

## **DATA PROTECTION ACT 1998**

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

#### **MONETARY PENALTY NOTICE**

To: Help Direct UK Ltd

Of: First Floor Unit 2 Villiers House Charter Court, Swansea Enterprise Park, Swansea, Wales, SA7 9FS

1. The Information Commissioner ("Commissioner") has decided to issue Help Direct UK Ltd 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 Help Direct UK Ltd.
2. This notice explains the Commissioner's decision.

#### **Legal framework**

3. Help Direct UK Ltd, whose registered office is given above (Companies House registration number: 07904408), is the person 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. "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".
6. "Individual" is defined in regulation 2(1) PECR as "a living individual and includes an unincorporated body of such individuals".
7. Section 11(3) of the Data Protection Act 1998 ("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)).
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 (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,
  - (c) 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,
  - (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 were amended for the purpose of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches the PECR regulations so as to give effect to the Directives.

**Background to the case**

11. Help Direct UK Ltd's business involves lead generation by way of text marketing.
12. Mobile phone users can report the receipt of unsolicited marketing text messages to the GSMA's Spam Reporting Service by forwarding the message to 7726 (spelling out "SPAM"). The GSMA is an organisation that represents the interests of mobile operators worldwide. The

Commissioner is provided with access to the data on complaints made to the 7726 service.

13. Between 15 December 2013 and 3 April 2014, 659 complaints were made to the 7726 service, or direct to the Commissioner, about the receipt of unsolicited direct marketing text messages which the Commissioner was satisfied had been transmitted by Help Direct UK Ltd in contravention of regulation 22 of PECR. As a result, on 24 February 2015 the Commissioner served Help Direct UK Ltd with an Enforcement Notice under section 40 of the DPA requiring the company to take steps to comply with regulation 22 of PECR by 31 March 2015.
14. However, in the period between 7 April 2015 and 30 April 2015 ("period of complaint"), a further 6758 (six thousand seven hundred and fifty eight) complaints were made to the 7726 service about the receipt of unsolicited direct marketing text messages relating to a variety of services including the reclaim of PPI payments, bank refunds and loans.
15. All of the text messages were sent from devices having IMEI numbers that were known to have been previously used by Help Direct UK Ltd. The Commissioner is therefore satisfied that the text messages were transmitted by Help Direct UK Ltd. Furthermore, the Commissioner is satisfied that these unsolicited direct marketing text messages were sent to individuals who had not consented to the receipt of such text messages from Help Direct UK Ltd.
16. The following are examples of some of the messages sent:

"Its been signed off, we have 3886.41 in your name for the accident you had, for us to put in your bank Now just fill out [www.accidentinjuryclaim.so](http://www.accidentinjuryclaim.so)".

"The Banks are refunding customers if they paid a monthly fee on packaged accounts up to 2000, visit [www.mybankrefund.com](http://www.mybankrefund.com) for your refund today or [optout.cc](http://optout.cc)".

"Get 100-5000 pound in 15MinsOpen 24x7 for fast payoutNo feesInstant PaymentJust click [www.fone-funds.net](http://www.fone-funds.net) or [STOPall.co](http://STOPall.co)".

"Hello x are you looking for a Car? We offer instant finance, Any credit rating accepted - apply now at [www.onlycarfinance.co.uk](http://www.onlycarfinance.co.uk) reply end to stop".

"Your application Has been ACCEPTED, fill out the form for us to transfer it NOW just fill out [www.fone-funds.net](http://www.fone-funds.net) or [stopall.co](http://stopall.co)".

17. Attached at Annex 2 is a spreadsheet detailing the 6,758 (six thousand seven hundred and fifty eight) complaints made by individual subscribers to the 7726 service. This list includes the subscribers' telephone numbers with the date and time of the text, together with the telephone number of the sender and mobile phone operator network.
18. The Commissioner has made the above findings of fact on the balance of probabilities.
19. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by Help Direct UK Ltd and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

20. The Commissioner finds that Help Direct UK Ltd contravened regulation 22 of PECR.
21. The Commissioner finds that the contravention was as follows:
22. Between 7 April 2015 and 30 April 2015, Help Direct UK Ltd used a public telecommunications service for the purposes of transmitting 6,758 (six thousand seven hundred and fifty eight) unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
23. The Commissioner is satisfied that Help Direct UK Ltd was responsible for this contravention.
24. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

### **Seriousness of the contravention**

25. The Commissioner is satisfied that the contravention identified above was serious. This is because of the scale of the contravention of regulation 22 over such a short space of time. The high number of complaints to the 7726 service during a relatively short period shows that Help Direct UK Ltd was engaged in an organised marketing campaign to send very large numbers of text messages.

26. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

**Deliberate or negligent contraventions**

27. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that Help Direct UK Ltd's actions which constituted that contravention were deliberate actions (even if Help Direct UK Ltd did not actually intend thereby to contravene PECR).
28. The Commissioner considers that in this case Help Direct UK Ltd did deliberately contravene regulation 22 of PECR.
29. 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 email, by post, or by fax. In particular it states that organisations can generally only send marketing texts to individual if that person has specifically consented to receiving them.
30. Help Direct UK Ltd was fully aware of the requirements of regulation 22 of PECR having been subject to a previous investigation by the Commissioner and served with an Enforcement Notice requiring it to take steps to ensure compliance.
31. Further, Help Direct UK Ltd carried out this unsolicited direct marketing text campaign using unregistered SIM cards and dongles which is well known amongst those in the direct marketing industry as a method of avoiding detection by the mobile telephone networks' spam detectors.



32. Help Direct UK Ltd deliberately sent unsolicited direct marketing text messages to individuals who had not consented to receive such unsolicited marketing texts on a massive scale.
33. The Commissioner is therefore satisfied that condition (c) from section 55A(1) DPA is met.

**The Commissioner's decision to issue a monetary penalty**

34. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A(1) DPA have been met in this case. He is also satisfied that section 55A(3A) and the procedural rights under section 55B have been complied with.
35. The latter has included the issuing of a Notice of Intent dated 25 August 2015, in which the Commissioner set out his preliminary thinking. In reaching his final view, the Commissioner has taken into account the representations made in response to that Notice of Intent.
36. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
37. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty. He has taken into account Help Direct UK Ltd's representations made in response to the Notice of Intent.
38. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited direct 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. This is an opportunity to reinforce the need for businesses to ensure that they are only sending unsolicited direct marketing text messages in compliance with PECR.

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

#### **The amount of the penalty**

40. There were no **mitigating features** of this case:

41. The Commissioner has taken into account the following **aggravating features** of this case:

- The contraventions took place whilst Help Direct UK Ltd was subject to the provisions of an Enforcement Notice for the same type of contravention.
- Help Direct UK Ltd may obtain a commercial advantage over its competitors by generating leads from unlawful marketing practices.

42. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£200,000 (two hundred thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

## Conclusion

43. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by 23 November 2015 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.
44. If the Commissioner receives full payment of the monetary penalty by 20 November 2015 the Commissioner will reduce the monetary penalty by 20% to **£160,000 (one hundred and sixty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
45. 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.
46. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
47. Information about appeals is set out in Annex 1.
48. 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.

49. 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 21<sup>st</sup> day of October 2015

Signed .....

David Smith  
Deputy Information Commissioner  
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) General Regulatory Chamber (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 he ought to have exercised his 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;
- d) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
  - e) 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)).