

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT 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 an enforcement notice under section 40 of the Data Protection Act 1998 ("DPA"). The notice is being issued because of 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 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 any advertising 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' for PECR purposes is now 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. The DPA contains enforcement provisions at Part V which are exercisable by the Commissioner. Those provisions are modified and extended for the purposes of PECR by Schedule 1 PECR.
13. Section 40(1)(a) of the DPA (as extended and modified by PECR) provides that if the Commissioner is satisfied that a person has contravened or is contravening any of the requirements of the Regulations, he may serve him with an Enforcement Notice requiring him to take within such time as may be specified in the Notice, or to refrain from taking after such time as may be so specified, such steps as are so specified.
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.

The contravention

16. The Commissioner finds that Bizfella contravened regulation 22 PECR.
17. The Commissioner finds that the contravention was as follows:
18. The Commissioner finds that between 15 November 2019 to 15 July 2020 there transmitted 224,550 direct marketing SMS messages received by subscribers contrary to regulation 22 of PECR.
19. 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 has been acquired.
20. 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.
21. 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.
22. 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.

23. 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.
24. Individuals can submit loan applications on the websites operated by Bizfella (including the Cash Carrot and Pixie Loans websites) which applications are then passed to Bizfella's panel of lenders to be approved or declined.
25. 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.
26. Bizfella relied on a 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](#)."

27. Individuals could only proceed to submit their loan application if they ticked the box signifying acceptance of the above statement.
28. 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.
29. 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.

30. 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.
31. 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.
32. 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.
33. The Commissioner has considered, as he is required to do under section 40(2) of the DPA (as extended and modified by PECR) when deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage or distress. The Commissioner has decided that it is unlikely that damage or distress has been caused in this instance.
34. **In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of his powers under section 40 of the DPA, he requires Bizfella to take the steps specified in Annex 1 of this Notice.**

35. There is a right of appeal against this Notice to the First-tier Tribunal (Information Rights), part of the General Regulatory Chamber.
Information about appeals is set out in the attached Annex 2.

Dated 6 April 2022

Andy Curry
Head of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

TERMS OF THE ENFORCEMENT NOTICE

Bizfella shall within 30 days of the date of this notice:

- Except in the circumstances referred to in paragraph (3) of regulation 22 of PECR, 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 Bizfella that he clearly and specifically consents for the time being to such communications being sent by, or at the instigation of, Bizfella.
- Where consent is relied on for the transmission of unsolicited communications for the purposes of direct marketing by means of electronic mail, ensure that:
 - Such consent is not made a pre-condition of service.
 - The consent statement is kept separate and distinct from other terms and conditions.
 - The consent statement specifies why the data is being obtained and what will be done with the data, including that it will be used for marketing purposes in relation to other loan applications.
 - The consent statement names Bizfella and any third party controllers who will be relying on the consent.
- Where the soft-opt put rule is relied on for the transmission of unsolicited communications for the purposes of direct marketing by means of electronic mail, ensure individuals are given the option to

opt out of receiving marketing at the point when their details are collected.

ANNEX 2

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom an enforcement 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

- The notice of appeal should be served on the Tribunal within 28 days of the date on which the enforcement notice was sent
4. 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)).