DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: The Energy Saving Centre Limited

Of: 15 Listerhills Science Park, Bradford, West Yorkshire, BD7 1HR

1. The Information Commissioner ("Commissioner") has decided to issue The Energy Saving Centre Limited ("ESC") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is being issued because of a serious contravention of regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003.

2. This notice explains the Commissioner's decision.

Legal framework

3. ESC, whose registered office is given above (companies house registration number:08736895), is the person stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for the purposes of direct marketing contrary to regulation 21 of PECR.

4. Regulation 21 applies to the making of unsolicited calls for direct marketing purposes. It means that if a company wants to make calls promoting a product or service to an individual who has a telephone number which is registered with the Telephone Preference Service Ltd ("TPS"), then that individual must have given their consent to that company to receive such calls.

5. Regulation 21 paragraph (1) of PECR provides that:

"(1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where-

(a) the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or

(b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26."

6. Regulation 21 paragraphs (2), (3), (4) and (5) provide that:

"(2) A subscriber shall not permit his line to be used in contravention of paragraph (1).

(3) A person shall not be held to have contravened paragraph (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.

(4) Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such calls being made on that line by that caller, such calls may be made by that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.

(5) Where a subscriber has given a caller notification pursuant to paragraph (4) in relation to a line of his—

(a) the subscriber shall be free to withdraw that notification at any time, and

(b) where such notification is withdrawn, the caller shall not make such calls on that line."

7. Under regulation 26 of PECR, the Commissioner is required to maintain a register of numbers allocated to subscribers who have notified them that they do not wish, for the time being, to receive unsolicited calls for direct marketing purposes on those lines. The Telephone Preference Service Limited ("TPS") is a limited company set up by the Commissioner to carry out this role. Businesses who wish to carry out direct marketing by telephone can subscribe to the TPS for a fee and receive from them monthly a list of numbers on that register.

8. 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)).

9. Under section 55A (1) of the DPA (as amended by PECR 2011 and the Privacy and Electronic Communications (Amendment) Regulations 2015) 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, 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."

10. 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.

11. PECR implemented European legislation (Directive 2002/58/EC) aimed at the protection of the individual's fundamental right to privacy in the electronic communications sector. PECR were amended for the purpose

of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches the PECR regulations so as to give effect to the Directives.

Background to the case

12. ESC is a company that offers a range of home improvement services including replacement windows, doors, energy saving glass, and guttering. It operates under a variety of trading styles including Energiglass, Energisaver and Energy Care.

13. ESC first came to the attention of the Commissioner when a number of complaints were identified about them within a monthly TPS report.

14. An analysis of those complaints made to the TPS regarding unsolicited calls from ESC identified that a total of 377 complaints were received between 21 June 2016 and 30 January 2017.

15. In addition, an interrogation of the ICO's on-line reporting tool showed that a further 148 complaints had been received in the same period from individuals who were registered with the TPS but had received unsolicited direct marketing calls from ESC.

16. On further investigation by the Commissioner, another CLI used by ESC was identified, and this generated an additional 105 TPS complaints and 90 via the ICO's online reporting tool during the same period.

17. Since the initial period of her investigation (i.e. since 1 February 2017), a further 613 complaints have been made regarding unsolicited calls from ESC, 421 via the TPS' reporting mechanism and 192 via the

Online Reporting Tool. This brings the total number of complaints between 21 June 2016 and 20 September 2017 to 1,138.

18. The following are examples of complaints received via the ICO's online reporting tool:

- *"Yet another company breaching the TPS code. This really annoys me. I do all I can and yet I still on a regular basis, often daily get an unsolicited call of some kind. These companies should have to pay compensation to each person they call who's number is on TPS. I'd say £50 per offence, plus an administrative charge for an organisation to collect and redistribute the compensation."*

- *"We are somewhat hard of hearing; we are registered with TPS as we only wish to recvieve (sic) calls from friends or family. When we hear the phone we rush to the phone, believing it to be from one of the above. We are thus agonised by having to deal with spurious such calls."*

- *"I am currently recovering from surgery and I've asked this company to remove me from their contact list and advised them I'm registered with the TPS before. They still keep ringing me."*

- *"This is the fourth time this company has telephoned me, even though I have told them not to call me again and remove my number from there data base."*

19. During the course of the Commissioner's investigation it was established from information supplied by ESC that in the 7 month period from 21 June 2016 to 30 January 2017 a total of 7,191,958

direct marketing calls were made to subscribers, which led to a total of 1,138 complaints during that period.

20. Furthermore, the network provider for one of the CLIs confirmed that on one particular day, 5 December 2016, calls to 42,499 separate CLI's were made by ESC. 33,626 of these CLI's were registered with the TPS of which 33,432 were registered for more than 28 days (representing 78.7% of all CLIs used that day).

21. On 31 January 2017 a letter setting out the ICO's concerns about ESC's compliance with PECR, and requesting an explanation for the complaints, was sent to the company together with a spreadsheet containing the details of the complaints received by the TPS and the ICO's online reporting tool.

22. ESC responded on 22 February 2017. It confirmed that the CLI's used during the period were those identified by the Commissioner and in respect of which the complaints had been made to the TPS and the Commissioner.

23. The response explained that in order to make their calls, ESC purchases data from a third party provider, stating "the data used has been purchased from [the third party], whom we believed to hold appropriate ICO registration and are contracted to provide TPS appropriate data... Energiglass seek to keep TPS and other complaints to an absolute minimum, and continue to work to reduce the number of any complaints... Orders are verbally requested and terms and conditions are attached."

24. When asked for any documentation completed during the "on-boarding" process for its data providers, ESC stated that "no records are kept". In addition ESC confirmed that there are no formal training

processes in place for their staff, nor does it have any formal written policies or procedures regarding contact with customers and its responsibilities under PECR.

25. Enquiries of ESC's list broker confirmed that "the data is supplied .... on the strict understanding that end user(s) of this database must themselves take responsibility for ensuring their use is compliant with all legal requirements, regulations and relevant codes of practice including, but not limited to, the ICO, PECR & DPA Regulations and all EU Directives and other European regulations and standards ("Regulations")."

26. ESC however, has sought to place the emphasis for TPS screening, data quality and compliance with regulations firmly with its data supplier rather than itself, and has offered no form of due diligence checks on the data supplier. Accordingly the consents relied upon by ESC to engage in marketing by way of live calls were not sufficient.

27. The Commissioner has made the above findings of fact on the balance of probabilities.

28. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by ESC and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

29. The Commissioner finds that ESC contravened regulation 21 of PECR.

30. The Commissioner finds that the contravention was as follows:

a) Between 21 June 2016 and 20 September 2017 ESC used a public telecommunications service for the purpose of making 1,138 unsolicited calls for direct marketing purposes to subscribers where the number allocated to the subscriber in respect of the line called was a number listed on the register of numbers kept by the Commissioner in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR; and

b) On one particular date, 5 December 2016, ESC used a public telecommunications service for the purposes of making 33,432 unsolicited calls for direct marketing purposes to subscribers where the number allocated to the subscriber in respect of the called line was a number listed on the register of numbers kept by the Commissioner in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR.

31. The Commissioner is also satisfied for the purposes of regulation 21 that these calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls and had not given their prior consent to ESC to receive calls.

32. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

33. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by ESC's activities over a 15 month period, and this led to a significant number of complaints about unsolicited direct

marketing calls to the TPS and the ICO.

34. In addition, it is reasonable to suppose that the contravention could have been far higher because those who went to the trouble to complain represent only a proportion of those who actually received calls. ESC made 7,191,958 marketing calls between 21 June 2016 and 30 January 2017 and these calls were not screened against the TPS register, nor were there sufficient contractual terms in place to ensure the data's veracity upon purchase. Based upon the 42,499 calls which were made on 5 December 2016 alone, 78.7% were registered with the TPS for more than 28 days.

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

Deliberate or negligent contraventions

36. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that the ESC's actions which constituted that contravention were deliberate actions (even if ESC did not actually intend thereby to contravene PECR).

37. The Commissioner considers that in this case ESC did not deliberately contravene regulation 21 of PECR in that sense.

38. The Commissioner has gone on to consider whether the contravention identified above was negligent.

39. First, she has considered whether ESC knew or ought reasonably to have known that there was a risk that this contravention would occur.

She is satisfied that this condition is met, given that ESC relied heavily on direct marketing due to the nature of its business, and the fact that the issue of unsolicited calls has been widely publicised by the media as being a problem.

40. The Commissioner has also published detailed guidance for companies carrying out marketing explaining their legal requirements 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. Specifically, it states that live calls must not be made to subscribers who have told an organisation that they do not want to receive calls; or to any number registered with the TPS, unless the subscriber has specifically consented to receive calls.

41. The TPS contacted ESC on each occasion a complaint was made to it which should have made ESC aware of the risk that these contraventions would occur. It is therefore reasonable to suppose that ESC should have been aware of its responsibilities in this area.

42. Finally, the Commissioner has gone on to consider whether ESC failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met.

43. Reasonable steps in these circumstances would have included ensuring that ESC could evidence consents relied upon to make marketing calls; having in place a contractual arrangement with its third party data supplier to ensure that the data being purchased met the required threshold for valid consent; screening the data against the TPS register and ensuring that it had in place an effective and robust suppression list.

44. The Commissioner is therefore satisfied that ESC failed to take reasonable steps to prevent the contravention.

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

The Commissioner's decision to impose a monetary penalty

46. 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(3) and the procedural rights under section 55B have been complied with.

47. The latter has included the issuing of a Notice of Intent dated 3 January 2018 in which the Commissioner set out her preliminary thinking.

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

49. The Commissioner has received representations in response to the Notice of Intent from ESC dated 30 January 2018 and has taken these into account when making her final determination.

50. The Commissioner has also taken into account the following **aggravating features** of this case:

- ESC failed to disclose all of the CLI's it used, and there was a general lack of engagement during the Commissioner's investigation;

- During the course of the investigation, British Telecom provided a list of CLI's dialled by ESC on one particular day, 5 December

2016. Of the 42,499 separate and distinct CLI's 33,626 (79.1%) were registered with the TPS of which 33,432 (78.7%) had registered on or before one month prior to the commencement of the Commissioner's enquiry. This suggests little or no regard for the PECR regulations or TPS registration.

- ESC has continued to make live marketing calls despite being aware of the ICO investigation and the reason for it. Since 1 February 2017 to the end of January 2018 a further 776 complaints have been made to the TPS and to the Commissioner's Online Reporting Tool about unsolicited calls by ESC.

51. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The making of unsolicited direct marketing calls 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 telephoning consumers who want to receive these calls.

The amount of the penalty

52. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£250,000 (Two hundred and fifty thousand pounds**.

Conclusion

53. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **16 May 2018** 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 May 2018** the Commissioner will reduce the monetary penalty by 20% to **£200,000 (Two hundred 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

59. the period for appealing against the monetary penalty and any 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 16th day of April 2018

Signed [redacted]

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 (Information Rights) 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)).