

## **DATA PROTECTION ACT 1998**

### **SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

#### **ENFORCEMENT NOTICE**

To: Fortis Insolvency Limited

Of: 683-687, Wilmslow Road, Didsbury, Manchester M20 6RE

1. The Information Commissioner ("the Commissioner") has decided to issue Fortis Insolvency Limited ("FIL") with an enforcement notice under section 40 of the Data Protection Act 1998 ("DPA"). The notice is being issued because of 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. FIL, whose registered office address is given above (Companies House Registration Number: 09870591) 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. Consent in PECR, between 29 March 2019 and 31 December 2020, was defined by reference to the concept of consent in Regulation 2016/679 ("the GDPR"): regulation 8(2) of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019. Article 4(11) of the 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. 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<sup>[1]</sup>: 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".*
  
8. Recital 32 of the UK GDPR materially states that *"When the processing has multiple purposes, consent should be given for all of them"*. Recital

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<sup>[1]</sup> 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.

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"*.

9. "Individual" is defined in regulation 2(1) of PECR as *"a living individual and includes an unincorporated body of such individuals"*.
10. 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"*.
11. "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"*.
12. The DPA contains enforcement provisions at Part V which are exercisable by the Commissioner. Those provisions are modified and extended for the purposes of PECR by Schedule 1 PECR.
13. Section 40(1)(a) of the DPA (as extended and modified by PECR) provides that if the Commissioner is satisfied that a person has contravened or is contravening any of the requirements of the Regulations, he may serve him with an Enforcement Notice requiring him to take within such time as may be specified in the Notice, or to refrain from taking after such time as may be so specified, such steps as are so specified.

14. 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.
15. 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.

### **The contravention**

16. The Commissioner finds that FIL contravened regulation 22 of PECR.
17. The Commissioner finds that the contravention was as follows:
18. The Commissioner finds that between 26 July 2020 and 26 July 2021 there were 527,481 direct marketing SMS messages received by subscribers. The Commissioner finds that FIL transmitted those direct marketing messages, contrary to regulation 22 of PECR.
19. FIL, 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.
20. For consent to be valid it is required to be "freely given", by which it follows that if consent to marketing is a condition of subscribing to a service, the organisation will have to demonstrate how the consent can be said to have been given freely.

21. Consent is also 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.
22. 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. Consent will not be valid if individuals are asked to agree to receive marketing from "similar organisations", "partners", "selected third parties" or other similar generic description.
23. The Commissioner has considered the "consents" obtained and, for the reasons explained below, is concerned that in each case there are issues as to whether the consents can be said to have been freely given, specific and informed.
24. FIL used data to send marketing messages that had been captured by third party websites. The Commissioner's investigation found that these third party websites did not obtain valid consent when collecting data and individuals were not sufficiently informed that by entering their details they were requesting solicited marketing messages from FIL.
25. The Commissioner is therefore satisfied from the evidence he has seen that FIL did not have the necessary valid consent for the 527,481 direct marketing messages received by subscribers.
26. The Commissioner has considered, as he is required to do under section 40(2) of the DPA (as extended and modified by PECR) when

deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage. The Commissioner has decided that it is unlikely that damage has been caused in this instance.

27. In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of his powers under section 40 of the DPA, he requires FIL to take the steps specified in Annex 1 of this Notice.

**Right of Appeal**

28. There is a right of appeal against this Notice to the First-tier Tribunal (Information Rights), part of the General Regulatory Chamber. Information about appeals is set out in the attached Annex 2.

Dated 27<sup>th</sup> day of June 2023

Andy Curry  
Head of Investigations  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

## **ANNEX 1**

### **TERMS OF THE ENFORCEMENT NOTICE**

FIL shall within 30 days of the date of this notice:

- Except in the circumstances referred to in paragraph (3) of regulation 22 of PECR, 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 FIL that he clearly and specifically consents for the time being to such communications being sent by, or at the instigation of, FIL.

## **ANNEX 2**

### **RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER**

1. Section 48 of the Data Protection Act 1998 gives any person upon whom an enforcement 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](mailto:grc@justice.gov.uk)

- The notice of appeal should be served on the Tribunal within 28 days of the date on which the enforcement notice was sent
4. 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)).