

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Leave.EU Group Limited

Of: Lysander House, Catbrain Lane, Cribbs Causeway, Bristol BS10 7TQ

1. The Information Commissioner ("Commissioner") has decided to issue Leave.EU Group Limited ("Leave.EU") 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. Leave.EU, whose registered office is given above (Company House Reference: 09763501), is the organisation 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. "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. The term "soft opt-in" is used to describe the rule set out 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.
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. 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, but

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

11. 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.
12. 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.
13. 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).

Background to the case

14. Leave.EU came to the attention of the Commissioner during investigations in relation to the wider use of personal data and analytics by political campaigns, social media and insurance companies. In particular Leave.EU has been investigated about its relationship with Eldon Insurance Services Ltd ("Eldon") (which trades using the brand GoSkippy Insurance) and their use of personal data.
15. The Commissioner is aware from publicly available company records and her investigation that there is a significant cross-over of employees and senior figures between the organisations named above. Leave.EU was incorporated on 4 September 2015 with two named directors who were also at that time directors of Eldon, and its sole subscriber is also the owner of the sole subscriber in Eldon (and is now the person with significant control in respect of both entities). Leave.EU and Eldon share the same corporate address.
16. In those circumstances, the Commissioner considers it especially important that different data controllers within the same corporate group have clear policies and procedures in place to ensure that personal data lawfully acquired and processed in the activities of one controller is not inappropriately used in the activities of a different controller. That is particularly so where the different controllers have different businesses.
17. In response to an Information Notice, the Commissioner was informed by Eldon on 20 April 2018, that an incident had taken place whereby a Leave.EU newsletter was incorrectly emailed to some Eldon customers, apparently due to an error in the way the email distribution system was used. It was advised as part of this response that, notwithstanding the above incident, Eldon data was not combined or shared with Leave.EU.

18. It was further indicated within the response that the incident had been previously reported and logged with the Commissioner. However, the Commissioner can find no record of this and, despite requests for a copy of the report or case reference number, she has not been provided with any evidence to support the suggestion that such a report was ever sent.
19. A further Information Notice was sent to Eldon on 27 July 2018 and responded to by a letter of 23 August 2018 signed by a director of Eldon (who was also at the relevant time a director of Leave.EU).
20. The information provided to the Commissioner during the course of investigations indicates as follows:
 - The Leave.EU newsletter was sent to Eldon customers on 16 September 2015 as a result of administrative error by Leave.EU staff.
 - This was an isolated incident which resulted in one complaint and was resolved by an agreed payment to charity.
 - Leave.EU sent the newsletter and Leave.EU instigated the sending of it.
 - 319,645 emails were sent in total to an Eldon dataset. 296,522 of those emails were successfully delivered and 61,396 of those emails were opened.
 - There have been no similar recorded incidents (i.e. where Leave. EU communications concerning the referendum were sent to Eldon insurance customers in error).

- Mailchimp (an account/application which appears to house distribution lists) was used to distribute marketing communications by email to Eldon/GoSkippy customers. The same account was used by marketing staff acting on behalf of Leave.EU. The member of marketing staff selected the incorrect data file (i.e. the Eldon data file) to be used to distribute a Leave.EU newsletter.
 - At the time of the incident one Mailchimp account was being used but another account was introduced in November 2016, which would further reduce the risk of such incidents.
 - In late 2017, Eldon introduced a further control mechanism in the form of a peer review before emails are sent out.
21. The Commissioner has considered whether her findings constitute a contravention of regulation 22 of PECR by Leave.EU and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

22. The Commissioner finds that Leave.EU has contravened regulation 22 of PECR.
23. The Commissioner finds that the contravention was as follows:
24. On 16 September 2015, Leave.EU used a public electronic telecommunications service for the purposes of transmitting 296,522 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

25. "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.
26. In this case the Commissioner is satisfied that Leave.EU did not have the consent, within the meaning of regulation 22(2), of the subscribers for the 296,522 unsolicited direct marketing emails it sent. The Commissioner is satisfied that the 'soft opt-in' exception afforded under regulation 22(3) would not apply in this instance since Leave.EU has no apparent prior relationship with the subscribers. The Commissioner further notes that in its representations in response to the Notice of Intent, Leave.EU did not seek to suggest that it did have consent to send its newsletter to an Eldon customer database.
27. The Commissioner is satisfied that Leave.EU was responsible for this contravention.
28. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met, that is to say that the contravention is of a sufficiently serious nature, and was carried out either deliberately or, in the alternative, negligently.

Seriousness of the contravention

29. The Commissioner is satisfied that the contravention identified above was serious. This is because on 16 September 2015 a total of 296,522 direct marketing emails were successfully delivered by Leave.EU and received by subscribers for whom they did not hold valid consent.

30. The Commissioner does not consider that a contravention is rendered not serious simply because it is not repeated, or because it was an error rather than deliberate. The contravention occurred in respect of hundreds of thousands of subscribers. That the contravention occurred on a single occasion and was not deliberate are appropriately addressed through the quantum of the penalty.
31. Therefore, given the number of affected subscribers, the Commissioner is satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

32. The Commissioner has considered whether the contravention identified above was deliberate.
33. On the balance of probabilities, the Commissioner accepts Leave.EU's claim that the incident arose as the result of an isolated administrative error, and there appears to have been no deliberate intention on the part of Leave.EU to breach PECR.
34. The Commissioner has therefore gone on to consider whether the contraventions identified above were negligent. First, she has considered whether Leave.EU 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. PECR has been in place for the entirety of the existence of Leave.EU (and well before its incorporation), and its terms and enforcement have been the subject of regular media coverage. There is no suggestion from Leave.EU that it was unaware of its obligations under PECR.

35. Furthermore, a company within a corporate group which shares personnel and premises with other group companies is expected by the Commissioner to be mindful of the care required to ensure marketing and personal data are not inappropriately mixed between companies. An organisation engaging in the sending of material constituting direct marketing should be aware that sharing a single Mailchimp account, housing multiple distribution lists, risks that a contravention could occur.
36. In the circumstances the Commissioner is satisfied that Leave.EU ought reasonably to have known that there was a risk a contravention would occur.
37. Second, the Commissioner considered whether Leave.EU failed to take reasonable steps to prevent the contravention. The Commissioner has published detailed guidance for those carrying out direct marketing explaining their legal obligations under PECR. This guidance gives clear advice regarding the requirements of consent for direct marketing and 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 emails to individuals if that person has specifically consented to receiving them from the sender. The Commissioner accepts that this contravention appears to have arisen as a result of a single administrative error, but is of the view that reasonable steps taken could have prevented the cross-contamination of distribution lists.
38. Reasonable steps to be expected of Leave.EU in the context of this case could have included using separate Mailchimp accounts to house separate data sets and to ensure processes were in place that reviewed mass-marketing communications before they are sent. Leave.EU appears to accept that these are reasonable steps, because it has said

that it has since implemented them (approximately a year after the relevant communication, and a further year after that). The Commissioner also has regard in this context to such steps being particularly important where Leave.EU had only very recently been incorporated, and may not yet have had an extensive opportunity to build its own properly consented database or fully train its staff.

39. In the circumstances, the Commissioner is satisfied that Leave.EU failed to take reasonable steps to prevent the contraventions.
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) DPA have been met in this case. She is also satisfied that the procedural rights under section 55B have been complied with.
42. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made by Leave.EU on this matter dated 4 December 2018.
43. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
44. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.

45. She does not consider that there is any basis to conclude that issuing a monetary penalty in the terms proposed in this Notice would affect economic growth, and in any event, such a penalty would be appropriate in all the circumstances.
46. The Commissioner has considered the likely impact of a monetary penalty on Leave.EU, including by reference to the company accounts provided to her by Leave.EU and its financial status as set out in those accounts. She has decided on the information that is available to her, that Leave.EU has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship, given the relatively modest amount of the penalty set on the facts of this case and the level of its cash assets recorded in its accounts.
47. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited 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 are only messaging those who specifically consent to receive marketing. It will additionally underscore the need to ensure those within a corporate group carefully prevent the wrongful use of data of a different entity.
48. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

49. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£15,000 (fifteen thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

50. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **6 March 2019** 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.
51. If the Commissioner receives full payment of the monetary penalty by **5 March 2019** the Commissioner will reduce the monetary penalty by 20% to **£12,000 (twelve thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
52. 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.
53. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
54. Information about appeals is set out in Annex 1.

55. 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.

56. 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 1st day of February 2019

Signed 

Stephen Eckersley
Director of Investigations
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 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty 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 (Information Rights) are contained in section 55B(5) 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)).