

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Just Hype Ltd

Of: Suite 2 Rosehill, 165 Lutterworth Road, Blaby, Leicester, LE8 4DY

1. The Information Commissioner ("Commissioner") has decided to issue Just Hype Ltd ("Just Hype") 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. Just Hype, whose registered office is given above (Companies House Registration Number: 07967928) 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 122(5) of the DPA 2018 defines direct marketing as "*the communication (by whatever means) of advertising material which is directed to particular individuals*". This definition also applies for the purposes of PECR (see regulation 2(2) PECR; and Schedule 19, paragraph 430 and 432(6) DPA18).
6. Consent is defined in Article 4(11) the General Data Protection Regulation 2016/679 as "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. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".
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. "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".
10. 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.
11. 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.”

12. 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.
13. 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.

14. 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

15. 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 and this data is incorporated into a Monthly Threat Assessment (MTA) used to ascertain organisations in breach of PECR.
16. Just Hype is a fashion brand primarily aimed at the youth market. It first came to the attention of the Commissioner following a number of complaints being received via the 7726 reporting tool over a 4-day period between 7 June 2020 and 10 June 2020. The message received by individuals read:

"Claim your free face mask now! no purchase required, download app to claim:- <https://qrco.de/bbYNDZ> .To opt out:- <http://bit.ly/2V4wm0K>"

17. Following further investigation by the Commissioner a number of additional complaints to the 7726 reporting tool were discovered in respect of Just Hype between 1 June 2019 and 12 June 2020. Additional complaints were also discovered that had been sent to the Commissioner via her online reporting tool.

18. An initial investigation letter was sent to Just Hype on 12 June 2020 raising some preliminary concerns with its PECR compliance and providing details of the complaints received. The correspondence also requested information about the volume of messages sent to subscribers, the sources of data for the recipients of those messages and any due diligence undertaken. Just Hype were warned that the Commissioner could issue civil monetary penalties of up to £500,000 for PECR breaches.
19. In its response of 3 July 2020 Just Hype assured the Commissioner that it had suspended all text message marketing on receipt of her correspondence. It stated that the marketing messages are sent through a third-party SMS messaging platform provider, with 2,001,959 messages having been sent between 1 June 2019 and 12 June 2020. Of this number 1,746,632 were received by subscribers. In respect of the free face mask messages, sent over the four-day period between 7 June 2020 and 10 June 2020, 107,795 messages were sent by Just Hype. In further correspondence it confirmed the bodies of all marketing messages sent which included further references to face masks and fashion masks.
20. It stated the data had been sourced from its own website namely from its own customers during the checkout process when purchasing items. Just Hype acknowledged that having reviewed the checkout page it could have been clearer to customers about how their data would be used and how they could opt out of receiving marketing messages. The website page was therefore amended by Just Hype. The Commissioner therefore requested copies of the checkout page before and after being updated which were provided for review.
21. In its correspondence with the Commissioner, Just Hype advised that it did not have any specific training in relation to contact with customers

for its staff, but this had been identified as an area for focus. It also did not have any written PECR policies and procedures in place. It had, however, updated its data protection policy to make specific reference to the requirements of PECR on receipt of the Commissioner's correspondence, a copy of which was provided.

22. Just Hype informed the Commissioner that its internal investigation into the complaints revealed an issue they had previously been unaware of with their SMS platform provider. The platform allows businesses to purchase credits to mass send marketing messages, and allows different distribution lists to be sent within one account. The individual IT consultant who had set up the account on their behalf also acted for several other businesses. Each business had its own distribution list contained within the one account. Just Hype had seemingly sent a number of messages to every user within the platform account that was being used by several companies rather than just to its own distribution list. Just Hype were asked to clarify what proportion of messages were sent to subscribers who were not Just Hype customers. The response indicated that of the 107,795 messages sent between 7 June to 10 June 2020, 72.23% of the distribution list contained within the platform account belonged to Just Hype. As such 29,995 messages were mistakenly sent to incorrect recipients.
23. The Commissioner has made the above findings of fact on the balance of probabilities.
24. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by Just Hype and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

25. The Commissioner finds that Just Hype contravened regulation 22 of PECR.
26. The Commissioner finds that the contravention was as follows:
27. The Commissioner finds that between 1 June 2019 and 12 June 2020 there were 1,746,632 direct marketing messages received by subscribers. The Commissioner finds that Just Hype instigated the transmission of the direct marketing messages sent, contrary to regulation 22 of PECR.
28. The Commissioner is satisfied that the contravention could have been higher, with a total of 2,001,959 text messages being sent over the relevant time.
29. Just Hype, as the instigator of the 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.
30. Just Hype collected information for marketing purposes through its website checkout page relying on the 'soft opt-in' exemption provided by Regulation 22(3) PECR. This exemption means that organisations can send marketing messages by text and e-mail to individuals whose details had been obtained in the course or negotiation of a sale and in respect of similar products and services. The organisation must also give the person a simple opportunity to refuse or opt out of the marketing, both when first collecting the details and in every message after that.

31. The checkout page of Just Hype's website contained an opt-out to marketing situated below the e-mail collection box that stated 'keep me up to date on news and exclusive offers'. Further down the page, where shipping information was collected, there was a box designed for collecting the customers telephone number. Whilst this box did state the individual would receive messages from the company, a 'question mark' symbol ('?') was contained within the box, that when hovered over, stated that Just Hype would only contact the customer about their order. Furthermore, an individual could not proceed without entering a number.
32. Just Hype informed the Commissioner that they relied on the opt out box below the e-mail box to collect consent for both e-mail and text marketing. Individuals were led to believe that by entering their telephone number they would only receive contact regarding their order and as such, it is the Commissioners view that they would not reasonably expect to receive marketing. As a result, 151 complaints were received regarding text messages sent by Just Hype during the contravention period.
33. In this instance Just Hype have been unable to evidence consent. From the evidence provided it is clear that the individuals had not, at the point their data was collected, been given a simple means of refusing the use of their contact details for direct marketing; accordingly, Just Hype's direct marketing messages failed to meet the criteria of Regulation 22(3)(c) PECR.
34. The Commissioner is therefore satisfied from the evidence she has seen that Just Hype did not have the necessary valid consent for the 1,746,632 direct marketing messages received by subscribers.

35. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

36. The Commissioner is satisfied that the contravention identified above was serious. This is because between 1 June 2019 and 12 June 2020, a confirmed total of 1,746,632 direct marketing messages were sent at the instigation of Just Hype. These messages contained direct marketing material for which subscribers had not provided adequate consent.
37. Just Hype also instigated the sending of a further 255,327 marketing messages. Although these were not received by individuals, it evidences an attempt to send large volumes of marketing messages to individuals without consent to do so.
38. Furthermore, it is the Commissioners view that Just Hype sought to capitalise on the current Covid-19 health pandemic through their marketing. 107,795 messages were sent over a four-day period to individuals offering a free face mask in return for downloading Just Hype's phone app. These messages accounted for 97 of the 151 complaints received.
39. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

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

41. The Commissioner does not consider that Just Hype deliberately set out to contravene PECR in this instance.
42. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
43. Firstly, she has considered whether Just Hype 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, not least since the issue of unsolicited text messages has been widely publicised by the media as being a problem.
44. 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 and fully explains the "soft opt-in" exemption and its requirements.
45. It is therefore reasonable to suppose that Just Hype should have been aware of its responsibilities in this area.
46. Secondly, the Commissioner has gone on to consider whether Just Hype failed to take reasonable steps to prevent the contraventions. Again, she is satisfied that this condition is met.

47. Such reasonable steps in these circumstances could have included putting in place appropriate systems, policies, and procedures to ensure that it had the consent of those to whom it had sent marketing messages. In this case the consent statement on their website was unclear with Just Hype relying on the “soft opt-in” exemption without offering a simple means for subscribers to opt out of unsolicited direct marketing. It would also have included ensuring that their messaging platform only sent messages to consented customers of Just Hype. Just Hype could legitimately have sought advice either from the Commissioner or from an independent legal advisor in relation to the basis on which it proposed to send its unsolicited direct marketing, however there is no evidence that Just Hype sought to do this.
48. In the circumstances, the Commissioner is satisfied that Just Hype failed to take reasonable steps to prevent the contraventions.
49. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner’s decision to issue a monetary penalty

50. The Commissioner has also taken into account the following **mitigating feature** of this case:
- Just Hype have advised the Commissioner that they have committed to or have implemented various steps to improve their compliance including updating their privacy policy to include specific reference to the requirements of PECR, staff training and changing their consent statement on their website.

51. 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.
52. 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 Just Hype on this matter.
53. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
54. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
55. The Commissioner has considered the likely impact of a monetary penalty on Just Hype. She has decided on the information that is available to her, that Just Hype has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
56. 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, or those for whom the soft opt-in exemption is applicable.

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 **18 March 2021** 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 **17 March 2021** 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 15th day of February 2021

Andy Curry
Head 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

Telephone: 0300 123 4504

Email: grc@justice.gov.uk

- 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)).