

**The Privacy and Electronic Communications (EC Directive)
Regulations 2003 as amended**

Monetary Penalty Notice [PECR]

Dated: 16 December 2013

Name: First Financial (UK) Limited

Registered Office: 145-157 St John Street, London, EC1V 4PW

Statutory framework

1. This monetary penalty notice is issued by virtue of Regulations 22 and 31 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ('PECR') as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2004 and by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 ('PECR 2011').
2. Regulation 22 states that.." 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. First Financial (UK) Limited ('First Financial') whose registered office is given above is the person stated in this monetary penalty notice for the purposes of Regulation 22 of PECR, to have transmitted or instigated the transmission of unsolicited communications for the purposes of direct marketing by means of electronic mail contrary to Regulation 22.
4. PECR came into force on 11 December 2003 and revoked the Telecommunications (Data Protection and Privacy) Regulations 1999. PECR adopted Part V entitled, 'Enforcement', and Schedules 6 and 9 of the Data Protection Act 1998 (the 'Act'). By virtue of Regulation 31 subparagraph 2 of PECR the Information Commissioner (the 'Commissioner') was made responsible for the enforcement functions under PECR.

5. On 26 May 2011, PECR 2011 amended Regulation 31 of PECR to adopt sections 55A to E of the Act and introduced appropriate adaptations to those sections.
6. Under sections 55A and 55B of the Act the Commissioner may, in certain circumstances, where there has been a serious contravention of the requirements of PECR, serve a monetary penalty notice on a person requiring the person to pay a monetary penalty of an amount determined by the Commissioner and specified in the notice but not exceeding £500,000.
7. The Commissioner has issued statutory guidance under section 55C (1) of the Act about the issuing of monetary penalties ('the Guidance'). The Guidance was approved by the Secretary of State and laid before Parliament. The Guidance was amended to take the changes to PECR into account and was published on 30 January 2012 on the Commissioner's website. It should be read in conjunction with the Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 and the Data Protection (Monetary Penalties) Order 2010.

Power of Commissioner to impose a monetary penalty

8. Section 55A of the Act as adopted by PECR 2011 states:-

“(1) The Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that –

- (a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person,
- (b) the contravention was of a kind likely to cause substantial damage or substantial distress, and
- (c) 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 –

- (i) that there was a risk that the contravention would occur, and
 - (ii) that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but
- (b) failed to take reasonable steps to prevent the contravention.”

Background

9. First Financial was incorporated on 6 December 2012. Under the heading 'Nature of the business' the company records state, 'none supplied', although it is clear that the business operated to provide low value, short term loans otherwise known as 'pay day loans'.
10. First Financial holds a consumer credit licence granted by the Office of Fair Trading ('OFT') under the Consumer Credit Act 1974. This Act requires most businesses that lend money to consumers or offer goods or services on credit or engage in certain ancillary credit activities to be licensed by the OFT.
11. The consumer credit licence indicated that First Financial used a number of trading names usually contained in website addresses that have now closed down such as:

www.firstpaydayloanuk.co.uk

www.firstpaydayloanuk.com

www.firstukpaydayloan.co.uk

www.firstukpaydayloan.com

www.paddypaydayloan.co.uk

www.paddypaydayloan.com

teletextloan.co.uk

teletextloan.com

12. The privacy policies on the websites were dated 28 January 2011 and were shown to have been last updated on 26 July 2012. These

dates precede the dates that not only First Financial, but also the websites were registered. This would indicate that these policies had been copied from another website and simply rebranded. This is indicative of the transient nature of businesses which are set up just to support certain targeted campaigns, make money quickly and then close down before any regulators or individuals affected can take action against them.

13. It is a fundamental requirement of PECR, and well-known throughout the direct marketing industry, that a consumer's consent must have been notified to the company before it sends direct marketing texts to a consumer. Therefore, it is a necessary step for all companies and businesses which undertake direct marketing, for their directors/owners to ensure that they do not send or instigate the sending of unsolicited, direct marketing texts to consumers unless the business holds records showing that those consumers have given their informed consent to that business to receive such texts.
14. Between 1 February 2013 and 31 March 2013 (the 'period of complaint') First Financial instigated the sending of or sent **4,031** unsolicited direct marketing texts to mobile phone subscribers who had not consented to receive them.
15. The number of contraventions alleged to have been committed by First Financial referred to in the previous paragraph is the total sum of all the complaints from people who had received such texts as set out below.
16. The number of complaints made to the mobile telephone networks using their complaints system (whereby the text is sent by the complainant to a special number which is 7726) can be broken down into three categories:-
 - Everything Everywhere - **444**
 - Vodafone - **3,197**
 - 3 - **390**
17. Spreadsheets containing the telephone number to which each of the above texts was sent, and the date and time it was sent, are available but owing to their size it is not practicable to attach them to this monetary penalty notice. They will be sent to First Financial

upon request.

18. Notably, First Financial carried out their SMS campaign using unregistered SIM cards which is a method well-known amongst those in the industry of avoiding detection by the mobile telephone networks' spam detectors.
19. The number of complaints made to the Commissioner during the period of complaint was **323**. This figure is already included in the **4,031** complaints referred to above because the people who complained to the Commissioner also complained to the telephone companies.
20. One of the **323** complaints to the Commissioner dated 13 February 2013 was from _____ who said that she was cross to be: "disturbed at 11.25 on Sunday evening by the text below, with the inevitable jolt that a late night phone message gives you." The text she complained about was: "You have been preapproved for up to £1,000 cash today. Apply now at www.firstpaydayloanuk.co.uk and receive your cash within 15 minutes. To opt out reply STOP +447585367318 10-FEB-2013 23.25."
21. Taking the **3,179** Vodafone messages as an example, exactly the same message as outlined in the previous paragraph was the script used most often. Another message used was, "Hi Mate I'm still out in town, Just got £950 in my account from these guys:www.firstpaydayloanuk.co.uk".
22. Some details from the complaints made by the **323** people who complained to the Commissioner are listed below:-
 - The texts were sent at inconvenient and unsociable hours of the morning and evening and at weekends e.g. 01:00 hours;
 - The texts interrupted people's sleep;
 - The texts caused particular problems for vulnerable recipients;
 - People texted 'stop' only to receive the same message minutes later;
 - The texts, especially when sent at unsociable times, caused unnecessary alarm and fears for the welfare of relatives particularly where the recipient's number was used only for

contact with a sick, elderly or otherwise vulnerable relative or close friend;

- The texts were unethical practices of the loan companies preying on those on low income;
- The texts were an invasion of privacy;
- The texts were designed to appear as if they were from a friend and were deceptive;
- The texts were about loans when the recipient had never had a loan, credit card or other kind of credit, had never had cash flow problems and did not need a loan/was ineligible for one;
- One person was concerned that their credit rating was being affected by the company searching the credit reference agency data bases;
- One person was scared to receive a text at 01:00 hours as a text at this time is usually bad news and it caused chest pain, worry and insomnia;
- Two people said that it was particularly concerning as the organisation 'seems to have at least some personal and financial information about me to be able to give the promise made in the text message';
- One person had to pay roaming charges for the messages;
- One person complained that the receipt of the messages was causing them problems with their manager at work;
- One person said they were on 24 hour emergency call and cannot switch their phone off and that the text woke them up, they were unable to get back to sleep and it affected their work the next day.

Grounds on which the Commissioner proposes to serve a monetary penalty notice

Breaches of Regulation 22

23. The relevant provision of PECR is Regulation 22(2) which provides that,

'..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'.

24. The term 'electronic mail' is defined in Regulation 2 (1) 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."
25. The term 'individual' is also defined in Regulation 2(1) PECR as "a living individual and includes an unincorporated body of such individuals."
26. The term 'subscriber' is defined also in Regulation 2(1) as, "a person who is a party to a contract with a provider of public electronic communications services for the supply of such services."
27. The term 'direct marketing' is defined in the section 11 of the Act as "the communication by whatever means of any advertising or marketing material which is directed to particular individuals."
28. Regulation 22 applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers. It means that if a company wants to send out unsolicited text messages advertising a product or service to an individual who has a mobile telephone, then that individual must have given their consent to that company to receiving such texts.

Definitions

29. The term 'person' applies to limited companies as well as individuals. It is defined in Schedule 1 of the Interpretation Act 1978 as follows:

"Person includes a body of persons corporate or unincorporate".
30. The following are defined in Regulation 2 (1) of PECR :
 - (a) The term 'public electronic communications service' is defined as having the meaning given in section 151 of the Communications Act 2003 which states that it means " any electronic communications service that is provided so as to be available for use by members of the public;"

- (b) The term 'individual' is defined as, "a living individual and includes an unincorporated body of such individuals;"
 - (c) The term 'subscriber' is defined as, "a person who is a party to a contract with a provider of public electronic communications services for the supply of such services;"
 - (d) The term 'call' is defined as "a connection established by means of a telephone service available to the public allowing a two-way communication in real time;"
 - (e) The term 'direct marketing' is defined in section 11 of the Act as "the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals."
31. The Commissioner is satisfied that on various dates during the period of complaint, First Financial sent or instigated the sending of **4,031** unsolicited marketing texts to mobile phone subscribers who had not consented to receive such unsolicited marketing texts from First Financial. The total of **4,031** has been calculated as shown above.
32. Therefore the Commissioner is satisfied (on the balance of probability) that First Financial has acted in breach of Regulation 22.

Serious (Section 55A (1) (a))

33. The Commissioner is satisfied that these contraventions of PECR have been serious as required by section 55A (1) (a) because of the sheer volume of contraventions of Regulation 22 discovered to have taken place over such a short period of time.
34. The fact that the number of complaints was so high during a relatively short period shows that First Financial was engaged in an organised marketing campaign to send as many texts as possible.
35. During the period of complaint, First Financial were one of the organisations about which the most complaints were received nationally and also the issue of unsolicited texts is a matter of considerable and widespread public concern.

36. In determining whether the contravention was serious consideration should be given to the Commissioner's Guidance. The Guidance gives an example of a serious contravention on page 13 as follows:

"Making a large number of automated marketing calls based on recorded messages or sending large numbers of marketing text messages to individuals who have not consented to receive them, particularly if distress and anxiety is caused to the recipients."
This is a case which is comparable to that example.

37. Therefore the Commissioner is satisfied that the case meets the 'seriousness threshold' because of the nature and extent of the breach.

The contravention was of a kind likely to cause substantial damage or substantial distress (Section 55A (1) (b))

38. The Commissioner is satisfied that the contravention is of a kind likely to cause substantial distress as required by section 55A (1) (b) because of the very large numbers of individuals who received these unsolicited calls and the fact that they took the trouble to complain using the 7726 system.

39. Although the distress in every individual complainant's case may not always have been substantial, the cumulative amount of distress suffered by the large numbers of individuals affected, means that overall the level was substantial. In this case over 4,000 people were sufficiently distressed to make formal complaints and a number of those who have complained have suffered substantial distress.

40. It is reasonable to infer that this was representative of only a small proportion of such texts that were sent out. The results of a survey by the Direct Marketing Association published in an article in September 2011 showed that a relatively small proportion of those receiving such texts actually take the trouble to complain at all and only 3 % would complain to the Commissioner.¹

¹ <http://www.dma.org.uk/toolkit/whack-mobile-tackling-text-spammers>

41. When looking at the meaning of 'substantial' in terms of the levels of distress, the Commissioner has had regard to section 2, page 14 of the Guidance. This says that the Commissioner considers that "if damage or distress that is less than considerable in each individual case is suffered by a large number of individuals the totality of the damage or distress can nevertheless be substantial". This reflects the fact that in extending section 55A to PECR cases the intention of Parliament was to ensure that cases such as this with high volumes of complaints fell within its remit.
42. When looking at the meaning of 'distress' the Commissioner has also had regard to page 15 of his Guidance in which it states that "distress is any injury to feelings, harm or anxiety suffered by an individual."
43. The Commissioner is satisfied that the fact that large numbers of individuals felt the need to make formal complaints shows that these unsolicited marketing calls are of a kind 'likely to cause substantial distress' as required by section 55A (1) (b).

Deliberate (Section 55A (2))

44. First Financial acted deliberately in sending, or instigating the sending of **4,031** unsolicited marketing texts to mobile phone subscribers who had not consented to receive such unsolicited marketing texts as set out above. First Financial carried out this SMS/text campaign using unregistered SIM cards which is well-known amongst those in the direct marketing industry as a method of avoiding detection by the mobile telephone networks' spam detectors.

Knew or ought to have known that there was a risk that the contravention would occur and that it would be of a kind likely to cause substantial damage or substantial distress (Section 55A (3)(a)(i) and (ii)).

45. The following factors are indicative of the fact that First Financial knew or ought to have known there was a risk of contravention and that it would be of a kind likely to cause substantial distress.

- First Financials' sole object was direct marketing by text messages of low value short term loans. The problem of unsolicited texts and calls has been widely addressed in articles published by the national press and elsewhere in the media, especially since the publication of the first monetary penalty notice for PECR contravention which was served at the end of 2012. Therefore, First Financial ought to have been aware of their responsibilities in this area and to have been aware that there was a high risk of a contravention when the volume of texts was so high.
- First Financial was aware of other regulatory requirements as demonstrated by the attempts to show on its various websites that it was complying with other obligations such as obtaining a consumer credit licence, issuing a notice on its website about 'cookies' and putting in place a privacy policy.

46. The Commissioner is therefore satisfied that section 55A (3)(a)(i) and (ii) of the Act applies in that during the period of complaint First Financial knew or ought to have known that there was a risk that the contravention would occur, and that such a contravention would be of a kind likely to cause substantial distress.

Failed to take reasonable steps to prevent the contravention (Section 55A (3) (b))

47. First Financial is a business in the text marketing industry and it failed to take steps to ensure it only contacted those persons who had consented to receiving texts from that business. It failed to do this on over 4,000 occasions. It cannot be said to be a 'one-off' contravention, as might be the case where there were systems in place but they momentarily failed. The sheer volume of complaints amounts to evidence that there were no systems in place.
48. The use of unregistered SIM cards as a way of avoiding detection shows that not only were no reasonable steps taken, but also there was never any intention of taking any such precautions and shows that the contraventions of PECR were deliberate.

Aggravating features the Commissioner has taken into account in determining the amount of a monetary penalty

49. Nature of the contravention:

- The texts were indiscriminate;
- A large number of people complained that the texts were sent at unsociable times during late evening/early morning.

50. Effect of the contravention:

- There were large numbers of and a wide variety of people including vulnerable people, affected by the calls due to the indiscriminate nature of the contravention;
- One person complained that he had incurred roaming charges whilst overseas as a result of receiving the texts;
- People were troubled as to why they had received the texts and were concerned about where the sender had obtained their details.

51. Behavioural issues:

- No steps were taken during the period of complaint to ensure the business was complying with PECR;
- The business was set up by a financial adviser (Hamed Shabani) just to deal with topical marketing campaigns using unregistered SIM cards. It appears that its aim was to send as many unlawful unsolicited texts to as many people as possible with the minimum adverse effect upon itself. Mr Shabani has since tried unsuccessfully to dissolve First Financial and has removed himself from the company register as a director. It appears to the Commissioner that these actions amount to avoidance tactics.

52. Impact on First Financial:

- First Financial is a private organisation within a competitive direct marketing industry where continuous breaches of PECR create an unfair advantage.

Mitigating features taken into account in determining the amount of the monetary penalty

53. There may be an adverse financial effect upon First Financial. Such newly constituted businesses do not need to publish accounts so there is no information available (see paragraphs 56 and 57 below).

Other considerations

54. The Commissioner's underlying objective in imposing a monetary penalty is to promote compliance with PECR. The sending or instigating of unsolicited direct marketing texts 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. This is an opportunity to reinforce the need for businesses to ensure that they are only texting consumers who want to receive the texts.

Notice of Intent

55. A notice of intent was served on First Financial dated 7 October 2013 as required by section 55B (1) of the Act. The Commissioner received written representations from the Company Secretary of First Financial in a letter dated 1 November 2013. The Commissioner has considered the written representations made in relation to the notice of intent when deciding whether to serve a monetary penalty notice. In particular, the Commissioner has taken the following steps:
- reconsidered the amount of the monetary penalty generally, and whether it is a reasonable and proportionate means of achieving the objective which the Commissioner seeks to achieve by this imposition;
 - ensured that the monetary penalty is within the prescribed limit of £500,000; and
 - ensured that the Commissioner is not, by imposing a monetary penalty, acting inconsistently with any of his statutory or public law duties and that a monetary penalty notice will not impose undue financial hardship on an otherwise responsible person.

56. First Financial have twice been invited to provide the Commissioner with as much reliable information as possible as to the financial position of the company. They were informed that a copy of the most recent company accounts certified by an independent professional body or person such as an accountant or if the company is newly formed, some other form of record showing the profit, loss and overheads, over the last 2 years, also certified by an independent professional such as an accountant, must be provided.
57. Instead, the Company Secretary of First Financial has simply informed the Commissioner in his written representations to the notice of intent that "the company has stopped trading and has no assets to make the proposed payment as the company's share value is £1." In the circumstances, it is reasonable to infer that First Financial has sufficient financial resources to pay a monetary penalty up to the maximum without causing undue financial hardship.

Amount of the monetary penalty

58. The Commissioner considers that the contravention of PECR is 'very serious' and that the imposition of a monetary penalty is appropriate. Further, that a monetary penalty in the sum of **£175,000** (One hundred and seventy five thousand pounds) is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Payment

59. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by 20 January 2014 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.

Early payment discount

60. If the Commissioner receives full payment of the monetary penalty by 17 January 2014 the Commissioner will reduce the monetary penalty by 20% to £140,000 (One hundred and forty thousand pounds). You should be aware that if you decide to take advantage of the early payment discount you will forfeit your right of appeal.

Right of Appeal

61. There is a right of appeal to the (First-tier Tribunal) General Regulatory Chamber against:
- a. the imposition of the monetary penalty
and/or;
 - b. the amount of the penalty specified in the monetary penalty notice.

Any notice of appeal should be served on the Tribunal by 5pm on 17 January 2014 at the latest. If the notice of appeal is served late the Tribunal will not accept it unless the Tribunal has extended the time for complying with this rule.

Information about appeals is set out in the attached Annex 1.

Enforcement

62. The Commissioner will not take action to enforce a monetary penalty unless:
- the period specified in 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 First Financial to appeal against the monetary penalty and any variation of it has expired.
- 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 or any sheriffdom in Scotland.

Dated this 16th day of December 2013

Signed

David Smith
Deputy Information Commissioner
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) provides that a person on whom a monetary penalty notice is served may appeal to the Tribunal against the issue of the monetary penalty notice and/or the amount of the penalty specified in the monetary penalty notice.
2. Section 55B (5) of the Data Protection Act 1998 which was adopted by Regulation 31 PECR gives any person upon whom a monetary penalty notice has been served a right of appeal to the (First-tier Tribunal) General Regulatory Chamber (the 'Tribunal') against the notice.
3. 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.

4. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

- a) The notice of appeal should be served on the Tribunal by 5pm on 17 January 2014 at the latest.
 - 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.
5. 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;
 - 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.
6. 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.
7. 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)).