

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Telegraph Media Group Ltd

Of: 111 Buckingham Palace Road, London SW1W 0DT

1. The Information Commissioner ("Commissioner") is minded to issue Telegraph Media Group Ltd with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is being issued because of a serious contravention of Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the Telegraph Media Group Ltd.
2. This notice explains the Commissioner's decision.

Legal framework

3. This notice is issued by virtue of Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR") as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2004 and by the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2011 ("PECR 2011").
4. PECR came into force on 11 December 2003 and revoked the Telecommunications (Data Protection and Privacy) Regulations 1999.

PECR adopted Part V entitled, "Enforcement", and Schedules 6 and 9 of the DPA. By virtue of Regulation 31(2) of PECR the Commissioner was made responsible for the enforcement functions under PECR.

5. The Telegraph, whose registered office is given above (Companies House registration number: 00451593), 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(2) of PECR.

6. Regulation 22 of PECR provides that:

"(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)."

7. 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)). Direct marketing includes promoting particular views or campaigns such as those of a political party.
8. The term "soft opt-in" is used in this notice to describe the rule set out in Regulation 22(3) of PECR. In essence, an organization may be able to email its existing customers even if they haven't specifically consented to electronic mail. However, the soft opt-in rule does not apply to non-commercial promotions such as election campaigning.
9. Under section 55A (1) of the DPA (as amended by PECR 2011 and the Privacy and Electronic Communications (Amendment) Regulations 2015) the Commissioner may serve a person with a monetary penalty notice 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.

10. 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.
11. 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 were amended for the purpose of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches the PECR regulations so as to give effect to the Directive.

Background to the case

12. The Telegraph Media Group Ltd ("Telegraph") is a multi-media news company that publishes daily and weekly publications in both print and digital versions.

13. The Telegraph carries out transactions with its readers in relation to various products and services and collects their email addresses at the same time. The data is held on the Telegraph's reader database.
14. This includes readers who subscribe to the newspaper; make a purchase or who respond to a product offer; sign up to receive editorial content or newsletters; sign up for paid services; enter competitions and register for Telegraph jobs.
15. A reader can "opt-out" of receiving marketing communications by email when they provide their transaction details. Readers may also provide or withhold their consent for different levels of marketing communications by ticking an "opt-out" box when subscribing to other online or email services.
16. The Telegraph sends general business communications and specific marketing communications to its readers by email. For example, changes to the subscription price or a renewal notice; newsletters; commerce; dating; puzzles; fantasy games; advertising and promotions.
17. The Telegraph has a separate "editorial content" mailing list which is subscribed to by readers who want this specific content ([REDACTED] of whom had not "opted-out" of receiving marketing communications by email).
18. The Telegraph uses a "marketing permission flag" against each reader to manage and regulate communications with that person. Any emails are sent with a clear invitation to a reader to unsubscribe from a particular service or from all email communications.
19. On 7 May 2015, the Telegraph's editorial team planned to send the usual "morning briefing" editorial bulletin to its readers who had

subscribed to receive "editorial content" emails. The email was to be linked to the lead story of the day, namely the general election.

20. The Telegraph's data team received a last minute instruction from the editorial team that a letter from the editor would be added to the email. The letter "urged" its readers to vote for the Conservative party ("letter").
21. The data team did not have time to properly consider the tone and nature of the communication that had changed from being an editorial communication to a marketing communication and that the marketing permission criteria should be applied to the email.
22. In the circumstances, the Telegraph's editorial team sent [REDACTED] emails to readers on the "editorial content" mailing list.
23. [REDACTED] of those readers had "opted-out" of receiving marketing communications from the Telegraph.
24. [REDACTED] of those readers had not "opted-out" of receiving marketing communications from the Telegraph and the soft opt-in rule would normally apply (See Regulation 22(3) of PECR).
25. However, the soft opt-in rule does not apply to non-commercial promotions such as charity fundraising and political campaigning. The letter was promoting the Conservative Party's election campaign.
26. The [REDACTED] readers on the "editorial content" mailing list had not provided the Telegraph with specific consent to receive communications by email promoting an election campaign.

27. The Commissioner has made the above findings of fact on the balance of probabilities.
28. The Commissioner has considered whether those facts constitute a contravention of Regulation 22(2) of PECR by the Telegraph and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

29. The Commissioner finds that the Telegraph contravened the following provisions of PECR:

The Telegraph has contravened Regulation 22(2) of PECR.

30. The Commissioner finds that the contravention was as follows:

On 7 May 2015, the Telegraph used a public telecommunications service for the purposes of transmitting [REDACTED] unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to Regulation 22(2) of PECR.

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

Seriousness of the contravention

33. The Commissioner is satisfied that the contravention identified above was serious. This is because of the scale of the contravention.
34. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

35. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that the Telegraph's actions which constituted that contravention were deliberate actions (even if the Telegraph did not actually intend thereby to contravene PECR).
36. The Commissioner considers that in this case the Telegraph did not deliberately contravene Regulation 22(2) of PECR in that sense.
37. The Commissioner has gone on to consider whether the contravention identified above was negligent. First, he has considered whether the Telegraph knew or ought reasonably to have known that there was a risk that this contravention would occur. He is satisfied that this condition is met, given that the Telegraph sends marketing communications to its readers by email on a regular basis. It is therefore reasonable to suppose that the Telegraph should have been aware of its responsibilities in this area.
38. The Commissioner has also published detailed guidance for companies carrying out direct marketing explaining their legal requirements 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. Specifically, it states that organisations

must not send electronic mail to individuals unless they have specifically consented to electronic mail or the soft opt-in rule applies.

39. Second, the Commissioner has considered whether the Telegraph failed to take reasonable steps to prevent the contravention. Again, he is satisfied that this condition is met. Reasonable steps in these circumstances would have included obtaining specific consent from readers on the "editorial content" mailing list to receive communications by email promoting an election campaign.
40. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

41. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) and 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.
42. The latter has included the issuing of a Notice of Intent dated 20 October 2015, in which the Commissioner set out his preliminary thinking.
43. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
44. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.

45. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. 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. This is an opportunity to reinforce the need for businesses to ensure that they are only transmitting emails to individual subscribers for the purposes of direct marketing in compliance with Regulation 22 of PECR.
46. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

47. The Commissioner has taken into account the following **mitigating features** of this case:
- The contravention was unprecedented.
 - The contravention was unlikely to cause substantial damage or substantial distress to the Telegraph's readers.
 - The Telegraph has taken substantial remedial action.
 - The Telegraph fully co-operated with the Commissioner's office.
 - There is potential for significant damage to the Telegraph's reputation as a result of this contravention which may affect future business.

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

- The Telegraph and the ICO received a total of 17 complaints.

49. The Commissioner has considered the likely impact of a monetary penalty on the Telegraph. He has decided that the Telegraph has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.

50. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£30,000 (thirty thousand pounds)**.

Conclusion

51. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **15 January 2016** 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.

52. If the Commissioner receives full payment of the monetary penalty by **14 January 2016** 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.

53. 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.
54. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
55. Information about appeals is set out in Annex 1.
56. 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.
57. 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 15th day of December 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)).

