

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

To: Eldon Insurance Services Limited (trading as GoSkippy Insurance)

Of: Lysander House (2nd floor), Catbrain Lane, Cribbs Causeway, Bristol
BS10 7TQ

1. The Information Commissioner ("Commissioner") has decided to issue Eldon Insurance Services Limited [T/A GoSkippy Insurance] (referred to hereafter as "GoSkippy" for the purposes of this notice) with an enforcement notice under section 40 of the Data Protection Act 1998 ("DPA"). The notice is in relation to a 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. GoSkippy, whose registered office is given above (Company House Reference: 06334001), is the organisation stated in this notice to have instigated the transmission of 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. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".
7. "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".
8. 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".
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.
10. 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.
11. 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.

12. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of Part 9, Schedule 20 of that Act).

The contravention

13. The Commissioner finds that on 23 August 2016, and between the dates of 25 February 2017 and 31 July 2017, GoSkippy instigated the transmission of 1,069,852 direct marketing emails to Leave.EU Group Limited ("Leave.EU") subscribers contrary to regulation 22 of PECR.
14. Section 11(3) DPA definition of direct marketing covers any advertising or marketing material, and applies to messages which contain even some marketing elements, even if that is not their main purpose.
15. In this instance, the Commissioner considers that Leave.EU is the sender of the emails; and indeed Leave.EU has not challenged that conclusion. Although Leave.EU (and GoSkippy) assert that Leave.EU was also the instigator of the emails, the Commissioner is not content to accept that assertion in this context.
16. The Commissioner accepts that the primary reason for the messages (save for that sent on 23 August 2016) being sent was in furtherance of Leave.EU's political campaigning activities. However, the particular form of these messages – as opposed to various other messages sent

by Leave.EU – included direct marketing on behalf of GoSkippy.

GoSkippy accepts that it created the advertising material for inclusion in the emails. GoSkippy provided – only in response to the Notice of Intent – a single email from August 2016 (and therefore, at best, only relevant to the single email sent on 23 August 2016 and not to the 20 emails sent from 25 February 2017) which purported to indicate that the request for such marketing material had emanated from Leave.EU. The Commissioner does not consider this clear evidence in favour of GoSkippy, and she notes that the individual in question was seconded from GoSkippy. The email does not address how the request came about, and it does not address the later 2017 emails at all. What it shows is GoSkippy working closely with Leave.EU to ensure that its own marketing – from which it, not Leave.EU, would benefit – was to be included in Leave.EU's emails. The Commissioner does not consider that the absence of a contractual arrangement assists GoSkippy; on the contrary, it is indicative of a more informal, blurred, arrangement whereby GoSkippy was able to instigate the inclusion of its own marketing material as it wished.

17. As an instigator of direct marketing communications, it is incumbent on GoSkippy, to ensure that it is compliant with the requirements of regulation 22 of PECR, and to ensure that valid consent to send those messages and the marketing within them had been acquired.
18. "Consent" within the meaning of regulation 22(2) requires that the recipient of the electronic mail has notified the sender that he consents to messages being sent by, or at the instigation of, that sender. Indirect, or third party, consent can be valid but only if it is clear and specific enough.
19. The Commissioner's direct marketing guidance says "organisations need to be aware that indirect consent will not be enough for texts,

emails or automated calls. This is because the rules on electronic marketing are stricter, to reflect the more intrusive nature of electronic messages.”

20. It goes on to say that indirect consent can be valid but only if it is clear and specific enough. Moreover, “the customer must have anticipated that their details would be passed to the organisation in question, and that they were consenting to messages from that organisation. This will depend on what exactly they were told when consent was obtained”.
21. 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.
22. The Commissioner understands that GoSkippy only received an assurance from Leave.EU that marketing would be sent only to those who had consented to receive its communications.
23. Since it does not appear that GoSkippy have had a prior relationship with the subscribers who received marketing for their products, they would not be able to rely on the ‘soft opt-in’ exception provided under regulation 22(3) of PECR.
24. Furthermore, having reviewed the Privacy Policy relied upon by Leave.EU, it is clear to the Commissioner that GoSkippy are not specifically named, or identified in such a way that would suggest they could lawfully instigate direct marketing to subscribers. The Commissioner does not consider that a subscriber to political emails

from Leave.EU can be taken to have consented to receiving marketing on behalf of an insurance company such as GoSkippy. There would need to be clear and specific evidence of such consent, whether direct or indirect. There is not.

25. The Commissioner is therefore satisfied that GoSkippy did not have the necessary valid consent for the 1,069,852 direct marketing emails for which it instigated transmission to subscribers.
26. The Commissioner has considered, as she is required to do under section 40(2) of the DPA (as extended and modified by the Regulations) when deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage. The Commissioner has decided that it is unlikely that actual damage has been caused in this instance.
27. **In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of her powers under section 40 of the DPA, she requires that GoSkippy shall within 30 days of the date of this Notice:**

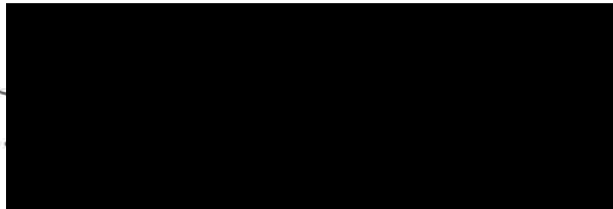
Except in the circumstances referred to in paragraph (3) of regulation 22 of PECR, neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified GoSkippy that he clearly and specially consents for the time being to such communications being sent by, or at the instigation of GoSkippy

28. 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 1.

29. Any Notice of Appeal should be sent so that it is received by the Tribunal within 28 days of the date on which this Notice is sent

Dated the 1st day of February 2019

Signed:

A large black rectangular box redacting the signature of Stephen Eckersley.

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

ANNEX 1

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:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
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)).