First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0262

Decided without a hearing

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS ANNE CHAFER AND GARETH JONES

Between

XERPLA LTD

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

NB Numbers in [square brackets] refer to the open bundle

The Tribunal's decision

The appeal is allowed. Xerpla Ltd (Xerpla) is not in breach of data protection legislation and does not have to pay the penalty levied by the Information Commissioner (the Commissioner).

Introduction

1. This is Xerpla's appeal against the Monetary Penalty Notice (MPN) **[50]** issued by the Commissioner on 4 October 2017 under section 55A Data Protection Act 1998 (DPA 1998). The penalty was for £50,000 but the MPN said that the Commissioner would reduce it to £40,000 if she received full payment by 3 November 2017. The

discount was not available if Xerpla exercised its right of appeal (as of course it has done). (Because it is allowing the appeal, the Tribunal does not need to consider whether the non-availability of a discount if the recipient of an MPN appeals represents an unlawful restriction with the right of appeal).

2. The penalty was in relation to what the Commissioner described as a serious contravention of regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). The MPN followed the issue by the Commissioner of a Notice of Intent (in materially identical form) on 7 August 2017 **[35]**. Xerpla did not respond to the Notice of Intent.

3. In the bundle **[109]** is an application in January 2018 by Xerpla's sole director, Mr James Hunt, to strike off the company. However, as far as the Tribunal is concerned the company is still extant. It seems no longer to be trading: it sent an email to that effect to the Commissioner on 31 March 2017.

4. The parties opted for paper determination of the appeal. The Tribunal was satisfied that it could properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber**)** Rules 2009 (as amended). [1]

The legal framework

5. The PECR transpose into domestic law Directive 2002/58/EC (the e-privacy directive). [2] Regulation 22 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.*
>
> *…*'

6. 'Direct marketing' is defined by section 11(3) of the DPA 1998 (applied to the PECR by regulation 2(2)) as 'the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals'. 'Electronic mail' is defined by regulation 2(1) of the 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'.

[1] SI 2009 No 1976

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002L0058&from=EN

7. Under Section 55A DPA 1998 (as amended), the Commissioner may serve an MPN where (i) there has been a serious contravention of the PECR and (ii) either the contravention was deliberate or the person concerned knew or ought to have known that there was a risk that the contravention would occur but failed to take reasonable steps to prevent it.

8. The PECR have survived replacement of the DPA 1998 by Regulation (EU) 2016/679 (commonly known as the General Data Protection Regulation or GDPR) and the Data Protection Act 2018. The GDPR changes the definition of 'consent' but the change is not relevant for present purposes since the events in question precede the coming into effect of the new regime. [3]

9. The essential issue in the case is whether Xerpla obtained the consent of its subscribers for the purposes of the PECR.

The MPN

10. The MPN alleged that Xerpla had transmitted unsolicited communications by means of electronic mail (via a public telecommunications service) to individual subscribers for direct marketing, contrary to regulation 22 of the PECR.

11. It recited that, between 6 April 2015 and 20 January 2017, Xerpla transmitted 1,257,580 unsolicited direct marketing emails, promoting the products and services of third parties. The emails consisted of marketing material from a variety of organisations including providers of dog food, pet products, wine, motoring services, magazines, financial services, competition, insurance and boilers. They were sent to individuals who had subscribed to two websites operated by Xerpla:

i. **www.yousave.co (the discounts/deals website)**

12. Individuals were informed:

> '*By submitting your details, you consent to receive our email newsletters and offers from and on behalf of our offer partners and from other similar third party online discount/deal providers, as well as to our processing of your information as outlined within our Privacy & Cookie Policy and Terms & Conditions. By submitting your details you confirm you have read, understood and consent to these in full*'.

13. The Tribunal has not seen the full Privacy Policy (the website can no longer be accessed) but it apparently included the following sections:

> '*We will use this information in the following ways:*

[3] The Commissioner has issued guidance about consent in the context of the GDPR: https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/consent/

- *To provide you with information that you have requested eg email newsletters and offers;*
- *To provide you with the latest online discounts/deals available covering travel, home improvements, automotive, finance, retail, insurance, charities, competitions, utilities, health, claims, storage and publishing*
- *We may broadcast special offers that would be of value to any online consumer to all of our subscribers*

…

- *To share with similar third party companies that offer a similar online discount/deal service with similar offers as ourselves in order to deliver you the best deals'*

14. The Tribunal has not seen the Terms & Conditions.

ii. **www.headsyouwin.co.uk (the competitions website)**

15. Individuals were informed:

> '*By submitting your details, you consent to receive our email newsletters and offers from and on behalf of our offer partners and from other similar third party online competition deal providers, as well as to our processing of your information as outlined within our Privacy & Cookie Policy and Terms & Conditions. By submitting your details you confirm you have read, understood and consent to these in full'.*

16. The Privacy Policy was apparently in very similar form save that it referred to competition deals. Again, the Tribunal has not seen the Terms & Conditions.

17. The MPN said, during 2016, that the Commissioner received 14 complaints alleging receipt of unsolicited direct marketing emails about the two websites.

18. In her view, email recipients had not given sufficiently informed consent. Xerpla was responsible for this contravention. The contravention was serious because Xerpla sent over 1.25m direct marketing emails to subscribers without their consent, a very large number. It was not, however, deliberate (even though a contravention could be deliberate even if the person concerned did not intend to contravene the PECR). However, it was negligent. Xerpla knew or ought reasonably to have known that there was a risk that the contravention would occur: the issue of unsolicited directing marketing by electronic mail has been widely publicised by the media as a problem and the Commissioner has published detailed guidance (the Direct Marketing Guidance or DMG [4]) explaining direct marketing obligations under the PECR. Xerpla had failed to take reasonable steps to prevent the contravention. Such steps would have included seeking appropriate guidance about the rules and ensuring that the consent it sought was valid.

[4] https://ico.org.uk/media/1555/direct-marketing-guidance.pdf

19. The Commissioner explained why she had decided to issue a monetary penalty. Her underlying objective was to promote compliance with the PECR. Sending unsolicited direct marketing emails was a matter of significant public concern and the present MPN should act as a general encouragement towards compliance or at least as a deterrence against non-compliance, particularly with regard to consent.

The Commissioner's investigation

20. On 20 January 2017 **[1]**, Mr Barry Wadeson, lead case officer at the Information Commissioner's Office (ICO), wrote to Mr Hunt informing him that four named individuals had made complaints to the ICO about direct marketing emails they had received from Xerpla without their consent. Mr Wadeson attached examples. The individuals had unsuccessfully attempted to opt out of future direct marketing emails by using the unsubscribe link. Mr Wadeson asked a number of questions, including how customers consented to receiving direct marketing emails and whether it used a suppression list for subscribers who did not want to receive communications, and requested evidence of consent and copies of Xerpla's training procedures informing staff about lawful contact with customers and policies and procedures about PECR.

21. Mr Hunt replied on 8 February 2017 **[6]**. He said that '[d]irect data subscribes using online forms on our websites, positively confirming consent to receive direct marketing emails as described to them by entering and submitting their details and in accordance with the corresponding website privacy policy, terms and conditions. Data including the ip address of registration and data/time stamp is recorded to provide proof of opt-in'. Xerpla did maintain an internal suppression list.

22. Considerable further correspondence ensued during which Mr Wadeson sought further information, for example relating to Xerpla's relationship with a Dutch company, VIP Response BV (VIP). Mr Hunt explained that Xerpla sent its subscribers UK offers on behalf of VIP. If they were interested, they clicked onto a UK business landing page and gave their details. Neither VIP nor Xerpla transferred data to the business.

23. The Commissioner was evidently not satisfied with all Mr Hunt's responses but it is important to note that he engaged fully with her office. Xerpla does not appear to be a fly-by-night company such as are common in this sector and has prosecuted this appeal despite ceasing to trade (and, perhaps therefore, not having the funds to pay the penalty if confirmed): Mr Hunt seems concerned about its reputation and his own.

The Grounds of Appeal and the Commissioner's Response

24. **Xerpla** issued submitted its appeal on 27 October 2017 **[65]**. The appeal is against the issue of a penalty, not its amount.

25. The company made the following points:

- It had not received the Notice of Intent

- The purpose of both websites was obvious. The discounts/deals website offered better deals on a range of products and services, similar to voucher code, daily deal and comparisons sites. The competitions website, in line with other 'compers' websites, gave members the opportunity to access the latest online competitions quickly and easily

- Although Xerpla had the right to transfer data or opt-ins to third parties for them to send their own offers, in practice it did not do so. It only sent emails from its own domains, with full business information and contact details. It therefore complied with the Direct Marketing Guidance: it made it clear that it and not the third party was the sender

- Appropriate consent was obtained. In the same way as supermarket subscribers can expect to receive emails about goods available at the supermarket, discount deal site members expect to receive emails regarding the discount deals available from that website. This adhered to the DMG which suggested that 'the intention of Regulation 22 is to ensure someone does not receive promotional material about products and services they would not reasonably expect to receive'.

- The range of likely offers was clearly set out on the website. This was part of the opt-in procedure (not simply part of the privacy policy to which subscribers consented). The privacy policy was separate from the subscription form for reasons of clarity

- 14 complaints resulting from over 1.25m emails represented less than 0.0012%, indicating that the vast majority of subscribers were content. The complainants could have contacted Xerpla, which would have sought to resolve any issues. In most cases, complaints were probably about difficulty activating the unsubscribe link, which was outside Xerpla's direct control

- Xerpla had expended considerable resources studying the regulations and ICO and Direct Marketing Association guidance. Staff were fully trained and they were given the latest copies of DPA 1998 and PECR and data security, direct marketing and internal guidance. Hundreds of hours were devoted to implementation and staff had to 'sign-off' activities at several stages

26. The **Commissioner** issued her **Response** on 26 January 2018 **[94]**. She addressed what she took to be Xerpla's Grounds of Appeal as follows:

a) **Service of Notice of Intent**: the Commissioner complied with the procedural requirements of section 55B DPA 1998 by sending the notice (and the MPN) by special delivery to Xerpla's registered business address. This, incidentally, was the address for service Xerpla had given for the appeal and the contact address on its website. The notices were also sent by email to the address used for correspondence with Xerpla during the Commissioner's investigation (Mr Hunt's email)

b) **Consent**: subscribers to the websites were unable to give informed consent for the purposes of the PECR because the true breadth of the material they were signing up to receive was not obvious from the terms of the consent they provided. This was because (i) the detail of what they were consenting to was only provided in a privacy policy housed on a separate webpage from the subscription box; and (ii) the description there of the type of material subscribers would receive was extremely generic and wide-ranging, covering almost every form of consumer commerce. Each Privacy Policy was four pages long. One of the categories – 'broadcast special offers that would be of value to any online consumer to all of our subscribers' – attempted no definition, leaving it to Xerpla to decide what was of interest to subscribers: this was the very antithesis of specific and informed consent, because it purported to be consent to receive whatever Xerpla wished to send.

   In addition, the subscription text implied that information about the use of personal data was contained in a further document, the Terms and Conditions, which ran to three pages of text and was located on a yet further webpage.

   Xerpla had failed to explain why it maintained that the breadth of material would have been obvious to any user of the website.

   It was appropriate to apply by analogy the Commissioner's guidance about indirect consent (see below) to messages containing third party offers from Xerpla itself: the degree of intrusion from unwanted advertising was similar

c) **The small number of complaints**: the Commissioner assumed that Xerpla's argument was that the small number of complaints indicated that the contravention was not serious. However, sending over a million messages in contravention of the PECR was undoubtedly serious

d) **Any contravention was not negligent and reasonable steps were taken to prevent it**: Xerpla ought reasonably to have known that there was a risk of contravention by virtue of the DMG, which repeatedly emphasises the need for consent to be specific and informed and illustrates by a series of clear examples. Xerpla ought at the very least to have been aware that there was a risk of contravention, given the breadth of the range of offers. The company's internal processes could provide no defence, if it ought reasonably to have

identified the risk of contravention, because it was not doing anything to avoid the contravention of which it was (unreasonably) unaware.

27. Xerpla **replied** by way of annotations to the Commissioner's Response (not the ideal way). These were the main points it made:

- It reiterated that it had not received the Notice of Intent
- The service being provided *was* obvious, similar to the offers made by cashback sites, comparison sites (for example, Money Saving Expert), voucher code sites and daily sites (such as Groupon)
- The low rate of complaints supported the obvious nature of the service: subscribers clearly understood what they were signing up for and use by the Commissioner of the phrase 'unwanted offers' was presumptuous
- Precise categories of offers were provided for additional clarity
- Xerpla might on occasion wish to pass on special offers from existing partners to all subscribers – this explained the reference to the broadcasting of special offers
- There was a double opt-in service
- The DMG defined 'indirect consent' as the transfer of data to third parties who then communicated with the data holders. Xerpla did not share data with third parties
- Internal processes went beyond what most and much larger businesses would reasonably be expected to do (Xerpla employed only a few staff).

Discussion

28. There are really two issues: (i) is Xerpla deemed to have received the Notice of Intent?; and (ii) did it obtain the consent of subscribers for the purposes of regulation 22(2) PECR before sending them direct marketing by electronic mail?

Service of the Notice of Intent

29. Section 55B DPA 1998 requires the Commissioner to send a Notice of Intent to a person provisionally considered to be in breach of the PECR, before an MPN may be issued. Under section 65(1)(ii) and (2), where the person is a body corporate, the Commissioner may send the Notice to the proper officer (the secretary or other executive officer charged with the conduct of the body's general affairs) at its registered office.

30. There is no question that the Commissioner has complied with her duty, for the reasons she gives. It is not credible that Xerpla did not receive the Notice, particularly given that the Commissioner sent a copy to Mr Hunt at the email address he has used throughout.

Consent

31. Consent is central to direct marketing by electronic means. Only if a person has given appropriate consent is such marketing lawful. The issue in the present case is whether the subscribers to the two Xerpla websites have given appropriate consent for the sorts of emails the company sent them.

32. Article 2(f) of the e-privacy directive adopts the definition of 'consent', by users or subscribers, in Article 2(h) of Directive 95/46/EC (the data protection directive) for data subjects:

> '*(h) "the data subject's consent" shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed*'.

33. It follows that consent must be (i) freely given; (ii) specific; and (iii) informed. There is no suggestion that Xerpla's subscribers did not freely give their consent to receiving direct marketing. The DMG says, in paragraph 60, that, to be specific, in the context of direct marketing 'consent must be specific to the type of marketing communication in question (eg automated call or text message) and the organisation sending it'. Again, there is no suggestion that consent was not specific in that sense.

34. The guidance also says, in the same paragraph, that, to give 'informed' consent,

> '*the person must understand what they are consenting to. Organisations must make sure they clearly and prominently explain exactly what the person is agreeing to, if this is not obvious. Including information in a dense privacy policy or hidden in 'small print' which is hard to find, difficult to understand, or rarely read will not be enough to establish informed consent. This links to the fairness requirements found in the first data protection principle of the DPA [1998] …*'.

35. In the Tribunal's judgment, Xerpla complied with this guidance. As the company says, it was obvious what its subscribers were consenting to. It was obvious because of the service Xerpla was offering. Whether consent is informed has to be judged in context. The nature of Xerpla's discounts/deals website was that subscribers could be sent third party offers about any products and services. That is why they subscribed to it. Had they wished to subscribe to a service offering only certain types of products and services, this was not the website for them. The same is true of the competitions website.

36. The fact that (wide-ranging) examples of the types of offers was only given in the Privacy Policies (and perhaps in the Terms & Conditions) – found on separate pages – is therefore not relevant. Subscribers freely signed up to receive offers on any products and services based on the subscription wording.

37. As Xerpla says, that it was obvious what subscribers were subscribing to is strongly supported by the very small number of complaints received by the Commissioner – just 14 following over 1.25m emails. As a percentage this is less than 0.0012%. In fact, the Commissioner only gave details of four complainants. The Tribunal appreciates that rates of complaint have to be treated with caution because the majority, perhaps the vast majority, of people who receive unsolicited electronic direct marketing simply delete the messages or at most unsubscribe. Complaining to the Commissioner, even if that is known to be an option, is time-consuming, disproportionately so in most cases. However, it cannot be said that the paucity of complaints is irrelevant. It indicates that the vast majority of Xerpla subscribers were content to receive direct marketing about a wide range of products and services - and that is likely to have been precisely because that is what they had signed up for. The Tribunal accepts Xerpla's evidence that the complaint rate is very low by industry standards.

38. In short: subscribers knew what they were consenting to.

39. The Commissioner seeks to buttress her case on consent by referring to the section in the DMG dealing with 'indirect consent', said to cover 'situations where a person tells one organisation that they consent to receiving marketing from other organisations. This is also sometimes known as "third party consent" or "third party opt-in"'. This will be 'relevant to any organisation using a bought-in marketing list. It will not have had any contact with those customers before, so they cannot have told the organisation directly that they consent to its marketing'.[5] Paragraph 86 says: 'In essence, 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'.

40. That is not Xerpla's situation. The company provided the direct marketing itself, albeit with third party offers. Subscribers received electronic communications only from Xerpla. This is why the Commissioner has to proceed by analogy. She quotes paragraph 89 from her guidance:

> '*However indirect consent could also be valid if the consent very clearly described precise and defined categories of organisations and the organisation wanting to use the consent clearly falls within that description. Consent is not likely to be valid where an individual is presented with a long, seemingly exhaustive list, of general categories of organisations. The names of the categories used must be tightly defined and understandable to individuals. In practice, this means that the categories of companies need to be sufficiently specific that individuals could reasonably foresee the types of*

[5] Para 84

companies that they would receive marketing from, how they would receive that marketing and what the marketing would be'.

41. The Commissioner says that the mischief at which this section of the guidance is aimed is the same as with the Xerpla model: the intrusion into privacy represented by unsolicited electronic direct marketing. There are a number of answers to that. First, arguments by analogy are unsatisfactory with a penal provision. Breach of the guidance can support the imposition of a heavy penalty – up to £500,000 [6] – and the Commissioner has sought to support the present MPN by relying on the guidance. A penalty of £50,000 is punitive for a company of Xerpla's size. Second, there is a qualitative difference between receiving direct marketing from a single, identified company with whom one has voluntarily established a relationship, on the one hand, and receiving such marketing from third parties, known or unknown, with whom one has not established a relationship, on the other. The mischief is not the same and the analogy therefore breaks down. The need for precision about the scope of direct marketing is greater with the latter than with the former. Third, there is no intrusion into privacy in this case because subscribers to the Xerpla websites have (so the Tribunal has found) freely consented to receiving third party offers for any products and services. This is what they expected. In that sense, the marketing is not unsolicited.

42. But, most important, the DMG deals directly with the Xerpla model:

> '*95. Some organisations may wish to contact their customers with marketing material relating to third parties. This can take different forms such as the third party providing all of the content of the material which the organisation then sends out or it could be a dual branding exercise between the organisation and the third party.*
> ***Example***
> *A supermarket decides to support a particular charity at Christmas and sends out a marketing email to its customers promoting the charity's work. Whilst the email is promoting the charity it also constitutes marketing by the supermarket itself as it is promoting its values.*
> *96. In such circumstances although the organisation is not passing the contact details of its customers to a third party it still needs to ensure that it has appropriate consent from its customers to receive marketing promoting third parties. Where possible it would be good practice for the organisation to screen against the third party's suppression list*'.

Surprisingly, the Commissioner does not refer to this passage.

43. 'Appropriate consent' is, clearly, a nebulous term but it must encompass the concept of freely given, specific and informed. In the Tribunal's judgment, Xerpla customers gave appropriate consent (including informed consent) in all the

[6] The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010

circumstances. Whether or not the company followed the suggested good practice of screening against third parties' suppression lists is not determinative.

44. The Commissioner, finally, relies on the decision of the (differently-constituted) Tribunal in *Optical Express v Information Commissioner* [7] (an appeal against an enforcement notice):

> '*When a data subject gives consent they must be informed about the processing to take place, including who by and what for. In no other way can consent be said to be "informed". … If the data subject doesn't know what products might be marketed then how can he exercise his right to object to some whilst being happy to receive others?*'

45. The answer to the Tribunal's rhetorical question is that Xerpla subscribers consented to, and knew they were consenting to, the direct marketing of third party offers for all kinds of products and services (including all kinds of competitions). That is why they subscribed to these sorts of website: they knew both the 'who by' and the 'what for', as demonstrated by the very low rate of complaints.

46. Since the Tribunal has found that subscribers did give consent within regulation 22(2) of the PECR, and there has therefore been no contravention, the questions whether the contravention was serious and whether Xerpla took reasonable steps to avoid it clearly do not arise.

Conclusion

47. For these reasons, the appeal is allowed. The decision is unanimous.

David Thomas
Judge of the First-tier Tribunal

Date of Decision: 14 August 2018
Date Promulgated: 20 August 2018

[7] EA/2015/0014