policy stated:

"We will use this information in the following ways:

- to provide you with information that you have requested eg email newsletters and offers;
- to provide you with the latest online discounts / deals available covering travel, home improvements, automotive, finance, retail, insurance, charities, competitions, utilities, health, claims, storage and publishing."

16. When subscribing to the HeadsYouWin website individuals were informed as follows:

"By submitting your details, you consent to receive our email newsletters and offers from and on behalf of our offer partners and from other similar third party online competition deal providers, as well as to our processing of your information as outlined within our Privacy & Cookie Policy and Terms & Conditions. By submitting your details you confirm you have read, understood and consent to these in full."

17. The Privacy Policy stated:

“We will use this information in the following ways:

- to provide you with information that you have requested eg email newsletters and offers;
- to provide you with the latest online competition deals available from competition providers.”

18. In 2016 the Commissioner received 14 complaints about the receipt of unsolicited direct marketing emails from YouSave and HeadsYouWin.

19. The Commissioner has made the above findings of fact on the balance of probabilities.

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

The contravention

21. The Commissioner finds that Xerpla has contravened regulation 22 of PECR. The Commissioner finds that the contravention was as follows.

22. Between 6 April 2015 and 20 January 2017, Xerpla used a public telecommunications service for the purposes of transmitting 1,257,580 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

23. Organisations cannot generally send marketing emails unless the recipient has notified the sender that they consent to such emails being sent by, or at the instigation of, that sender.
24. Consent must be freely given, specific and informed, and involve a positive indication signifying the individual's agreement.
25. 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. Further, consent will not be valid where an individual is presented with a long, seemingly exhaustive list of general categories of organisations.
26. The Commissioner is satisfied that the consent relied on by Xerpla was not sufficiently informed and therefore did not amount to valid consent for the purposes of regulation 22 PECR.
27. The Commissioner is satisfied that Xerpla was responsible for this contravention.
28. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

29. The Commissioner is satisfied that the contravention identified above was serious. This is because Xerpla sent 1,257,580 direct marketing emails to subscribers without their consent.

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

Deliberate or negligent contraventions

31. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that the Xerpla's actions which constituted that contravention were deliberate actions (even if Xerpla did not actually intend thereby to contravene PECR).
32. The Commissioner considers that in this case Xerpla did not deliberately contravene regulation 22 of PECR.
33. The Commissioner went on to consider whether the contravention identified above was negligent. First, she has considered whether Xerpla knew or ought reasonably to have known that there was a risk that these contraventions would occur. She is satisfied that this condition is met, given that the issue of unsolicited direct marketing by means of electronic mail has been widely publicised by the media as being a problem.
34. Furthermore, 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.

35. It is therefore reasonable to suppose that Xerpla knew or ought reasonably to have known that there was a risk that these contraventions would occur.
36. Second, the Commissioner considered whether Xerpla failed to take reasonable steps to prevent the contraventions.
37. Reasonable steps in these circumstances could have included seeking appropriate guidance on the rules in relation to electronic direct marketing and ensuring that the consent it sought to rely on was valid.
38. In this case the Commissioner is satisfied that Xerpla failed to take reasonable steps to prevent the contravention.
39. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

40. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. She is also satisfied that section 55A (3A) and the procedural rights under section 55B have been complied with.
41. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. There have been no representations made by Xerpla in response on this matter.
42. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

43. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
44. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited direct marketing emails 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 only send direct marketing emails those who have consented to receive them.
45. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

46. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£50,000 (fifty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

47. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **6 November 2017** 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.

48. If the Commissioner receives full payment of the monetary penalty by **3 November 2017** the Commissioner will reduce the monetary penalty by 20% to **£40,000 (forty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
49. 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.
50. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
51. Information about appeals is set out in Annex 1.
52. 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.

53. 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 4th day of October 2017

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 (Information Rights) (the 'Tribunal') against the notice.
2. If you decide to appeal and if the Tribunal considers:-
 - a) that the notice against which the appeal is brought is not in accordance with the law; or
 - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

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

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

- b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.

4. The notice of appeal should state:-

- a) your name and address/name and address of your representative (if any);
- b) an address where documents may be sent or delivered to you;
- c) the name and address of the Information Commissioner;
- d) details of the decision to which the proceedings relate;
- e) the result that you are seeking;
- f) the grounds on which you rely;
- g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
- h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.

5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.

6. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).