

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

To: The Money Hive Limited

Of: Britannic House
657 Liverpool Road
Irlam
Lancashire
M44 5XD

1. The Information Commissioner ("the Commissioner") has decided to issue The Money Hive Limited ("TMHL") with an enforcement notice under section 40 of the Data Protection Act 1998 ("DPA"). The notice is being issued because of 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. TMHL, whose registered office address is given above (Companies House Registration Number: 09932988) 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 122(5) of the Data Protection Act 2018 ("DPA18") defines direct marketing as "*the communication (by whatever means) of advertising or marketing material which is directed to particular individuals*". This definition also applies for the purposes of PECR (see regulation 2(2) PECR and paragraphs 430 & 432(6) to Schedule 19 of the DPA18).
6. At the time of the alleged contravention, PECR was defined by reference to the concept of consent in Regulation 2016/679 ("the GDPR"): regulation 8(2) of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019. Article 4(11) of the GDPR set out the following definition: "*'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her*".
7. Recital 32 of the GDPR materially states that "*When the processing has multiple purposes, consent should be given for all of them*". Recital 42 materially provides that "*For consent to be informed, the data subject should be aware at least of the identity of the controller*". Recital 43 materially states that "*Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case*".
8. "Individual" is defined in regulation 2(1) of PECR as "*a living individual and includes an unincorporated body of such individuals*".
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. "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"*.
11. The term "soft opt-in" is used to describe the rule set out in 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.
12. Section 40(1)(a) of the DPA (as extended and modified by PECR) provides that if the Commissioner is satisfied that a person has contravened or is contravening any of the requirements of the Regulations, he may serve him with an Enforcement Notice requiring him to take within such time as may be specified in the Notice, or to refrain from taking after such time as may be so specified, such steps as are so specified.
13. PECR were enacted to protect the individual's fundamental right to privacy in the electronic communications sector. PECR were subsequently amended and strengthened. The Commissioner will interpret PECR in a way which is consistent with the Regulations' overall aim of ensuring high levels of protection for individuals' privacy rights.
14. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the DPA18: see paragraph 58(1) of Schedule 20 to the DPA18.

The contravention

15. The Commissioner finds that TMHL contravened regulation 22 of PECR.
16. The Commissioner finds that the contravention was as follows:
17. The Commissioner finds that between 12 March 2020 and 8 September 2020 there were 752,425 unsolicited direct marketing text messages received by subscribers. The Commissioner finds that TMHL transmitted those direct marketing messages via two platform providers, contrary to regulation 22 of PECR.
18. The Commissioner takes the view that these messages are unsolicited. Subscribers used TMHL's websites, which advertised themselves as a "100%" and "purely online" service, as a means of obtaining a short-term loan offer. However, in order to proceed with the online application, individuals had no choice but to agree to receive an undefined number of contacts via text, email and telephone from TMHL and its third-party partners. TMHL used the individual's mandatory agreement as a basis for engaging in its direct marketing campaign. Individuals used TMHL's service to obtain an online loan offer and had not requested this additional contact voluntarily; the Commissioner therefore takes the view that the marketing cannot be said to have been solicited. The fact that individuals were denied this choice at the outset of their application is evidenced by the high volume of complaints which were received regarding these messages.
19. TMHL, as the sender of unsolicited direct marketing, is required to ensure that it is acting in compliance with the requirements of

regulation 22 of PECR, and to ensure that valid consent to send those messages had been acquired.

20. Whilst TMHL has suggested that its messages were 'service messages', and not direct marketing messages, the Commissioner is satisfied that the messages which were received by subscribers, which advertised the availability of loan products from both TMHL and third-party providers, can be appropriately defined as falling within the definition of direct marketing as prescribed by Section 122(5) DPA18.

21. For consent to be valid it is required to be "freely given", by which it follows that if consent to marketing is a condition of subscribing to a service, the organisation will have to demonstrate how the consent can be said to have been given freely. Whilst TMHL did provide a separate set of optional opt-in boxes for individuals who might wish to agree to marketing in the future, it is the case that if a subscriber wished to proceed with their online loan application they would be required to agree to receiving a variety of contacts (telephone, email and text message) from TMHL and a range of third-parties. In this instance, over a 6-month period over 750,000 messages were sent. These messages would be sent if an individual decided not to proceed with the subsequent online offer, or if they were ineligible for a loan offer from TMHL. This requirement to agree to TMHL's messages was also bundled up with the requirement to agree to a credit check. Individuals were unable to agree solely to the credit check and to proceed with their loan application online only. Agreement to being potentially contacted by text message, email and telephone was a requirement of proceeding with TMHL's service. Whilst TMHL has characterised its text messages as a "courtesy" for customers, in the Commissioner's view it is misleading to do so, as subscribers had no choice but to agree to

receipt of these messages. Furthermore, and in any event, messages sent as a "courtesy" are not exempt from the rules regarding PECR.

22. Consent is also required to be "specific" as to the type of marketing communication to be received, and the organisation, or specific type of organisation, that will be sending it. Individuals in this instance were not able to select the method by which they may wish to receive direct marketing, with agreement to being potentially contacted by text message, email and/or telephone, being a requirement.

23. 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. In this instance, individuals did not have the option to select which, if any, of TMHL's third parties it might wish to receive direct marketing from following their online loan application. Whilst some of the third parties about which the individuals might receive direct marketing were named within the relevant Privacy Policy, there was no indication of how many messages they might receive, nor was there an option to select the method of contact. Indeed, as TMHL itself recognised in the course of the investigation, it could be confusing for an individual to receive a text with a link to a third-party website offering a loan with an alternative panel with which it will have had no contact previously. It is also understood that in relation to the messages which were sent which advertised the loan products of third-parties, whilst some third-parties were named within TMHL's Privacy Policies, the third-parties included brokers (who might in turn advertise their own affiliates) and entities who provided lead generation services

/ affiliate network services. Accordingly, TMHL were not fully aware of precisely which loan provider a subscriber may be directed to within its text messages. Therefore, subscribers were denied the chance to select which, if any, of the potential third-parties it might wish to receive marketing messages about.

24. The Commissioner is therefore satisfied from the evidence he has seen that TMHL did not have the necessary valid consent for the 752,425 direct marketing messages received by subscribers.
25. The Commissioner is also satisfied that TMHL cannot rely on the soft opt-in exemption provided by regulation 22(3). This is because, contrary to the requirement of regulation 22(3)(c) individuals were unable to opt out of receiving these particular direct marketing messages at the point at which their details were taken, since agreement to receipt of these messages was a condition of service. Furthermore, 203,100 of the 752,425 received messages did not relate to TMHL's own products or services, contrary to the requirement of regulation 22(3)(b).
26. Whilst the Commissioner is encouraged by TMHL's recent efforts to become compliant with the legislation, he is concerned that complaints continue to be received as recently as 31 January 2022 in respect of unsolicited direct marketing sent by TMHL and accordingly finds that an Enforcement Notice is an appropriate step to compel TMHL to comply with the law.
27. The Commissioner has considered, as he is required to do under section 40(2) of the DPA (as extended and modified by PECR) when deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage or

distress. The Commissioner has decided that it is likely that damage or distress has been caused in this instance.

28. **In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of his powers under section 40 of the DPA, he requires TMHL to take the steps specified in Annex 1 of this Notice.**

Right of Appeal

29. There is a right of appeal against this Notice to the First-tier Tribunal (Information Rights), part of the General Regulatory Chamber. Information about appeals is set out in the attached Annex 2.

Dated the 14th day of February 2022

Andy Curry
Head of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

TERMS OF THE ENFORCEMENT NOTICE

TMHL shall within 30 days of the date of this notice:

- Except in the circumstances referred to in paragraph (3) of regulation 22 of PECR, 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 TMHL that he clearly and specifically consents for the time being to such communications being sent by, or at the instigation of, TMHL.

ANNEX 2

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom an enforcement 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 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:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester
LE1 8DJ

Telephone: 0203 936 8963

Email: grc@justice.gov.uk

- The notice of appeal should be served on the Tribunal within 28 days of the date on which the enforcement notice was sent
4. 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)).