DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Muscle Foods Limited

Of: Unit L Fulcrum Business Park, Vantage Way, Poole, Dorset, BH12 4NU

1. The Information Commissioner ("Commissioner") has decided to issue Muscle Foods Limited ("MFL") 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. MFL, whose registered office is given above (companies house registration number: 09019725), is the organisation (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 provides that:

"(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 device 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 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 defines "direct marketing" as "the communication (by whatever means) of any advertising material which

is directed to particular individuals". This definition also applies for the purposes of PECR.

6. "Electronic mail" is defined in regulation 2(1) PECR as " any text, voice, sound or image 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".

7. 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".

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 (EC Directive) (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, and

(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 implemented 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.

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. MFL is an online food retailer selling high protein food and snacks, lean meats and sports supplements.

13. MFL first came to the attention of the Commissioner in October 2019 after complaints were received about marketing emails from 11 individuals.

14. On 25 October 2019, the ICO sent an investigation letter to MFL requesting the volume of marketing emails sent between 25 March 2019 and 25 October 2019, whether it had consent to send such emails, where it obtained data from and whether it used telephone or SMS marketing. This letter also provided details of the complaints and asked for evidence of consent to directly market the complainants.

15. On 29 November 2019, the ICO received a response from MFL (via its solicitors). The response stated that a total of 135,651,627 marketing emails were sent and delivered within the period requested, and that MFL sourced data directly from its customers who had purchased products from its website. MFL explained that it operates a customer preference centre where customers can update their marketing preferences, which is accessible by creating an online account once a customer has placed an order. MFL advised the Commissioner that it also conducted SMS marketing.

16. MFL went on to explain that on 11 October 2019 it conducted a review of its e-commerce and marketing platforms following a change of senior management. This review led to the discovery of a coding error on its e-commerce platform which meant that changes made to some users marketing preferences via its marketing providers platform were not updated accordingly.

17. In response to the complaints provided by the ICO, MFL provided evidence to show that eight out of 11 individuals were opted in to receive marketing and that three had recently opted out.

18. The Commissioner went onto raise further enquiries about the SMS messages sent by MFL and also sent details of further complaints

received by the Commissioner. MFL responded on 20 January 2020 explaining that individuals would have agreed to its terms and conditions and privacy policy prior to placing an order online. It also confirmed that a total of 6,354,426 marketing SMS messages were sent to individuals in the period 25 March 2019 to 25 October 2019. The response detailed emails sent to the individuals who had raised complaints to the ICO because of the coding error, and provided copies of marketing emails and SMS messages. Screenshots were provided to show the 'customer journey'. These indicated that an individual chooses the item they wish to order, inputs their billing address and payment details, and is then presented with a scrolling box containing MFL's terms and conditions.

19. A review by the Commissioner of the information provided by MFL revealed that a customer who places an order is automatically opted in to receive marketing. Customers are not presented with an opportunity to opt in to marketing via different methods prior to placing an order, but are presented with the scrolling box containing the terms and conditions, followed by a tick box where they agree to the terms and conditions and privacy policy. The scrolling box does not contain the privacy policy, nor does it explain how an individuals' details will be used for marketing purposes or give the opportunity to opt out of marketing. Individuals are only able to update their marketing preferences, including opting out, via their online account after an order is placed.

20. In conclusion the Commissioner considered that MFL relied upon invalid consent to send direct marketing emails and SMS to its customers.

21. The Commissioner received a total of 27 complaints about unsolicited marketing emails from MFL and 7 relating to unsolicited marketing SMS

messages up to the point of conclusion of her investigation. These have been received through a combination of both the Commissioner's online reporting tool (OLRT) and direct to the ICO. Examples of some of the complaints are as follows:

"I have requested to unsubscribe multiple times but I keep getting emails!"

"I have unsubscribed from all forms of communication from this company approx 15 times. I have emailed them directly numerous times to ask them to stop ignoring my unsubscribe requests and stop contacting me. They have continued to do so on both email and text message, I'm getting incredibly frustrated and also concerned that a company is seemingly retaining my personal data when I have requested for them not to do so, numerous times."

Representations

22. On 18 December 2020 the Commissioner received representations in response to the Commissioner's Notice of Intent. These also included various screenshots of the customer journey taken from MFL's website. MFL sought to agree 'common ground' with the Commissioner, on the basis that a large part of the representations primarily focussed upon MFL's apparent reliance on the 'soft opt-in' under Reg 22(3), and in particular, that part of the regulation relating to the phrase "*….at the time the details were initially collected*" (reg 22(3)(c)). MFL appears to assert that a both a simple means of refusing marketing was provided (which the Commissioner was invited to agree), and at a point in time which could be considered "at the time the details were initially collected".

23. For the avoidance of doubt, the Commissioner finds that MFL not only failed to satisfy the consent requirements of regulation 22 generally, but also failed to satisfy regulation 22(3)(c) as a whole, and so no 'common ground' may be agreed. This is borne out by the following observations made by the Commissioner in relation to the representations and attached screenshots:

a) At no point on the customer journey does MFL state that it wishes to use customer's data for direct marketing purposes, let alone advise individuals how to refuse;

b) The 'Order Summary' makes no mention of marketing or how to opt out, albeit the Commissioner would not generally expect to see this in a basket summary;

c) At the point of purchase there is no mention of marketing or how to opt out. This includes no mention of preference options being contained within 'My Account' or any instruction to visit 'My Account'. In the Commissioner's experience this is commonly the type of page where online retailers reliant upon regulation 22(3) advise customers about marketing and provide an opt-out;

d) The 'order screen' makes no mention of marketing or how to opt out (including no mention of preferences within 'My Account'). The first bullet point refers to "View or change your details in 'My Account'" but no mention of marketing is made. The fact that there is mention of ensuring "confirmation emails" don't go to junk folders does, in the absence of anything to the contrary, suggest that confirmation emails are the only type of contact individuals will get from MFL.

e) There is no mention on the 'My Account' screen that individuals can change or manage marketing preferences. There is an ambiguous 'manage preferences' option within the box called 'Account Information' but it does not refer to marketing and has no context, so it would be unlikely to be obvious to individuals, particularly given that there has been no clear information given to individuals that MFL will even use their data for marketing.

f) The customer preference centre has a slightly misleading title as "How often do you wish to hear from us" suggests frequency, when actually the choices are about the type of contact individuals would like. Individuals have no choice over frequency;

g) The Account Establishment email mentions nothing about the fact MFL will send direct marketing to the individual. It does not mention marketing preferences or the ability to opt-out and nor does it direct individuals to 'My Account' to do this. In fact the text near the top right of the screen which says "Receive great deals from musclefood straight into your inbox. Click here to sign up" gives the impression that email marketing will only be sent if the individual consents, which is somewhat misleading;

h) The SMS marketing message has no unsubscribe/STOP on either message as required by regulation 22(3). It is unclear whether the wording "To exit" is supposed to be an unsubscribe but it is unlikely that individuals would equate those words as such.

24. In relation to MFL's representations as to the timing of the 'opt-out', the Commissioner does not agree with MFL's interpretation of the phrase "*at the time that the details were initially collected*". The Commissioner's view remains that it should be part of the same

process when customer details are initially being inputted. The arguments made by MFL that the opt-out was provided as part of the 'same event' and prior to marketing being sent do not in the Commissioner's view satisfy that part of regulation 22(3), as those arguments relate to a time after initial collection rather than 'at the time'.

25. In any event, as evidenced by the screenshots, individuals were not informed that their data would be used for direct marketing purposes. It is not for an individual to assume that an organisation intends to send direct marketing unless they opt-out. Likewise, it is not then for the individual to further assume or guess that an opt-out for direct marketing could be found within their customer account.

26. MFL's privacy policy is the only point where marketing is mentioned which advises customers that it will provide a way out of marketing when a customer first purchases. For the reasons above, this is clearly not the case.

27. Even if the order process had clearly informed individuals about marketing and directed them to click on 'My Account' in order to refuse, this would still not be a simple means as the process is outside collection of customer details and involves a number of 'clicks'. Furthermore, even if the completion of order email had contained details of how to use 'My Account' to opt out of direct marketing, it is not in the Commissioner's view a 'simple means' nor is it given 'at the time' of collection regardless of how quickly the email is sent.

28. A common sense approach to what 'at the time' means and the objective of regulation 22(3) is that individuals can have some control

over the marketing they receive. The approach taken by MFL appears to hide this control and makes it difficult to exercise.

29. Thus, MFL's business model is fundamentally flawed in that the consent relied on by MFL did not amount to valid consent for the purposes of regulation 22 PECR, nor did MFL satisfy the requirements of the 'soft opt-in'.

30. The Commissioner made the above findings of fact on the balance of probabilities.

31. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by MFL and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

32. The Commissioner finds that MFL has contravened Regulation 22 of PECR. The Commissioner finds that the contravention was as follows:

33. Between 25 March 2019 and 25 October 2019 MFL transmitted 135,651,627 emails and 6,354,426 SMS (totalling 142,006,053 unsolicited communications) over a public electronic communications network by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

34. Organisations cannot generally send marketing emails or SMS unless the recipient has notified the sender that they consent to such emails being sent by, or at the instigation of, that sender.

35. The Commissioner is satisfied that MFL did not have the necessary consent required by Reg 22(2) to send marketing communications to

subscribers. Nor was MFL able to avail itself of the 'soft opt-in' provided by regulation 22(3). An organisation which is reliant upon regulation 22(3) of PECR to send marketing emails and SMS to its customers, must ensure the recipient has been given a simple means of refusing the use of his contact details for the purposes of such direct marketing at the time that the details were initially collected. MFL failed to do so.

36. The Commissioner is satisfied that MFL was responsible for this contravention.

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

Seriousness of the contravention

38. The Commissioner is satisfied that the contravention identified above was serious.

39. This is because MFL sent approximately 135,651,627 marketing emails and 6,354,426 marketing SMS messages to individuals without their consent, over a period of seven months.

40. The Commissioner's Direct Marketing Guidance available on the ICO's website states that: "Organisations can generally only send marketing texts or emails to individuals (including sole traders and some partnerships) if that person has specifically consented to receiving them". Furthermore, consent is defined 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" (para. 7 above). Point 60 of the Guidance refers to the fact that

freely given consent should be demonstrated where it is the "condition of subscribing to a service", however it is apparent that consent is not freely given in this instance because individuals are not able to place an order without subscribing to marketing.

41. Furthermore, the Commissioner's guidance in relation to PECR states that "making a large number of marketing calls based on recorded messages or sending large numbers of marketing text messages to individuals who have not consented to receive them […] is likely to constitute a serious contravention of the Regulations". The situation here is analogous in that substantial numbers of marketing emails and SMS were sent to individuals who had not consented to receive them.

42. In MFL's representations it stated that the complaints referred to in paragraph 21 above all related to the period during which the unsubscribe button was not working due to a 'technical glitch', and not as a consequence of the contravention at the heart of this notice. Notwithstanding this (which the Commissioner does not accept given that MFL have not provided the Commissioner with any indication of the period over which the unsubscribe failed to work), the sheer volume of marketing emails and SMS alone sent on the basis of a flawed business model would surpass the threshold of 'seriousness' in the Commissioner's opinion. It is noteworthy that the Commissioner has continued to receive complaints about emails and text messages since the 'technical glitch' was fixed (see para. 56 below).

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

Deliberate or foreseeable contravention

44. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that MFL's actions which constituted that contravention were deliberate actions (even if MFL did not actually intend thereby to contravene PECR).

45. The Commissioner considers that in this case the failure by MFL to include a consent statement at the point of collection of customer's information was a deliberate act. Individuals were automatically opted into marketing and could only access their marketing preferences via their online account once an order had been placed. The means and instruction for opting out were hidden and not simple to exercise.

46. Further and in the alternative the Commissioner has gone on to consider whether the contravention identified above was negligent.

47. First, she has considered whether MFL knew or ought reasonably to have known that there was a risk that this contravention would occur. She is satisfied that this condition is met, given that MFL's business model relied heavily on direct marketing.

48. MFL is registered with the ICO as a data controller and as such should be aware of the Regulations. As the instigator of the emails and SMS it was the responsibility of MFL to ensure valid consent had been obtained prior to their transmission, or to ensure that it could satisfy the requirements of the 'soft opt-in'.

49. 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.

50. Furthermore, the issue of unsolicited marketing has been widely publicised by the media as being a problem.

51. MFL asks individuals to consent to its terms and conditions and privacy policy at the time when their details are collected. The privacy policy does include some information about marketing materials and how an individual can opt out of receiving these by changing their preferences through their online account, albeit this is not directly accessible to customers at the point of purchase. This demonstrates some awareness on the part of MFL as to its statutory obligations, although MFL has not done enough to ensure that it is fully compliant with Regulation 22 of PECR for the reasons stated previously.

52. It is therefore reasonable to suppose that MFL knew or ought reasonably to have known that there was a risk that these contraventions would occur.

53. The Commissioner has also considered whether MFL failed to take reasonable steps to prevent the contraventions.

54. Reasonable steps could have included seeking appropriate guidance on the rules in relation to electronic direct marketing and ensuring either the consent on which it sought to rely on was valid, or that it could satisfy the requirements of the soft opt-in.

55. In this case, MFL has included some information in its privacy policy about marketing activity and how an individual can update their preferences, but it has not clearly informed individuals of its intention to send direct marketing, nor provided an opportunity to opt out of

marketing at the time their details are collected. Review and understanding of Regulation 22 of PECR would have made it clear that in the absence of valid consent, a simple means of opting out should be presented to individuals at the point of placing an order to ensure compliance.

56. Furthermore, MFL has continued to send marketing emails to individuals throughout the course of the Commissioner's investigation and continues to do so without any apparent remedial measures having have been taken to prevent further contraventions. Indeed, since the completion of the Commissioner's investigation to the date of this notice, there have been a further 467 complaints made about marketing emails and SMS sent by MFL (9 direct to the Commissioner, 2 SMS complaints via the OLRT and 456 complaints via 7726 SPAM reporting service).

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

The Commissioner's decision to impose a monetary penalty

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

- MFL has continued to run the marketing campaign during (and since) the Commissioner's investigation and despite the ICO's concerns, without attempting to amend or review its practices.
- The Commissioner considers MFL's actions were for financial gain as the marketing was promoting the organisations products.

59. The Commissioner considers there are no mitigating factors to be considered in this case.

60. 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.

61. This has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking, and invited MFL to make representations in response.

62. The Commissioner has received and considered Representations in response to the Notice of Intent dated 18 December 2020.

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

64. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty. She has decided that a monetary penalty is an appropriate and proportionate response to the finding of a serious contravention of regulation 22 of PECR by MFL.

65. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The making of unsolicited direct marketing calls 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 telephoning consumers who want to receive these calls.

66. The Commissioner has also considered the likely impact of a monetary penalty on MFL.

The amount of the penalty

67. Taking into account all of the above, the Commissioner has decided that the amount of the penalty is **£50,000 (Fifty thousand pounds)**.

Conclusion

68. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **1 April 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.

69. If the Commissioner receives full payment of the monetary penalty by **31 March 2021** the Commissioner will reduce the monetary penalty by 20% to **£40,000 (Forty thousand pounds).** However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

70. 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.

70. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.

71. Information about appeals is set out in Annex 1.

72. 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

- period for appealing against the monetary penalty and any variation of it has expired.

73. 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 March 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 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 (Information Rights) 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)).