

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Finance Giant Ltd

Of: 6th Floor, 25 Farringdon Street, London, EC4A 4AB

1. The Information Commissioner ("the Commissioner") has decided to issue Finance Giant Ltd ("FGL") with a monetary penalty under section 55A of the Data Protection Act 2018 ("DPA"). The penalty is in relation to a serious contravention of Regulations 22 and 23 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. FGL, whose registered office address is given above (Companies House Registration Number: 09749034) 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. Regulation 23 of PECR states that *"A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail –*
- (a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed;*
 - (b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided*
 - (c) where that electronic mail would contravene regulation 7 of the Electronic Commerce (EC Directive) Regulations 2002;*
or
 - (d) where that electronic mail encourages recipients to visit websites which contravene that regulation."*
6. Section 122(5) of the Data Protection Act 2018 ("**DPA18**") defines direct marketing as *"the communication (by whatever means) of advertising or marketing 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).
7. *"Consent"* is defined by regulation 8(2) of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 by reference to the UK General Data Protection Regulation ("**GDPR**"), article 4(11) of which provides that: *"'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"*.

8. 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"*.
9. "Individual" is defined in regulation 2(1) of PECR as *"a living individual and includes an unincorporated body of such individuals"*.
10. 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"*.
11. "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"*.
12. 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.
13. Section 55A of the DPA (as applied to PECR cases by Schedule 1 to PECR, as variously amended) 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."

14. 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.
15. 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.

16. 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.

Background to the case

17. FGL is a private limited company incorporated in England on 25 August 2015 (company number 09749034). The address of its registered office is 6th Floor, 25 Farringdon Street, London, EC4A 4AB. FGL acts as a loan broker for individuals seeking car finance. Its primary website is presently carfinancegiant.co.uk.
18. FGL is registered with the Financial Conduct Authority ('**FCA**') to carry out regulated services (reference number 726597) and with the Commissioner's Office as a Tier 1 data controller (registration number ZB191170).
19. FGL came to the attention of the Commissioner during the second lockdown (between 5 November and 2 December 2020) imposed as a result of the Covid-19 pandemic. In this period, the Commissioner received 97 complaints from individual subscribers of unsolicited direct marketing SMS messages containing the following text:

Marketplace CRASHED! Over 320,000 cars prices DROPPED due to 2nd lockdown. Best time to upgrade - <https://carfinancegiant.co.uk/cars> Good Luck! CFG

20. The messages were reported to the Commissioner through the 7726 spam reporting system indicating that the SMS messages in question were sent without the subscribers consent. The SMS messages also did not contain an opt-out.

21. On 24 November 2020, the Commissioner's office FGL to notify it that the Commissioner was investigating FGL's compliance with the PECR, including the actions of individual directors and officers of the company to determine their liability. Attached to the email was a letter which asked FGL to provide various items of information concerning its SMS messaging activities between 1 January and 24 November 2020.
22. On 22 December 2020, FGL replied to the Commissioner's request for information, stating materially that:
 - a. FGL had sent no text messages to customers between 1 January and 31 October 2020 but that it had sent 40,524 text messages to individual customers and 465,241 emails to 72,483 customers in November 2020;
 - b. all the text messages sent by FGL in November 2020 were identical, stating: *"Marketplace CRASHED! Over 320,000 cars prices DROPPED due to 2nd lockdown. Best time to upgrade - <https://carfinancegiant.co.uk/cars> Good Luck! CFG"*. The text of the emails sent by FGL stated: *"Want to upgrade your car? Over 320,000 car prices reduced"*.
 - c. the data had been obtained by FGL directly from its customers. The texts were sent only to customers *"who applied for finance through our website and accepted our T&C and Privacy policy which covers our marketing communication"*;
 - d. asked to provide evidence that individual customers had given their consent, FGL stated that customers were *"unable to submit the application until they tick the box that they agreed*

with T&C and we direct the customers to read our privacy policy"; and

- e. asked to confirm whether it operated an internal suppression list of numbers in circumstances where it had been advised that the subscriber did not wish to receive marketing communications, FGL stated that "We relied on the platform we use to offer customers an option to stop any future text messages etc. We were concerned when we received an inquiry from ICO. This highlighted that perhaps customers were not provided with an option which may have led to the customers lodging a complaint with ICO. As a result, we raised a query with the platform providers" [emphasis added]. FGL attached a response from the platform providers, stating that an opt out was *"not included automatically"* but could be added.

23. At this time, FGL also provided the Commissioner's office with screenshots of the application process, a copy of the emails sent to customers, a copy of FGL's terms and conditions and a link to its privacy policy. It also stated that its staff completed an online GDPR training course provided by the [REDACTED].
24. On 23 December 2020, the Commissioner's office asked FGL to (i) clarify how many of the text messages and emails it were successfully delivered to individuals; and (ii) supply the name of the platform FGL used to send text and email messages. It also drew FGL's attention to the Commissioner's Direct Marketing Guidance, including the requirement that electronic direct marketing messages necessitate consent. On 18 January 2021, FGL provided the further information as requested, showing that the rate of successful delivery for SMS was

68.13% and the corresponding rate in relation to emails was in excess of 90%.

25. On 29 January 2021, the Commissioner's office sought further clarification of the numbers of texts and emails sent to individual customers. On 8 February 2021, FGL provided the further information sought.
26. On 4 March 2021, the Commissioner's office notified FGL that it had completed its investigation and would now consider whether to take formal enforcement action. It invited FGL to provide any further evidence or information regarding its policies, procedures and training programmes within 7 days.
27. The Commissioner has made the above findings of fact on the balance of probabilities.
28. The Commissioner has considered whether those facts constitute a contravention of regulations 22 and 23 of PECR by FGL and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

29. The Commissioner finds that FGL contravened regulations 22 and 23 of PECR.
30. The Commissioner finds that the contravention was as follows:
31. The Commissioner finds that between 1 and 30 November 2020 there were (i) 40,524 direct marketing SMS sent and 27,608 direct marketing SMS received by subscribers; and (ii) 465,235 direct marketing emails sent and 445,138 direct marketing emails received

by subscribers. The Commissioner finds that FGL transmitted those direct marketing messages via the sendinblue.com platform, contrary to regulation 22 of PECR.

32. FGL as the sender 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.
33. In this instance, FGL claimed that its customers had consented to receiving direct marketing messages as part of their agreement to the terms and conditions and privacy policy during the application process. However, FGL's application process enables applicants only to signify their agreement to the terms and conditions. There is no separate opt-in or opt-out box to enable applicants either to consent or withdraw consent specifically in relation to direct marketing messages. Nor are applicants informed that direct marketing messages will be sent, unless they separately consult the terms of FGL's privacy policy.
34. The Commissioner's Direct Marketing Guidance makes clear that *"organisations need to be aware that indirect consent will not be enough for texts, emails or automated calls. This is because the rules on electronic marketing are stricter, to reflect the more intrusive nature of electronic messages"*. Indirect consent may only be valid where it is sufficiently clear and specific. 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. 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.

35. Having regard to the above, the Commissioner concludes that the consents obtained by FGL as part of the application process did not meet the requirements of PECR in respect of direct marketing messages. Specifically:
- a. consent was not informed because individuals were not notified during the application process that marketing messages would be sent;
 - b. consent was not specific as there was no indication as to the type of marketing communication that would be sent; and
 - c. consent was not freely given because it was required as a condition of making an application.
36. The Commissioner is therefore satisfied from the evidence he has seen that FGL did not have the necessary valid consent for the 27,608 direct marketing SMS and 445,138 direct marketing emails received by subscribers in November 2020.
37. The Commissioner is further satisfied that the actions of FGL have contravened regulation 23 PECR, in that the 27,608 direct marketing SMS did not contain any opt-out to enable customers to stop receiving further messages. The Commissioner acknowledges that the 445,138 direct marketing emails did include such an opt-out.
38. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

39. The Commissioner is satisfied that the contravention identified above was serious. This is because between 1 and 30 November 2020 a confirmed total of 505,759 direct marketing messages were sent by FGL. These messages contained direct marketing material for which subscribers had not provided valid consent.
40. In assessing the seriousness of the contravention, the Commissioner also has regard to the following matters:
- a. there was no way for applicants to avoid consenting to the FGL's use of direct marketing messages as part of the application process other than by declining the service altogether;
 - b. the implications of FGL's terms and conditions – including the use of direct marketing messages - were never made clear to applicants at the application stage;
 - c. the text messages sent by FGL referenced the Covid-19 pandemic, in an attempt to capitalise on an apparent crash in the market to increase sales; and
 - d. the text messages did not contain an opt-out as required by regulation 23 PECR.
41. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

42. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that FGL's actions which constituted that contravention were deliberate actions (even if FGL did not actually intend thereby to contravene PECR).
43. The Commissioner considers that in this case FGL did deliberately contravene regulations 22 and 23 of PECR. FGL's privacy policy expressly stated that individuals would only receive marketing should they consent to it, and that individuals would be able to choose which channel they would want to receive marketing. FGL were, therefore, plainly aware of the requirements for obtaining valid consent for marketing. The application process on FGL's website did not reflect its privacy policy. Applicants were instead required to consent to direct marketing messages as part of its terms and conditions, nor were individuals properly informed of this during the application process. FGL's privacy policy shows that it knew what was required but chose to ignore those requirements when it came to the application process.
44. For the above reasons, the Commissioner is satisfied that this breach was deliberate within the meaning of s55A(2).
45. Further and in the alternative, the Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
46. Firstly, he has considered whether FGL knew or ought reasonably to have known that there was a risk that these contraventions would occur. He is satisfied that this condition is met, in light of the content of

FGL's own privacy policy which recognised the need for valid consent.

In light of those FGL cannot have been unaware that a failure to follow its own privacy policy might give rise to a risk of contravention.

47. 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 messages to individuals if that person has specifically consented to receiving them[; and highlights the difficulties of relying on indirect consent for electronic mail]. The Commissioner has also published detailed guidance on consent under the GDPR. In case organisations remain unclear on their obligations, the ICO operates a telephone helpline. ICO communications about previous enforcement action where businesses have not complied with PECR are also readily available.
48. It is therefore reasonable to suppose that FGL should have been aware of its responsibilities in this area.
49. Secondly, the Commissioner has gone on to consider whether FGL failed to take reasonable steps to prevent the contraventions. Again, he is satisfied that this condition is met. Specifically, there is no evidence that FGL took any steps to implement the requirements of its privacy policy as part of its application process. Nor did it offer any evidence that it sought to include an opt-out in relation to the SMS direct marketing messages, even though this option was available on the platform it used. FGL, moreover, had no tangible policies or procedures relating to the PECR to ensure that its marketing would comply with

those requirements. Nor is there any evidence that FGL changed its website to reflect the enforcement action.

50. In the circumstances, the Commissioner is satisfied that FGL failed to take reasonable steps to prevent the contraventions.
51. The Commissioner is therefore satisfied in the alternative that FGL failed to take reasonable steps to prevent the contravention as required by section 55A(3) DPA.

The Commissioner's decision to issue a monetary penalty

52. The Commissioner has taken into account the following aggravating features of this case:
 - the actions of FGL were clearly motivated by the desire to increase its customer base during the pandemic and generate additional profit; and
 - FGL ignored the guidance issued by the Commissioner's Office in relation to direct marketing, as well as the helpline operated by the Office to assist businesses seeking clarification of their obligations under the PECR.
53. The Commissioner has taken into account the following mitigating features of this case:
 - FGL ceased electronic marketing following notification of the Commissioner's investigation, nor is the Commissioner aware of any further complaints or concerns; and

- FGL indicated that it had take legal advice to ensure further and ongoing compliance with the PECR.
54. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. He is also satisfied that the procedural rights under section 55B have been complied with.
55. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out his preliminary thinking and invited FGL to make representations in respect of this matter. In reaching his final view, the Commissioner has taken into account the representations made by FGL on this matter.
56. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
57. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.
58. The Commissioner has considered the likely impact of a monetary penalty on FGL. He has decided on the information that is available to him that a penalty remains the appropriate course of action in the circumstances of this case.
59. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited direct 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 messaging those who specifically consent to receive direct marketing.

The amount of the penalty

60. 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

61. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **11 May 2022** 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.
62. If the Commissioner receives full payment of the monetary penalty by **10 May 2022** the Commissioner will reduce the monetary penalty by 20% to **£48000 (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.
63. 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.

64. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
65. Information about appeals is set out in Annex 1.
66. 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.
67. 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 11 April 2022

Andy Curry
Head of Investigations
Information Commissioner's Office
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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 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

- 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)).