

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Vanquis Bank Limited

Of: No. 1 Godwin Street, Bradford, West Yorkshire, BD1 2SU

1. The Information Commissioner ("Commissioner") has decided to issue Vanquis Bank Limited ("VBL") 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") by VBL.
2. This notice explains the Commissioner's decision.

Legal framework

3. VBL whose registered office is given above (Companies House Registration Number: 02558509), is the organisation 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. 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)).
6. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".
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. The term "soft opt-in" is used to describe the rule set out in in Regulation 22(3) of PECR. In essence, an organisation may be able to e-mail its existing customers even if they haven't specifically consented to electronic mail. The soft opt-in rule can only be relied upon by the organisation that collected the contact details.
9. Section 55A of the DPA (as amended by the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2011 and the Privacy and Electronic Communications (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,

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

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. Organisations cannot send, or instigate the sending, of marketing text messages unless the recipient has notified the sender that he consents to messages being sent by, or at the instigation of, that sender.
13. Consent must be a freely given, specific and informed indication signifying the individual's agreement.

14. Consent will not be specific if individuals are asked to agree to receive marketing messages from "selected third parties", "trusted partners" or other similar generic description.
15. 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.
16. VBL first came to the attention of the Commissioner in December 2015 where, on review of the ICO's 'monthly threat assessment', it was found that a total of 15 complaints had been received about VBL via the 7726 service.
17. The content of the text message was as follows:

"Great News! You've been pre-selected to apply for a Vanquis Visa Credit Card. Visit <http://bit.do/vanq22> Rep 39.9% APR (variable). To opt out text STOP to 60070"
18. As a result of the complaints identified, the Commissioner made a decision to investigate VBL with a view to determining whether their text message marketing had been carried out in compliance with Regulation 22 PECR.
19. On 16 February 2016 an initial letter was sent from the Commissioner to VBL regarding concerns about their Regulation 22 PECR compliance and requesting evidence of the consent relied upon by VBL for the instigation of their marketing campaign.

20. On 21 March 2016 a response to the substantive request for information was received. Within the response VBL referred to direct marketing sent to a group of individuals ("cold prospects") whose information had been licenced from a third party. This group was referred to in the response as 'Group 5'.
21. VBL indicated that this data had been purchased from an organisation [REDACTED] who act as a global marketing services company. VBL state that within their contractual agreement with [REDACTED] "either they [REDACTED] or their suppliers have obtained all appropriate consents as required under PECR".
22. VBL confirmed that in the period of 9 April 2015 to 16 February 2016 870,849 direct marketing text messages were sent and delivered to individuals within Group 5.
23. Between the same period a total of 131 complaints were made to the 7726 service about the receipt of unsolicited direct marketing text messages sent by VBL to individuals within Group 5.
24. On 6 May 2016 an email was sent to VBL requesting proof of consent for the individuals within Group 5.
25. VBL responded on 23 May 2016 providing consent that they had received from [REDACTED] for 86 of the 131 complainants. They were unable to locate consent for the remaining 45 complainants.
26. VBL had obtained their marketing lists from [REDACTED], who had themselves obtained the data from third parties. VBL had relied on indirect consent for each of the direct marketing text messages sent to individuals within Group 5.

27. The ICO'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."
28. It goes on to say that indirect consent can be valid but only if it is clear and specific enough. Moreover, "the customer must have anticipated that their details would be passed to the organisation in question, and that they were consenting to messages from that organisation. This will depend on what exactly they were told when consent was obtained."
29. The consents that were capable of being provided for Group 5 had been provided via [REDACTED], and dated back over a long period of time. The consent wording used does not specifically name VBL or any of its trading styles, nor does it describe a particular category of organisation. Instead, non-specific, general wording is used such as 'trusted partners' and 'carefully selected third parties' or, where there is a list of credit card providers VBL is not included. Furthermore, the privacy statements provided by VBL [REDACTED] were generic in their description of the sectors that the information may be shared with, and failed to specifically name VBL.
30. VBL was unable to evidence that the individuals to whom direct marketing text messages had been sent had specifically consented to receipt of the messages
31. In addition, during the course of the investigation the Commissioner received 9 complaints (via the ICO formal complaints procedure) in respect of email direct marketing. These emails had been received between 17 December 2015 and 3 August 2016.

32. An example of the content of the email is as follows:

*"Dear JACK,
Join the 2.5 million people ACCEPTED for a Vanquis Credit Card!!"*

33. On 14 September 2016, in light of the complaints received, the Commissioner wrote to VBL to request information in respect of unsolicited marketing emails delivered/received over the period of 1 April 2016 to 1 September 2016.
34. VBL confirmed in their response that 620,000 direct marketing emails had been sent within the given period by [REDACTED], one of VBL's sub-affiliates, on behalf of VBL.
35. For each of the 9 complaints received via the ICO ELE reporting tool, VBL was unable to provide any evidence of clear and specific consent. The indirect consent relied upon for 7 of the 9 complaints had been obtained through various affiliates and sub-affiliates and is nevertheless insufficient for the purposes of the ICO's Direct Marketing Guidance.
36. VBL was consequently unable to evidence that the individuals to whom e-mails had been sent had consented to receipt of the messages
37. The Commissioner has made the above findings of fact on the balance of probabilities.
38. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by VBL and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

39. The Commissioner finds that VBL has contravened regulation 22 of PECR.
40. The Commissioner finds that the contravention was as follows:
41. Between 9 April 2015 and 16 February 2016, VBL used a public telecommunications service for the purposes of instigating the transmission of 870,849 unsolicited communications by means of electronic mail (SMS text message) to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR. This resulted in 131 complaints being made to the 7726 system.
42. The Commissioner is satisfied that VBL was responsible for this contravention.
43. Furthermore, Between 1 April 2016 and 1 September 2016, VBL used a public telecommunications service for the purposes of instigating the transmission of 620,000 unsolicited communications by means of electronic mail (e-mail) to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR. This resulted in 9 complaints being made to the ICO.
44. Whilst VBL did not send the e-mails itself, it contracted with third party affiliates to send the messages on its behalf. The aim of the messages was to promote VBL credit cards. The Commissioner is therefore satisfied that VBL was the instigator of the direct marketing e-mail messages.

45. As the instigator of the direct marketing e-mail messages, it was the responsibility of VBL to ensure that valid consent to send those messages had been acquired.
46. "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. Indirect, or third party, consent can be valid but only if it is clear and specific enough. 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.
47. In this case the Commissioner is satisfied that VBL did not have the consent, within the meaning of regulation 22(2), of the 870,849 subscribers to whom it had sent unsolicited direct marketing text messages; moreover, the Commissioner is satisfied that VBL did not have the consent, within the meaning of regulation 22(2), of the 620,000 subscribers to whom its affiliate, [REDACTED], had sent unsolicited direct marketing e-mails.
48. The Commissioner is satisfied that VBL was responsible for this contravention.
49. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

50. The Commissioner is satisfied that the contravention identified above was serious. This is because in a ten month period VBL sent a

total of 870,849 direct marketing text messages to subscribers without their consent. This resulted in 131 complaints being made.

51. Further, in a five month period VBL instigated the sending of a total of 620,000 direct marketing emails [REDACTED] to promote VBL services to subscribers without their consent. This resulted in 9 complaints being made.
52. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

53. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that VBL's actions which constituted that contravention were deliberate actions (even if VBL did not actually intend thereby to contravene PECR).
54. The Commissioner considers that in this case VBL did not deliberately contravene regulation 22 of PECR.
55. The Commissioner went on to consider whether the contraventions identified above were negligent. First, she has considered whether VBL 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 issue of unsolicited text SMS/e-mail messages has been widely publicised by the media as being a problem. It is therefore reasonable to suppose that a company of VBL's size should have been aware of its responsibilities in this area.

56. It is reasonable to suppose that VBL knew or ought reasonably to have known that there was a risk that these contraventions would occur.
57. Second, the Commissioner considered whether VBL failed to take reasonable steps to prevent the contraventions. 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 from the sender. It also makes it clear that particular care must be taken when relying on "indirect consent" and that it is not acceptable to rely on assurances given by third party suppliers without undertaking proper due diligence. Whilst a contract did exist between VBL and ██████, VBL failed to take reasonable steps to ensure that the consents obtained were clear, specific and valid. Furthermore, As the instigator of the direct marketing e-mails by ██████ ██████ on behalf of VBL, it was the responsibility of VBL to ensure that valid consent to send those messages had been acquired.
58. In addition, reasonable steps that could have been taken include ensuring that data lists are not bought unless there is proof of opt-in consent specifically naming, or clearly describing the organisation; and carrying out small sampling exercises to assess the reliability of data purchased. In the circumstances, the Commissioner is satisfied that VBL failed to take reasonable steps to prevent the contraventions.
59. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

60. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. She is also satisfied that section 55A (3A) and the procedural rights under section 55B have been complied with.
61. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. VBL elected to not serve any representations in response to 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, she should exercise her discretion so as to issue a monetary penalty.
64. The Commissioner has considered the likely impact of a monetary penalty on VBL. She has decided on the information that is available to her, that VBL has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
65. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited marketing texts/e-mails 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/emailing those who consent to receive marketing.

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

The amount of the penalty

67. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£75,000 (seventy five thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

68. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **6 November 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.
69. If the Commissioner receives full payment of the monetary penalty by **3 November 2017** the Commissioner will reduce the monetary penalty by 20% to **£60,000 (sixty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
70. There is a right of appeal to the First-tier Tribunal (Information Rights) against:
- (a) the imposition of the monetary penalty
and/or;
 - (b) the amount of the penalty specified in the monetary penalty notice.

71. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
72. Information about appeals is set out in Annex 1.
73. 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.
74. 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 4th day of October 2017

Signed 

Stephen Eckersley
Head of Enforcement
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)).