

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Everything DM Ltd

Of: Mha Macintyre Hudson Equipoise House, Grove Place, Bedford, England
MK40 3LE

1. The Information Commissioner ("Commissioner") has decided to issue Everything DM Ltd ("EDML") (formerly 'MarketingFile Ltd', and referred to herewith for the purposes of this notice as EDML) 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. EDML, whose registered office is given above (Company House Reference: 03244074), 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) 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. 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.”

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. EDML first came to the attention of the Commissioner following an investigation by 'Which? Magazine' ("Which?") to investigate the marketing activities of list brokers in connection with early pension release schemes.

13. EDML is one such list broker, and was one of the organisations being looked into by 'Which?'. Through the course of their investigation, 'Which?' investigators were able to place orders for lists of personal data of third party consumers held on licence from the list owners by EDML, and received invoices quoting fees for the disclosure of the same.
14. The research carried out as part of the 'Which?' investigation was passed to the Commissioner, amid signs that peoples data protection rights may be at risk.
15. The Commissioner wrote to EDML on 24 January 2017 setting out her concerns regarding their compliance with the DPA and PECR in light of the investigation carried out by 'Which?'.
16. EDML responded on 13 February 2017 setting out their answers to the Commissioner's initial investigatory questions, specifically confirming that they function as a list broker and that *"As a list broker, [they] licence business and consumer postal and email addresses, and telephone numbers collected by list owners for other companies to use in their direct marketing"; that "[They] act as a data processor of the lists that [they] licence. [They] only process the data on behalf of the list owners who are the data controllers"; and that "[They] rely on [their] agreements with the data controllers for the appropriate consents for processing the data and direct marketing purposes."*
17. The Commissioner discovered that in addition to acting as a list broker and offering a service to sell the use of the personal data they held on licence to organisations, EDML could also utilise a direct marketing system called 'Touchpoint', a service which they would offer to their clients to conduct the direct marketing on their behalf, without

necessarily selling them the data directly. There is evidence that, on request, EDML would offer to send such electronic direct marketing messages via Touchpoint to individuals [referred to by EDML as "prospects"] (i.e. data subjects whose details were contained in the licenced lists) on behalf of the client for a fee.

18. As such, the Commissioner is of the view that EDML would use the data that they have obtained on licence from the list owners for their own purposes, i.e. processing data with the intention of selling the use of that data to their clients, or sending direct marketing messages to the individuals identified in that data, and exercising their discretion as to how that data would be used, thus rendering them a data controller for the purposes of that information.
19. EDML also make clear to their clients that when such campaigns are undertaken, and an electronic direct marketing message is sent to the recipient, it would contain no trace of the message being sent from EDML, thus giving the impression that it has been sent by the 'instigator' directly.
20. Whilst EDML have indicated that they carry out due diligence checks on the organisations that they licence the data from, sight of the third party privacy policies and fair processing notices relied on by EDML for the marketing campaigns indicate that there is only reference to data being passed to unspecified 'partners' and/or 'third party companies', involved in a wide range of marketing sectors. EDML are not specifically named and in the circumstances do not appear to hold valid consent to engage in direct marketing. Furthermore, there is no indication that the individuals had consented with the original list owners to receive direct marketing from the organisations for whom EDML sent direct marketing emails. The Commissioner is of the view that EDML relied

wholly on indirect consent for their actions in relation to the licenced data.

21. Further enquires with EDML revealed that they had sent a total of 1,502,364 direct marketing emails to individuals, of which 1,424,144 were delivered. No evidence of valid consent from the subscribers has been provided for any of the emails sent by EDML.
22. The Commissioner has made the above findings of fact on the balance of probabilities.
23. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by EDML and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

24. The Commissioner finds that EDML has contravened regulation 22 of PECR.
25. The Commissioner finds that the contravention was as follows:
26. Between 31 May 2016 and 30 May 2017, EDML used a public electronic telecommunications service for the purposes of transmitting 1,424,144 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
27. "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.

28. Organisations cannot generally send marketing emails unless the recipient has notified the sender that they consent to such emails being sent by, or at the instigation of, that sender.
29. Consent must be freely given, specific and informed, and involve a positive indication signifying the individual's agreement.
30. 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. Further, consent will not be valid where an individual is presented with a long, seemingly exhaustive list of general categories of organisations.
31. The Commissioner is satisfied that EDML did not hold valid consent for the purposes of regulation 22 PECR. Furthermore, it appears from the representations provided by EDML that they do not appear to accept that they, as the sender of the messages, are required to hold such valid consent, notwithstanding that the content of those messages may relate to third parties.
32. In this case the Commissioner is satisfied that EDML did not have the consent, within the meaning of regulation 22(2), of the 1,424,144 subscribers to whom it had transmitted unsolicited direct marketing messages.

33. The Commissioner is satisfied that EDML was responsible for this contravention.
34. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

35. The Commissioner is satisfied that the contravention identified above was serious. This is because between the dates of 31 May 2016 and 30 May 2017, EDML sent a total of 1,424,144 direct marketing emails to subscribers without their consent.
36. The scale of the contravention could have been larger as EDML had attempted to send a total of 1,502,364 direct marketing emails.
37. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

38. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that EDML's actions which constituted that contravention were deliberate actions (even if EDML did not actually intend thereby to contravene PECR).
39. The Commissioner considers that in this case EDML did not deliberately contravene regulation 22 of PECR.

40. The Commissioner went on to consider whether the contraventions identified above were negligent. First, she has considered EDML 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, given that EDML act primarily as a data broker, and given that the issue of unsolicited marketing by means of electronic communications has been widely publicised by the media as being a problem.
41. 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 email, 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. It also makes it clear that particular care must be taken when relying on "indirect consent" and that it is not acceptable to rely on assurances given by third party suppliers without undertaking proper due diligence.
42. It is therefore reasonable to suppose that EDML knew or ought reasonably to have known that there was a risk that these contraventions would occur.
43. Second, the Commissioner considered whether EDML failed to take reasonable steps to prevent the contraventions.
44. Organisations licencing marketing lists from third parties, or contracting with third parties to carry out marketing for them, must make rigorous checks to satisfy themselves that the data being used was obtained fairly and lawfully, and that the necessary consent has been provided. Organisations should take extra care to ensure that the

consent is sufficiently clear and specific for the purposes of sending marketing texts or emails.

45. In this case EDML relied upon contractual assurances from its data suppliers (the list owners) that the necessary consent had been obtained for sending unsolicited direct marketing messages. However, the Commissioner does not consider that EDML undertook sufficient due diligence. It did not, for example, make proper enquiries as to the basis on which the data it held on licence was said to be "opted-in". Had it done so, it should have been clear that EDML did not have consent to send unsolicited direct marketing messages, particularly on behalf of their unspecified third party clients.
46. The Commissioner's direct marketing guidance at paragraphs 95 and 96 make specific reference to organisations engaging in direct marketing relating to third parties, a practice EDML have partaken in. Although they may not have necessarily sold the data to the third parties in such instances, they relied on the fact that subscribers had agreed to receive marketing from unspecified third parties to engage in such marketing. As a data broker EDML should have taken steps to ensure that they held valid consent for the purposes of their direct marketing.
47. In the circumstances, the Commissioner is satisfied that EDML failed to take reasonable steps to prevent the contraventions.
48. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

49. The Commissioner has taken into account the following aggravating factors in this case:

- EDML took steps to conceal their identity from the recipient;
- EDML have failed to engage any remedial measures to bring their practices in line with lawful requirements;
- EDML continue to provide email campaigns on behalf of their clients in breach of regulation 22.

50. 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 (3A) and the procedural rights under section 55B have been complied with.

51. 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 EDML on this matter.

52. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

53. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.

54. The Commissioner has considered the likely impact of a monetary penalty on EDML. She has decided on the information that is available to her, that EDML has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.

55. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited marketing 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 are only emailing those who consent to receive marketing.
56. For these reasons, the Commissioner has decided to issue a monetary penalty in this case

The amount of the penalty

57. 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

58. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **4 October 2018** 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.
59. If the Commissioner receives full payment of the monetary penalty by **3 October 2018** 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.

60. 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.
61. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
62. Information about appeals is set out in Annex 1.
63. 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.
64. 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 3rd day of September 2018

Signed



Stephen Eckersley
Director of Investigations
Information Commissioner's Office
Wycliffe House
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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)).