



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0263P

**Determined, by consent, on written evidence and submissions.
Considered on the papers on 1 February 2021**

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Anne Chafer
Mr Michael Jones

Between

Koypo Laboratories Limited

and

The Information Commissioner

Appellant

Respondent

DECISION AND REASONS

DECISION

1. The appeal is allowed in part.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 812 and additional documents.

BACKGROUND

4. This is an appeal against a monetary penalty notice (MPN) issued by the the Commissioner dated 4 August 2020. The Notice contained findings that the Appellant had contravened Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR) by instigating the transmission of unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing.

STATUTORY FRAMEWORK

5. PECR implemented the Privacy and Electronic Communications Directive 02/58/EC (the Directive) in domestic law. The Commissioner's power to impose a monetary penalty notice, the Appellant's right of appeal and the Tribunal's jurisdiction to hear the Appeal all derive from the Data Protection Act 1998 (DPA 1998). The repeal of DPA 1998 does not affect its operation insofar as it relates to PECR: paragraph 58 of Schedule 20 to the Data Protection Act 2018.

6. Regulation 22 of PECR provides:-

(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).

7. In *Microsoft Corporation v McDonald (trading as Bizads)* [2006] EWHC 3410 (Ch)10, Lewison J (as he then was) considered the meaning of instigation for the purposes of regulation 22 PECR. He concluded at [13] that:

“The Regulations apply to prevent not only the transmission of electronic mail but also the instigation of such transmission. What is the meaning of the word ‘instigate’? Mr Vanhegan, who appears on behalf of Microsoft, submits that it has its ordinary dictionary definition which includes urging or inciting somebody to do something. I accept that submission. I do, however, consider that to urge or incite somebody to do something requires something more than the mere facilitation of the action concerned; it requires, in my judgment, some form of positive encouragement”.

8. By virtue of regulation 2(2) of PECR and section 11(3) of the DPA 1998, “direct marketing” means “the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals.”

9. By virtue of regulation 2(3) of PECR, Article 2(f) of the Directive and Article 2(h) of the Data Protection Directive 95/46/EC, “consent” means “any freely given specific and informed indication of his wishes by which the data subject signifies his agreement...”.

10. In the recent Upper Tribunal case of *Leave.EU Group Limited and Eldon Insurance Services Limited v IC* (GIA/921/2020, GIA/922/2020 & GIA/923/2020) (‘Leave.EU’)¹ the UT considered the meaning of “specific and informed” consent as follows:-

48. There are two decisions of the Court of Justice (CJEU) which are helpful in this context: Case C-673/17 *Verbraucherzentrale Bundesverband eV v Planet49 GmbH* (EU:C:2019:801) [2020] 1 WLR 2248 (‘Planet49’) and Case C-61/19 *Orange Romania SA v ANSPDCP* (EU:C:2020:901) (‘Orange Romania’). The CJEU’s decision in the latter case post-dates the FTT’s decision.

49. The *Planet49* case concerned an online promotional lottery. The registration process involved the installation of cookies on users’ computers and pre-selected boxes agreeing to being contacted by third parties. In the first

¹ The UT decision post-dates the initial consideration by the Panel, but the decision essentially upholds the approach of the FTT in the case whose decision was before us.

instance, users who wished to enter the lottery were presented with a generic opening statement as to their consent to receiving information from “certain sponsors and cooperation partners”. However, they then had the opportunity to specify their preferences in considerable detail (see the CJEU judgment at [26]-[30]). The Court of Justice ruled that “the indication of the data subject’s wishes referred to in Article 2(h) of Directive 95/46 must, inter alia, be ‘specific’ in the sense that it must relate specifically to the processing of the data in question and cannot be inferred from an indication of the data subject’s wishes for other purposes” (at [58]). The Court also agreed with the Advocate General that clear and comprehensive information (as required by Article 5(3) of the 2002 Directive) “implies that a user must be in a position to be able to determine easily the consequences of any consent he or she might give and ensure that the consent given is well informed. It must be clearly comprehensible and sufficiently detailed so as to enable the user to comprehend the functioning of the cookies employed” (CJEU judgment at [74]).

50. Furthermore, the passage at paragraph [58] of the Court of Justice’s judgment was expressly adopted in *Orange Romania* (at [38]). Likewise, and notably, the Court reaffirmed the passage from *Planet49* at [74] in *Orange Romania* at [40]:

[40] As regards the requirement arising from Article 2(h) of Directive 95/46 and Article 4(11) of Regulation 2016/679 that consent must be ‘informed’, that requirement implies, in accordance with Article 10 of that directive, read in the light of recital 38 thereof, and with Article 13 of that regulation, read in the light of recital 42 thereof, that the controller is to provide the data subject with information relating to all the circumstances surrounding the data processing, in an intelligible and easily accessible form, using clear and plain language, allowing the data subject to be aware of, inter alia, the type of data to be processed, the identity of the controller, the period and procedures for that processing and the purposes of the processing. Such information must enable the data subject to be able to determine easily the consequences of any consent he or she might give and ensure that the consent given is well informed (see, by analogy, judgment of 1 October 2019, *Planet49*, C-673/17, EU:C:2019:801, paragraph 74).

51. We consider that *Planet49* and *Orange Romania* are high authority as to the proper approach to the meaning of consent in this context. The decisions are especially helpful as regard the requirement that consent be both “specific” and “informed”. They set a relatively high bar to be met for a valid consent.

11. Section 55A of the DPA 1998 (as modified by section 31 and Schedule 1 of PECR)

provides the Commissioner with a power to impose a monetary penalty notice (such as the Notice in this case) “if the Commissioner is satisfied that – (a) there has been a serious contravention of the requirements of the [PECR], and (b) subsection (2) or (3) applies.” Subsections (2) and (3) provide (again, as modified):

- (4) This subsection applies if the contravention was deliberate.
- (5) 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. In *Leave.EU* the UT has provided some guidance on the operation of PECR and monetary penalty notices (MPNs). At paragraph 70 of the judgment the UT explained:-

70. MPNs represent one part of a suite of enforcement measures available to the Commissioner. In this context we note that Directive 2009/136/EC (‘the 2009 Directive’) amended the 2002 Directive, in part to strengthen enforcement of the rules governing the use of electronic mail for direct marketing. Article 15a(1) of the 2002 Directive, as amended, provides (our emphasis):

Members States shall lay down the rules on penalties, including criminal sanctions where appropriate, applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided must be effective, proportionate and dissuasive and may be applied to cover the period of any breach, even where the breach has subsequently been rectified.

13. The maximum limit for a MPN under the DPA 1998 is £500,000 (see section 55A(5) and regulation 2 of the Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 (SI 2010/31; ‘the 2010 Regulations’). As regard the information that must be contained in the MPN, most notably this includes “the reasons for the amount of the monetary penalty including any aggravating or mitigating features the Commissioner has taken into account

when setting the amount” (see section 55A(7) and regulation 4(e) of the 2010 Regulations).

14. Section 55B sets out the procedural requirements of imposing a monetary penalty notice, including at subsection (1) that “the Commissioner must serve the data controller with a notice of intent” before serving the monetary penalty notice. Article 2 of the Data Protection (Monetary Penalties) Order 2010 (the Order) requires the Commissioner to “consider any written representations made in relation to a notice of intent when deciding whether to serve a monetary penalty notice.”

15. Section 55B(5) of the DPA 1998 goes on to provide:

A person on whom a monetary penalty notice is served may appeal to the Tribunal against –

- (a) the issue of the monetary penalty notice;
- (b) the amount of the penalty specified in the notice.

16. By virtue of article 7 of the Order, the s. 55B(5) right of appeal is to be determined in accordance with s. 49 DPA 1998. This provides that the Tribunal shall allow the appeal and (“or”) substitute another Notice if the Notice is “not in accordance with the law” or to the extent that the Commissioner exercised her discretion, it should have been exercised differently:-

35.... The statutory wording used in s. 49 DPA 1998 also describes the Tribunal’s jurisdiction in relation to appeals against Decision Notices issued by the Information Commissioner under the Freedom of Information Act 2000 (“FOIA”) and the Environmental Information Regulations 2004 (“EIRs”). The Upper Tribunal has confirmed that an appeal against a Decision Notice made under FOIA or EIRs is to be regarded as an appeal by way of re-hearing. The most recent and authoritative support for that approach may be found in the Decision of a three-judge panel of the Upper Tribunal (AAC) in *Malnick v IC and ACOBA* [2018] UKUT 72 (AAC)

17. Section 160 DPA 2018 requires the Information Commissioner to publish a Regulatory Action Policy giving guidance about how she proposes to exercise her functions under the DPA 2018. This was published in November 2018. The Commissioner also publishes internal guidance which it uses when deciding the level of an MPN:-

The [Case Working] Group will determine a starting figure that reflects the nature and seriousness of the contravention of the Act by the data controller or collection of breaches of PECR by a person.

This will involve looking at the nature of the contravention or collection of breaches together with the scope of the potential harm caused, and a consideration of what is reasonable and proportionate, given the circumstances of the case.

The initial view is based on the sanction available based on the statutory maximum of £500,000, which will be considered against a 'nature and seriousness' rating as follows:

- Level A = £1 to £10,000
- Level B = £10,001 to £40,000
- Level C = £40,001 to £100,000
- Level D = £100,001 to £250,000
- Level E = £250,001 to £500,000

Once the level of nature and seriousness has been determined, the starting figure will be set by moving upwards or downwards in the band dependent on the specific circumstances of the case.

For PECR breaches, the Group will take into account the number of unlawful communications which were the subject of complaints, the types of complaints and the period over which the collection of PECR breaches extended.

18. In relation to seriousness the UT in *Leave.EU* emphasised that it was a factually specific issue in each case but also noted at paragraph 81 that 'the number of emails involved gives a sense of scale. On any reckoning, over a million emails is a serious number and the FTT was entitled to take that as a starting point'

and at paragraph 93 that 'we are satisfied that the contravention of Regulation 22 PECR was serious in view of the 1,069,852 million emails sent'.

FACTUAL BACKGROUND

19. Complaints were made to the Commissioner from members of the public to the effect that the Appellant had been responsible for the receipt by them of unsolicited emails promoting the Appellant's "Simple PPI Claims" service.
20. On 9 March 2018 the Commissioner notified the Appellant of her concerns and asked a series of questions of the Appellant. The Appellant said that it had sent no emails, but that four of its "affiliates" had been engaged to send direct marketing emails on its behalf. The Commissioner says that this is a process known as "hosted marketing".
21. In further correspondence on 30 March 2018 and 20 May 2018, the Appellant estimated that 22,056,029 emails had been sent in the thirteen months between 1 March 2017 and 31 March 2018, by four affiliates (listed below with the number of emails sent):-
 - (a) MP Innovations (London Bridge): 5,728,839
 - (b) WRM Media: 9,409,000
 - (c) Hypro Media LTD: 152,000
 - (d) Digital Age Media: 6,314,000
22. The Commissioner was of the view that the Appellant was not able to demonstrate that consent had been given to send such direct marketing. The sites from which the supposed "consent" was obtained simply referred vaguely to "third parties" and "partners". The Appellant referred to the privacy policies

and fair processing notices (FPNs) of its affiliates. However, the Commissioner raised the following points:-

- (a) The Appellant was not named in any of these policies or notices, other than WRM's lengthy list of partners (grouped with nine other "Claims Management" companies) where individuals could "fine tune" their "consent" options. To reach this page, individuals would have to click a hyperlink from WRM's FPN.
- (b) The others, at most, referred to sectors from which marketing might be expected. The most specific of these was M6 Web, used by MP Innovations, which referred to "Finance".
- (c) The sites in question were all prizes and competitions, whereby users would provide their details in the hopes of winning free prizes. Users of such sites for those purposes would not reasonably expect that their contact information would be used to send them marketing about PPI.

23. A penalty setting meeting occurred on 8 January 2020. This concluded that:-

- (a) This case is a serious contravention of Regulation 22; involving the instigation of emails sent without appropriate level of consent. This case involves affiliate marketing.
- (b) There were an estimated 21,166,574 contraventions of Regulation 22 of PECR.
- (c) The period of contravention is between 1 March 2017 and 31 March 2018. This amounts to 1,628,198 emails per month and 407,049 per week.

- (d) The panel reviewed the comparator graphs and noted that there were no relevant comparator cases with regards to both volume and duration. The panel noted 2 cases involving short duration (e.g. 1 day 'blasts') but similar volumes. This provided for an initial point of £75,000. It then took the duration of 13 months into account, considering the more sustained period of contravention, subsequently agreeing a starting point £130,000.
- (e) The panel agreed that the contravention was as a result of negligence rather than a deliberate intention to contravene the regulations.
- (f) The panel considered that there was minimal impact upon individuals...This does not distract from the fact that this was unsolicited unlawful marketing which arrived at its intended destination.
- (g) Indications would suggest that the conduct of the business was being carried out to generate leads via affiliate marketing programming.
- (h) The Company states it has instructed a law firm to develop procedures with regards to compliant handling of data.
- (i) The Company is unlikely to be able to withstand a penalty. The director would however, have the opportunity to provide further and current evidence of its financial status via Representations if required.
- (j) The panel agreed that a reduction from the starting point of £130,000 was appropriate. This was due to the director stating he is engaged in actively changing policies and procedures which should in turn, improve compliance. The director also stated that email marketing campaigns were suspended. As a result, the panel recommends a penalty be issued for £100,000.

24. On 18 February 2020, the Commissioner sent to the Appellant a Notice of Intent to issue a monetary penalty notice, pursuant to section 55B DPA 1998, along with a Preliminary Enforcement Notice. The Appellant submitted representations in response a month later, including a reference to financial hardship which led to a request for further information from the Commissioner. The Appellant provided these on 2 June 2020, and they were reviewed by the Commissioners Financial Recovery Unit who issued a report dated 11 June 2020. The Commissioner held an internal Representations Meeting on 22 June 2020.

25. The notes of that meeting concluded that the financial information provided by the Appellant was not complete:-

....although the director has provided some information to support his claim of financial hardship, the lack of detail, in addition to some apparent financial inconsistencies, means no firm conclusion can be drawn, particularly regarding turnover and status of assets since the ICO investigation began.

...Koypo have been allowed enough time to provide financial information but insufficient and inconsistent information has been produced. ...the information provided has raised more questions than answers. The average number of staff is declared as one by the director, yet payments for wages and tax for [named employee] (a resigned director and company secretary) were paid as late as January 2020. Business premises are rented, costs fell significantly from £15,512 for p/e 31/03/2019 to £7,072 in 2020. The landlord is unknown and no further details about why these costs fell is provided....the ICO questions for example the validity of the business premises rental amount and ownership of the premises.

Koypo provided unaudited, draft financial accounts for the period ending 31 March 2020 to the ICO. For the 5 months prior to 31 March 2020 a total of £39,599.71 was paid into the business account of Koypo, yet the accounts show the turnover (before costs and depreciation) was £267,350.00 for the whole year. Without further banking statements for the whole year no conclusion can be drawn. However it suggests that either the Company carried out the bulk of the years' trade to the value of £227,750.29 between 01 Apr 2019 and 01 Nov 2019, or some information is missing.

It was also noted that there are four vacancies advertised on the Company website, including for a Biddable Media Executive and an Affiliate Marketing Manager. Despite this recruitment, the director has stated that a fine of any size will result in the closure of the Company.

...based upon the information provided, the Company is unlikely to be able to withstand a penalty nor service a payment plan. As a result, any fine issued is likely to render the Company insolvent.

26. Nevertheless, the conclusion was that the £100,000 monetary penalty remained appropriate and proportionate in this case.

27. Following the Representations Meeting, the Commissioner decided to exercise her power to issue a MPN and Enforcement Notice on 4 August 2020.

28. The MPN details the contravention as follows:-

Between 1 March 2017 and 31 March 2018, Koypo instigated the transmission of 21,166,574 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

27. Koypo, 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 sufficient consent had been acquired.

28. "Consent" within the meaning of regulation 22(2) requires that the recipient of the electronic mail has notified the sender that he consents to messages being sent by, or at the instigation of, that sender.

29. In this case the Commissioner is satisfied that Koypo did not have the consent, within the meaning of regulation 22(2), of the 21,166,574 subscribers to whom it had instigated the sending of unsolicited direct marketing messages.

30. The Commissioner is satisfied that Koypo was responsible for this contravention.

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

Seriousness of the contravention

32. The Commissioner is satisfied that the contravention identified above was serious. This is because between 1 March 2017 and 31 March 2018 Koypo sent a total of 21,166,574 direct marketing messages to subscribers without their consent.

33. In addition, Koypo also instigated the sending of a further 889,455 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.

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

Deliberate or negligent contraventions

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

36. The Commissioner considers that in this case Koypo did not deliberately contravene regulation 22 of PECR in that sense.

37. The Commissioner had gone on to consider whether the contraventions identified above were negligent.

38. First, the Commissioner has considered whether Koypo knew or ought to reasonably have known that there was a risk that these contraventions would occur. She is satisfied that this condition is met given that Koypo is involved in a business reliant on direct marketing, and the fact that the issue of unsolicited messages has been widely publicised by the media as being a problem. In addition, Koypo have held a valid data protection register entry since 5 April 2016. They should therefore be aware of the Commissioner's available guidance and of their obligations under PECR.

39. Furthermore, 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 e-mail, by post, or by fax. In particular it states that organisations can generally only send marketing messages to individuals if that person has specifically consented to receiving them from the sender.

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

41. Secondly, the Commissioner has gone on to consider whether Koypo failed to take reasonable steps to prevent the contraventions.

42. Organisations contracting with third parties to carry out marketing for them must make rigorous checks to satisfy themselves that the third party has obtained the data it is using fairly and lawfully, and that they have the necessary consent. Organisations must ensure that consent was validly obtained, that it was reasonably recent, and that it clearly extended to them specifically or to organisations fitting their description. It is not acceptable to rely on assurances of indirect consent without undertaking proper due diligence.

43. Indirect consent can be achieved in circumstances that are clear and specific enough, if a third party is specifically named at the point of data collection so that an individual would reasonably expect their data to be shared with or to receive marketing from a third party.

44. In this case Koypo was unable to provide evidence that it had undertaken appropriate due diligence in this case. The e-mails sent on behalf of Koypo contained only Koypo branding and do not explain who the sender is. It is therefore unclear to the individuals why they are receiving this marketing communication. For consent to be valid it must be freely given, specific and informed, an individual must know what they are consenting to and be given clear instruction on what that consent means.

45. Contracts in place between Koypo and its affiliates make no mention of data use or controls. When asked by the Commissioner to provide evidence of consent, Koypo were unable to retrieve it without the specific e-mails sent to an individual. Whilst Koypo advised the Commissioner that they verify consent by asking their affiliates for opt in proofs at random times there is no written evidence of any other due diligence checks being carried out by Koypo.

46. The Commissioner's direct marketing guidance is clear that organisations should keep clear records of what an individual has consented to, and when and how this consent was obtained, so that they can demonstrate compliance in the event of a complaint.

47. In the circumstances, the Commissioner is satisfied that Koypo failed to take reasonable steps to prevent the contraventions in this case.

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

29. As to whether to issue a penalty the Commissioner said as follows:-

49. The Commissioner has taken into account the following mitigating feature of this case:

- Koypo have advised the Commissioner that they have instructed a law firm to develop procedures with regards to the compliant handling of data.
- Koypo have suspended their email marketing campaigns at present though they have not advised whether they intend to begin email marketing again.

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

- The conduct of the business was being carried out to generate leads via affiliate marketing programming. Affiliates operate incentivised marketing where they are paid for results or leads generated, encouraging higher rates of unsolicited marketing.
- Advice and guidance is published on the Commissioner's website and is also available through her advice services. There is also guidance and advice provided by trading bodies such as the Direct Marketing Association.

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. Upon receiving the Notice of Intent, Koypo submitted representations which were considered by the Commissioner when considering whether to exercise her discretion to issue a monetary penalty.

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 Koypo. She has decided on that information that is available to her, that Koypo 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.

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

30. In relation to the amount of the penalty, the Commissioner said:-

58. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of £100,000 (One hundred thousand pounds) is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

THE APPEAL

31. The Appellant appealed against the issue of a MPN on 1 September 2020. The summary of the appeal said:-

Koypo has been subjected, by the Commissioner, to a glacial, 29 months investigation that has been poorly run, inaccurate and missing documentation. The Commissioner issued a 'Notice of Intent' on the 18th February 2020 and an almost entirely identical 'Penalty Notice' on 4th

August, just 2 weeks short of their obligation under Schedule 16, 2(c) of the Data Protection Act.

Koypo would suggest and will show, that the Commissioner has interpreted regulation 22 PECR in such a way as to suggest Koypo is in contravention. Koypo would argue that we have in fact met the requirements of regulation 22 PECR and in addition, in 52% of all emails sent, have gone so far as to meet the Commissioners own, arguably harsher interpretation of the legislation.

Koypo believes that the Commissioner has misunderstood important elements of the case, ignored others and drawn conclusions that do not warrant a monetary penalty of any kind, let alone one so stern as to result in the cessation of business for Koypo. The impact of this investigation has already significantly impeded the growth of Koypo Laboratories and has resulted in significant loss of actual and potential earnings.

32. The Appellant's grounds can be summarised as follows:-

- (a) All of the affiliates that sent emails on behalf of the Appellant, to individuals, had obtained consent to do so from the individual.
- (b) That could certainly be shown in relation to affiliate WRM (responsible for over 11million of the emails).
- (c) It was enough for the other affiliates to obtain consent for the marketing of financial products or similar, even if the Appellant was not mentioned by name.
- (d) The Appellant has now stopped email marketing 'and would now only do so with the company name specifically mentioned in FPN's and consent processes'.
- (e) Even if the Appellant was negligent this was on a minimal basis because very little publicity exists about using emails rather than forms of messages.

- (f) There were only 11 complaints and the Commissioner decided that no actual damage was done.
- (g) The Appellant had carried out due diligence with the affiliates.
- (h) The Appellant had not been evasive about the number of emails sent and the Commissioner had not understood how the calculation was carried out.
- (i) The Appellant can do checks to confirm the consent of a complainant.
- (j) There is no grounds for the Commissioner's assertion that affiliates "operating incentivised marketing" would "encourage higher rates of unsolicited marketing, a mitigating feature of the case". The Appellant's model of remuneration is widespread and common place within the industry.
- (k) The Appellant disputes the seriousness of the breach and disputed the finding that almost 900,000 emails not received indicated an attempt to send large numbers of emails without consent.
- (l) The fine of £100,000 imposed by the Commissioner seems to have no bearing on the case or indeed any precedent that can be found by the Appellant.

33. On the issue of the level of fine the Appellant says:-

The Commissioner was made aware of Koypo's turnover during the investigation (p128-131, p57-63) and again in most recent representations made by Koypo in which it was explained the annual turnover to March 31st 2018 was £1,078,082 (p166) and that the turnover for the year ending March 31st 2020 was £267,350 (p62).

On 2nd June 2020, as requested by the ICO, Koypo provided 6 months' worth of bank statements to Sarah Jones, via email. The statements, combined with the June bank statements (p129), clearly show the financial standing of Koypo over the past 6 months and that a fine of any amount would be impossible to pay. It is worth pointing out that the contents of the email sent to Sarah Jones has (as far as we can tell) not appeared in the bundle issued to Koypo on 27th August 2020. Presumably, the Commissioner has failed to review or ignored this information.

A fine of £100,000 represents 9.27% of that year's (March 2017 to March 2018) turnover. It represents a 37.4% of turnover for the year to March 31st 2020 (p62). Whilst Koypo appreciates that the cause of this investigation took place before GDPR, the 4% rule under GDPR combined with precedence for fines for other organisations such as British Airways (fined 1.5% of turnover), Dixons Car Phone Warehouse, Marriot all with significantly lower fines than 9% of turnover would further suggest the excessive nature of this fine.

34. The Appellant also said as follows:-

The Commissioner has stated that "Koypo has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship". The Commissioner has again ignored the information provided by Koypo on numerous occasions (p62-65, P129), the 18th March, and throughout correspondence in 2020. Koypo has provided ample information to evidence that the company is unable to pay any fine and Koypo has explained to the Commissioner that any fine would force the closure of Koypo and most certainly would cause 'undue financial hardship'. On the 2nd June, 8th June Koypo provided 6 months company bank statements, draft balance sheet, profit and loss and accounts, all of which confirm the financial standing of Koypo and the inability to pay a fine. The Commissioner has ignored the bank statements sent on the 8th June for month to 1st June 2020 which shows a balance of -£462.19 (p128). This yet again speaks to the Commissioners willingness to ignore the facts throughout this investigation.

In addition, there seems to have been no consideration paid to the Covid-19 crisis and the impact that has had on the business, which is enormous.

35. Koypo also complained about the length of investigation and mentioned that the investigation had commenced because Koypo had asked the Commissioner whether any complaints had been made. Koypo also said that it had learnt lessons and had instructed a law firm to develop procedures with regards to the compliant handling of data.
36. The Commissioner produced a Response to the Appeal which re-iterated the points previously made by the Commissioner in the case. The Appellant responded to this on 2 November 2020. In summary, the Appellant argued that the recipients of emails had given consent, the impact on individuals was low, there had been very few complaints, and generally repeated points made in the appeal document about having learnt lessons and the hardship that might be caused.

DISCUSSION

37. In our view there is little doubt that the Appellant was engaged in what the Commissioner calls 'hosted marketing' which did not have the consent of recipients. In our view most, if not all, of the recipients of the 21 million emails would not have known who the Appellant (Koypo) was and what they were being contacted about by the Appellant.
38. In our view it could not be said that the recipients have freely given their consent. It is noteworthy that the Appellant has not addressed the need for consent to be specific and informed and has relied upon very general 'consents' obtained from users. To whatever extent these did signify any agreement to receive promotional emails, that indication was not freely given, specific or informed. Indeed, it appears from the Appellant's submissions that it does not understand the degree to which consent must be specific and informed.

39. As the Commissioner says, the Appellant was not named in any of these policies or notices, other than WRM's lengthy list of partners (grouped with nine other "Claims Management" companies) where individuals could "fine tune" their "consent" options. To reach this page, individuals would have to click a hyperlink from WRM's FPN. The Commissioner explained:-

The others, at most, referred to sectors from which marketing might be expected. The most specific of these was M6 Web, used by MP Innovations, which referred to "Finance".

The sites in question were all prizes and competitions, whereby users would provide their details in the hopes of winning free prizes. Users of such sites for those purposes would not reasonably expect that their contact information would be used to send them marketing about PPI.

40. The Tribunal has considered the various websites for itself. For example, on the Prize Reactor site (WRM) in the Privacy Policy is a section 'You are in Control'. One sentence reads 'Our registration forms will always have an unticked box for third party marketing, which you can optionally select to allow your personal data to be sent to our partners for direct marketing purposes.' This appears to imply that a person can only opt in to all third party marketing or none.

41. The same was to be found on the Aldaniti site. On the accessible page was only a category of 'Financial' provided by financial institutions, insurance and social security. There is a tick box on the registration form for third party disclosure and this appears also to be an all or nothing option.

42. We are concerned that the Appellant still asserts that its affiliates did nothing wrong. The Appellant instigated the transmission of over 21 million unsolicited emails over 13 months for the purposes of direct marketing, in breach of Regulation 22 of PECR. By any measure this is a serious breach (see the comments in the *Leave.EU* case about the sending of a million emails).

While each individual email will have caused little more than inconvenience and irritation, the sheer volume of the emails means that the cumulative effect of that is considerable. The fact that there were few complaints cannot in itself mean that the breach was not serious: again, see the *Leave.EU* case on this where the UT said:-

54...the volume of complaints cannot be a reliable let alone determinative metric for deciding whether there has been a PECR breach, given that subscribers have easier default options than lodging a formal complaint with the Commissioner.

43. We agree with the Commissioner that the breach was due to negligence on behalf of the Appellant and was not deliberate.
44. The Commissioner assessed the monetary penalty at a level of £130,000 and then took into account some of the mitigating circumstances raised by the Appellant and reduced it to £100,000. However, as the Commissioner states, the Appellant has been registered as a data controller since 2016 and is a member of the Direct Marketing Association so should they have known about PECR and the pitfalls of 'hosted marketing'.
45. It seems to us that the sheer volume of emails sent in a period of over a year in this case has rightly led the Commissioner to consider this as a serious case worthy of a very substantial penalty.
46. However, we are anxious that the high level of penalty will lead to a hardship on the Appellant and we bear in mind the evidence that the firm may cease trading as a result (although we also note the Commissioner's point that the Appellant has not been completely transparent in relation to its financial affairs).

47. Taking into account all we have read we are convinced that a substantial penalty is appropriate. The use of penalties is designed to deter non-compliance and to encourage future compliance. We have no doubt that the transgressions in this case were worthy of the Commissioner's starting point figure of £130,000. However, it seems to us that the Commissioner has not taken into account sufficiently the prospect of financial hardship when setting the level of the penalty at £100,000. Doing the best we can on the information available in this case, it seems to us that it would be appropriate to reduce the starting figure of £130,000 by £50,000 to £80,000 and that is the level at which we set the monetary penalty.

48. This is still a substantial penalty to reflect a substantial breach but takes into account both the mitigating factors raised by the Appellant and the risk of financial hardship. In our view, to reduce the penalty any further would fail to reflect the seriousness of the breach or the stated aims of imposing financial penalties.

CONCLUSION

49. For these reasons this appeal is dismissed in relation to the decision to impose a monetary penalty notice.

50. However, in relation to the level of penalty the appeal is allowed, and a monetary penalty is substituted of £80,000.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 12 March 2021.