

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY 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 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. 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. 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.”
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 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.
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).

Background to the case

13. GoSkippy 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 GoSkippy has been investigated about its relationship with Leave.EU Group Limited ("Leave.EU") and their use of personal data.

14. 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. GoSkippy was incorporated in 2007. Leave.EU was incorporated on 4 September 2015 with two named directors who were also at that time directors of GoSkippy, and its sole subscriber is also the owner of the sole subscriber in GoSkippy (and was also the person with significant control in respect of both entities, and a director of GoSkippy). Leave.EU and GoSkippy share the same corporate address.
15. 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 marketing activities are appropriately delineated. That is particularly so where the different controllers have different businesses.
16. The Commissioner, on 3 July 2018, having learned that Leave.EU were including advertisements for GoSkippy on their electronic newsletters, requested details from GoSkippy in relation to the consent being relied upon for that marketing.
17. On 18 July 2018 GoSkippy responded to the Commissioner to advise that although no data was shared, Leave.EU were indeed including a promotional discount for GoSkippy within their emails.
18. The Commissioner served GoSkippy with an Information Notice on 27 July 2018, receiving a response on 23 August 2018 which advised that although GoSkippy prepared marketing material for general use, it was

Leave.EU which had incorporated it into a banner to be included within their newsletters. Leave.EU had been served a similar Information Notice on the same date, and responded on the same date, in a letter from the same individual who responded on behalf of GoSkippy.

19. It was advised that there existed no formal contract between GoSkippy and Leave.EU for the processing of data or the promotion of each other's services, but that in any event it was Leave.EU which had both instigated and sent the emails.
20. The further information provided to the Commissioner during her wider investigations included the following, which was provided in response to the Information Notice of 27 July 2018:
 - Between 25 February 2017 and 31 July 2017, 1,020,661 such emails were received by Leave.EU subscribers.
 - The majority of these emails were weekly round-up newsletters and all of them contained a banner showing the GoSkippy logo and offered '10% off' for Leave.EU supporters. If the banner is clicked the GoSkippy website is accessed.
 - In addition, on 23 August 2016, 49,191 emails were sent to subscribers titled "Skippy Saves the Day". Again, the content of these messages offered a 10% discount on all GoSkippy insurance products.
21. This response confirmed therefore that, on the dates specified by GoSkippy in their response to the Commissioner's Information Notice of 27 July 2018, a total of 1,069,852 messages were sent by Leave.EU and are understood to have been received by subscribers over two

separate periods, each containing marketing material promoting the services of GoSkippy.

22. The information provided by GoSkippy indicates that 311,735 of those email messages were opened by the recipient. In its representations to the Notice of Intent, GoSkippy stated that on its calculations of the changes in subscribers over the relevant time period, approximately 54,286 different subscribers would have received relevant emails.
23. In its representations to the Notice of Intent, GoSkippy also stated that it had received no complaints concerning the content of the emails in issue.
24. The Commissioner has considered whether these findings constitute a contravention of regulation 22 of PECR by GoSkippy as the instigator of the emails and, if so, whether the conditions of section 55A DPA are satisfied.
25. The Commissioner notes that she has separately considered whether Leave.EU also contravened regulation 22 of PECR as having sent the messages. Sending and instigating the sending of direct marketing emails amount to separate and distinct breaches of PECR and have been addressed as separate cases.

The contravention

26. The Commissioner finds, on the balance of probabilities, that GoSkippy has contravened regulation 22 of PECR.
27. 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 subscribers contrary to regulation 22 of PECR.

28. 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.
29. 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.
30. 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.

31. 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.
32. "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.
33. 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."
34. 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".
35. 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.

36. 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.
37. 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.
38. 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.
39. 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.
40. The Commissioner is satisfied that GoSkippy was responsible for this contravention and has gone on to consider whether the conditions under section 55A DPA were met, that is to say that the contravention was serious, and either deliberate or negligent.

Seriousness of the contravention

41. The Commissioner is satisfied that the contravention identified above was serious. This is because on 23 August 2016 and between the dates of 25 February 2017 and 31 July 2017, a total of 1,069,852 direct marketing emails were instigated by GoSkippy, and received by over 54,000 subscribers, advertising marketing material for which they had not provided consent.
42. The Commissioner does not consider that a contravention is rendered not serious simply because some of the emails were not opened by the recipient: that is a matter of pure chance, over which GoSkippy has no control. Nor does the Commissioner accept, contrary to GoSkippy's representations, that the contravention is not serious because GoSkippy's marketing was only a banner within the email. This was direct marketing sent by email, without consent, to which PECR applies. Sending emails which advertise insurance companies to a subscriber who is expecting, and has consented, only to receiving emails in relation to a particular political campaign is a serious matter.
43. Therefore, given the number of affected subscribers and the 21 repeated occasions on which the contravention occurred, the Commissioner is satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

44. The Commissioner has considered whether the contravention identified above was deliberate, or negligent.

45. The Commissioner accepts that in this case GoSkippy did not deliberately contravene regulation 22 of PECR, but was negligent. In the Commissioner's view, this means that whilst GoSkippy instigated the transmission of direct marketing emails to subscribers, there is no evidence that they intended to breach PECR.
46. The Commissioner has therefore gone on to consider whether the contravention identified above was negligent. First, she has considered whether GoSkippy knew or ought reasonably to have known that there was a risk that the contravention would occur. She is satisfied that this condition is met. PECR has been in place for the entirety of the existence of GoSkippy (and well before its incorporation), and its terms and enforcement have been the subject of regular media coverage. There is no suggestion from GoSkippy that it was unaware of its obligations under PECR. GoSkippy having taken an incorrect view of the law does not provide it with an answer to whether it ought reasonably to have known even of a risk of a contravention: it has, for example, provided no evidence of any positive consideration having been given to compliance at the relevant time.
47. Second, the Commissioner considered whether GoSkippy 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, or instigate, marketing emails to individuals if that person has specifically consented to receiving them from the sender.

48. Reasonable steps that might be expected of GoSkippy in the context of this case would have included carrying out appropriate due diligence checks to ensure that GoSkippy and the nature of its products were specifically named within the relevant Privacy Policy of Leave.EU as the sender of the emails, and ensuring specific contractual relations existed between the organisations to provide suitable assurance to GoSkippy that marketing of their products by Leave.EU was lawful.
49. In the circumstances, the Commissioner is satisfied that GoSkippy failed to take reasonable steps to prevent the contravention.
50. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

51. The Commissioner has taken the following mitigating factor into account:
 - The Commissioner and GoSkippy have received no complaints about the contravention.
52. 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.
53. 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 GoSkippy on this matter dated 4 December 2018.

54. The Commissioner is accordingly entitled to issue a monetary penalty in this case to reflect the specific contravention of GoSkippy.
55. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
56. 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.
57. The Commissioner has considered the likely impact of a monetary penalty on GoSkippy. She has decided on the information that is available to her, including publicly available accounts, that GoSkippy has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship. GoSkippy has not suggested otherwise.
58. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The instigating 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.
59. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

60. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£60,000 (sixty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

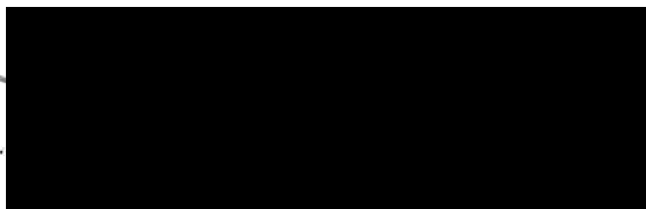
Conclusion

61. 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.
62. If the Commissioner receives full payment of the monetary penalty by **5 March 2019** the Commissioner will reduce the monetary penalty by 20% to **£48,000 (forty eight thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
63. 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.
64. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.

65. Information about appeals is set out in Annex 1.
66. 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.
67. 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 ..

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

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)).