

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: L. A. D. H Limited

Of: Oak House Beal Lane, Shaw, Oldham, United Kingdom, OL2 8PB

1. The Information Commissioner ("the Commissioner") has decided to issue L. A. D. H Limited ("LADH") with a monetary penalty under section 55A of the Data Protection Act 1998 ("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. LADH, whose registered office address is given above (Companies House Registration Number: 12065159) 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 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).

7. From 1 January 2021, consent in PECR has been defined by reference to the concept of consent in the UK GDPR as defined in section 3(10) of the DPA 2018^[1]: see regulation 2(1) of PECR, as amended by Part 3 of Schedule 3, paragraph 44 of The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations

^[1] The UK GDPR is therein defined as Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 ("GDPR") as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018.

2019/419. Article 4(11) of the UK GDPR sets 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"*.

8. Recital 32 of the UK 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. 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."

13. 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.

14. 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.

15. 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

16. Mobile users can report the receipt of unsolicited marketing text messages to the Mobile UK's Spam Reporting Service by forwarding the message to 7726 (spelling out "SPAM"). Mobile UK is an organisation that represents the interests of mobile operators in the UK. The Commissioner is provided with access to the data on complaints made to the 7726 service.
17. LADH is a company in the financial services sector. The exact nature of LADH's business is unclear due to its limited online presence. However, from the publicly available information on Companies House, LADH's business is stated as "Life Insurance" and in LADH's lapsed ICO registration, the nature of LADH's work is stated as "Independent Financial Adviser". The sole director of LADH is Mr Stuart Pearson (the "LADH Director") who is also listed on Companies House as LADH's person of significant control.
18. LADH came to the attention of the Commissioner as part of a wider operation that focused on organisations sending unsolicited direct marketing messages promoting debt advice and debt management solutions. As part of this operation, [REDACTED] was used to identify SMS complaints submitted to the 7726 service. This [REDACTED] identified 48 complaints regarding SMS messages sent from the following number: +447520649718 (the "Relevant Number"). Two examples of the SMS messages sent are as follows:

"Free Debt Help can consolidate your unaffordable payments, write off up to 85% of your total debt Check if you qualify text HELP or Stop2Stop."

"FREE Government Debt Help can consolidate your unaffordable debt and write off up to 85% of your total debt. Check if you qualify by texting help"

19. [REDACTED] identified a further 58 complaints that were received in relation to these SMS messages, but which did not identify the Relevant Number as the sender. As a result [REDACTED], the Commissioner identified a total of 106 complaints that were received by the 7726 service.
20. On 17 May 2022, the Commissioner sent a third party information notice to [REDACTED] (the "Communications Service Provider" (CSP)) to which the Relevant Number was allocated. This notice requested the CSP to provide, amongst other things, information relating to:
- the identity and contact details of the subscriber to the Relevant Number;
 - the total number of SMS messages sent by the subscriber during the periods of connection including the number of these SMS messages that were successfully delivered;
 - copies of message logs showing all SMS messages sent by the subscriber since 1 January 2022.

21. The CSP responded to the Commissioner's notice on 14 June 2022 and confirmed the subscriber was LADH. The CSP also provided the message logs which showed that during the period between 14 March 2022 and 30 April 2022 (the "Contravention Period"), LADH sent a total of 49,938 SMS marketing messages, of which 31,329 messages were delivered. The complaints sent to the 7726 service were cross-checked against (and matched) the message logs provided by the CSP.
22. On 15 July 2022, the Commissioner sent an initial investigation letter to LADH by email (the "Initial Investigation Letter") which attached a spreadsheet of the 106 complaints sent to the 7726 service and, amongst other things, requested LADH to provide information on:
- the source of data used to promote LADH's business;
 - for each source of data, how LADH ensured that individuals had consented to receiving SMS messages from LADH;
 - evidence that subscribers to the relevant mobile numbers had consented to receiving unsolicited direct marketing messages from LADH;
 - any contracts with third parties from which information was purchased by LADH including details of any due diligence undertaken.
23. The LADH Director responded to the Initial Investigation Letter on the same day, stating that LADH "is no longer trading since 2021". In response, the Commissioner informed the LADH Director of the information received from the CSP which, amongst other things, confirmed that 49,938 SMS messages were sent to individuals from a

mobile number allocated to LADH. In view of this and the fact that LADH remained active on Companies House, the Commissioner informed the LADH Director that a response to the Initial Investigation Letter was still required. However, the Commissioner did not receive a response or acknowledgement from the LADH Director by the required deadline.

24. On 9 August 2022, the Commissioner sent another email to the LADH Director attaching a copy of the Initial Investigation Letter and requesting a response within seven days. The LADH Director responded on the same day and requested a call to discuss the matter. Following a series of exchanges between the Commissioner and the LADH Director, a call was finally held on 15 August 2022. During the call, the LADH Director confirmed, amongst other things, that:
- he was offered this opportunity in respect of an SMS campaign under investigation;
 - he had been verbally reassured that he was receiving 'opt-in data' and went ahead to send the SMS messages;
 - he had not received anything in writing to confirm that he was receiving 'opt-in data'.
25. The LADH Director did not provide the Commissioner with any information on who offered him this opportunity or who provided him with the 'opt-in data'. The LADH Director reassured the Commissioner that he would respond to the queries in the Initial Investigation Letter by 19 August 2022.

26. On 16 August 2022, the Commissioner sent an email to the LADH Director providing additional time for the LADH Director to respond to the Initial Investigation Letter (i.e. a revised deadline of 22 August 2022). The LADH Director thanked the Commissioner and stated that he would "have all the answers...and any evidence". However, no further response was provided from the LADH Director after this communication. The Commissioner sent a further chaser on 31 August 2022 and reminded the LADH Director of the deadline set.
27. On 19 October 2022 (following an unsuccessful attempt on 15 September 2022 due to postal delivery issues), the Commissioner served a hand delivered Information Notice to LADH's registered address which requested a response to the queries in the Initial Investigation Letter by 23 November 2022 and reminded LADH that failure to respond to an Information Notice is a criminal offence. No response was received from LADH by the required deadline. The Commissioner did not receive any further contact or communication from the LADH Director.
28. The Commissioner has made the above findings of fact on the balance of probabilities.
29. The Commissioner has considered whether those facts constitute a contravention of regulations 22 and 23 of PECR by LADH and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

30. The Commissioner finds that LADH contravened regulations 22 and 23 of PECR.
31. The Commissioner finds that the contravention was as follows:

32. The Commissioner finds that between 14 March 2022 and 30 April 2022 there were 31,329 direct marketing SMS messages received by subscribers. The Commissioner finds that LADH transmitted those direct marketing messages, contrary to regulation 22 of PECR.
33. LADH, 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.
34. In this instance LADH was required to demonstrate that valid consent had been obtained in order to enable it to send the direct marketing SMS messages described in paragraph 18 above.
35. The Commissioner's direct marketing guidance says *"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."*
36. However, it does go on to say that indirect consent may be valid, but only if it is clear and specific enough. If categories of organisations are referred to then those categories must be tightly defined and the organisation wanting to use the consent must clearly fall within the description. Consent is not likely to be valid where an individual is presented with a long, seemingly exhaustive list of categories of organisations.
37. 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.

38. 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.
39. 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.
40. LADH failed to provide any evidence that the SMS messages sent were solicited or that the recipients had notified LADH that they had consented for the time being to receive such SMS messages. In addition, based on the specific SMS messages submitted by the complainants, the Commissioner found that most of the SMS messages did not contain an opportunity for individuals to opt out.
41. The Commissioner is therefore satisfied from the evidence he has seen that LADH did not have the necessary valid consent for the 31,329 direct marketing messages received by subscribers.
42. The Commissioner is further satisfied that the actions of LADH have contravened regulation 23 PECR given that the only identifying information of the sender was the Relevant Number. The Commissioner was only able to link the Relevant Number to LADH by way of a third party information notice as explained in paragraphs 20 and 21 above.

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

Seriousness of the contravention

44. The Commissioner is satisfied that the contravention identified above was serious. This is because between 14 March 2022 and 30 April 2022, a confirmed total of 31,329 direct marketing messages were sent by LADH. These messages contained direct marketing material and LADH could not produce any evidence of subscribers having provided valid consent.
45. Although the contravention involves a relatively short period of time (six weeks), the weekly volumes of SMS messages sent were high and attracted a total of 106 complaints. Further, the Commissioner also notes that almost 49,938 SMS messages were actually sent (of which 31,329 were delivered).
46. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

47. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that LADH's actions which constituted that contravention were deliberate actions (even if LADH did not actually intend thereby to contravene PECR).
48. The Commissioner does not consider that LADH deliberately set out to contravene PECR in this instance.

49. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
50. Firstly, he has considered whether LADH 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, for the following reasons:
- the LADH Director ought to have known that there was a risk that the contraventions would occur since he has been the director of a number of companies since 2016. As a result, he should have been fully aware of the responsibilities of a director, including the requirement to comply with applicable legislation;
 - given that LADH was also registered with the Commissioner, the LADH Director (who is named in the registration) should have been aware of the available resources on the Commissioner's website, including guidance on PECR and direct marketing; and
 - during a telephone call with the Commissioner's investigating officer on 15 August 2022, the LADH Director: (i) demonstrated an awareness for the need to use 'consented' data; (ii) acknowledged that he should have obtained written confirmation from the third party data supplier(s) in relation to the same; and (iii) confirmed his awareness of the fines issued by the Commissioner in this area.
51. 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.

52. It is therefore reasonable to suppose that LADH should have been aware of its responsibilities in this area.
53. Secondly, the Commissioner has gone on to consider whether LADH failed to take reasonable steps to prevent the contraventions. Again, he is satisfied that this condition is met.
54. The Commissioner's direct marketing guidance makes clear that organisations acquiring marketing lists from a third party must undertake rigorous checks to satisfy themselves that the personal data was obtained fairly and lawfully, and that they have the necessary consent. It is not acceptable to rely on assurances given by third party suppliers without undertaking proper due diligence. In this instance, the Commissioner found that:
 - LADH failed to demonstrate that it had obtained written confirmation from the third party data supplier(s) that valid consent had been obtained from the relevant individuals in order to enable LADH to send the direct marketing SMS messages;

- LADH failed to provide any evidence that it had a contract in place with the third party data supplier in relation to the acquisition of the third party data; and
 - LADH failed to provide any evidence that it had conducted appropriate due diligence in this regard.
55. As a result, there were a number of steps that the LADH failed to take, including the following:
- having a written contract in place with the third party data supplier(s) (rather than accepting verbal assurances that he was receiving 'opt-in' data);
 - undertaking appropriate due diligence on the third party data received, including obtaining the relevant 'opt-in' information before sending the SMS messages; and
 - seeking advice from the Commissioner about PECR and direct marketing compliance.
56. In the circumstances, the Commissioner is satisfied that LADH failed to take reasonable steps to prevent the contraventions.
57. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

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

- The LADH Director failed to engage and satisfactorily cooperate with the Commissioner's investigation despite the opportunities given to him by the Commissioner's investigating officer. Despite numerous opportunities, deadline extensions and assistance provided to LADH, the LADH Director did not provide any responses to the Commissioner's enquiries. This resulted in the service of an Information Notice which was not complied with, which is a criminal offence contrary to section 47 DPA 1998.
 - Although the contravention period was relatively short, the weekly volumes of SMS messages sent were relatively high and resulted in a significant number of complaints (106 in total).
59. The Commissioner does not consider that there are any mitigating factors 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. He is also satisfied that the procedural rights under section 55B have been complied with.
61. The latter has included the issuing of a Notice of Intent, dated 14 September 2023, in which the Commissioner set out his preliminary thinking. In reaching his final view, the Commissioner has taken into account the information provided by LADH following service of the Notice of Intent.
62. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

63. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.
64. The Commissioner has attempted to consider the likely impact of a monetary penalty on LADH but has been unable to do so given the lack of recent publicly available information. LADH was invited to provide financial representations in response to the Notice of Intent, but failed to do so. The Commissioner considers in the circumstances that a penalty remains the appropriate course of action.
65. 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.
66. In making his decision, the Commissioner has also had regard to the factors set out in s108(2)(b) of the Deregulation Act 2015; including: the nature and level of risks associated with non-compliance, including the risks to economic growth; the steps taken by the business to achieve compliance and reasons for its failure; the willingness and ability of the business to address non-compliance; the likely impact of the proposed intervention on the business, and the likely impact of the proposed intervention on the wider business community, both in terms of deterring non-compliance and economic benefits to legitimate businesses.

67. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

68. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£50,000 (fifty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

69. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **13 February 2024** 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.
70. If the Commissioner receives full payment of the monetary penalty by **12 February 2024** 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.
71. 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.

72. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
73. Information about appeals is set out in Annex 1.
74. 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.
75. 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 11th day of January 2024

Signed

A large black rectangular redaction box covers the signature. A dotted line extends from the right side of the box.

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 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)).