

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 was also the person with significant control in respect of both entities, and a director of Eldon). 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 marketing activities are appropriately delineated. That is particularly so where the different controllers have different businesses.
17. The Commissioner's investigations led to an Information Notice being served on Leave.EU on 27 July 2018, requesting information in relation to a promotional banner advertising the services of GoSkippy Insurance ("GoSkippy") which the Commissioner had become aware had been included within newsletters sent via email by Leave.EU to Leave.EU subscribers.
18. Leave.EU responded to the Information Notice on 23 August 2018 providing the following information:

- 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 Leave.EU subscribers titled "Skippy Saves the Day". Again, the content of these messages offered a 10% discount on all GoSkippy insurance products.
 - Leave.EU did not receive any complaints about the inclusion of the GoSkippy marketing. There was suggestion that a small number of subscribers welcomed the discount.
19. This response confirmed therefore that, on the dates specified by Leave.EU 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 received by subscribers over two separate periods, each containing marketing material promoting the services of GoSkippy.
20. The information provided by Leave.EU indicates that 311,735 of those email messages were opened by the recipient. In its representations to the Notice of Intent, Leave.EU 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.
21. When queried as to the consent held by Leave.EU for the sending of these messages, Leave.EU responded to say that they believed the

emails were not unsolicited since subscribers, as part of their registration process, provided consent to receive Leave.EU newsletters, and the privacy policy that Leave.EU provided made reference to subscribers receiving "information about other organisations' products and services".

22. A review of the cited Privacy Policy was conducted by the Commissioner. The Policy provided with the response to the Information Notice was expressed only to apply to a different company and data controller: Better For The Country. For present purposes, the Commissioner is content to accept that the Policy was also used by Leave.EU and was understood to be applicable to it by Leave.EU's subscribers, but may review that acceptance in the light of any further information which comes to light. The Policy advises that the subscribers' data may be used by the controller or "selected third parties" to provide information about goods or services which may be of interest. It does not name GoSkippy, or indeed any third parties at all. It does not explain that the goods or services which it may deem the subscriber to be interested in could include very different matters to those which it itself is concerned in. Furthermore, it does not make clear the types of marketing which subscribers could expect to receive or the forms of communication that such marketing might take.
23. It was confirmed that there is no formal contract in place between Leave.EU and GoSkippy to provide direct marketing, and that the inclusion was an informal arrangement.
24. The Commissioner has considered whether her findings constitute a contravention of regulation 22 of PECR by Leave.EU as the sender of the messages and, if so, whether the conditions of section 55A DPA are satisfied.

25. The Commissioner notes that she has separately considered whether Eldon also contravened regulation 22 of PECR as having instigated 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 that Leave.EU has contravened regulation 22 of PECR.
27. The Commissioner finds that the contravention was as follows:
28. On 23 August 2016, and between the dates of 25 February 2017 and 31 July 2017, Leave.EU transmitted 1,069,852 direct marketing emails to subscribers containing a banner advertising the services of GoSkippy.
29. The 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.
30. Contrary to the representations advanced by Leave.EU, the Commissioner is not satisfied that Leave.EU held the requisite consent of subscribers to send direct marketing to them in the form of emails which contained marketing banners relating to GoSkippy.
31. The Commissioner is of the view that these messages therefore constitute unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

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. As the sender of the direct marketing emails, it was the responsibility of Leave.EU to ensure that it held appropriate consent to send those messages, and that this consent applied to marketing material advertising GoSkippy.
34. Regulation 22(3) provides for a 'soft opt-in' exception to enable organisations to send marketing emails to existing customers however the Commissioner's Direct Marketing Guidance at paragraph 131 states that to rely on this exception the organisation must have obtained the contact details in the course of a sale of a product or service to that person; must only be marketing their own similar products and services; and must have given the person a simple opportunity to refuse/opt-out of the marketing.
35. As Leave.EU were advertising the services of GoSkippy, and not their own similar products or services, they cannot rely on the "soft opt-in" exception.
36. The Privacy Policy relied on by Leave.EU does not specifically name GoSkippy, rather it referred only to 'third parties'.
37. 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.

38. 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.”
39. 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”.
40. It is apparent to the Commissioner that the wording of the Privacy Policy relied upon by Leave.EU was not sufficiently clear and precise so as to give the subscriber a reasonable expectation that they would receive direct marketing advertising the services of GoSkippy. 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. There would need to be clear and specific evidence of such consent, whether direct or indirect. There is not.
41. The Commissioner is therefore satisfied that Leave.EU did not have the necessary valid consent for the 1,069,852 direct marketing emails which were sent to subscribers.
42. The Commissioner is satisfied that Leave.EU 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

is of a sufficiently serious nature, and was carried out either deliberately or, in the alternative, negligently.

Seriousness of the contravention

43. 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 sent by Leave.EU, and received by over 54,000 subscribers, advertising marketing material for which they had not provided consent.
44. 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 Leave.EU has no control. Nor does the Commissioner accept, contrary to Leave.EU's representations, that the contravention is not serious because it was not accompanied by unlawful data sharing between Eldon and Leave.EU.
45. 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

46. The Commissioner has considered whether the contravention identified above was deliberate.

47. The Commissioner considers that in this case Leave.EU did not deliberately contravene regulation 22 of PECR, but rather was negligent. Whilst Leave.EU did seek to send direct marketing to subscribers, and that marketing contained elements relating to the products of GoSkippy, there is no evidence of a deliberate intention on the part of Leave.EU to breach PECR.
48. 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. Leave.EU 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.
49. Second, the Commissioner considered whether Leave.EU failed to take reasonable steps to prevent the contraventions. 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. It also makes it clear that particular

care must be taken when promoting the aims, ideals, or services of third party organisations to ensure that the consent being relied upon is appropriate.

50. Reasonable steps that might be expected of Leave.EU in the context of this case would have included listing third parties by name within the Privacy Policy (which would have been particularly easy to do in respect of third parties who were within the same corporate group), and making clear in the Policy that marketing communications on behalf of third parties might encompass entirely different sectors with no connection to the purpose for which the subscriber had consented to receiving Leave.EU emails. It would also be expected that Leave.EU would have a formal contractual arrangement with any party whose advertising was to be included in its marketing emails.
51. In the circumstances, the Commissioner is satisfied that Leave.EU failed to take reasonable steps to prevent the contraventions.
52. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

53. The Commissioner has taken the following **mitigating factor** into account:
 - The Commissioner and Leave.EU have received no complaints about the contravention.
54. 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.

55. 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.
56. The Commissioner is accordingly entitled to issue a monetary penalty in this case to reflect the specific contravention of Leave.EU.
57. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
58. 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.
59. 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. The Commissioner also notes that the company has received considerable loans from one of the directors of the company and no evidence has been provided to suggest that the funding relationship will be withdrawn.

60. 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.
61. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

62. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£45,000 (forty five thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

63. 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.
64. If the Commissioner receives full payment of the monetary penalty by **5 March 2019** the Commissioner will reduce the monetary penalty by 20% to **£36,000 (thirty six thousand pounds)**. However, you

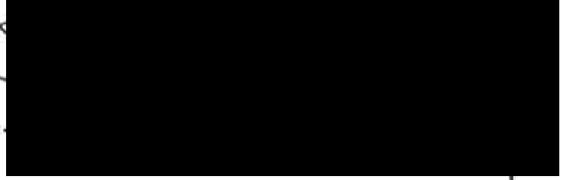
should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

65. 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.
66. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
67. Information about appeals is set out in Annex 1.
68. 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.
69. 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
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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)).