

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Silver City Tech Limited

Of: Suite 7 Lansdowne Place 17 Holdenhurst Road Bournemouth Dorset
BH8 8EW

1. The Information Commissioner ("Commissioner") has decided to issue Silver City Tech Limited ("the Company") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to a serious contravention of Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. The Company, whose registered office is given above (Companies House registration number: 08120942), is the person stated in this notice to have instigated the transmission of unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
4. Regulation 22 of PECR states:

- “(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.
- (2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.
- (3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—
- (a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;
 - (b) the direct marketing is in respect of that person’s similar products and services only; and
 - (c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.
- (4) A subscriber shall not permit his line to be used in contravention of paragraph (2).”

5. Regulation 23 of PECR states:

"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; or

(b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided.

6. Section 11(3) of the DPA defines "direct marketing" as "the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals". This definition also applies for the purposes of PECR (see regulation 2(2)).

7. "Electronic mail" is defined in regulation 2(1) 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".

8. Section 55A of the DPA (as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 and the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2015) states:

"(1) The Commissioner may serve a person with a monetary penalty if the Commissioner is satisfied that –

(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person, and

(b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person –

(a) knew or ought to have known that there was a risk that the contravention would occur, but

(b) failed to take reasonable steps to prevent the contravention.”

9. Following the introduction of the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2015, there is no longer a requirement to demonstrate that any contravention of PECR is of a kind likely to cause substantial damage and substantial distress before a monetary penalty notice can be issued.
10. 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.
11. PECR implements European legislation (Directive 2002/58/EC) aimed at the protection of the individual's fundamental right to privacy in the electronic communications sector. PECR was amended for the purpose of giving effect to Directive 2009/136/EC which amended and

strengthened the 2002 provisions. The Commissioner approaches PECR so as to give effect to the Directives.

Background to the case

12. The Company generates leads for its business by helping introducers (or affiliates) to match suitable customers to a range of products offered by a number of institutions in the Financial Services Market. This is done, by instigating those 'affiliates' to send direct marketing text messages, for example:

"Maxine We have received your details & could arrange A £500 over 6 months. Click <http://clx.me/LiSjX> for CASH 1270% Rep Apr, 292% Int Stop2OptOut".

13. Mobile phone users can report the receipt of unsolicited marketing text messages to the GSMA's Spam Reporting Service by forwarding the message to 7726 (spelling out "SPAM"). The GSMA is an organisation that represents the interests of mobile operators worldwide. The Commissioner is provided with access to the data on complaints made to the 7726 service.
14. Between 11 November 2015 and 17 December 2015, 165 reports were made to the 7726 service about the receipt of unsolicited direct marketing text messages sent by affiliates on behalf of the Company. Upon further investigation, however, the Commissioner noted that consent for 18 of those complaints was seemingly acquired by the Company themselves on one of their own websites.
15. In correspondence with the Commissioner, the Company explained that it did not conduct any text message marketing activity with consumers

itself, although it had contracted with a third party affiliates to send the unsolicited text messages on its behalf.

16. The Commissioner contacted the third parties with whom the Company had contracted to establish the volume of SMS instigated. According to the responses received from the affiliate marketing companies, 1,132,149 SMS were sent during the investigation period of 11 November 2015 and 17 December 2015.
17. The Company was unable to provide the Commissioner with any evidence that the individuals to whom the text messages had been sent had consented to the receipt of those messages.
18. The Commissioner made the above findings of fact on the balance of probabilities.
19. The Commissioner served a notice of intent dated 14 September 2016 in which she concluded that the above facts constituted a serious contravention of regulation 22 of PECR by the Company and that the conditions of section 55A DPA were satisfied. The notice of intent stated that the Commissioner was minded to issue the Company with a monetary penalty.
20. Following service of the Notice of Intent, the Commissioner received written representations from the Company.

The contravention

21. The Commissioner finds that the Company has contravened regulation 22 of PECR.

22. The Commissioner finds that the contravention was as follows:
23. Between 11 November 2015 and 17 December 2015, the Company instigated the use, via third party affiliates, of a public telecommunications service for the purposes transmitting 1,132,149 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
24. After the Commissioner first contacted the company on 21 December 2015 to raise her concerns following the complaints received, the company's third party affiliates continued to send such unsolicited communications by SMS to a further 1,942,182 individuals during the period 18 December 2015 and 16 April 2016. In total therefore, during the period of 11 November 2015 and 16 April 2016, 3,074,331 such messages were sent.
25. 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. Consent must be freely given, specific and informed, and involve a positive indication signifying the individual's agreement. Informing individuals that their details will be shared with unspecified third parties, is neither freely given nor specific and does not amount to a positive indication of consent.
26. The Company partnered with select marketing organisations with the intention of embarking on an SMS campaign. As instigator of the SMS, it was the responsibility of the Company to ensure sufficient consent had been acquired.
27. In this case the Commissioner, having considered examples of the consent sought is satisfied that the Company's affiliates did not have

the consent, within the meaning of regulation 22(2), of the individuals to whom they sent unsolicited direct marketing text messages.

28. The Commissioner is satisfied that, by the instigation of the sending of the messages by affiliates, the Company was responsible for this contravention.
29. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

30. The Commissioner is satisfied that the contravention identified above was serious due to:-
 - The significant number of individuals who have been affected by the contravention.
 - The extent and duration of the contravention.
31. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

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

33. The Commissioner considers that in this particular case the Company did not deliberately contravene regulation 22 of PECR in that sense.
34. The Commissioner has gone on to consider whether the contraventions identified above were negligent.
35. First, the Commissioner has considered whether the Company knew or ought reasonably to have known that there was a risk that these contraventions would occur. She is satisfied that this condition is met given that the Company is involved in a business heavily reliant on direct marketing, and the fact that the issue of unsolicited text messages has been widely publicised by the media as being a problem.
36. The Commissioner has published detailed guidance for those carrying out direct marketing explaining their legal obligations under PECR. This guidance explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by email, by post, or by fax. In particular it states that organisations can generally only send marketing texts to individuals if that person has specifically consented to receiving them.
37. It is therefore reasonable to suppose that the Company knew or ought reasonably to have known that there was a risk that these contraventions would occur.
38. Second, the Commissioner has gone on to consider whether the Company failed to take reasonable steps to prevent the contraventions.
39. Organisations buying marketing lists from third parties, or contracting with third parties to carry out marketing for them, must make rigorous checks to satisfy themselves that the third party has obtained the personal 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. As instigator of the SMS messages, it was therefore the responsibility of the company to ensure sufficient consent to receive messages from the Company had been acquired.

40. The Company has informed the Commissioner that "as outlined in the Company's compliance protocols, audits are undertaken of opt ins and privacy policies on a regular basis with action taken where issues identified" and that it believed that "the required level of consent existed in our contracts, even at the time under investigation and that those would suffice".
41. However, despite this, upon the Company providing evidence of consent for the complaints received, it became apparent to the Commissioner that the consent was inadequate. Attached with the Company's response to the initial notification by the Commissioner of the complaints was a spreadsheet with the evidence of consent relied upon to instigate marketing to those individuals who made a complaint. Having reviewed the consent, the Commissioner is satisfied that the subscribers would not have anticipated that they would be the recipient of SMS marketing from the Company.
42. The Company has failed to demonstrate that the subscribers have previously notified the Company that they consented to receiving such communications. The Commissioner is therefore satisfied that the SMS messages were unsolicited.
43. The Commissioner does not consider it acceptable to rely on assurances of indirect consent without undertaking proper due diligence. Such due diligence might, for example, include the following:

- How and when was consent obtained?
 - Who obtained it and in what context?
 - Was the information provided clear and intelligible? How was it provided – e.g. behind a link, in a footnote, in a pop-up box, in a clear statement next to the opt-in box?
 - Did it specifically mention texts, e-mails or automated calls?
 - Did it list organisations by name, by description, or was the consent for disclosure to any third party?
44. The Commissioner concluded on the facts of this case that the Company was unable to provide evidence that it had undertaken appropriate due diligence before the text messages were sent. The Commissioner does not consider it sufficient for the Company to place reliance upon its agreements with its affiliates and carry out random reviews of opt ins for customers introduced.
45. The Company advised in its representations that when notified of the complaints, the Company started to amend its policies and procedures and hired additional staff. However, this occurred after the contraventions during the Commissioner's investigation period and, in any event, the evidence suggests that such steps were not adequate given the continuing contraventions after being notified of the complaints. Following this notification, the Company could have e.g. suspended the marketing campaign on its behalf whilst it put appropriate measures.
46. The Commissioner is therefore satisfied that the Company failed to take reasonable steps to prevent the contraventions.
47. The Commissioner is therefore satisfied that condition (b) from section 55A(1) DPA is met.

The Commissioner's decision to issue a monetary penalty

48. 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 section 55A (3A) and the procedural rights under section 55B have been complied with.
49. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made by the Company on this matter.
50. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
51. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
52. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited marketing texts 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 texting those who consent to receive marketing.

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

The amount of the penalty

54. The Commissioner has taken into account the following **mitigating features** of this case:

- There is a potential for damage to the Company's reputation which may affect future business.

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

- The Company may obtain a commercial advantage over its competitors by generating leads from unlawful marketing practices.
- After the Commissioner first contacted the Company to advise it of the complaints received, the unsolicited marketing text messages continued to be sent. A further 1,942,182 messages were sent during the period 18 December 2015 and 16 April 2016.
- The Company has accepted that in some cases duplicate messages were sent to the same individual.

56. 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.

Conclusion

57. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **6 January 2017** 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.
58. If the Commissioner receives full payment of the monetary penalty by **5 January 2017** the Commissioner will reduce the monetary penalty by 20% to **£80,000 (eighty six thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
59. 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.
60. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
61. Information about appeals is set out in Annex 1.
62. 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.

63. 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 25th day of November 2016

Signed ..



Elizabeth Denham
Information Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice or variation notice has been served a right of appeal to the First-tier Tribunal (information Rights) (the 'Tribunal') against the notice.
2. If you decide to appeal and if the Tribunal considers:-
 - a) that the notice against which the appeal is brought is not in accordance with the law; or
 - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

- a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.

- b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.

4. The notice of appeal should state:-

- a) your name and address/name and address of your representative (if any);
- b) an address where documents may be sent or delivered to you;
- c) the name and address of the Information Commissioner;
- d) details of the decision to which the proceedings relate;
- e) the result that you are seeking;
- f) the grounds on which you rely;
- g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
- h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.

5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.

6. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).