



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

Appeal Reference: EA/2017/0022

**On appeal from:
Information Commissioner's Monetary Penalty Notice
Dated: 18 January 2017**

**Appellant: LAD Media Limited
Respondent: The Information Commissioner**

**Before
JUDGE ANNABEL PILLING
TRIBUNAL MEMBER ANNE CHAFER
TRIBUNAL MEMBER JEAN NELSON**

Decision

For the reasons given below, the Tribunal allows the appeal and substitutes a Monetary Penalty Notice in the same terms as that issued by the Information Commissioner with the amount of the penalty amended to £20,000 (twenty thousand pounds).

Reasons for Decision

Introduction

1. This is an appeal against a Monetary Penalty Notice (MPN) issued pursuant to section 55A of the Data Protection Act 1998 (the 'DPA') by the Information Commissioner (the 'Commissioner') to the Appellant, LAD Media Limited, dated 18 January 2017. The Commissioner has the power to issue a MPN on data controllers, imposing what is, in effect, a civil fine of up to £500,000 for certain breaches of the data protection legislation.

2. This MPN was issued by the Commissioner following the Appellant's contravention of regulation 22 of the Privacy and Electronic Communications (EC Directive)

Regulations 2003 (as amended) ('PECR') in relation to the sending of 393,872 SMS messages for direct marketing purposes without the necessary consent of the recipients. Following an investigation and after considering representations from the Appellant, the Commissioner imposed a penalty in the sum of £50,000.

3. Section 55B of the Data Protection Act 1998 (the 'DPA') provides that a person on whom a MPN is served may appeal to the Tribunal against both the issue of the MPN

and the amount of the penalty specified. On such an appeal, if the Tribunal considers (a) that the notice 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 shall allow the appeal or substitute such other notice or decision as could have been served or made by the Commissioner. The Upper Tribunal has confirmed that the scope of the Tribunal's jurisdiction is a full merits review. It may consider all the evidence before it – which may be greater than the evidence before the Commissioner.

4. The Appellant appeals against both the imposition of the MPN and the amount of that penalty.

5. The parties have agreed that this appeal can be dealt with on the papers without the need for an oral hearing. The Tribunal was provided in advance with an agreed bundle of papers which includes written representations from both the Appellant and the Commissioner. We have had regard to all the material before us although we are not able to refer to every matter in our decision.

The Legislative Framework

6. PECR were made pursuant to section 2(2) of the European Communities Act 1972 to give effect to, among other things, Directive 2002/58/EC (the 'Directive'). The fundamental purpose of the Directive was to protect the privacy of electronic communications users.

7. Regulation 22 PECR provides as follows:

"22 Use of electronic mail for direct marketing purposes

(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.”

8. “Direct marketing” is defined in section 11(3) DPA as *“the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals”*.

9. PECR have been amended to give effect to the amendments to the Directive, made by Directive 2009/136/EC, which refers to the need for effective implementation and enforcement powers to provide adequate incentives for compliance. Regulation 31 provides that the enforcement provisions of the DPA are extended for the purposes of PECR, subject to modifications set out in Schedule 1. Section 55A DPA (as modified by Schedule 1) provides that:

“55A Power of Commissioner to impose monetary penalty

(1) The Commissioner may serve a person with a monetary penalty notice 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, and

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

(2) This subsection applies if the contravention is 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.

...

(4) A monetary penalty notice is a notice requiring the data controller to pay to the Commissioner a monetary penalty of an amount determined by the Commissioner and specified in the notice. (5) The amount determined by the Commissioner must not exceed the prescribed amount.”

10. Regulation 1 of the Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 provides that the prescribed amount must not exceed £500,000.

The Factual Background

11. The Appellant is a lead generation and data brokerage business operating in the financial services, debt management and consumer claims sector. It sources and supplies data and leads from sources for clients’ marketing campaigns.

12. In early 2016, the Commissioner and the GSMA Spam Reporting Service received 158 complaints about receipt of unsolicited direct marketing text messages sent on behalf of the Appellant offering assistance with debt relief.

13. The Commissioner contacted the Appellant on 15 February 2016. The Appellant confirmed that 393,872 SMS messages had been sent and that it has been purchasing data opted in for SMS marketing in order to run campaigns to generate web enquiries for its clients. The Appellant subsequently provided to the Commissioner copies of its contractual documentation with the third party which provided the data of these recipients; this warrants that the numbers are provided to the Company with valid consent for the purposes of direct marketing under PECR and indemnifies the Company for any damage arising out of any breach of warranty. The Company also provided the Commissioner with an anonymised sample consent wording, taken from privacy notices on websites from which this third party data provider had obtained the personal data in question, which included an “opt in” which it said amounted to giving consent for the direct marketing by the Appellant.

14. On 4 November 2016, the Commissioner issued a Notice of Intent to the Appellant, which included a proposed penalty of £50,000. A preliminary Enforcement Notice was also issued. At this stage the Appellant informed the Commissioner, through its solicitor, that it had provided “some erroneous information” during the course of the Commissioner’s investigation. The actual “opt in” statements emanate from five websites, which were identified to the Commissioner. The wording of these privacy policies are said to be “markedly different” from the anonymised wording previously provided.

15. Representations were received through the Appellant’s solicitor. After considering these, the Commissioner accepted that an Enforcement Notice was not necessary. She concluded that the issue of a MPN was appropriate and issued this on 18 January 2017.

16. The MPN sets out the background facts, including the fact of the number of complaints. It sets out the content of the unsolicited direct marketing SMS messages sent on behalf of the Appellant, and some of the privacy notices upon which the Appellant based its position that sufficient consent had been provided. She concluded that the Appellant had breached regulation 22 PECR; the Appellant did not have consent for the SMS messages it had instigated and it was responsible for the contravention. She determined that the breach was serious and that the Appellant’s actions were not deliberate but that it knew or ought to have known that there was a risk the contraventions would occur, that it had not taken reasonable steps to avoid the contravention and failed to undertake sufficient due diligence in relation to data which a third party had obtained. She considered that the monetary penalty of £50,000 was reasonable and proportionate in the circumstances, rejecting the Appellant’s proposal of a penalty of £1000.

The Appeal

17. The Appellant appeals against both the imposition of the MPN and the amount of that penalty on the following grounds:

Ground 1 – failure in law and/or in the exercise of discretion in determination of the contravention

Ground 2 – failure in the exercise of discretion in determining the seriousness of the contravention

Ground 3 – failure in law and/or in the exercise of discretion in determination of Section 55A(1)(b) DPA

Ground 4 – failure in law and/or in the exercise of discretion in determination of the deliberate or negligent nature of the contravention

Ground 5 – failure in the exercise of discretion in the imposition of a monetary penalty

Ground 6 – failure in the exercise of discretion in the amount of the monetary penalty

18. The Commissioner opposes each of these grounds of appeal.

19. We have considered each in turn.

Ground 1 – failure in law and/or in the exercise of discretion in determination of the contravention

20. The appellant submits that there was no contravention of regulation 22 PECR as the recipients of the SMS messages in question had “opted in” to receiving further product or service offerings through five websites. It is submitted that the majority of the websites to which the recipients had provided their details were providing short term loans, with the information being collected as part of the loan application process. As the purpose of the SMS messages sent in this instance was to market financial services to the recipient, the Appellant submits that there is consistency between the data collected and its use.

21. The Commissioner maintains that the Appellant did not have the requisite consent under regulation 22 PECR to send direct marketing SMS messages to individuals whose contact details they had bought from a third party. None of the privacy notices identifies the Appellant as a potential recipient of the data.

22. We agree with the Commissioner that the meaning of consent in regulation 22 PECR requires the giver of that consent to have been “*informed about the processing to take place, including who by and what for.*” Unless the data subject is able to understand what will be done with his data and by whom, he will have been deprived of his right to object to the use of that data and, in terms of regulation 22 PECR specifically, he will not be able to notify the relevant data controllers that his consent is no longer valid. The privacy notices in this case only go so far as to inform individuals that their details will be shared with unspecified third parties; this is not freely given nor specific and does not amount to a positive indication of consent.

23. We agree with the Commissioner. Some of the “opt in” statements are so wide that they are rendered meaningless. We disagree with the Appellant’s assessment of the websites providing short term loans; at least two, “premieroffersdirect.co.uk” and “ukprize.co.uk”, would not appear to fall into that category. It would therefore not be possible to extend the Appellant’s argument that the direct marketing was for similar services to the data obtained from these websites. It is not possible to identify which of the 393,872 SMS messages were sent to individuals whose data emanated from these particular websites. Similarly, the Appellant’s argument cannot extend to those whose data emanated from “aspiremoney.co.uk” which included the assurance that data would not be shared unless certain exceptions applied. There can be no

suggestion that those individuals consented to their data being sold on, or for the Appellant to contact them directly offering loan services.

24. We are satisfied that the Appellant did not have the required consent for the purposes of PECR and that the SMS messages sent are in breach of regulation 22.

Ground 2 – failure in the exercise of discretion in determining the seriousness of the contravention

25. The Appellant submits that the contravention is not serious for the purposes of section 55A(1)(a) DPA. It challenges the Commissioner's conclusion based on the lack of consent and the number of recipients and submits that in light of the provision of a form of consent, the justification for the message origin, the extremely low level of complaint and the reduction in the number of recipients from that quoted by the Commissioner that the contravention was not serious.

26. We have already concluded that the Appellant did not have the requisite consent. The actions and beliefs of the Appellant are not relevant for the purposes of assessing whether the contravention itself was serious.

27. It is an agreed fact that there were 393,872 recipients of SMS direct marketing by the Appellant. The Appellant suggests that the issue of relevance of the message to the recipient may well account for the extremely low number of complaints and supports a finding that the contravention was not serious. The Commissioner submits that in her experience the number of complaints in the timeframe concerned is compelling. It is difficult for us to judge whether the number of complaints is low or not.

Recipients of unsolicited marketing text messages can report these by forwarding the message to 7726 (spelling out "SPAM") to the GSMA's Spam Reporting Service. The Commissioner is provided with access to the data on complaints to this service. In this case, 158 complaints were received between 6 January and 10 March 2016 either to the 7726 service or directly to the Commissioner. It may be that other recipients took other action, such as making a request for the marketing to stop, or in extreme cases of which we are aware changing telephone numbers, rather than choosing to record the complaint formally.

28. The Appellant suggests that there is "general industry guidance" that 15-20% of sent messages in these types of campaigns do not reach a recipient. It submits that there is therefore a significant reduction in the number of recipients in this case. We have seen no evidence to this effect. In any event, the number of recipients was still well over quarter of a million people who had not provided the necessary consent for this Appellant to contact them directly to market services.

29. We also consider that the fact that some of the recipients were contacted about loan services after their details had been obtained through what appears to be a gambling website is a factor to consider when assessing the seriousness of the contravention. There is no evidence before of us any direct harm but it appears to us that there is a high likelihood of harm by offering loan services to those who may already have financial difficulties or addictions.

30. For these reasons we agree with the Commissioner's assessment that this was a serious contravention of the requirements of PECR and the condition in section 55A(1)(a) DPA is met.

Ground 3 – failure in law and/or in the exercise of discretion in determination of Section 55A(1)(b) DPA

31. The Appellant submits that the Commissioner has failed to consider this section and/or failed to exercise any appropriate discretion in relation to this section.

32. Section 55(1) DPA is set out above. This section provides the power to the Commissioner to serve a MPN if satisfied that (a) there has been a serious contravention of PECR and (b) that subsection (2) or (3) applies; that is, that the contravention was deliberate or, in effect, negligent.

33. The Commissioner had clearly considered this section. The MPN makes it clear that the Commissioner did not regard the contravention as deliberate, but concluded that the Appellant knew or ought to have known that there was a risk the contravention would occur, and that it had failed to take reasonable steps to avoid the contravention.

34. This ground of appeal is misconceived.

Ground 4 – failure in law and/or in the exercise of discretion in determination of the deliberate or negligent nature of the contravention

35. The Appellant submits that the contravention was neither deliberate nor negligent. It asserts that it had reasonable grounds to believe the form of consent provided by the recipients of the text messages was sufficient, and that it undertook sufficient due diligence.

36. The Commissioner concedes that the Appellant did carry out some measure of due diligence in respect of the data it purchased from the third party, but submits that this was insufficient. She refers to the Commissioner's Direct Marketing Guidance in this respect which is a useful guide for the steps that would be reasonable to take.

37. We agree with the Commissioner that a proper due diligence exercise would have revealed the lack of the necessary consent. The issue of unsolicited texts for direct marketing was widely publicised by the media as being a problem and before commencing on a direct marketing campaign such as this, the Appellant needed to make sure it had the necessary consent to do so.

38. It appears to us that the Appellant was unaware of the true origins of the data until some point in late 2016 during the Commissioner's investigation when he provided the Commissioner with the names of the five websites concerned. The direct inference being that the Appellant did not have this information at the time of the direct marketing campaign. If this information had been available it would have been obvious to the Appellant that the services being marketed were unlikely to be of a same or similar character in respect of the data emanating from two websites which appear to have no link with the financial services sector.

39. We have seen the “due diligence” form completed by the Appellant in respect of the data provider. This contains what we regard as a “red flag” that the third party providing the data did not subscribe to the Telephone Preference Service register which would enable individuals to remove their data, that it did not have a documented complaints procedure or a Treating Customers Fairly Policy which may have had some relevance to the financial services being offered. The Appellant should in our view have made further and more detailed enquiries with the data provider, and ensured that it was provided with full copies of the relevant “opt ins”. If it had been provided with these, the Appellant would have been able to supply these to the Commissioner immediately upon request in February 2016.

40. The Appellant states that its main work involves the brokerage of data and so it has not ‘relied heavily on direct marketing’.

41. The Appellant also asserts that it had not been previously involved in a text messaging campaign. The Commissioner correctly points out that the MPN which is the subject of this appeal does not state that the Appellant “relied heavily upon direct marketing”. This appeared in the Notice of Intent but was removed following careful consideration of the representations made.

Ground 5 – failure in the exercise of discretion in the imposition of a monetary penalty

42. The Appellant’s submissions on this ground effectively repeat those made in respect of grounds 1 to 4.

43. As a matter of law, the Commissioner has a discretion as to whether to issue an MPN, if satisfied that the conditions in section 55A(1) DPA are met.

44. As this is a full merits appeal, we have considered whether she ought to have exercised her discretion differently and are satisfied that she was plainly right to issue the MPN in this case. We have taken into account the following factors:

(i) the seriousness of the contravention, including the volume of messages, and the potential for harm;

(ii) the woeful due diligence conducted by the Appellant, in particular the “red flag” that the third party providing the data did not subscribe to the Telephone Preference Service register which would enable individuals to remove their data;

(iii) that the Appellant did not fully assist the Commissioner during the investigation, with delays in providing all the relevant information;

(iv) that there was no admission of the contravention or expression of remorse.

Ground 6 – failure in the exercise of discretion in the amount of the monetary penalty

45. The Appellant submits that the amount of the monetary penalty is excessive. The company is small, it may have to be wound up and makes no profit other than to provide a modest income for the Director only. In representations to the Commissioner, the Appellant had proposed a monetary penalty in the amount of £1000.

46. The Commissioner's statutory guidance gives general pointers as to the types of issues that will be relevant to deciding the appropriate level of an MPN (see *Guidance about the issue of monetary penalties* (2012), paras. 4.1- 4.3). A further publication *Framework for determining the appropriate amount of a monetary penalty* (31 January 2011) sets out a "seriousness rating" as follows:

‘Serious = £40,000 to £100,000

Very serious = more than £100,000 but less than £250,000

Most serious = more than £250,000 up to the maximum of £500,000

Once the level of seriousness has been determined, the starting point will be set at the mid-way point within each band.’

47. There is no binding guidance from the higher courts or tribunal to assist with the scale of the monetary penalty, or how to approach the assessment. The following factors appear to us to be relevant although will differ from case to case:

- (i) The circumstances of the contravention;
- (ii) The seriousness of that contravention, as assessed by
 - (a) the harm, either caused or likely to be caused, as a result;
 - (b) whether the contravention was deliberate or negligent; and
 - (c) the culpability of the person or organisation concerned, including an assessment of any steps taken to avoid the contravention.
- (iii) Whether the recipient of the MPN is an individual or an organisation, including its size and sector;
- (iv) The financial circumstances of the recipient of the MPN, including the impact of any monetary penalty;
- (v) Any steps taken to avoid further contravention(s);
- (vi) Any redress offered to those affected.

48. We also consider that the amount of the penalty should be of a level to deter further contraventions, whether by the recipient of the MPN or others.

49. We were provided with copies of the Appellant's accounts for the financial years ending 2014, 2015 and 2016. It appears to us that at the time of this contravention the Appellant's turnover and profit increased substantially, and that the "modest income" paid to the Director almost doubled from £10,016 to £20,909. There is no

evidence before us that the Appellant would become bankrupt as a result of having to pay the MPN nor what the “real” impact would be.

50. Although aggravated by the lack of provision of full information to the Commissioner and a demonstration of woefully unsatisfactory due diligence undertaken, in the circumstances, we consider that £50,000 was too high for a company of this size. This was the Appellant’s first contravention and was the first and only time it conducted a direct marketing campaign such as this. We consider that the appropriate penalty is £20,000 having taken into account the factors identified above, in particular the amount of profit that appears to have been generated during the financial year in which this contravention occurred.

Conclusion

51. For the reasons given above we therefore refuse the appeal on grounds 1-5, but allow the appeal on ground 6. We therefore substitute a Monetary Penalty Notice in the same terms as that issued by the Commissioner with the amount of the penalty at paragraph 47 amended from £50,000 (fifty thousand pounds) to £20,000 (twenty thousand pounds.)

Signed

Date Promulgated: 9 June 2017

Judge Annabel Pilling