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DIGITONOMY LIMITED FINED £120,000

Monetary Penalty Notice

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DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Digitonomy Limited

Of: 5b Steam Mill Street, Chester, CH3 5AN

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

Legal framework

3. The Company, whose registered office is given above (Companies House registration number: 08385135), is the person stated in this notice to have instigated the transmission of 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. Regulation 23 of PECR states:

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

6. Section 11(3) of the DPA defines "direct marketing" as "the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals". This definition also applies for the purposes of PECR (see regulation 2(2)).
7. "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".
8. Section 55A of the DPA (as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 and the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2015) 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, and
 - (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."
9. 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.
10. PEGR implements European legislation (Directive 2002/58/EC) aimed at the protection of the individual's fundamental right to privacy in the electronic communications sector. PEGR was amended for the purpose of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches PEGR so as to give effect to the Directives.

Background to the case

11. The Company is a credit broker which effects introductions between borrowers and lenders for the purposes of entering into loan agreements under various trading names. It is registered with the

Financial Conduct Authority. In part, it generates leads for its business through affiliates who send marketing text messages directing individuals to website properties owned by them, for example:

"Are you still short of cash after XMAS break & need a loan? Get an INSTANT DECISION on loans up to Â£2000. Go to www.loan-24.co.uk TODAY txt STOP to 60075"

"Little Loans: Need Extra Funds This New Year? Get up to ;3,000 with Instant Decision & Same Day Cash. APPLY NOW
<http://tx2.in/RjovHtUDMyX> reply STOP to optout"

"We have reviewed your details. We could arrange a 250 loan today. Any credit rating. www.luvmoney.co.uk for CASH NOW. Amy at Approvals. Dont Delay. End2OptOut"

12. Mobile phone users can report the receipt of unsolicited marketing text messages to the GSMA's Spam Reporting Service by forwarding the message to 7726 (spelling out "SPAM"). The GSMA is an organisation that represents the interests of mobile operators worldwide. The Commissioner is provided with access to the data on complaints made to the 7726 service.
13. The Commissioner's monthly threat assessment for the month of December 2015 identified unsolicited direct marketing text messages being sent by the Company as being in the "Top 20" messages reported to the GSMA.
14. On further investigation, it was discovered that between 6 April 2015 and 29 February 2016, 1408 complaints were made to the 7726 service about the receipt of unsolicited direct marketing text messages sent by

the Company. Between 6 April 2015 and 29 February 2016 a further 56 complaints were made direct to the Commissioner.

15. In correspondence with the Commissioner, the Company explained that it did not purchase any data from third parties but used affiliate marketing channels through affiliate managers in order to acquire customers.
16. The Commissioner was provided with examples of the consent wording relied on by its third party data providers some of which are as follows:

"You consent to us and our trusted partners contacting you by SMS, mail, email, telephone and automated message."

"As a credit broker, we can pass your details onto our panel of lenders or to related third party affiliates. For more information on how we handle your data, please read our Privacy Policy."

"By entering this competition you agree to the Terms & Conditions and Privacy Policy. You also agree to receive information by post, telephone, email & SMS from X and third parties listed in our Data Collection Notice & for your data to be available for tracing companies. You can opt-out from these communications at anytime."

17. The Company was unable to provide the Commissioner with any evidence that the individuals to whom the text messages had been sent had consented to the receipt of the messages.
18. During the investigation, the Company told the Commissioner that it had instigated the sending of 5,900,940 text messages during the

period of complaint. However, it indicated that whilst this number of direct marketing text messages was attempted only 5,238,653 were successfully transmitted. There was later misunderstanding over whether this number of messages was correct and whether it actually represented the number of messages sent by the affiliate managers on loan campaigns generally but not necessarily related to the Company's offers. Further investigation with the Company's affiliate managers confirmed that the Company had instigated the sending of 5,900,940 text messages during the period of complaint and successfully transmitted 5,238,653 in relation to the Company's offers.

19. The Commissioner has made the above findings of fact on the balance of probabilities.
20. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by the Company and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

21. The Commissioner finds that the Company has contravened regulation 22 of PECR.
22. The Commissioner finds that the contravention was as follows:
23. Between 6 April 2015 and 29 February 2016, the Company used a public telecommunications service for the purposes of instigating the transmission of 5,238,653 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

24. As instigator of the direct marketing text messages, it was the responsibility of the Company to ensure that sufficient consent had been acquired.
25. Organisations cannot send, or instigate the sending, of marketing text messages unless the recipient has notified the sender that he consents to messages being sent by, or at the instigation of, that sender.
26. Consent must be freely given, specific and informed, and involve a positive indication signifying the individual's agreement. Indirect, or third party, consent can be valid only if it is clear and specific enough. Informing individuals that their details will be shared with unspecified third parties, is neither freely given nor specific and does not amount to a positive indication of consent.
27. In this case the Commissioner is satisfied that the Company did not have the consent, within the meaning of regulation 22(2), of the 5,238,653 subscribers to whom it sent unsolicited direct marketing text messages.
28. The Commissioner is satisfied that the Company was responsible for this contravention.
29. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

30. The Commissioner is satisfied that the contravention identified above was serious. This is because the Company instigated the sending of a total number of 5,238,653 direct marketing text messages to

subscribers without their consent resulting in 1464 complaints being made.

31. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

32. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that the Company's actions which constituted that contravention were deliberate actions (even if the Company did not actually intend thereby to contravene PECR).
33. The Commissioner considers that in this case the Company did not deliberately contravene regulation 22 of PECR in that sense.
34. The Commissioner has gone on to consider whether the contraventions identified above were negligent.
35. First, the Commissioner has considered whether the Company knew or ought reasonably to have known that there was a risk that these contraventions would occur. She is satisfied that this condition is met given that the Company is involved in a business heavily reliant on direct marketing, and the fact that the issue of unsolicited text messages has been widely publicised by the media as being a problem.
36. The Commissioner has published detailed guidance for those carrying out direct marketing explaining their legal obligations under PECR. This guidance 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 marketing texts to individuals if that person has specifically consented to receiving them.

37. It is therefore reasonable to suppose that the Company knew or ought reasonably to have known that there was a risk that these contraventions would occur.
38. Second, the Commissioner has gone on to consider whether the Company failed to take reasonable steps to prevent the contraventions.
39. Organisations buying marketing lists from third parties, or contracting with third parties to carry out marketing for them, must make rigorous checks to satisfy themselves that the third party has obtained the personal data it is using fairly and lawfully, and that they have the necessary consent. Organisations must ensure that consent was validly obtained, that it was reasonably recent, and that it clearly extended to them specifically or to organisations fitting their description.
40. It is not acceptable to rely on assurances of indirect consent without undertaking proper due diligence. Such due diligence might, for example, include the following:
 - How and when was consent obtained?
 - Who obtained it and in what context?
 - Was the information provided clear and intelligible? How was it provided – eg behind a link, in a footnote, in a pop-up box, in a clear statement next to the opt-in box?
 - Did it specifically mention texts, e-mails or automated calls?
 - Did it list organisations by name, by description, or was the consent for disclosure to any third party?

- Have they checked that the data meets the required standard of consent by obtaining a sample of the data and have they conducted further periodic sample checking of data in addition to the monitoring of complaint levels (and sources of data)?
41. The Commissioner does not consider that the Company undertook sufficient due diligence. It did not, for example, carry out a proper review of the privacy notices of the websites from which the data had been obtained. Had it done so, it should have been clear that the Company did not have consent to instigate the sending of unsolicited direct marketing text messages. These notices could have been provided by their affiliate manager had they been requested by the Company. The Commissioner is therefore satisfied that the Company failed to take reasonable steps to prevent the contraventions.
42. The Commissioner is therefore satisfied that condition (b) from section 55A(1) DPA is met.

The Commissioner's decision to issue a monetary penalty

43. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A(1) DPA have been met in this case. She is also satisfied that section 55A(3A) and the procedural rights under section 55B have been complied with.
44. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary views. In reaching her final view, the Commissioner has taken into account the representations made by the Company on this matter.

45. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
46. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
47. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited 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. The issuing of a monetary penalty will reinforce the need for businesses to ensure that they are only texting those who have consented to receive marketing from them.
48. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

49. The Commissioner has taken into account the following **mitigating features** of this case:
 - There is a potential for damage to the Company's reputation which may affect future business.
50. The Commissioner has taken into account the following **aggravating features** of this case:

- The Company may obtain a commercial advantage over its competitors by generating leads from unlawful marketing practices.
51. The Commissioner has also taken into account the fact that Digitonomy Limited has contravened regulation 23 of PECR in that it did not identify the person who was sending or instigating direct marketing text messages.
52. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£120,000 (one hundred and twenty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

53. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **16 March 2017** 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.
54. If the Commissioner receives full payment of the monetary penalty by **15 March 2017** the Commissioner will reduce the monetary penalty by 20% to **£96,000 (ninety six thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
55. 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.
56. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
57. Information about appeals is set out in Annex 1.
58. 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.
59. 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 13th day of February 2017

Signed

Stephen Eckersley
Head of Enforcement
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 48 of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice or variation 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 she ought to have exercised her 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:

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

- 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 (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)).