

**Data Protection Act 1998**

**Monetary Penalty Notice [PECR]**

**Dated: 26 November 2012**

**Name:** Mr Christopher Anthony Niebel trading as Tetrus Telecoms

**Address:** [REDACTED] Manchester, [REDACTED]

**Statutory framework**

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1. Mr Christopher Anthony Niebel, trading as Tetrus Telecoms, is the person referred to for the purposes of Regulations 22 and 23 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") in respect of the transmission or instigation of the transmission by him of unsolicited communications for the purposes of direct marketing by means of electronic mail.
2. 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.
3. 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.
4. 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. The Commissioner has issued Statutory Guidance under section 55C (1) of the Act about the issuing of

monetary penalties which is published 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.

5. The Statutory Guidance referred to in paragraph 4 above was amended to take the changes to PECR into account and was published on 30 January 2012.

### **Power of Commissioner to impose a monetary penalty**

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- (1) Under section 55A of the Act as adopted by PECR 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

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6. Mr Christopher Anthony Niebel, ("Mr Niebel") is one of the owners of Tetrus Telecoms. The business, not being a limited company, was set up by Mr Niebel and another individual called Gary John Peter McNeish ("Mr McNeish") on or before December 2009 and they each have a share in the business. Mr Niebel and Mr McNeish are therefore inextricably linked because the facts relating to Mr Niebel are also relevant or explanatory to those relating to Mr McNeish.
7. Mr Niebel, trading as Tetrus Telecoms from 26 May 2011, sent or instigated the sending of many millions of unsolicited direct marketing text messages contrary to Regulation 22 of PECR and concealed their identity and/or failed to provide a valid address by which the recipients can request that the texts cease contrary to Regulation 23 of PECR.
8. On 7 July 2010, Mr McNeish applied for notification on the data protection register maintained by the Commissioner under Section 17 of the Act (registration number Z2286374). The contact address given for the purposes of the register was listed as, "Tetrus Telecoms, [REDACTED]" and the following names were listed in the 'other names' section: Tetrus Telesoms (sic), loanslineuk.co.uk, mydebtgone.com, writeoffppi.com, mycompensationsuk.com, mypaydayloan247.com and Genie-Communications. The requisite fee was never received despite two reminder letters having been sent out on 16 August 2010 and 26 September 2010 and the registration was not completed.
9. On or around 16 May 2011, the Commissioner received intelligence that a marketing company called Tetrus Telecoms ("Tetrus") based at addresses in Manchester ([REDACTED], Vauxhall Industrial Estate, Greg Street, Reddish, Stockport, SK5 7BR) and Birmingham (Fort Dunlop, Fort Parkway, Birmingham, B24 9PF) was sending out large numbers of unsolicited text messages on a daily basis advertising financial products.
10. [REDACTED], run by [REDACTED] who is the Director of that company, was sending out the texts on Tetrus' behalf, using [REDACTED] tariff and being paid by Tetrus for positive responses to those texts.
11. On 4 July 2011 the website [www.tetr.us](http://www.tetr.us) advertised that:
  - Tetrus "are specialists in Bulk SMS",
  - They "charge only 2p per text message sent"

- They "have a minimum send requirement of 100,000 texts".
- They "have direct access" to customer data files including loan enquiries and declines, credit card declines and personal injury claims.
- "All files comply with the Data Protection Act and have been correctly offered the chance to opt-in/out".

12. On 26 July 2011 a "whois" search, which is a tool used to obtain information on the registered users of internet domain names, showed that the domain name tetr.us was registered to Tetrus Telecoms at the address Mayfair Trust Group, Independence Avenue, Capital City, Mahe, Box 1312, Seychelles. A cached version or snapshot of the "whois" information as it appeared on 9 June 2011 is available via the Google search engine. This shows that the same domain name was previously registered to Gary McNeish at [REDACTED] Manchester, M1 3GW.
13. As a result of a visit by the Commissioner's enforcement officers on 27 July 2011, Mr Niebel trading as Tetrus was linked to premises at [REDACTED] Vauxhall Industrial Estate, Greg Street, Reddish, Stockport, SK5 7BR ("the Stockport premises"). The Stockport premises was one of the units in the premises [REDACTED] on 25 July 2011, saw two males in possession of 4 or 5 PCs, approximately 100 mobile phones and hundreds of SIM cards.
14. On 11 August 2011, enforcement officers employed by the Commissioner executed a search warrant at the Stockport premises which had recently been vacated. However, correspondence relating to both Mr Niebel and Tetrus was found in [REDACTED]. Also on the premises were 382 prepay mobile phone top up receipts and details of associated debit card payments. These payments have since been linked to an account used to conduct the business of Tetrus.
15. Throughout this period [REDACTED] had been monitoring the broadcast of large numbers of text messages from batches of unregistered SIM cards being sent over their network from particular locations including the mobile phone mast near the Stockport premises as well as Tamworth and Altrincham. [REDACTED] confirmed from their records that messages had been sent using over 16,000 separate unregistered SIM cards which [REDACTED] disconnected on various dates from January 2011 onwards. The messages from this mast in the Stockport location ceased after 29 July 2011. A list of the mobile phone numbers linked to these texts and details of the affected phone mast locations provided by [REDACTED] has been compared to the complaints received by the Commissioner.

16. 411 of the complaints that were made to the Commissioner about unsolicited texts received between 24 January 2011 and 9 November 2011 can be linked directly to those mobile phone numbers provided by [REDACTED].
17. 17 of the 411 complaints made to the Commissioner link directly to the top up receipts which were found at the Stockport premises which were paid for by Tetrus. A schedule showing the 17 complaints linked to the top ups is in **Annex 3**.
18. The main concerns expressed by the complainants were that the messages were unlawful, constituted a nuisance and it was an invasion of privacy. In addition they complained that they received multiple texts over a short period of time, they received texts after texting STOP and they had to pay international charge rates to retrieve texts whilst abroad.
19. Examples of the types of messages being received are as follows:-
- CLAIM TODAY you may be entitled to £3500 for the accident you had. To claim free, reply CLAIM to this message. To opt out text STOP. Thank you
  - You are eligible to claim compensation please reply with 'claim' for further information
  - URGENT! If you took out a Bank Loan prior to 2007 then you are almost certainly entitled to £2300 in compensation. To claim reply 'YES'
  - Our records indicate you still have not claimed compensation for your accident. You may be entitled up to £3650
  - You have still not claimed the compensation you are due for the accident you had. To claim then PLS reply claim. To opt out text STOP
  - Free Msg: Our records indicate you may be entitled to £3450 for the accident you had. To apply free reply CLAIM to this message. To opt out text STOP
20. On 28 February 2012, officers from the Commissioner executed a search warrant at [REDACTED] in [REDACTED] which was known to be Mr Niebel's home address to which the business of Tetrus Telecoms had been linked. Mr Niebel was present during the execution of the warrant. A number of items were seized, including paper documents and handwritten notes, letters, bank statements, a tax return, debit cards, computer equipment and a mobile phone.
21. A document entitled "Heads of Agreement between Chris Niebel & Gary McNeish ('Tetrus') and [REDACTED]"

[REDACTED] is a written agreement between Tetrus and [REDACTED] to enter into various business ventures. It includes an agreement to share the profit of running RTA leads, PPI leads and debt leads "generated by Tetrus's text messaging and other lead generation tools". (RTA and PPI are the commonly used abbreviations for road traffic accident and payment protection insurance) The agreement states that Tetrus will own 10-25% of the share capital of various companies and will pay [REDACTED] £30,000 per month for 6 months commencing 1 June 2011. The document is signed by Mr Niebel (for and on behalf of Tetrus) and [REDACTED] (for and on behalf of [REDACTED]) and dated 26 May 2011.

22. Handwritten notes and calculations relating to various SMS marketing campaigns were found in Mr Niebel's desk drawer with the agreement referred to in paragraph 16 above. These contained references to "70 sims", "840k daily", "2 million records", "leads", "debt" and "PPI". The calculations show costs of £18,000 per week and sales of £7,862.50 per day. The notes also contain various company names, contact names, email addresses and telephone numbers including the name "██████" which is ████████████████████. This is a business which is a client of Tetrus and which buys leads from companies like Tetrus in order to operate their business of claims management.
23. ██████████ bank statement for a personal account in the name of Mr Chris Niebel covering the period from 15 February 2010 to 10 March 2010 shows that a total of £██████████ was paid into the account during the period and that a total of £██████████ was withdrawn. There are also a number of transactions which appear to be linked to the text message business including payments of £██████████ to ██████████ and a total of £██████████ received from Tetrus.
24. Two ██████████ debit cards were in the names of "Tetrus Telecoms - Mr C A Niebel" and "Tetrus Telecoms - Mr G J P McNeish". ██████████ records showed that this account for which the cards were used was set up in December 2009 by Mr Niebel and Mr McNeish when the account was opened as Tetrus Telecoms and that the business was a 50/50 business partnership.
25. Bank statements for that account for the period 27 January 2011 to 31 January 2012 showed total payments of £175,715 to Mr Niebel and £79,400 to Mr McNeish as well as payments of £70,768 to a company called Ad-Vance Online of which Mr Niebel was a Director though it was owned by ██████████ of ██████████. The statements also show payments for "data", "SMS", "SIM cards", "topups" and "leads".

26. The total financial advantage to Mr Niebel is shown in **Annex 2.**
27. Emails from between December 2011 and February 2012 recorded on the computer found at Mr Niebel's home between Mr Niebel and Mr McNeish contained references to direct marketing text messages and lead generation as well as exchanges between Mr Niebel and various clients and associates including [REDACTED].
28. Files found stored on one of the laptops found at Mr Niebel's home contained Tetras business plans, spreadsheets of names, mobile phone numbers and other personal details. They also contained copies of [REDACTED] conversations between Mr Niebel and various clients and associates including Mr McNeish, [REDACTED] and [REDACTED]. The [REDACTED] conversations conducted by Mr Niebel relate to the sending of SMS messages, [REDACTED], references to the Commissioner's investigation and SIM cards being disconnected.
29. On 28 February 2012 Mr Niebel initially denied the laptop at his home belonged to him but when it was later examined it was found to be labelled with his name, address and mobile phone number.
30. In various telephone conversations with the Commissioner's enforcement officers over the period 4 October 2011 to 7 March 2012 Mr Niebel initially denied being involved in Tetras, but later said that he was a consultant or salesman. He said that he dealt with the data suppliers and clients but was not involved with the sending of text messages. He said they bought an average of 22,000 loan application records per day, and he had been advised that if they sent text messages for something related to the industry, such as debt or PPI, it was acceptable. He also said that he wanted to be 'educated' as to what he could and could not do. During these conversations, the Commissioner's enforcement officers provided advice about the requirements of PECR.
31. Since the execution of the warrant at Mr Niebel's home address, the Commissioner has continued to receive complaints from members of the public about unsolicited text messages from this company. The content of the messages has not changed except that many of the messages now contain website addresses; however, they no longer include details of how to opt out and the websites do not contain any company details. Some of the website addresses (e.g. [www.writeoffppi.com](http://www.writeoffppi.com) and [www.mydebtgone.com](http://www.mydebtgone.com)) are listed on Mr McNeish's pending data protection registration. A "whois" search on the website address [www.writeoffppi.com](http://www.writeoffppi.com) shows that the website is registered to John Peter (Mr McNeish's middle names) at Leadmasters,

Fallowfield, Manchester, M14 [REDACTED]

[REDACTED] The email address is listed as [REDACTED] and the telephone number as [REDACTED]. This telephone number is also listed on the website [www.tetr.us](http://www.tetr.us). At least 15 complaints have been received about text messages promoting [www.writeoffppi.com](http://www.writeoffppi.com) since April 2012.

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

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### **Breaches of Regulation 22**

32. 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'.

33. 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'.

34. The term, 'individual' is also defined in Regulation 2(1) PECR as 'a living individual and includes an unincorporated body of such individuals.'

35. 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'.

36. The term, 'direct marketing' is defined in the Data Protection Act at section 11 as 'the communication by whatever means of any advertising or marketing material which is directed to particular individuals.'

37. 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.

38. The Commissioner is satisfied that unsolicited direct marketing texts referred to in the background above were sent by or on behalf of Mr Niebel trading as Tetrus Telecoms to the recipients who complained to the Commissioner in this case. The Commissioner is further satisfied that those recipients had not given their prior consent to the receipt of such texts to Tetrus. Therefore the Commissioner is satisfied that Mr Niebel, who is a joint owner of Tetrus, is responsible for the actions of the business and has acted in breach of Regulation 22.

### **Breaches of Regulation 23**

39. Regulation 23 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; 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.'

40. The Commissioner is satisfied that there have been contraventions of Regulation 23 because the unsolicited texts referred to were sent without identifying the sender.

### **Serious (S55A(1)(a))**

41. The Commissioner is satisfied that these contraventions of PECR have been serious as required by Section 55A (1)(a) because there have been multiple breaches of Regulations 22 and 23 by Mr Niebel arising from to his activities as the joint owner of Tetrus leading to an extremely large number of complaints to the Commissioner. There have been at least 411 formal written complaints to this office which relate to messages sent on behalf of Mr Niebel trading as Tetrus using ■■■ SIM cards. A proportion of these can be traced back to the purchase of SIM card top ups via receipts found at the premises in Stockport when the warrant was executed in August 2011 and the receipts showed that they had been paid by a bank account used by Tetrus. Text messages of a similar type were sent from the mobile phone mast near the Stockport premises of Tetrus, and from masts in Tamworth and Altrincham, using over 16,000 SIM cards.

42. On various dates from January 2011 onwards ■ disconnected these SIM cards. There is the potential for thousands of messages to have been sent from each SIM card. From Tetrus' own website it says that they have a minimum send of 100K texts per customer. Mr Niebel's own calculations on the handwritten notes found at his address showed that Tetrus could send out 840,000 texts per day. These messages continue to be sent except that they are no longer sent via the Stockport mobile phone mast. The actions of the company, in sending the unsolicited texts, were indiscriminate and could affect anyone who owns a mobile phone. The actions of the company can be characterised as a series of continued, repetitive and deliberate contraventions of the law.

**Likely to cause substantial damage or substantial distress  
(S55A(1)(b))**

43. The Commissioner is satisfied that the contravention is of a kind likely to cause substantial damage or substantial distress as required by section 55 (1) (b) because of the sheer numbers of individuals who were receiving these texts. Although the distress in each individual case may not always have been substantial, the cumulative amount of distress suffered by the huge numbers of individuals affected means that the level became substantial. In some cases individuals had received a number of texts despite requesting that the practice ceased. When looking at the definition of 'substantial' in terms of the levels of distress, the Commissioner has had regard to section 2, page 14 of the Statutory Guidance referred to in paragraphs 4 and 5 above and 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'.

44. The main concerns expressed by the 411 complainants in this case are about receiving multiple texts over a short period of time, receiving texts after texting STOP and also having to pay international charge rates to retrieve texts whilst abroad. The underlying theme of the complaints is that the messages are unlawful and cause a nuisance and are an invasion of privacy. The incurring of international charge rates is a form of damage.

45. It is reasonable to suppose that an individual receiving a message about an accident claim could feel unwarranted concern for the safety of a member of their family. It is also reasonable to suppose that some recipients will actually have suffered accidents and may be disturbed by being reminded of this. Therefore the potential for alarm beyond irritation is a real risk. Some of the 411 received several

messages from the same source so suffered more than others who could only show receipt of one or two.

46. The wording of the messages is indicative of the potential for distress - e.g. quoting an amount of money saying, 'Claim today'. Saying for example, 'you are eligible to claim compensation,' with no regard as to whether they are eligible or not. Words like, 'Almost certainly entitled to £2300,' 'We know how much you are owed', and, 'You have still not claimed compensation for the accident you had'. These are clearly intended to have the maximum impact on an individual and in some cases are likely to be misleading. Distress will be caused by the raising of false expectations.

### **Deliberate (S55A(2))**

47. The breaches of Regulation 23 (failing to declare senders details) were deliberate from the outset as the facts speak for themselves. The senders also actively concealed who they were by the various methods set out below including the use of unregistered SIM cards.

48. Initially the breaches of Regulation 22 (consent of recipient) may not have been deliberate due to alleged ignorance of the law but the Commissioner is satisfied that the breaches became deliberate under section 55A(2) of the Act. The following evasive action taken by Mr Niebel and Tetras Telecoms is indicative of the breaches being deliberate:

- i. On 11 August 2011, when the warrant was executed, 15 days after a previous visit by the Commissioner's enforcement officers on 27 July, the Stockport premises were found to have recently been vacated.
- ii. The messages sent from the mobile phone mast near the Stockport premises ceased after 29 July 2011 following the visit by the Commissioner's enforcement officers.
- iii. Use of unregistered SIM cards.
- iv. The [REDACTED] conversations conducted by Mr Niebel with others including his business partner Mr McNeish relate to the sending of SMS messages, [REDACTED], references to the Commissioner's investigation and SIM cards being disconnected.
- v. One [REDACTED] conversation records a tip as to how to avoid detection namely [REDACTED].

- vi. On 28 February 2012 Mr Niebel initially denied the laptop at his home belonged to him but when it was later examined it was found to be labelled with Mr Niebel's name, address and mobile phone number.
- vii. In a telephone conversation on 4 October 2011 Mr Niebel told investigating officers that he was not involved and then later on 6 and 7 March 2012 he admitted that he was.
- viii. Tetrus' practice in ensuring recipients and regulators experience the utmost difficulty in ascertaining the name and contact details of the senders of the texts.

**Mr Niebel 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 distress (S55A(3)(a)(i) and (ii)).**

49. The Commissioner is satisfied that section 55A(3) of the Act applies in that Mr Niebel trading as Tetrus Telecoms 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 damage or substantial distress, but failed to take reasonable steps to prevent the contravention.

**Mr Niebel knew or ought to have known that there was a risk that the contravention would occur (S55A(3)(a)(i)).**

50. Mr Niebel knew there was a risk of a contravention, as demonstrated by the avoidance tactics referred to herein.
51. Even if Mr Niebel can claim that he did not know that there was a risk of contravention, as a responsible business owner, he ought to have acquainted himself with the rules and regulations of his own industry. Tetrus was a business whose main activity was to send multiple marketing texts out to individuals' telephone numbers in order to generate 'leads' for other companies and it was advertised on its website as being 'specialists in bulk SMS'.
52. There has been heightened public awareness of the issue because of increased media coverage of complaints by members of the public about receipt of unsolicited or 'spam' texts over the last 18 months which Mr Niebel ought to have noted.
53. Tetrus also bought personal data from third parties and this greatly increased the risk of non-compliance.

**The Commissioner is satisfied that Mr Niebel knew or ought to have known that such a contravention would be of a kind likely to cause substantial damage or substantial distress contrary to S55A(3)(a)(ii).**

54. Mr Niebel was aware of the sheer volume of texts, 'bulk SMS', being sent out by Tetrus. This is evidenced by the information found at his home address which shows that he was aware of the volumes of texts and the projected amounts of money they would generate for the company.

55. He knew or ought to have known that the volume of such unsolicited texts his business was instigating would create a considerable risk of substantial damage or substantial distress. Mr Niebel trading as Tetrus was aware of the wording of the messages and given the public outcry publicised by the media, as well as complaints to them directly by some who were able to discover their identity, they should have known that there was the potential for substantial damage or distress.

**Failed to take reasonable steps to prevent the contravention (S55A(3)(b))**

56. The Commissioner is satisfied that Mr Niebel failed to take reasonable steps to prevent the contravention.

57. He was the joint owner of a business sending out bulk SMS messages which by its nature is a very efficient method of communication which means it can be done in extremely large numbers over a very short period of time. Large amounts of money were received by him from companies for whom his thousands of unsolicited texts generated 'leads'. If the names and telephone numbers of the recipients had been obtained from another source, he failed to apply his mind sufficiently to whether or not those named individuals had consented to receive texts from him trading as Tetrus.

58. He failed to apply his mind at all to taking any such reasonable steps, or if he did later apply his mind to it, he was principally concerned to take steps to avoid detection by the Commissioner and conceal any wrongdoing rather than towards compliance.

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

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59. *Nature of the contravention*

- The receipt of unsolicited direct marketing texts has become an issue of significant public importance
- Contravention was particularly serious because of the sheer volume of unsolicited texts sent out

*60. Effect of the contravention*

- Extremely large numbers of people affected
- Not only was the contravention of a kind likely to cause substantial distress to the subscribers receiving them, particularly through a cumulative effect, but damage was caused in some cases.

*61. Behavioural issues by Mr Niebel trading as Tetrus Telecoms:-*

- exhibited a complete disregard for PECR
- took measures to evade detection by the Commissioner
- continued to send out unsolicited texts after the owners of the business were aware of the Commissioner's investigation into their practices
- no precautions were taken at all to ensure the business was complying with PECR
- the contravention was deliberate
- intended that one of the purposes of the business was to frustrate the requirements of the regulations.

*62. Impact on Mr Niebel as an individual*

- He made considerable profit from the leads generated by the unsolicited texts and thereby gaining a commercial advantage by unlawful means – see Annex 2

## **Mitigating features the Commissioner has taken into account in determining the amount of the monetary penalty**

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### *63. Nature of the contravention*

- Mr Niebel may initially have believed that the individuals whose names and numbers he had purchased had consented to receiving the text from Tetrus – i.e. that they had what has become commonly known as 'opted in' and therefore may initially have believed that what he was doing was acceptable.

### *64. Behavioural issues*

- Towards the latter stages of the Commissioner's investigation Mr Niebel did speak amicably to enforcement officers but refused a formal interview saying he would only respond to written questions

### *65. Impact on Mr Niebel*

- Potential for detriment to financial position as an individual
- Potential for damage to reputation

## **Other considerations**

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66. Mr Niebel is a data controller and should have registered with the Commissioner under section 17 of the Act before processing the personal data contained in the emails sent in conducting the business of Tetrus and the names and telephone numbers of the recipients of the texts and the Commissioner will be taking separate action in relation to that.

67. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with the PECR. This is an opportunity to reinforce the need for people who run marketing businesses to ensure that they are only sending direct marketing texts to people who want to receive them and to encourage them not to conceal their identity and not to make it impossible or difficult for those recipients to stop the messages from coming.

## **Notice of Intent**

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68. A notice of intent was served on Mr Niebel dated 24 September 2012. The Commissioner received representations from the data controller in a letter and an e-mail from Mr Niebel's representative, [REDACTED], dated 20 October 2012 and 21 November 2012 respectively. The Commissioner has considered these written representations and the statement of means signed by Mr Niebel made in relation to the notice of intent when deciding whether to serve this 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.

## **Amount of the monetary penalty**

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69. The Commissioner considers that the contravention of PECR is serious and that the imposition of a monetary penalty is appropriate. Further that a monetary penalty in the sum of £300,000 (Three hundred thousand pounds) is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

## **Payment**

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70. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by 24 December 2012 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**

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71. If the Commissioner receives full payment of the monetary penalty by 24 December 2012 the Commissioner will reduce the monetary penalty by 20% to £240,000 (Two hundred and forty thousand pounds).

## **Right of Appeal**

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72. 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 24 December 2012 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**

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73. 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 the data controller 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 the 26 day of November 2012

Signed: .....

David Smith  
Deputy Information Commissioner  
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) General Regulatory Chamber (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:

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 24<sup>th</sup> December 2012 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.
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;
  - d) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
  - e) 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)).



REDACTED