

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: This Is The Big Deal Limited

Of: 4 Callaghan Square, Cardiff, CF10 5BT

1. The Information Commissioner ("the Commissioner") has decided to issue This Is The Big Deal Limited ("TBDL") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to a serious contravention of regulations 22 and 23 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. TBDL, whose registered office address is given above (Companies House Registration Number: 08867458) is the organisation stated in this notice to have both transmitted and instigated the transmission of unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulations 22 and 23 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. Regulation 23 of PECR states that *"A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail –*

(a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed;

(b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided;

(c) where that electronic mail would contravene regulation 7 of the Electronic Commerce (EC Directive) Regulations 2002; or

(d) where that electronic mail encourages recipients to visit websites which contravene that regulation."

6. 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).

7. 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”.

8. Since 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”.*
9. 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”.*
10. *“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.

11. 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"*.
12. "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"*.
13. The term "soft opt-in" is used to describe the rule set out in in Regulation 22(3) of PECR. In essence, an organisation may be able to send direct marketing to its existing customers even if they haven't specifically consented to electronic mail. The soft opt-in rule can only be relied upon by the organisation that collected the contact details.
14. 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."

15. 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.
16. 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.
17. 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

18. At all material times TBDL provided energy switching services to consumers, under the trading name "Look After My Bills" ("LAMB").
19. TBDL has been registered with the Commissioner as a data controller since 17 April 2014, under registration number ZA048101.
20. 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 [REDACTED] used to ascertain organisations which may be acting in breach of PECR.

21. TBDL most recently came to the attention of the Commissioner in March 2021, [REDACTED]
22. Searches of the 7726 database revealed that there was a total of 1,109 complaints about text messages containing the phrase 'Look After My Bills' between 1 June 2020 and 27 March 2021.
23. Searches of the complaints received via the ICO online reporting tool ("OLRT") revealed a further three complaints about text messages containing the phrase 'Look After My Bills' between June 2020 and February 2021.
24. Comments from the complainants included:

"I filled in an online enquiry a few weeks back, but decided not to continue. Despite emailing and asking them to remove me from their [sic] systems I have continued to receive marketing messages. Calling them 0203 950 1166 only gives options for 1. Existing customers, or 2. You want to sign up."

"I had previously texted STOP twice before but they continue to ignore that request. Please can you get them to stop texting me as I do not want their service or offers."

25. Some of the messages contained 'bit.ly' links which redirected to various landing pages on the website <https://lookaftermybills.com/>. The website's privacy policy stated that "*Look After My Bills is owned and operated by [TBDL]*" and that "*[TBDL] is the controller responsible for personal information processed by it*"¹.
26. The website also contained information about TBDL's "*fantastic affiliate program*" which is available through an agency called [REDACTED]. The website explained that affiliates "*can choose from a range of banners, content and text links*" to promote TBDL's offering to their users in exchange for "*market leading commissions*".
27. The Commissioner conducted a separate search for email complaints and found that 30 complaints had been received about unsolicited emails apparently sent by, or at the instigation of, TBDL between 24 June 2020 and 27 March 2021. Of those, a number of the complaints received between January 2021 and March 2021 relate to emails sent on TBDL's behalf by an affiliate marketing company called Opportunity Online Group Ltd ("OOG")².
28. On 27 April 2021, an initial investigation letter was sent to TBDL informing them of the complaints which had been received regarding its direct marketing communications. The letter outlined the requirements of PECR and the enforcement powers available to the Commissioner and asked them to provide answers to a number of questions regarding its direct marketing activity by 18 May 2021.

¹ Whilst 'Look After My Bills' is, and was at the material time, the trading name used by TBDL, for the purposes of this Notice any future reference to either 'Look After My Bills' or TBDL shall be referred to as TBDL as the correct legal entity.

² Formerly known as Estra Information Group Ltd.

29. Following a request for a short extension, TBDL provided a substantive response to the Commissioner's queries on 28 May 2021. The response confirmed that all 1,112 text messages listed in the Commissioner's complaints spreadsheet (i.e. 1,109 '7726' complaints, and three OLRT complaints) were sent by TBDL, along with 13 out of the 30 emails which had been complained about. The remaining 17 emails were sent by a German affiliate called Audience Serv GmbH ("ASG") and/or by affiliates of ASG. TBDL understood that OOG was an affiliate of ASG.

30. Between 1 June 2020 and 4 May 2021, TBDL sent a total of 55,876,054 emails and 3,700,474 text messages, of which 55,846,575 emails and 3,452,109 text messages were successfully delivered. Over the same period, they received 102,959 email opt-out requests and 37,715 text message opt-out requests.

31. In terms of the email and text communications which it sent itself, TBDL explained that the data it relies on is obtained directly from customers via its website, and that these details are not provided to affiliates. The mechanism used for obtaining consent can be found on the TBDL homepage. The homepage invites individuals to provide their email address and postcode to receive a quote via a 'Get your quote in 30 seconds' button. Immediately above this button is an unticked box alongside the following wording: "*By ticking here, you agree we can send you occasional emails with incredibly helpful money saving tips.*" This is understood to be the point at which TBDL obtained consent for the purposes of its unsolicited direct marketing; it is notable that an individual does not provide their telephone number at this point, and there is no reference to direct marketing being sent by text message, with the opt-in box referring just to "*occasional emails with incredibly helpful money saving tips*" (emphasis added). Individuals are also provided with a link to a privacy policy. The Commissioner considered

this privacy policy at the time and noted that it did not expressly refer to the fact that individuals would receive direct marketing text messages. Under the heading '*What communications you may receive from us*', it stated:

"a. Direct marketing communications

We understand that some of our customers like to receive our newsletters and other information about our latest offers, products and promotions. You can choose to opt-in to receiving these direct marketing communications when you subscribe to our products and services. You can also choose to opt-out of receiving these direct marketing communications at any time.

b. Service communications

Service communications broadly comprise of communications which:

- 1. we have a legal or regulatory obligation to send to you (such as communications which we are obliged by our regulator to send to you from time to time);*
- 2. we send in connection with the provision of our services to you; and*
- 3. we send so that we can provide services at your request (such as password reset emails, which you may ask us to send if you do not remember your login credentials but want to access our products and services)."*

32. The Commissioner understands that individuals who click the button to obtain a quote are then taken to another webpage to provide further details about themselves, including their full name, date of birth and, at this point, their telephone number. Whilst entering a mobile

telephone number is not mandatory, there is nothing to advise individuals at this point that, by entering it, they are taken to have consented to receiving unsolicited direct marketing via text message.

33. TBDL indicated in its response that direct marketing by text message accounted for only around 10% of its total electronic marketing but acknowledged that the wording on its homepage could have been clearer to individuals about the possibility of direct marketing being sent by text message. TBDL was asked whether there was a separate box which an individual could check to opt in to text message marketing, or to expressly opt out, to which it responded that there was not.
34. TBDL noted that several of the text messages and emails contained in the spreadsheet provided by the Commissioner would constitute service communications rather than direct marketing communications. For example, several of the communications notify TBDL's customers that TBDL has commenced the process of switching its customer's energy supplier in connection with the automatic switching service provided by TBDL.
35. TBDL explained that recipients of emails can opt out of direct marketing communications sent by TBDL by email by either: (i) using the unsubscribe hyperlink contained in any email which they receive from TBDL or (ii) contacting TBDL's customer services team and requesting to be unsubscribed from TBDL direct marketing.
36. Similarly, recipients of text messages can opt out of direct marketing communications sent by TBDL by SMS by either: (i) replying "STOP" to any text message which they receive from TBDL or (ii) contacting

TBDL's customer services team and requesting to be unsubscribed from TBDL's direct marketing.

37. TBDL explained that, due to human error, two of the 31 text message campaigns run by TBDL since 1 June 2020 did not contain opt-out instructions due to those text messages being incorrectly designated as service communications.
38. Upon receipt of the Commissioner's letter, TBDL suspended their text message marketing, and a decision has since been taken to cease marketing by text message altogether. It also identified the following four improvements which would be implemented as a priority:

"1. providing refresher training to its marketing, product and customer services teams on [TBDL's] obligations under The Privacy and Electronic Communications (EC Directive) Regulations 2003;

2. updating the text on its homepage and in its privacy notices to make more clear that: (i) service communications may be sent to customers by both email and SMS without their consent and (ii) direct marketing communications may be sent to customers by email only with their consent;

3. undertaking an exercise to ensure that service communications sent by email and SMS do not contain promotional material; and

4. undertaking an exercise to ensure that all direct marketing communications sent by email contain opt-out instructions."

39. TBDL explained that its affiliates obtained data either directly from individuals or from third parties. It provided a copy of its standard

affiliate terms and conditions as evidence of the contract between TBDL and ASG. It stated that ASG *"operates at arm's length from [TBDL] and [TBDL] is not responsible for its marketing activities"*. It advised the Commissioner to contact ASG directly for further information.

40. The Commissioner wrote to TBDL on 10 June 2021 with some further queries, and explained that, as an instigator of direct marketing communications sent by a third party, TBDL continues to be bound to comply with PECR.
41. In its response on 24 June 2021, TBDL did not accept that it was the instigator of the emails sent by ASG and/or its affiliates. It reiterated that *"[ASG] and [OOG] have always operated at an arms' [sic] length from [TBDL]"* and *"have exercised their own judgement and discretion when determining to whom marketing emails are sent"*.
42. TBDL confirmed that the total number of emails sent by ASG and/or OOG on behalf of TBDL over the period 20 October 2020 to 10 May 2021 was 45,322,164. All of the creative content of these emails was provided to ASG by TBDL. TBDL stated that it was unable to provide evidence of consent for the emails sent as this information was held by ASG and/or OOG. The total number of leads and/or sales generated by these emails was 621.
43. In relation to the details collected via TBDL's own website, it provided a screenshot of the webpage where individuals are asked to enter their mobile phone number. It confirmed that the mobile phone number field is not mandatory and that it is possible for individuals to request a quote without ticking the box to opt in to direct marketing.

44. TBDL provided a copy of the complaints spreadsheet which the Commissioner had originally sent across, onto which it had added an additional column indicating the purpose of the message (service or marketing). The updated spreadsheet confirmed that 1,046 of the 1,112 text messages and 16 of the 30 emails reported to the Commissioner or the 7726 service were sent for the purposes of direct marketing. TBDL also provided another spreadsheet listing the date and time the relevant subscriber provided their mobile phone number to it. The dates ranged from 11 March 2019 to 18 May 2021. 56 of the mobile phone numbers were listed as 'not found'.
45. TBDL also confirmed that a total of 104,949 direct marketing text messages were sent without opt-out instructions during August 2020 and September 2020, due to the messages being incorrectly designated as service communications.
46. On 28 June 2021, an email was sent to TBDL confirming that, based on the information provided, the Commissioner has formed the preliminary view that it was the instigator of the emails sent by ASG and/or OOG. The email highlighted OOG's status as a dormant company on Companies House, the director's occupation and country of residence and the lack of registration with the Commissioner, and explained that this raised concerns about the quality of the due diligence checks carried out by TBDL on its affiliates and sub-affiliates. Further information was sought by the Commissioner, including in relation to copies of the "application forms"³ completed by OOG and/or ASG, copies of completed due diligence questionnaires and evidence of

³ "Application Form" is defined in paragraph 2.1 of LAMB's Standard Terms as "the registration form at <http://lookaftermybills.hasoffers.com/signup>, or by which operators of websites, applications, technologies or services apply to participate in the Network".

consent for each of the marketing emails listed in the complaints spreadsheet.

47. TBDL responded on 2 July 2021 providing a spreadsheet showing the date and time the consent was obtained for each of the customers who received emails from TBDL. There were four customers whose email addresses could not be found. It was TBDL's assumption that these related to individuals who had requested that it deletes their data.
48. TBDL continued to deny that it was the instigator of the emails sent by ASG and/or OOG, as it did not have a contract with OOG and was unaware of the relationship between ASG and OOG. However, it confirmed that it had asked ASG to provide evidence of consent for the emails and would forward this information on to the Commissioner as soon as it received this.
49. TBDL provided a copy of the due diligence questionnaire completed by ASG on 1 October 2020. The form states that ASG is a trading name of Karma Response SL ("Karma"), which is a Spanish company based in Barcelona. The form states that they do not contract campaigns to sub-affiliates and that email opt-ins are obtained via its website, https://lsp.produktegratis.de/start_248.html.
50. TBDL also provided a copy of an 'insertion order' dated 13 October 2020 which forms part of TBDL's contractual relationship with ASG. The document contains details of the email advertising campaign to be carried out by Karma on behalf of TBDL (referred to in the document as the "Advertiser"). The document states: "*The contents of the campaigns are sole responsibility of the Affiliate/Advertiser who will make the materials available to [Karma] prior enough to the dispatch of each campaign.*" TBDL agrees to pay Karma £■■■ for each approved

sale. The document also states: *"The databases to which the campaign will be sent are the property of [Karma] or third parties that have ceded their use to [Karma] with enough permissions to send campaigns. [Karma] confirms that the data bases to which the Affiliate/Advertiser's campaign will be sent meet the Requirements of the General regulations for the protection of data UE 2016/679 (hereinafter RGPD) and of the law 34/2002, of 11 July, of services of the information society and of Electronic Commerce (hereinafter LSSI) regarding the express authorization of the interested parties contained in them to receive communications Commercial by electronic means"*.

51. TBDL also provided a copy of an ASG brochure entitled 'Compliance Deck', which outlines the requirements of the GDPR and how ASG ensures compliance with the principles. The brochure includes examples of opt-in forms used by ASG to obtain consent.
52. TBDL confirmed that it was not made aware of the relationship between ASG and OOG when it appointed ASG as an affiliate. TBDL now shared the Commissioner's concerns about the extent of the due diligence carried out by ASG on OOG and confirmed that it no longer works with ASG as a result.
53. ASG's website, https://lsp.produktgratis.de/start_248.html, is branded as "London Shave Products". The website is partly in German. Users are invited to *"Sign up for the chance to get your free gift box here!"* by entering their name, email address and date of birth and by clicking a flashing green button. The form includes two tick boxes alongside the following wording:
 - *"I agree to the terms and conditions [hyperlink] of participation and have read and understood the privacy policy [hyperlink]. I*

confirm that the competition operator Audience Serv GmbH may inform me about current offers by e-mail, telephone, text messages and/or post/push notifications. I can withdraw my consent to receive communications at any time."

- *"I confirm that the sponsors [hyperlink] of the competition may inform me about current offers by e-mail telephone, text message and/or post/push notifications. I can withdraw my consent to receive communications at any time."*

The small print explains that users can *"Enter the sweepstakes without giving consent to receive advertising by sending an email with your full details to customerservice@estrainformation.com"*.

54. The privacy policy states that *"The processing of your personal data takes place in accordance with the declaration of consent for advertising and marketing purposes by telephone, SMS, e-mail."* However, it does not specify the companies or types of companies about which users may receive communications.
55. The sponsors are listed as ASG, [REDACTED] (a Singapore company) and Karma. Under each sponsor, there is a list of sectors about which users may receive advertising. The full list of sectors is as follows: *"fashion, beauty, travel, telecommunications, electronics, insurance, banking, finance, lottery, sports betting, online gaming platforms, casual dating, food, dietary supplements, cosmetics, culture, e-commerce (online shops, clothing, pet food, cosmetics, household goods, flower shipping, decorative items) and insurance (occupational disability, dental supplements, care, private health insurance, motor vehicle)." It appears that users may also receive advertising about other sectors as each list includes the following proviso: "The*

company's email campaigns are not limited in content, as the company lives on customer orders."

56. Having been notified that TBDL had been unable to obtain opt-in evidence from ASG, despite its efforts, the Commissioner elected to contact OOG directly and sent it an initial investigation letter by email on 16 July 2021, along with a spreadsheet listing 125 complaints (from 24 separate individuals) received by the Commissioner about unsolicited direct marketing emails sent by OOG on behalf of various advertisers between 27 October 2020 and 27 March 2021. Having received a 'delivery failed' response, the Commissioner sent further copies of this correspondence by post to OOG's registered office address on 19 July 2021.
57. On 30 July 2021, an email was received from TBDL enclosing the opt-in information provided by ASG. This consisted of date stamps and IP addresses for six of the eight individuals⁴. The other two email addresses were listed as 'not found'. No information was provided about the source of the email addresses. TBDL stated that they had asked ASG to provide further information relating to the two email addresses labelled as 'not found' but ASG were no longer responding to their requests for further information.
58. An 'end of investigation' email was sent to TBDL on 4 August 2021, inviting any further relevant evidence by 11 August 2021.
59. The Commissioner's correspondence to OOG was not acknowledged, and a chaser letter sent on 18 August 2021 was subsequently returned marked 'refused'.

⁴ The 17 emails which had been sent by ASG on TBDL's behalf (referred to at paragraph 26 of this Notice) had been sent to 8 individuals.

60. On 20 August 2021, a request for information was sent to [REDACTED], operator of the registered office address used by OOG. [REDACTED] confirmed that the account was registered by a company formation agent based in Germany. On 23 August 2021, enquiries were made with the company formation agent who provided the following information: "*[OOG] was incorporated by us as an agent. We hold the copy of the director's ID and the certificate of residence notarised. Unfortunately, we do not know anything else*". The company formation agent provided the name of [REDACTED], and an address.
61. On 27 August, an email was received from info@estrainformation.com. The email stated: "*I'm [REDACTED] and responsible for [OOG]. We would like to apologize to you for this incident, and we take your complaint very seriously. We generate our data via Sweepstakes and co-sponsoring, all with double opt-in. Please send us the email addresses of the complainants so that we can provide evidence of the correctness of our actions.*" The email properties revealed that the email was sent from the IP address [REDACTED] which is located in Berlin. That same day, the Commissioner sent an email to info@estrainformation.com enclosing a copy of the initial investigation letter dated 19 July 2021 and a copy of the complaints spreadsheet.
62. On 7 September 2021, an email was received from OOG enclosing a spreadsheet entitled '*Opt-Ins [REDACTED]*'. The spreadsheet consisted of IP addresses, timestamps, and URLs for 21 of the 24 email addresses listed in the complaints spreadsheet. This email did not address a number of the Commissioner's questions, or provide opt-in evidence from the other three complainants. OOG was asked for this and, on 8 September 2021, advised: "*I am not able to answer these questions because we only work as an advertising agency.*"

Unfortunately, I am now forced to stop our work for economic reasons. The company [OOG] is closed with immediate effect. If I get the missing opt-in, I will send it to you. However, it is possible that our email account will soon no longer be available because we have no longer paid the fee for it". Opt-in evidence for the remaining three complainants was sent over to the Commissioner later that day, and shortly afterwards an email was received from Companies House confirming that an application had been received to strike OOG off the register.

63. On 23 September 2021, an Information Notice was sent to OOG's registered office address requiring it to provide answers to the outstanding questions by 30 October 2021. A copy was also sent by email.
64. Analysis of the opt-in information provided by OOG revealed that the email addresses had been obtained from various prize draw and special offer websites between February 2013 and June 2021. The email addresses of the complainants who had reported receiving emails advertising TBDL's services were allegedly obtained from three websites: (1) www.winareward.com, (2) <https://optinplus.eu> and (3) <https://thedailygifts.club>.

www.winareward.com

65. www.winareward.com is operated by a company called Winareward LLC which is based in Florida. The 'Win a Reward' website invites users to "*Sign up today and start receiving offers for products and services around the World!*", by entering their name, email address, mobile number, state, city, and country. The form includes two tick boxes alongside the following wording:

- *"Please Note: You understand and agree that you are establishing a business relationship with our network of affiliate partners, and you may be contacted by one of our partners by telephone or mobile using automated dialing or electronic mail. You also agree to our Privacy Policy [hyperlink]. There is no obligation for submitting your information."*
 - *"I consent to the processing of personal data for complementary purposes of sponsors [hyperlink] and third parties [hyperlink]. I understand that my details may be used until I choose withdraw my consent and that I can do this at any time by clicking unsubscribe on any communication that I receive from [REDACTED] or their Partners. Types of products or services that will be promoted: Promo, GiftCard, Coupon, Survey, Reward, Saving, Sweepstakes, Shopping, Govtaid, Electronics, Payday, Debt, Finance, Tax, Insurance, LifeInsurance, AutoInsurance, HomeInsurance, HealthInsurance, Entertainment, Gambling, Travel, Education, Job, Grant, HomeBiz, Dating, Solar, BackgroundCheck, Legal, CreditCard, CreditRepair, CreditScore, CreditReport, Auto, AutoLoan, Home, Refinance, Mortgage, HealthBeauty, Muscle, Beauty, Diet, Health, Sport, SeniorCare, Kids, Baby"*
66. The sponsors/third parties are listed as [REDACTED] (a French company) and [REDACTED] (a Cypriot company). [REDACTED] [REDACTED]'s privacy policy includes a link to a list of their partners and their partners' privacy policies. The list currently includes over 100 partners, however it does not include OOG, ASG or TBDL. [REDACTED] [REDACTED]'s privacy policy, which is available via the Internet Archive, states that *"We will not sell, distribute or lease your personal information to*

third parties unless we have your permission or required by law to do so”.

<https://optinplus.eu>

67. The 'OptinPlus' website is operated by a Belgian company called Pass-online.net. The complainant's details were obtained via a prize draw to win an iPhone 11. The entry form asks users to enter their email address and to tick a series of boxes confirming that they *“agree to be contacted or receive promotions, contests, benefits and commercial offers via phone, email or text by OptinPlus and the partners below.”* The partners are listed as [REDACTED], [REDACTED] and [REDACTED].
68. Users are also asked to tick another box confirming that they *“agree to the Terms of Service and Privacy Policy”*. The privacy policy states that *“we do neither disclose, nor share, nor sell to any third party any information about yourself, such as address, email, phone and fax numbers, demographic data or identification without your consent ... or without your knowing the goal of the treatment”*. The privacy policy does not identify any partners other than the three companies named on the entry form.

<https://thedailygifts.club>

69. This is a website operated by a Dutch company called Firebrick Media NV and branded as “NectarContests”. The complainant's details appear to have been obtained via a prize draw to win a selfie ring light. The entry form is in Dutch and invites users to provide their name, gender, email address and date of birth.

70. The small print in the website footer states: *"NectarContests collects and handles your information under the UK Data Protection Act 1998 and the (EC Directive) Regulations 2003. When you register your details, enter a competition or submit a questionnaire including your preferences you agree to NectarContests its agents or affiliates using your details and supplying them to other organizations (who may be located overseas in a wide range of countries including UK, AU, NZ, US, EU and Philippines) for purposes of: sending you information, offers and promotions about products and services based on your preferences and any prize notification (offers) by mail, phone/SMS/MMS or email; incorporating your details in any information products and information management services to provide to NectarContests' clients; and administering your details including improving and personalizing offers, verifying and assessing your identity, maintaining and updating records. When you respond to a question from a named organization in an offer you expressly consent to that organization and its agents or affiliates using your details to contact you for offers. You agree that we can use your details for an indefinite period or until you notify us or opt out from receiving offers. NectarContests is not affiliated with, sponsored by or endorsed by companies from whom we obtain the prizes. We do receive marketing fees from organizations placing offers in our questionnaires including financial institutions. You should always read their terms and conditions and any product disclosure statement."*
71. The 'NectarContests' privacy policy states: *"Your data will be provided to our website sponsors, partners and selected third parties. We and they will only use your data for: Marketing communications, market research and analysis, aggregation, testing, profiling, identity verification, credit and risk management, anti-money laundering regulations, national security, crime prevention and detections, enforcement, anti-fraud processes, asset recovery and asset*

reunification, revenue collation, database verification and tracing activities, segmentation, and suppression. Depending on what personal information we and our website sponsors, partners and selected third parties hold about you, we and they may contact you by post email, social media, online advertising, telephone and/or mobile in line with the permissions you provided to us at registration."

72. The policy goes on to list a number of sectors in which these companies operate. The full list is as follows: *"Retail, Automotive, Lifestyle, Charity, Utility, Telecommunications, Insurance, Publishing / Media, Entertainment/Gaming/Leisure, Public Sector, Financial Services, Travel, Mail Order, Health/Beauty, Education, FMCG, Marketing Agencies and Brokers, Pharmaceuticals"*.

73. The policy also specifies a number of named third party companies with whom they share personal data. These include [REDACTED]
[REDACTED]
[REDACTED] and [REDACTED]. It does not include OOG, ASG or TBDL.

74. On 28 October 2021, a letter was received from [REDACTED] in response to the Information Notice issued to OOG on 23 September 2021. The letter appeared to contradict OOG's earlier responses in that they now denied having sent the emails. The letter stated:

"OOG did not send any emails between 1st October 2020 and 31st March 2021. OOG has made enquiries with a number of their clients. Having spoken to Audience Serv GmbH (ASG), with whom they had exploratory discussions, it appears that ASG sent these emails showing OOG as the sender. This was a manual error, where

OOG's name was inadvertently picked from within ASG's systems as the sender.

ASG are extremely concerned that this happened and have reassured OOG that they have investigated fully to confirm how this error occurred and have now implemented a double step process to ensure this could never happen again."

[...]

"Each email that was sent did contain an unsubscribe link which took the individual to a webpage operated by ASG which confirmed their request and the fact that the unsubscribe has been processed and the user will no longer receive emails from ASG. In addition, each email included a contact email address for ASG where the individual could make requests in respect of his/her other GDPR related rights."

75. The letter claimed that, as OOG did not send the emails, they were unable to provide the other information requested in the Information Notice.
76. On 8 November 2021, an email was sent to [REDACTED], highlighting the apparent inconsistencies between the response to the Information Notice and OOG's previous responses, and requesting clarification of certain points.
77. On 8 December 2021, an email was received from [REDACTED] on behalf of OOG. The email stated that OOG does not generate any data in the UK; all email addresses and domains, including estrainformation.com and [REDACTED], are managed by

ASG; and it was ASG who provided the opt-in information to OOG. The email stated that OOG was unable to provide copies of correspondence with ASG regarding the error as all communication between the two companies was by phone or Skype.

78. On 4 November 2022, the Commissioner sent further enquiries to TBDL requesting clarification as to how many text messages were sent for direct marketing purposes and how many text messages and emails were successfully delivered.
79. TBDL responded by way of two emails dated 17 November 2022 and 7 December 2022, and confirmed:
- the total number of text messages that were sent for direct marketing purposes during the period 1 June 2020 to 4 May 2021 was 1,601,555, of which 1,511,547 messages were delivered.
 - 114,441 of the above text messages were sent without an opt-out due to those texts being incorrectly designated as service messages, of which 102,132 messages were delivered.
 - 45,322,164 emails were sent by ASG and/or OOG during the period 20 October 2020 to 10 May 2021, of which 39,906,342 were delivered.
80. The Commissioner has made the above findings of fact on the balance of probabilities.

81. The Commissioner has considered whether those facts constitute a contravention of regulations 22 and 23 of PECR by TBDL and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

82. The Commissioner finds that TBDL contravened regulations 22 and 23 of PECR.
83. The Commissioner finds that the contravention was as follows:
84. The Commissioner finds that between 20 October 2020 and 10 May 2021 there were 45,322,164 direct marketing emails sent to subscribers on behalf of TBDL, of which 39,906,342 were received. The Commissioner finds that TBDL instigated the transmission of those direct marketing messages, contrary to regulation 22 of PECR.
85. TBDL, as the instigator of the direct marketing emails, 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. The Commissioner is satisfied in this case that TBDL did not hold valid consent.
86. During the Commissioner's investigation, TBDL has indicated that it does not consider itself to be the instigator of the direct marketing emails as it is claimed that the affiliates operate at arm's length from it and exercise their own judgement and discretion when determining to whom marketing emails are sent. However, it is understood that TBDL provides the creative content of the emails and has a contractual relationship with ASG under which it pays ASG £[REDACTED] for each approved sale. The Commissioner therefore takes the view that this arrangement

constitutes "*positive encouragement*" and is clearly "*something more than the mere facilitation of the action concerned*"⁵. The Commissioner therefore considers TBDL to be the instigator of the relevant emails.

87. Accordingly, as instigator, it requires consent for the emails sent. Given that TBDL is reliant on its affiliates to obtain the data to use for sending the direct marketing relating to TBDL, this would constitute 'indirect consent'.
88. The Commissioner's direct marketing guidance says "*organisations need to be aware that indirect consent will not be enough for texts, emails or automated calls. This is because the rules on electronic marketing are stricter, to reflect the more intrusive nature of electronic messages.*"
89. However, it does go on to say that indirect consent may be valid, but only if it is clear and specific enough. If categories of organisations are referred to then those categories must be tightly defined and the organisation wanting to use the consent must clearly fall within the description. Consent is not likely to be valid where an individual is presented with a long, seemingly exhaustive list of categories of organisations.
90. 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.

⁵ *Microsoft Corporation v McDonald* [2006] EWHC 3410 (Ch) at [13]

91. 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.
92. 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.
93. The Commissioner considers that the consent relied upon by ASG and/or OOG to send emails on behalf of TBDL is invalid for a number of reasons:
- The promotions offered in the sites from which the “consents” are obtained are entirely unrelated to the energy sector.
 - ASG is not named on any of the websites operated by the third party companies.
 - TBDL and OOG are not specifically named on any of the websites, including the website operated by ASG (London Shave Products).
 - In order to participate in the promotions, users are required to agree to marketing from companies operating in numerous different sectors.
 - Consent is not granular so users cannot specify how they would prefer to be contacted.

- One of the websites is partly in German and another is partly in Dutch so English-speaking users cannot be expected to understand what they are consenting to.
 - The email addresses were collected between 2013 and 2021 so the data is up to eight years' old.
94. The Commissioner therefore takes the view that TBDL did not hold valid consent for the 39,906,342 direct marketing emails received by subscribers.
95. Furthermore, Commissioner finds that between 1 June 2020 and 4 May 2021 there were also 1,601,555 direct marketing text messages transmitted to subscribers by TBDL, of which 1,511,547 were received. The Commissioner finds that TBDL transmitted those direct marketing messages, contrary to regulation 22 of PECR.
96. Of those 1,511,547 direct marketing text messages which were received by subscribers, 102,132 of them did not contain a valid opt-out address in contravention of regulation 23(b) of PECR.
97. TBDL, as the sender of the direct marketing text messages, is required to ensure that it is acting in compliance with the requirements of regulation 22 and 23(b) of PECR, and to ensure that valid consent to send those messages had been acquired, and that they include a valid address to which the recipient of the communication may send a request that such communications cease. The Commissioner is satisfied in this instance that such valid consent was not held.

98. The Commissioner is satisfied that TBDL cannot avail itself of the 'soft opt-in' exemption provided by regulation 22(3) PECR as, contrary to the requirements of regulation 22(3)(c) PECR, individuals were not provided with a simple means of refusing the use of their contact details for the purposes of such direct marketing via text message, at the time that the details were initially collected.
99. The Commissioner makes this finding because whilst the data TBDL used was obtained from its own website, individuals providing consent were unable to specify the method by which they might wish to receive marketing, specifically the TBDL website referred only to email marketing. The consent obtained is therefore not appropriately specific.
100. The Commissioner is therefore satisfied that TBDL did not have the necessary valid consent for the 1,511,547 direct marketing text messages which were received by subscribers.
101. The Commissioner is further satisfied that in respect of 102,132 of the 1,511,547 direct marketing text messages, the actions of TBDL have contravened regulation 23 PECR.
102. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

103. The Commissioner is satisfied that the contravention identified above was serious. This is because between 1 June 2020 and 10 May 2021, TBDL transmitted or instigated the transmission of a total of 41,417,889 unsolicited direct marketing communications (39,906,342 emails which it had instigated, and 1,511,547 text messages which it

had itself transmitted) to subscribers who had not consented to receiving such communications, in contravention of regulation 22(2) of PECR.

104. Furthermore, of the 1,511,547 direct marketing text messages which were received by subscribers having been transmitted by TBDL, 102,132 were sent without the necessary opt-out information as required by regulation 23(b) PECR.
105. Over this same period, a total of 1,062 complaints relating to TBDL's unsolicited direct marketing were received by the Commissioner and the 7726 spam reporting service.
106. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

107. The Commissioner has considered whether the contravention identified above was deliberate. The Commissioner does not consider that TBDL deliberately set out to contravene PECR in this instance.
108. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
109. Firstly, he has considered whether TBDL knew or ought reasonably to have known that there was a risk that these contraventions would occur. This is not a high bar, and he is satisfied that this condition is met.

110. As a well-established organisation with a business model that relies heavily on direct marketing, the Commissioner considers it reasonable as a general principle that TBDL should have been aware of the rules that apply to such communications.
111. 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; and highlights the difficulties of relying on indirect consent for electronic mail. 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. TBDL has been registered with the ICO since 2014 so they should reasonably have been aware of the ICO guidance, and the enforcement action taken by the Commissioner against companies that have sent unsolicited marketing messages in contravention of PECR.
112. Finally, TBDL ought to have recognised the inherent risks associated with using affiliates. Their standard affiliate 'terms and conditions' contain warranties regarding compliance with data protection legislation, including the Privacy and Electronic Communications Directive 2002/58/EC, but no specific requirements regarding consent. They did ask ASG to complete a two-page due diligence questionnaire which required ASG to confirm that they had consent to send emails

and could provide evidence of consent if requested. However, they appear to have taken the answers at face value.

113. It is therefore reasonable to suppose that TBDL should have been, and indeed were, aware of its responsibilities in this area.
114. Secondly, the Commissioner has gone on to consider whether TBDL failed to take reasonable steps to prevent the contraventions. Again, he is satisfied that this condition is met.
115. The Commissioner's direct marketing guidance makes clear that organisations utilising marketing lists from a third party must undertake rigorous checks to satisfy themselves that the personal data was obtained fairly and lawfully, and that they have the necessary consent. It is not acceptable to rely on assurances given by third party suppliers without undertaking proper due diligence.
116. In relation to the emails sent on its behalf, if TBDL had visited the website listed on the due diligence questionnaire completed by ASG, they would have realised that the website was partly in German and that ASG did not have valid consent to send emails on behalf of TBDL.
117. Furthermore, before embarking on a text marketing campaign in August 2020, TBDL should have ensured that the wording of the opt-in statement on their own website covered the sending of direct marketing via text message. The high number of opt-out requests received in relation to the text messages (37,715 out of a total of 1,511,547 messages sent) should have alerted them to the problem and caused them to double-check the wording.

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

The Commissioner's decision to issue a monetary penalty

120. Having consideration of the seriousness of the contravention, the duration of the contravention, the negligent nature of the breach, and having regard to comparator cases, the Commissioner considers that an appropriate starting point for the penalty is £150,000.
121. The Commissioner has not identified any relevant aggravating features of this case.
122. The Commissioner has taken into account the following mitigating features of this case:
- TBDL's employees have since been provided with refresher training relating to compliance with PECR;
 - TBDL has ensured that all of its subsequent direct marketing communications include the requisite opt-out instructions;
 - TBDL's Privacy Notice has been updated;
 - TBDL is actively reviewing the content of their service communications to ensure no direct marketing material is inadvertently included;

- TBDL has ceased all SMS text message direct marketing;
- TBDL has terminated its arrangement with ASG.

123. In light of the above mitigating factors, the Commissioner considers that the penalty should be reduced by £50,000 to £100,000.

124. The Commissioner has gone on to consider the currently available financial information for TBDL, and the likely impact of a monetary penalty on the company. The Commissioner considers in the circumstances that a penalty remains the appropriate course of action in the circumstances of this case, however, on the basis of the financial information available, the Commissioner has decided to further reduce the penalty by £70,000 to £30,000.

125. 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.

126. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out his preliminary thinking. TBDL responded to the Notice of Intent, indicating that it accepted the outcome of the investigation and did not wish to challenge the Commissioner's decision.

127. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

128. 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.

129. In making his decision, the Commissioner has 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.
130. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

131. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£30,000 (thirty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

132. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **5 September 2023** 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.
133. If the Commissioner receives full payment of the monetary penalty by **4 September 2023** the Commissioner will reduce the monetary penalty by 20% to **£24,000 (twenty four thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
134. 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.
135. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
136. Information about appeals is set out in Annex 1.
137. 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.

138. 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 3rd day of August 2023

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)).