

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Grocery Delivery E-Services UK Limited T/A HelloFresh.

Of: The Fresh Farm, 60 Worship Street, London, EC2A 2EZ

1. The Information Commissioner ("the Commissioner") has decided to issue Grocery Delivery E-Services UK Limited T/A HelloFresh ("HelloFresh") 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. HelloFresh, whose registered office address is given above (Companies House Registration Number: 07893709 is the organisation stated in this notice to have transmitted 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 122(5) of the Data Protection Act 2018 "DPA18" defines direct marketing as *"the communication (by whatever means) of advertising or marketing material which is directed to particular individuals"*. This definition also applies for the purposes of PECR (see regulation 2(2) PECR and paragraphs 430 & 432(6) to Schedule 19 of the DPA18).
6. From 1 January 2021, consent in PECR has been defined by reference to the concept of consent in the UK GDPR as defined in section 3(10) of the DPA 2018^[1]: see regulation 2(1) of PECR, as amended by Part 3 of Schedule 3, paragraph 44 of The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019/419. Article 4(11) of the UK GDPR sets out the following definition: *"'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her"*.
7. Recital 32 of the [UK] GDPR materially states that *"When the processing has multiple purposes, consent should be given for all of them"*. Recital 42 materially provides that *"For consent to be informed, the data subject should be aware at least of the identity of the controller"*. Recital 43 materially states that *"Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case"*.
8. "Individual" is defined in regulation 2(1) of PECR as *"a living individual and includes an unincorporated body of such individuals"*.

^[1] The UK GDPR is therein defined as Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 ("GDPR") as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018.

9. A "subscriber" is defined in regulation 2(1) of PECR as *"a person who is a party to a contract with a provider of public electronic communications services for the supply of such services"*.

10. "Electronic mail" is defined in regulation 2(1) of 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"*.

11. Section 55A of the DPA (as applied to PECR cases by Schedule 1 to PECR, as variously amended) 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, but

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

12. 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.

13. PECR were enacted to protect the individual's fundamental right to privacy in the electronic communications sector. PECR were subsequently amended and strengthened. The Commissioner will interpret PECR in a way which is consistent with the Regulations' overall aim of ensuring high levels of protection for individuals' privacy rights.
14. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the DPA18: see paragraph 58(1) of Schedule 20 to the DPA18.

Background to the case

15. HelloFresh is an online meal order business operating within the food and beverage sector. HelloFresh delivers ingredients and recipes in food boxes to its customers, which the customer can then use to prepare meals. HelloFresh provides its meal delivery services on a subscription plan basis.
16. The Commissioner's investigation into HelloFresh was launched following a review of data from the UK's Spam Reporting Service, 7726.
17. Mobile users can report the receipt of unsolicited marketing text messages to the Mobile UK's Spam Reporting Service by forwarding the message to 7726 (spelling out "SPAM"). Mobile UK is an organisation that represents the interests of mobile operators in the UK. The Commissioner is provided with access to the data on complaints made

to the 7726 service and this data is used to ascertain organisations in breach of PECR.

18. Between 27 September 2021 and 23 February 2022, 15,221 complaints were logged with the 7726 service in relation to messages from HelloFresh.
19. Furthermore, between 28 September 2021 and 6 November 2021, the ICO online reporting tool received 14 complaints about unsolicited SMS messages from HelloFresh.
20. Between 21 October 2021 and 24 May 2022, the ICO received three complaints about direct marketing emails sent by HelloFresh.
21. Complainant's comments about the messages they received from HelloFresh are included below.
 - *"Annoying - how are these mobile numbers contacting me?? dont [sic] know how to stop them I [sic] can only block them. I used HelloFresh once, ages ago, but this is from a UK mobile number...?"*
 - *"I had previously replied STOP to this number over a year ago. I received a confirmation that I had opted out of promotional SMS, and have had no relationship with the company since then."*
 - *"It arrived at unsociable hours after previous attempts to get the company to stop contacting me disturbing sleep"*
 - *"I had previously bought from this company and ensured that I did not consent to marketing material. I was not happy with their service so cancelled my subscription. Recently (last 1-2 months) I*

have started regularly receiving unsolicited advertising emails from the company, and now they are sending unsolicited text messages. It seems to be a growing trend – companies that I have previously bought from and had no problems with in the past suddenly start sending large numbers of advertising emails and text messages to past customers.”

- *“I’ve asked this company to stop marketing in the past but they still send stuff.”*
 - *“I have explicitly withdrawn consent to marketing previously, so am annoyed that the company has contacted me.”*
22. On 10 March 2022, the Commissioner sent an initial investigation letter and a spreadsheet of complaints to HelloFresh. The letter requested information about HelloFresh’s marketing activities between the period of 23 August 2021 and 23 February 2022. It also requested information about how HelloFresh obtained consent from individuals to send them direct marketing communications.
23. HelloFresh replied to the initial investigation letter on 30 March 2022. In its response, HelloFresh stated that it had consent to contact the individuals who had complained to the 7726 service. It also explained that it sends SMS based direct marketing to two groups of data subjects. The first group is “*active UK customers*”, which it defined as “*customers who have an active, or paused subscription.*” The second group is “*reactivation customers*”, these are former customers that have cancelled their subscription within the last 24 months but have consented to receive SMS based marketing messages from HelloFresh.

24. HelloFresh explained that before sending marketing messages, it checked the target telephone number against the relevant customer's communication settings for their account. Once screening was completed, a third-party provider sent the SMS message on behalf of HelloFresh. HelloFresh stated that it removed individuals from its marketing list within 30 days of them making a removal request.
25. HelloFresh confirmed that between 23 August 2021 and 23 February 2022, it sent 1,939,487 SMS messages to active and reactivation customers. Of these, 1,113,734 messages were delivered.
26. As part of its 30 March 2022 response to the Commissioner's questions, HelloFresh provided various information and documents. This included a tick box with the following consent statement next to it:

"Yes, I'd like to receive sample gifts (including alcohol) and other offers, competitions and news via email. By ticking this box I confirm I am over 18 years old".
27. Another screenshot provided by HelloFresh showed that users could update their communication preferences in the app. However, the preference settings did not allow users to set their marketing preferences by reference to the communication channel used for direct marketing (e.g. phone, text or email).
28. There was no information in the screenshots that informed a customer about the length of time that they could receive marketing communications from HelloFresh after cancelling their subscription.
29. As part of its correspondence with the Commissioner, HelloFresh provided various other supporting documents including a calling script for marketing calls made by HelloFresh, a training document in respect

of telephone marketing, a data protection policy, an information security policy and HelloFresh's ICO registration certificate.

30. HelloFresh also provided its analysis of the complaints to the 7726 service. HelloFresh believed that of the 15,221 complaints to the 7726 service, only 8,729 were valid complaints about marketing. The Commissioner agrees with this assessment.
31. In further correspondence with the Commissioner, HelloFresh confirmed that between 23 August 2021 and 23 February 2022, it sent 79,940,241 marketing emails of which 79,779,279 were received by recipients.
32. The Commissioner has made the above findings of fact on the balance of probabilities.
33. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by HelloFresh and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

34. The Commissioner finds that HelloFresh contravened regulation 22 of PECR.
35. The Commissioner finds that the contravention was as follows:
36. The Commissioner finds that between 23 August 2021 and 23 February 2022 there were 80,893,013 direct marketing messages, comprised of 79,779,279 emails and 1,113,734 SMS messages, received by subscribers. The Commissioner finds that HelloFresh transmitted those direct marketing messages, contrary to regulation 22 of PECR.

37. HelloFresh, as the sender of the direct marketing, is required to ensure that it is acting in compliance with the requirements of regulation 22 of PECR, and to ensure that valid consent to send those messages had been acquired.
38. HelloFresh is required to demonstrate that the consent is freely given, specific, informed, and contains an unambiguous indication from the individual via an affirmative action.
39. Of particular relevance in this case, is the fact that for consent to be valid it is required to be "specific" as to the type of marketing communication to be received, and the organisation, or specific type of organisation, that will be sending it.
40. In addition, consent will not be "informed" if individuals do not understand what they are consenting to. Organisations should therefore always ensure that the language used is clear, easy to understand, and not hidden away in a privacy policy or small print.
41. The consent statement relied on by HelloFresh for its email and SMS direct marketing was as described in paragraph 26. It is the Commissioner's finding that this statement does not satisfy the requirement for consent to be "specific" and "informed" because:
 - the consent statement did not mention that SMS would be used as a channel for direct marketing purposes;
 - the consent statement was not clear (and was bundled with other aspects) as it combined an age confirmation statement and consent to receive free samples with a consent for direct marketing via email; and

- customers were not given sufficient information to make them aware that they could receive direct marketing messages up to 24 months after they had cancelled their subscription with HelloFresh.
42. It is the Commissioner's view that it would not be in the reasonable expectations of former customers that they would receive direct marketing up to 24 months after ending their subscription contract with HelloFresh.
43. The Commissioner is therefore satisfied from the evidence he has seen that HelloFresh did not have the necessary valid consent for the 80,893,013 direct marketing messages received by subscribers.
44. The Commissioner has gone on to consider whether the conditions under section 55A DPA 1998 are met.

Seriousness of the contravention

45. The Commissioner is satisfied that the contravention identified above was serious. This is because between 23 August 2021 and 23 February 2022, a confirmed total of 80,893,013 direct marketing messages were sent by HelloFresh. These messages contained direct marketing material for which subscribers had not provided valid consent.
46. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

47. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, in order to make a finding that a deliberate contravention has occurred, this would require that HelloFresh's actions, which constituted that contravention, to be deliberate actions (even if HelloFresh did not actually intend thereby to contravene PECR).
48. The Commissioner does not consider that HelloFresh deliberately set out to contravene PECR in this instance.
49. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
50. Firstly, he has considered whether HelloFresh knew or ought reasonably to have known that there was a risk that these contraventions would occur. He is satisfied that this condition is met, as HelloFresh failed to exercise proper due care to avoid conducting unsolicited marketing, including evidence presented to the Commissioner indicating that HelloFresh had a misunderstanding of the relationship between PECR and the UK GDPR.
51. The Commissioner has published detailed guidance for those carrying out direct marketing explaining their legal obligations under PECR. This guidance gives clear advice regarding the requirements of consent for direct marketing and 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, or instigate, marketing messages to individuals if that person has specifically consented to receiving them. The Commissioner has also published detailed guidance on consent

under the GDPR. In case organisations remain unclear on their obligations, the ICO operates a telephone helpline. ICO communications about previous enforcement action where businesses have not complied with PECR are also readily available.

52. It is therefore reasonable to suppose that HelloFresh should have been aware of its responsibilities in this area.
53. Secondly, the Commissioner has gone on to consider whether HelloFresh failed to take reasonable steps to prevent the contraventions. Again, he is satisfied that this condition is met.
54. Reasonable steps in these circumstances may have included:
 - ensuring that the consent statements relied on for direct marketing met the requirements of the UK GDPR and had been reviewed against guidance from the Commissioner;
 - providing mechanisms that allow individuals to easily select the channels that they consent to receiving direct marketing through;
 - providing privacy notices to individuals that clearly explained how long they would continue to receive direct marketing for after cancelling their subscription (in addition to providing clear transparency information about the use of personal data for direct marketing and how individuals could exercise their rights in relation to direct marketing);
 - documenting internal policies, procedures and training that clearly demonstrated an organisational understanding of PECR requirements and the interplay with the UK GDPR.

55. In the circumstances, the Commissioner is satisfied that HelloFresh failed to take reasonable steps to prevent the contraventions.
56. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

57. The Commissioner notes there are no aggravating features in this case.
58. The Commissioner also acknowledges that HelloFresh has fully cooperated with the investigation, and has taken steps to improve its marketing practices and customer journey following this investigation. However, no other mitigating features have been identified in this case.
59. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. He is also satisfied that the procedural rights under section 55B have been complied with.
60. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out his preliminary thinking. In reaching his final view, the Commissioner has taken into account the representations made by HelloFresh on this matter.
61. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
62. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.

63. The Commissioner has considered the likely impact of a monetary penalty on HelloFresh. He has decided on the information that is available to him, that a penalty remains the appropriate course of action in the circumstances of this case.
64. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited direct marketing messages is a matter of significant public concern. A monetary penalty in this case should act as a general encouragement towards compliance with the law, or at least as a deterrent against non-compliance, on the part of all persons running businesses currently engaging in these practices. The issuing of a monetary penalty will reinforce the need for businesses to ensure that they are only messaging those who specifically consent to receive direct marketing.
65. In making his decision, the Commissioner has also had regard to the factors set out in s108(2)(b) of the Deregulation Act 2015; including: the nature and level of risks associated with non-compliance, including the risks to economic growth; the steps taken by the business to achieve compliance and reasons for its failure; the willingness and ability of the business to address non-compliance; the likely impact of the proposed intervention on the business, and the likely impact of the proposed intervention on the wider business community, both in terms of deterring non-compliance and economic benefits to legitimate businesses.
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 **£140,000 (one hundred and forty 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 **13 February 2024** 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 **12 February 2024** the Commissioner will reduce the monetary penalty by 20% to **£112,000 (one hundred and twelve 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 11 day of January 2024

Signed

Andy Curry
Head of Investigations
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 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty 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 he ought to have exercised his 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:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester
LE1 8DJ

Telephone: 0203 936 8963

Email: grc@justice.gov.uk

- 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 (Information Rights) are contained in section 55B(5) 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)).