

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Boiler Breakdown Limited

Of: 41 Oldfields Road, Sutton, Surrey, SM1 2NB

1. The Information Commissioner ("the Commissioner") has decided to issue Boiler Breakdown Limited ("BBL") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to a serious contravention of regulations 21 and 24 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. BBL, whose registered office is given above (Companies House Registration Number: 08649752) is the organisation 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 notified the company that they do not object to receiving such calls from it.

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. Regulation 24 of PECR provides:

“(1) Where a public electronic communications service is used for the transmission of a communication for direct marketing purposes the person using, or instigating the use of, the service shall ensure that the following information is provided with that communication –

...

(b) in relation to a communication to which regulation 21 [or 21A] (telephone calls) applies, the particulars mentioned in paragraph (2)(a) and, if the recipient of the call so requests, those mentioned in paragraph (2)(b).

(2) The particulars referred to in paragraph (1) are –

(a) the name of the person;

(b) either the address of the person or a telephone number on which he can be reached free of charge.”

8. 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 which operates the register on the Commissioner's behalf. 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.
9. Section 122(5) of the Data Protection Act 2018 ("DPA18") defines direct marketing as "*the communication (by whatever means) of advertising or marketing material which is directed to particular individuals*". This definition also applies for the purposes of PECR (see regulation 2(2) PECR and paragraphs 430 & 432(6) to Schedule 19 of the DPA18).
10. From 1 January 2021, consent in PECR has been defined by reference to the concept of consent in the UK GDPR as defined in section 3(10) of the DPA 2018^[1]: see regulation 2(1) of PECR, as amended by Part 3 of Schedule 3, paragraph 44 of The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019/419. Article 4(11) of the UK GDPR sets out the following definition: "*consent*' of the data subject means "*any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her*".

^[1] The UK GDPR is therein defined as Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 ("GDPR") as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018.

11. "Individual" is defined in regulation 2(1) of PECR as *"a living individual and includes an unincorporated body of such individuals"*.
12. A "subscriber" is defined in regulation 2(1) of PECR as *"a person who is a party to a contract with a provider of public electronic communications services for the supply of such services"*.
13. Section 55A of the DPA (as applied to PECR cases by Schedule 1 to PECR, as variously amended) states:

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

(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person,

(b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person –

(a) knew or ought to have known that there was a risk that the contravention would occur, but

(b) failed to take reasonable steps to prevent the contravention.

14. 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.

15. PECR were enacted to protect the individual's fundamental right to privacy in the electronic communications sector. PECR were subsequently amended and strengthened. The Commissioner will interpret PECR in a way which is consistent with the Regulations' overall aim of ensuring high levels of protection for individuals' privacy rights.
16. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the DPA18: see paragraph 58(1) of Schedule 20 to the DPA18.

Background to the case

17. BBL offers one-off boiler repairs, servicing, boiler installations and annual service plans. A similar but separate company, Boiler Cover Breakdown Limited ("BCBL"), shares the same directorship and has the same registered office as BBL.
18. BBL first came to the attention of the Commissioner following a separate investigation into BCBL ("the BCBL investigation"), as a result of complaints about unsolicited direct marketing calls to TPS registered individuals. A particular Calling Line Identifier ("CLI"): [REDACTED] was linked to two complaints made to the TPS and twelve complaints to the Commissioner's own Online Reporting Tool ("OLRT") between January and July 2020.
19. The OLRT complaints relating to CLI [REDACTED] between included the following:

- *Tried to claim that I had to set up boiler insurance with them for the yearly maintenance. Recently had a boiler fitted, so thought it was something to do with that. They wanted to set up a Direct Debit - thought this was strange as you usually pay on completion of work. Looked up the number on Google and it said that it was dangerous and a scam so ended the call. Caller got frustrated that he had been kept on the phone "for 10 minutes now". Immediately got a call back from another number (0208XXXXXXX). Ignored it... Worried that I almost gave my banking details to scammers. When challenged as to whether they were already my service provider the girl admitted this was a courtesy call. I then asked if she was aware of and [sic] registered with TPS, she stated probably so I explained to her the company would be reported for unsolicited call to a number registered with TPS.*
- *Person identified himself as '██████' tried to persuade my Mum (who took the call) to provide her bank details to give her a refund on her boiler warranty direct debit. She doesn't have a direct debit and it's a relatively new boiler so she was immediately suspicious, and the scammer hung up when she refused to provide her bank details... My Mum is 85 years old and in lockdown, she was anxious about this call and wanted me to check if it was legitimate. A quick perusal online suggested this number is a serial offender regarding boiler warranty scams.*
- *I am not sure whether the name of the company given to me when I called back is correct, we have lived at this address for 5 years, this phone call always asks for Mr XXXX of XXXX they want to engage in conversation about whether I have my free newspaper delivered, double glazing etc. etc. I have asked them on endless*

occasions to remove me from their list and stop making these calls but they do not stop.

- *A web search of this number suggests they are phishing hoping to reach elderly women. The call purports to be about boiler servicing [sic] and one report stated that when he answered the phone the caller hung up. This accords with my experience. I answered with "Hello". The voice asked "Mr XXXX?" and I replied "Who is calling?" at which point the caller hung up, presumably inferring that a) I was male and b) I was a bit cautious... Yet another interruption andteh[sic] need to report it because if these are not reported the size of the problem goes unrecognised.*
 - *Boiler breakdown... Called to offer me a renewal on my boiler cover. Seemed polite and helpful; although I've never to my knowledge had boiler cover with this company. Offered what seemed good terms, so I've given my Bank sort code and account number over the phone. Having just looked up the ring-back phone number on Google, I see that they may be scammers of the elderly / vulnerable. I'm still not sure whether I've purchased a legitimate service or been scammed out of my savings (I'll have to check my bank account tonight).*
20. During the course of the BCBL investigation the Commissioner sent a Third-Party Information Notice ("3PIN") to the Communications Service Provider ("CSP"), [REDACTED] ("[REDACTED]") for the CLI in question: [REDACTED] on 8 September 2020 requesting the identity of the CLI's subscriber. The response, which was received on 23 September 2020, identified the subscriber as BCBL, and provided a list of three other CLIs allocated to BCBL. The response also provided Call

Detail Records ("CDR"s) for the CLIs allocated to BCBL between 1 January 2020 and 7 September 2020.

21. The CDRs were screened against the TPS register and between 1 January 2020 to 31 August 2020, 543,219 calls were made of which 348,724 (equating to 64%) were made to individuals registered with the TPS. The number making the calls was [REDACTED].
22. A request was made to [REDACTED] on 19 November 2020 for evidence of the allocation of the number [REDACTED], and a response was received containing an invoice dated 4 September 2020, showing this number was allocated to BCBL trading as Boiler Cover UK.
23. During the course of the BCBL investigation a letter was sent on 25 November 2020 requesting clarification of the CLIs used by each organisation. A response was received on 2 December 2020 which stated *"Our companies trading names are as follows :- Boiler Cover Breakdown trades as Boiler Cover UK and has the following CLIs [REDACTED]. Boiler Breakdown Ltd has the following CLI's [REDACTED]."*
24. In light of this evidence, and particularly BCBL's assertion that the CLI [REDACTED] was allocated to BBL, the Commissioner set up a separate investigation into BBL. Whilst the company is identified in a Google search, the Commissioner found no link to a website in the company information.
25. An initial investigation letter was sent to BBL's registered office on 8 December 2020 and a response received on 29 December 2020. In error, it appeared that BBL had responded to the ICO's initial letter to BCBL, rather than the separate and different initial letter to BBL. In its

response however, BBL confirmed the CLIs used by BBL were [REDACTED] and [REDACTED] and that between 01 January to 31 August 2020 approximately 80,000 calls were made, although no information could be provided as to the volume of connected calls.

26. This response about call volumes failed to correspond with evidence obtained in the BCBL investigation, that between 1 January to 31 August 2020 the CLI [REDACTED] (which BBL confirmed is a CLI used by them) had made 543,219, calls of which 348,724 were made to individuals registered with the TPS.
27. BBL confirmed that it purchased data from third parties and that this data was "*Opt-in data where the customers have consented to third party use*". BBL also stated that it screened data against the TPS register prior to making unsolicited marketing calls. In answer to a question requesting a description of any process in place to run any marketing lists against the TPS register and an in-house suppression list, BBL stated "*When data is imported it runs against our in-house suppression. If individuals have been marked as not to be contacted the data will not be imported and will be rejected ensuring that individuals are not contacted again*".
28. Further enquiries were sent to BBL on 14 January 2021 and a response received on 22 January 2021, confirming the identity of its data supplier as [REDACTED], and providing copies of a 'Marketing Questionnaire Script' and an undated document titled 'Due Diligence Boiler Breakdown'.
29. The Marketing Questionnaire Script read as follows:

"Good Morning could I speak to _____ please?"

Hi, this is _____ from _____ and the reason for my call is to ask you just a few simple direct marketing questions... I promise to be quick...

Is that Okay?

(There **MUST** be a positive expression of interest to continue with the marketing questionnaire)

Data Confirmation

To ensure that I address you correctly, could I ask for your first name please? Ok... thanks for that and then your last name please?

Opt – in Statement

Our privacy policy is available on our website, _____ and its trusted partners may contact you for up to 12 months via telephone to offer promotions, market their products or services or to update your preferences.

Is this Okay?

(There **MUST** be a positive expression of interest to continue with the marketing questionnaire)

Thank you. All calls are recorded for compliance purposes.

Could I ask, in which age bracket do you fall?

18-24 / 25-34 / 35-44 / 45-54 / 55-64 / 65-74 / 75-80 Not Answered

What is your current residential status? Do you....

Own your home / Rent from the Council) / Rent Privately / Rent through a Housing Association or Living with Family

Sponsored questions asked here... Closing

Thanks very much for your time today. If, at any point you wish to opt out of future marketing simply go to _____, also on this site you will find our privacy policy.

End Call

Have a great day and goodbye

Recorded Message:

_____ is a trading style of _____ which is a registered company with ICO number _____. To opt out of future marketing, you may call our Customer Care number _____.

Depending on your answers, your data may be shared with the following industries as mentioned at the start of the call.

- **Professional Services such as charities, solicitors, financial advisors or consultants.**
- **Financial Services such as Mortgage, Loans, Funeral Plans and Wills.**
- **Agencies and Brokers who buy and sell consumer data in the UK.**
- **Telecoms and Broadband Companies offering mobile phone, landline, broadband and technology.**
- **Household Service Companies such as utility, gas, electric and solar.**
- **Insurance such as car, home, life, pet and warranty companies and electrical goods cover.**
- **Lifestyle, leisure and retail companies such as home improvements, white goods, and high street brands.**
- **Automotive such as the car, bike and caravan industry.**
- **Gaming, Mail order, Media and Travel industry.**
- **Health / Mobility such as cosmetics and mobility aids.**

Thanks very much for your time today, have a great day and good bye."

30. The document titled 'Due Diligence Boiler Breakdown' states "**█** has been taking the necessary steps and measures to ensure that we adhere to GDPR. We work very closely with **█** a compliance solicitor (scripting/data chain of consent and providence of the data) to help make these changes". With regard to TPS screening **█** state "...TPS checks are done every week for preparation of calling data whilst it is done daily prior to data delivery depending on clients request In-house – We do have a copy of the most updated TPS file and we do the checks from our Production department."
31. On 16 February 2021, further queries were sent to BBL regarding the complaints emanating from CLI **█**. A substantive response was received on 9 March 2021 in which it was stated "The firm, when purchasing data, purchases that data pre screened against the TPS register, and is also provided with a "do not contact" list on future dates if the call was to be registered on the TPS register after that call was made" and "The firm accepts that this is not ideal as they are

responsible for the compliance of the data. Despite the firm only being the contractual processor of the data (not controller), that does not absolve themselves of liability under PECR. The firm has committed to updating their compliance requirements in line with this and will conduct further screening against the TPS register after purchasing the data. Please note, the firm still understands that the complaints made to the TPS register do not concern itself with the firm". It was apparent from the content of its response that BBL were reliant upon the legitimate interest basis under GDPR for consent to make direct marketing calls.

32. With regard to one of the TPS complaints, BBL denied having any record of calling the number despite "keeping meticulous records". The complainant's number does however appear on the list of CDRs provided by [REDACTED] and TPS screening confirms the number was registered some years prior to the call.
33. In relation to the second TPS complaint BBL did not accept the call took place in the fashion alleged by the complainant, and alleged the complainant was confused about which number had called them. The complainants number however did appear on the list of CDRs from [REDACTED] and TPS screening confirmed the individual had registered several years prior to the call.
34. With regards to five of the complaints, BBL referred to leads supplied by a third party who has since ceased trading but said each person was contacted on a 'legitimate interest' basis. BBL later advised it no longer had copies of third party contracts, and enquiries conducted by the Commissioner with Companies House confirmed the data supplier referred to went into liquidation in December 2016, giving rise to

concerns on the part of the Commissioner about the age of the data BBL was relying on.

35. BBL, in general commentary about complaints, suggested the complaints were not genuine, saying they either did not involve Boiler Breakdown at all, were part of an online smear campaign, or having read reviews on Google that the calls were a scam going onto report the organisation to the ICO.
36. On 12 May 2021 a check was made with the TPS service who confirmed that they were unable to find a licence held under the name of either Boiler Breakdown Limited, Boiler Cover Breakdown Limited or Boiler Cover UK.
37. As part of the BCBL investigation a 3PIN had been sent on 7 December 2020 to [REDACTED] requesting information regarding the identity of the subscriber(s) of [REDACTED] and two other numbers, together with CDRs for calls between 1 March to 31 August 2020. A response was received on 8 January 2021 including CDRs, and in which [REDACTED] confirmed the number [REDACTED] was allocated to BBL. The other two numbers were not provided by [REDACTED]. In addition [REDACTED] confirmed the numbers within the range [REDACTED] to [REDACTED] and a single number [REDACTED] were also allocated to BBL.
38. A further 3PIN was sent to [REDACTED] on 16 February 2021 requesting additional CDRs for January and February 2020 and confirmation that the CDRs included all calls made by numbers allocated to Boiler Breakdown Limited in the number range [REDACTED] to [REDACTED] and the single number [REDACTED].

39. A response was received from [REDACTED] on 12 April 2021 including the requested information. [REDACTED] confirmed that there were no additional outbound calls for any of the other numbers on the requested dates. The CDRs from this 3PIN and the previous 3PIN were screened against the TPS register, and showed that between 1 January to 31 August 2020 the CLI [REDACTED] made 13,632 calls of which 9,075 (equating to 67%) were to TPS registered individuals.
40. Further enquiries were sent to BBL on 6 April 2021 in relation to which BBL provided further information on 13 April 2021. BBL confirmed that it has 4719 active clients and provided details of its website: <https://www.boiler-breakdown.net/>. In answer to questions about how calls to both CLI [REDACTED] (allocated to BBL but used by BCBL) and CLI [REDACTED] (allocated to BCBL but used by BBL) are answered, BBL stated both lines reference 'Boiler Breakdown' as does the automated response.
41. The website referred to above contains a privacy policy which states under 'Who is the Data Controller?': "*We are the controller and is [sic] responsible for your personal information.*" This is at odds with a response to the Commissioner dated 9 March 2021 in which BBL said it was not a data controller. The policy goes on to state under 'How is your Personal Information collected?' that data may be collected by "*Third Parties or publicly available sources ... We may receive personal data about you from various third parties.*" In addition, whilst the http web address given by BBL does show a website, an internet search using Google does not bring this website up on the first four pages of Google.

42. On 20 April 2021, the Commissioner received a report from the Financial Conduct Authority ("FCA") regarding a complaint it had received about a call made on 27 March 2021 to an individual from CLI [REDACTED]. The name of the company reported was BBL. The complainant reported that direct debits had been taken over a period of three years for boiler cover, when the complainant stated they had no cover with this company (having already had a policy with a different company), had never had contact with the company nor received any paperwork. The Commissioner's investigations have shown that CLI [REDACTED] is allocated to BBL but used by BCBL.
43. On 12 May 2021 an end of investigation letter was sent to BBL explaining that the Commissioner had gathered the necessary evidence and would determine if any regulatory action would be taken.
44. In respect of the 348,724 unsolicited direct marketing calls made by BBL to TPS numbers, BBL has to date been unable to evidence that the subscribers receiving them had not for the time being objected to receiving its direct marketing calls.
45. The Commissioner is satisfied that the 348,724 calls were all made for the purposes of direct marketing as defined by section 122(5) DPA18.
46. The Commissioner has made the above findings of fact on the balance of probabilities.
47. The Commissioner has considered whether those facts constitute a contravention of regulations 21 and 24 of PECR by BBL and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

48. The Commissioner finds that BBL contravened regulations 21 and 24 of PECR.
49. The Commissioner finds that the contravention was as follows:
50. Between 1 January 2020 and 31 August 2020, using CLIs allocated to BCBL (specifically [REDACTED]), BBL used a public telecommunications service for the purposes of making 348,724 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.
51. The Commissioner is satisfied for the purposes of regulation 21 that these 348,724 unsolicited direct marketing calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls, and who for the purposes of regulation 21(4) had not notified BBL that they did not for the time being object to receiving such calls.
52. For such notification to be valid under regulation 21(4), the individual must have taken a clear and positive action to override their TPS registration and indicate their willingness to receive marketing calls from the company. The notification should reflect the individual's choice about whether or not they are willing to receive marketing calls. Therefore, where signing up to use a product or service is conditional upon receiving marketing calls, companies will need to demonstrate

how this constitutes a clear and positive notification of the individual's willingness to receive such calls.

53. The notification must clearly indicate the individual's willingness to receive marketing calls specifically. Companies cannot rely on individuals opting in to marketing communications generally, unless it is clear that this will include telephone calls.
54. Further, the notification must demonstrate the individual's willingness to receive marketing calls from that company specifically. Notifications will not be valid for the purposes of regulation 21(4) if individuals are asked to agree to receive marketing from "similar organisations", "partners", "selected third parties" or other similar generic descriptions.
55. The Commissioner's Direct Marketing Guidance is clear regarding organisational responsibilities regarding consent and states:
"Organisations should keep clear records of what an individual has consented to, and when and how this consent was obtained, so that they can demonstrate compliance in the event of a complaint."
56. The Guidance goes on to state with regard to indirect (third party) consent: "Any third party controllers who will be relying on the consent must be named – precisely defined categories of third parties will not be acceptable under the GDPR definition." The Guidance goes on to state: "Consent is not likely to be valid where an individual is presented with a long, seemingly exhaustive list, of general categories of organisations. The names of the categories used must be tightly defined and understandable to individuals."
57. In the Marketing Questionnaire Script from [REDACTED] the list of sectors is provided in a recorded message at the end of the call. Individuals have already been asked to consent to contact by third

parties without having the information about which sectors or organisations that could be from. Also, the recorded message list of sectors is too general and not tightly defined.

58. Furthermore, the script also states: "██████████ and its trusted partners may contact you for up to 12 months via telephone to offer promotions, market their products or services or to update your preferences." The Direct Marketing Guidance, under Time Limits, states "As a general rule of thumb, if an organisation is making contact by phone, text or email for the first time, we recommend that it does not rely on any indirect consent given more than six months ago – even if the consent did clearly cover that organisation."
59. The Commissioner considers it is spurious reasoning for BBL to consider processing under legitimate interests; in this instance PECR applies and it is clear that, unless BBL had specific consent, it should not have made direct marketing calls to TPS registered individuals.
60. BBL provided conflicting accounts as to whether it TPS screened data, and there is no evidence to suggest that BBL, or any other separate legal entities which held BBL's registered office address as its own at the time, were carrying out TPS checks on data. Indeed, the TPS have no record of a licence being held in the name of either BBL, BCBL or Boiler Cover UK. BBL appear to be solely reliant on assurances from its data supplier that the data was TPS screened. Nor is there any explanation provided for why CLIs which were in use by BBL at the material time were used to make 348,724 unsolicited calls to individuals who had been registered with the TPS for not less than 28 days.

61. BBL has been unable to provide any evidence that the subscribers who received these calls had notified BBL that they did not, for the time being, object to such calls.
62. The Commissioner is therefore satisfied that there is evidence of 348,724 unsolicited direct marketing calls being made by BBL to subscribers who had been registered with the TPS for not less than 28 days, and who had not previously notified BBL that they did not object to receiving such calls.
63. In addition, BBL permitted its lines (specifically CLI [REDACTED]) to be used by BCBL contrary to regulation 21(2) of PECR, resulting in 9,075 connected calls to TPS registered individuals between 1 January and 31 August 2020.
64. Further and in relation to calls made by BBL, as the complaints indicate, BBL failed, as required by regulation 24 of PECR, to provide the recipient of the calls from CLI [REDACTED] the particulars specified at regulation 24(2) of PECR in that there is evidence that the calls and automated message from that CLI identified the caller as "Boiler Breakdown". Contrary to information provided to the Commissioner by BCBL with regard to which CLIs were allocated to which companies, BBL is actually the subscriber of this CLI, which creates a confusing picture of which organisation is using which lines to call individuals and makes it difficult for individuals to be clear about who is calling them. The name used is sufficiently generic that it could apply to both companies, and searches for a website demonstrate that it is difficult for individuals to locate the correct organisation without knowing the exact http address.

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

Seriousness of the contravention

66. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulations 21 and 24 by BBL arising from the organisation's activities between 1 January 2020 and 31 August 2020, and this led to 348,274 unsolicited direct marketing calls being made to subscribers who were registered with the TPS and who had not notified BBL that they were willing to receive such calls. This equates to 64% of calls made by BBL. Furthermore, BBL allowed its lines to be used by BCBL to make significant numbers of unsolicited live calls to individuals who were registered with the TPS and who had not provided notification that they did not object to receiving such calls.
67. A total of 14 complaints were received in relation to calls made from CLIs allocated to BBL over the relevant period, with the complaints suggesting that inaccurate information was provided as to the caller's identity. The FCA complaint shows that CLIs allocated to BBL continued to be used to make calls despite awareness of the Commissioner's investigation, and in that instance direct debits had been taken without the individual having received any paperwork or indeed having any knowledge of setting up payments. BBL alleged in representations to the Commissioner that other similar companies and competitors are "*proactively trading with deliberate attempt to confuse matters*" and that these account for some of the complaints. However the Commissioner has seen no evidence to support this theory, and in fact the evidence supports that all of the complaints can be traced back to CLIs allocated to BBL. BBL also points to the low call/complaint ratio as

evidence of a lack of seriousness, but the Commissioner places little or no weight on this argument as the lack of clarity as to the identity of the calling organisation would have made it difficult for individuals to complain.

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

Deliberate or negligent contraventions

69. The Commissioner has considered whether the contravention identified above was deliberate.
70. The Commissioner considers that in this case BBL did deliberately contravene regulations 21 and 24 of PECR. It is noted that there is sufficient evidence to suggest that BBL conducted a significant number of unsolicited direct marketing calls to TPS-registered individuals, and made no apparent effort to establish that those individuals did not object to receiving such calls. The Commissioner is particularly concerned that the set-up of the organisations, alongside apparent use of a different company name during its calls and automated message, suggests that BBL was deliberately attempting to deceive individuals as to its identity. As BBL and BCBL have a common directorship, the directors would have known which of their organisations was allocated which CLIs, and which organisation was using which numbers. That there is a clear division of calling numbers, having essentially been 'swapped' in their entirety by the two companies, is in the Commissioner's view, indicative of a business model deliberately conceived.

71. For the above reasons, the Commissioner is satisfied that this breach was deliberate.
72. Further and in the alternative, the Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
 73. Firstly, he has considered whether BBL knew or ought reasonably to have known that there was a risk that this contravention would occur. This is not a high bar, and he is satisfied that this condition is met.
 74. The Commissioner has 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 any subscriber registered with the TPS, unless the subscriber has specifically notified the company that they do not object to receiving such calls. In case organisations remain unclear on their obligations, the ICO operates a telephone helpline. ICO communications about previous enforcement action where businesses have not complied with PECR are also readily available
75. Standard practice of the TPS is to contact the organisation making the calls on each occasion a complaint is made. It is therefore reasonable to believe that BBL would have been aware of a notification from the TPS for the complaints being made in this case. That there were two complaints made to the TPS alone over the period of the contravention should have made BBL aware of the risk that such contraventions may occur and were indeed occurring.

76. It is therefore reasonable to suppose that BBL should have been aware of its responsibilities in this area.
77. Secondly, the Commissioner has gone on to consider whether BBL failed to take reasonable steps to prevent the contravention. Again, he is satisfied that this condition is met.
78. Reasonable steps in these circumstances may have included conducting thorough TPS checks on all of the data it was to use for its direct marketing campaigns; or at least obtaining and recording evidence of notification from those TPS-registered individuals whom it intended to contact prior to engaging in its direct marketing calls. In respect of those calls BBL could have made it clear both in its live calls and automated message the correct identity of the calling organisation. Furthermore, the directors of BBL and BCBL could have ensured that each organisation was using CLIs allocated to it for the purposes of making direct marketing calls. In respect of purchased data, BBL could have conducted more thorough due diligence and had contracts in place with its supplier to ensure the veracity of the data received.
79. Given the volume of calls in contravention of Regulation 21(1) PECR, and the volume of connected calls as a result of allowing its lines to be used by BCBL in contravention of regulation 21(2) PECR, it is clear that BBL failed to take those reasonable steps. BBL did not itself undertake checks of the TPS register, and appeared reliant on verbal assurances from third party providers that the data was compliant. Had sufficient checks been undertaken, these would have revealed this was not the case. Indeed, in BBL's representations it accepted that it was *"unsure over who had been contacted for what purpose under what lawful basis and whether we had any license to contact those who had complained to understand better what we could do to support them"*. A CLI was

presented which, whilst being a legitimate CLI, was not one which would allow the subscriber to identify the caller either by ringing the number back and speaking to an operative, listening to a recorded message or by a search on the internet. Furthermore, that a complaint was received by the FCA relating to an unsolicited call on 27 March 2021 from CLI [REDACTED] – a number allocated to BBL but used by BCBL - would suggest that the organisation did not alter its business model, and continued to permit BCBL to make calls using its lines, despite awareness of the Commissioner's ongoing investigation into concerns about the organisation's compliance with PECR.

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

The Commissioner's decision to issue a monetary penalty

81. The Commissioner has taken into account the following **aggravating features** of this case:
- The Commissioner is concerned by evidence that BBL targeted vulnerable individuals. BBL concede that 80% of call recipients are elderly and many are 'vulnerable'. It is apparent that due to the volume of calls they were persistent in nature. Furthermore, complaints indicate that misleading information was provided to individuals promoting a belief that they already had a direct debit set up, and so potentially causing financial loss to those individuals.
 - BBL acted deliberately in contravention of PECR with a view to generating an increase in profit and turnover.
 - BBL failed to follow ICO Guidance or seek support where necessary.

- BBL's business model was purposefully opaque such that individuals were unable to identify which organisation was calling them, making it difficult to object to calls or complain.
 - Whilst BBL did engage with the Commissioner's investigation, information provided has been deliberately misleading in an apparent attempt to confuse or evade regulatory action.
82. The Commissioner notes that BBL has indicated a willingness to be compliant, but he does not consider that this constitutes mitigation for the contravention which took place. Indeed evidence suggests that lines allocated to BBL continued to make calls leading to complaints up to March 2021. Further, whilst BBL has informed the Commissioner in representations that it has temporarily ceased making marketing calls pending the outcome of this matter, and has produced draft policies and processes designed to improve the business practices, the Commissioner notes that BBL has been reactive in its approach to compliance, and only seems to make changes in its practices in order to comply with the law when failings are discovered, and changes are required, by a regulator. Had such measures been implemented at the outset, then this contravention may have been averted.
83. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A(1) DPA have been met in this case. He is also satisfied that the procedural rights under section 55B have been complied with.
84. The latter has included issuing a Notice of Intent on 6 May 2022, in which the Commissioner set out his preliminary thinking and invited BBL to make representations in respect of this matter. In reaching his

final view, the Commissioner has taken into account the representations and additional documents and financial information provided by BBL.

85. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
86. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.
87. The Commissioner has considered the likely impact of a monetary penalty on BBL. He has decided on the information that is available to him that a penalty remains the appropriate course of action in the circumstances of the case.
88. 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 are not registered with the TPS and/or specifically indicate that they do not object to receiving these calls.

The amount of the penalty

89. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£140,000.00 (One hundred and forty thousand pounds)** is reasonable and proportionate given the

particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

90. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **23 September 2022** 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.
91. If the Commissioner receives full payment of the monetary penalty by **22 September 2022** the Commissioner will reduce the monetary penalty by 20% to **£112,000.00 (One hundred and twelve thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
92. 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.
93. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
94. Information about appeals is set out in Annex 1.

95. 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.

96. 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 **24th** day of **August** 2022

Andy Curry
Head of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the 'Tribunal') against the notice.

2. If you decide to appeal and if the Tribunal considers:-

a) that the notice against which the appeal is brought is not in accordance with the law; or

b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised his discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

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

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester
LE1 8DJ

Telephone: 0203 936 8963
Email: grc@justice.gov.uk

- a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.
 - b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state:-
- a) your name and address/name and address of your representative (if any);
 - b) an address where documents may be sent or delivered to you;
 - c) the name and address of the Information Commissioner;
 - d) details of the decision to which the proceedings relate;
 - e) the result that you are seeking;
 - f) the grounds on which you rely;
 - g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
 - h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time

and the reason why the notice of appeal was not provided in time.

5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.

6. The statutory provisions concerning appeals to the First-tier Tribunal (Information Rights) are contained in section 55B(5) of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).