

## **DATA PROTECTION ACT 1998**

### **SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

#### **MONETARY PENALTY NOTICE**

To: EE Limited

Of: Trident Place, Mosquito Way, Hatfield, Hertfordshire, AL10 9BW

1. The Information Commissioner ("Commissioner") has decided to issue EE Limited 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") by EE Limited.
2. This notice explains the Commissioner's decision.

#### **Legal framework**

3. EE Limited, whose registered office is given above (Companies House registration number: 02382161), is the person 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. "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. 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.
8. 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.”

9. 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.
10. 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.
11. 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**

12. EE Limited is one of the UK's largest digital communications companies.
13. On 12 March 2018 EE Limited sent a direct marketing text message to an individual as follows:

*"My EE: Get Active! Not long now, X! You'll soon be able to switch up your routine by upgrading your Apple Iphone 6s. You can countdown the days to your upgrade with the My EE app. Just like the My EE website, it lets you view your bill, check your refresh data and usage. Stay active on the go and log in <http://discover.ee.co.uk/A6r4j3n7> today."*

14. Following receipt of the message the individual made a complaint to the Commissioner explaining that they had previously opted out of marketing messages from EE Limited. The Commissioner wrote to EE Limited on 19 March 2018, providing details of the complaint made. EE Limited were warned that the Commissioner could issue civil monetary penalties of up to £500,000 for PECR breaches.
15. EE Limited were informed that it was the Commissioner's view that organisations cannot send marketing messages to an individual to promote a product or service if that individual has opted out of receiving such direct marketing messages. To include a marketing message within a service message is also prohibited.
16. EE Limited advised that it had sent 16,620,416 "Get Active" messages to its customers between 17 February 2018 and 25 March 2018. However, EE Limited indicated that whilst this number of direct marketing messages was attempted only 14,544,582 were successfully received.
17. EE Limited explained that they felt this constituted a service message and was therefore outside of the remit of the rules regarding direct marketing.
18. The "Get Active" messages had been sent in two batches. The second batch were sent to customers who did not interact with, use or

download the My EE application following the initial message. A revised version of the initial message were sent in the second batch as follows:

*"Mr EE: Get Active! Want to flex your data muscles this month, first name.? Use the My EE app to see how much data you have left, check when your refresh date is, manage your bill and much more. Get active on My EE and log in <URL> today."*

19. Between 17 February 2018 and 1 March 2018, a total number of 8,183,881 messages were sent. Of that number, 1,515,990 individuals had previously opted out of receiving marketing messages via text message.
20. Between 14 March 2018 and 25 March 2018 a second batch of messages were sent totalling 8,436,535. Of that number, 1,210,440 individuals had previously opted out of receiving marketing messages via text message.
21. Of the total 2,726,430 messages sent to individuals who had previously opted out of receiving direct marketing, 2,590,456 were successfully received. Of these messages, 775,015 individuals received a message in each batch.
22. EE Limited was consequently unable to evidence that the individuals to whom direct marketing messages had been sent had consented to receipt of the messages.
23. The Commissioner has made the above findings of fact on the balance of probabilities.

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

**The contravention**

25. The Commissioner finds that EE Limited has contravened regulation 22 of PECR.

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

Between 17 February 2018 and 25 March 2018, EE Limited instigated the transmission of 2,590,456 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

27. As the instigator of these messages, it was the responsibility of EE Limited to ensure that sufficient consent had been acquired.
28. "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.
29. In this case the Commissioner is satisfied that EE Limited did not have the consent, within the meaning of regulation 22(2), of the 2,590,456 subscribers to whom it had instigated the sending of unsolicited direct marketing messages.
30. The Commissioner is satisfied that EE Limited was responsible for this contravention.

31. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

**Seriousness of the contravention**

32. The Commissioner is satisfied that the contravention identified above was serious. This is because between 17 February 2018 and 25 March 2018 EE Limited sent a total of 2,590,456 direct marketing messages to subscribers without their consent.
33. EE Limited were aware that the messages were being sent to individuals who, according to their records, had previously indicated that they did not consent to receive direct marketing.
34. In addition, EE Limited also instigated the sending of a further 135,974 marketing messages. Although these were not received by individuals, it evidences an attempt to send large volumes of marketing messages to individuals without consent to do so.
35. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

**Deliberate or negligent contraventions**

36. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that EE Limited's actions which constituted that contravention were deliberate actions (even if EE Limited did not actually intend thereby to contravene PECR). It is not necessary for EE Limited to have known that they were breaking the law for the contravention to be considered



deliberate.

37. The Commissioner considers that in this case EE Limited did deliberately contravene regulation 22 of PECR.
38. EE Limited were aware that the messages were being sent to individuals who, according to their records, had previously indicated that they did not consent to receive direct marketing. Individuals have a right to opt out of receiving direct marketing and as soon as they have clearly said they wish not to receive it organisations must stop.
39. EE Limited had sufficient knowledge of the requirements under the DPA and PECR and were aware of the Commissioner's direct marketing guidance. Whilst it was aware of these requirements, this did not prevent EE Limited from messaging customers who had explicitly opted out of receiving direct marketing.
40. 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 e-mail, by post, or by fax. In particular it states that organisations can generally only send marketing messages to individuals if that person has specifically consented to receiving them from the sender. Individuals have a right to opt out of receiving marketing at any time. As soon as an individual says they don't want the texts or emails, this will override any existing consent or soft opt-in under PECR and they must stop.
41. The Commissioner's direct marketing guidance is clear that if a message includes any significant promotional material aimed at customers to buy extra products or services or to renew contracts that

are coming to an end that message is no longer a service message. It instead crosses the threshold into marketing and will be subject to the same rules as other electronic marketing messages. The guidance also stresses that organisations should keep clear records of what an individual has consented to, and when and how this consent was obtained, so that they can demonstrate compliance in the event of a complaint.

42. The messages sent as part of the campaign were additionally designed to promote and encourage customers to access and use the My EE app. This in itself is promotional material. Whilst the app does offer a customer the option to perform service related tasks such as checking their monthly bills, it also offers customers the option to purchase new products, add data to their account and 'countdown the days' until their upgrade. The fact that EE Limited sent a second message to those who did not engage with the app, following receipt of the first message, further supports the Commissioner's finding that these were marketing messages.
43. In the circumstances, the Commissioner is satisfied that EE Limited failed to take reasonable steps to prevent the contraventions in this case.
44. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

#### **The Commissioner's decision to impose a monetary penalty**

45. 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(3)DPA and the procedural rights under section 55B have been complied with.

46. The latter has included the issuing of a Notice of Intent dated 18 April 2019 in which the Commissioner set out her preliminary thinking.
47. The Commissioner has considered whether, in the circumstances she should exercise her discretion so as to issue a monetary penalty. In reaching her final view, the Commissioner has taken into account representations made by EE Limited dated 14 May 2019 however there is nothing contained therein to dissuade the Commissioner from her preliminary view. In particular, the Commissioner has considered EE Limited's representations that the text messages were service messages and not direct marketing. However, the Commissioner is satisfied that the messages include significant promotional material and were therefore sent for the purposes of direct marketing.
48. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited marketing text messages 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 marketing text messages to those who specifically consent to receiving such messages.
49. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

**The amount of the penalty**

50. Taking into account all of the above, the Commissioner has decided that the amount of the penalty is **£100,000 (One hundred thousand pounds)**

**Conclusion**

51. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **23 July 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.
52. If the Commissioner receives full payment of the monetary penalty by **22 July 2019** the Commissioner will reduce the monetary penalty by 20% to **£80,000 (Eighty 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 20<sup>th</sup> day of June 2019

Signed



Andrew White  
Director  
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)).