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Monetary Penalty Notice

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DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Solartech North East Limited

Of: Cooperative Building, 1st Floor, 251-255 Linthorpe Road, Middlesbrough, TS1 4AT

1. The Information Commissioner ("Commissioner") has decided to issue Solartech North East Limited ("SNEL") 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. SNEL, whose registered office is given above (companies house registration number: 07327707), 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.

12. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of Part 9, Schedule 20 of that Act).

Background to the case

13. SNEL is a company which, when initially brought to the attention of the Commissioner, advertised itself as a Microgeneration Certification Scheme (MCS) installer of solar energy equipment. It states that its current main trading activity is windows, doors and roofing.
14. SNEL first came to the attention of the Commissioner in February 2014 when a number of complaints were identified about them within a monthly TPS report.
15. Following communication with SNEL regarding the complaints SNEL's response stated that "the information was purchased from a Third Party and we assumed it was TPS checked". SNEL also informed the Commissioner that they had purchased a licence from the TPS to carry out checks on data purchased. Accordingly, the Commissioner wrote to SNEL on 27 May 2014 and provided advice on key areas, including screening of data against both TPS and internal suppression lists, and due diligence when purchasing third party data. SNEL was also placed under a period of monitoring for three months, during which there was a slight decrease in the number of complaints received.
16. SNEL came to the attention of the Commissioner again in March 2016 when a number of further complaints about SNEL were contained within a monthly TPS report.
17. On 25 May 2016 a letter was sent to SNEL addressing the Commissioner's concerns regarding compliance with the PECR,

- specifically regulation 21. The letter included a spreadsheet of complaints received by the TPS and via the ICO online reporting tool, and also directed SNEL to the ICO's detailed guidance on the PECR.
18. Following ongoing communications, SNEL attended a compliance meeting with the ICO on 19 September 2016, at which SNEL agreed to carry out a number of actions in order to remedy its non-compliance with regulation 21 of PECR. This was followed up with written correspondence on 20 September 2016 when additional guidance was provided. SNEL was also placed on a period of monitoring totalling six months, over which time there was again a slight decrease in the number of complaints received.
 19. Towards the end of this period, on 15 March 2017, SNEL contacted the Commissioner seeking advice on a due diligence document it had received from a proposed new data supplier, to which the Commissioner responded on 21 March 2017, providing general guidance on points to consider when purchasing data from a third party. SNEL then confirmed, on 29 March 2017, that all old data purchased from their previous supplier had been removed from their system and replaced with data from their new supplier.
 20. On 13 April 2017 the Commissioner sent a letter to SNEL advising that it would be subject to a further three months monitoring period. During this period there was an increase in the number of TPS complaints.
 21. An initial analysis of those complaints made to the TPS regarding unsolicited calls from ESC identified that a total of 39 complaints were received between 1 January 2017 and 30 June 2017.
 22. In addition, an interrogation of the ICO's on-line reporting tool showed that a further 9 complaints had been received in the same period from

individuals who were registered with the TPS but had received unsolicited direct marketing calls from SNEL.

23. The following are examples of complaints received via the ICO's online reporting tool:
- *"They have phoned before and know that phone is registered with TPS."*
 - *"I have received numerous calls from this company over several months and have twice reported them to TPS. They are always from 01642 numbers and the caller gives different names. The problem is getting worse and I received 3 calls in a 4 hour period from 01642 ***** on 29 June. When I again told the caller on the third call that I was registered with TPS and didn't want them to call me, he laughed and claimed he was calling from Asda! They seem to find the situation funny but I don't. "*
 - *"I am disabled and have difficulty getting to the telephone. Nuisance calls of this type cause me considerable disruption and upset."*
24. The Commissioner established from information provided by SNEL during her investigation that, in the six month period from 1 January 2017 to 30 June 2017, a total of 555,939 (averaging 92,656 per month) direct marketing calls were made to subscribers. This led to a total of 48 complaints.
25. Furthermore, enquiries of SNEL's network provider for 16 (out of a total 51) CLIs used by SNEL, confirmed that during May and June 2017 a total of 100,103 separate calls were made. 74,902 of these calls were registered with the TPS at the time of the call (representing an average

75% of those CLIs used in that period). Whilst the percentage of calls made to TPS registered numbers varied for each CLI, in respect of one particular CLI, 99% of all calls made (5697 out of 5759) were to TPS registered numbers.

26. It is apparent from the Commissioner's investigation that SNEL 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 SNEL 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 SNEL and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

29. The Commissioner finds that SNEL contravened regulation 21 of PECR.
30. The Commissioner finds that the contravention was as follows:
31. Between 1 January 2017 and 30 June 2017 SNEL used a public telecommunications service for the purpose of making 74,902 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

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

Seriousness of the contravention

34. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by SNEL's activities over a 6 month period, and this led to a significant number of complaints about unsolicited direct marketing calls to the TPS and the ICO.
35. 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. On its own case, SNEL made 555,939 marketing calls between 1 January 2017 and 30 June 2017. 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 sample of calls analysed for May and June 2017, an average of 75% were registered with the TPS for more than 28 days which would suggest that the amount of calls to TPS registered numbers is likely to be significantly higher.

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

Deliberate or negligent contraventions

37. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that SNEL's actions which constituted that contravention were deliberate actions (even if SNEL did not actually intend thereby to contravene PECR).
38. The Commissioner considers that in this case SNEL did not deliberately contravene regulation 21 of PECR in that sense.
39. The Commissioner has gone on to consider whether the contravention identified above was negligent.
40. First, she has considered whether SNEL 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 SNEL 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.
41. The TPS contacted SNEL on each occasion a complaint was made to it which should have made SNEL aware of the risk that these contraventions would occur.
42. 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.

43. Prior to the period of the contravention detailed in this Notice the Commissioner had communicated with SNEL (in May 2014 & May 2015) regarding complaints about marketing calls to TPS registered numbers, in which she provided written advice and guidance about PECR, and in particular regulation 21. SNEL has also been monitored, with their knowledge, on two separate occasions for a period totalling 12 months. Furthermore, SNEL attended a compliance meeting with the ICO in September 2016 when they received face to face advice, followed up in writing with additional guidance. In addition, the Commissioner provided specific advice to SNEL following a request in March 2017, regarding the proposed purchase of data from a new supplier. It is therefore reasonable to suppose that SNEL should have been well aware of its responsibilities under the PECR.
44. Finally, the Commissioner has gone on to consider whether SNEL failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met.
45. Reasonable steps in these circumstances would have included ensuring that SNEL 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.

46. Despite assurances provided by SNEL in 2014 that it had purchased a licence from TPS to screen data, the TPS informed the Commissioner on 25 January 2018 that it has no record of SNEL subscribing to the TPS nor any record of SNEL having made enquiries about subscribing. SNEL acknowledged in representations made in response to the Notice of Intent that its failure to subscribe to the TPS was a source of regret and an obvious solution to the data issue identified in this Notice.
47. The Commissioner is therefore satisfied that SNEL failed to take reasonable steps to prevent the contravention.
48. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to impose a monetary penalty

49. 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.
50. The latter has included the issuing of a Notice of Intent dated 5 September 2018 in which the Commissioner set out her preliminary thinking.
51. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
52. The Commissioner has received representations in response to the Notice of Intent from ESC dated 17 October 2018 and has taken these into account when making her final determination.

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

- During the course of the investigation, the network provider for a number of CLIs confirmed that in May and June 2017, 75% of 100,103 calls sampled were registered with the TPS for more than 28 days. In addition, one individual reported to the TPS that they had continued to receive calls on numerous occasions despite having registered with the TPS and SNEL having previously confirmed the number was suppressed. This suggests little or no regard for the PECR regulations or TPS registration.
- SNEL did not screen data despite claiming to hold a TPS licence and there is no evidence that a TPS licence had been purchased.
- SNEL failed to heed ICO advice surrounding key areas provided in May 2014 and September 2016.
- ICO monitoring has been in place at various periods between 2014 and 2018.
- SNEL purchased third party data without undertaking any or any sufficient due diligence, clearly indicating that any steps and measures in place to prevent such contraventions were deficient.
- SNEL continued to make live marketing calls despite being aware of the ICO investigation and the reason for it. This led to 25 further complaints (17 via the TPS's reporting mechanism and 8 via the ICO's Online Reporting Tool) post the period of contravention (between September 2017 and May 2018).

54. The following **mitigating factors** have also been considered:

- There has been a reduction in the overall number of complaints (7) since January 2018.

55. 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

56. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£90,000 (ninety thousand pounds)**.

Conclusion

57. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **28 December 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.

58. If the Commissioner receives full payment of the monetary penalty by **27 December 2018** the Commissioner will reduce the monetary penalty by 20% to **£72,000 (seventy two thousand pounds)**.

However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

59. 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.
60. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
61. Information about appeals is set out in Annex 1.
62. 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
63. 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 23rd day of November 2018

Signed



Stephen Eckersley
Director 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 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)).