

## **DATA PROTECTION ACT 1998**

### **SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

#### **MONETARY PENALTY NOTICE**

To: Brighter Home Solutions Ltd

Of: Units E & F West Side Business Centre, Flex Meadow, Harlow, Essex,  
CM19 5SR.

1. The Information Commissioner ("Commissioner") has decided to issue Brighter Home Solutions Ltd ("Brighter Homes") 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 by Brighter Home Solutions Ltd.
2. This notice explains the Commissioner's decision.

#### **Legal framework**

3. Brighter Homes, whose registered office is given above (Companies House registration number: 06791536), 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. Brighter Homes' business involves making marketing calls to subscribers in order to sell its home improvement products and services including windows, doors, conservatories and kitchens.
13. Between 4 January 2016 and 26 August 2016, the TPS received 160 complaints about Brighter Homes. The TPS, maintained by OFCOM at that time, referred all of those complaints to Brighter Homes and also notified the ICO. Brighter Homes did not respond to the TPS in relation to any of the complaints.
14. Some of those individual subscribers complain that the calls were misleading because the callers gave the impression that they were calling from a local number and were misled into believing that they may have been contacted by Brighter Homes previously and agreed at that time to receive further calls in the future.
15. The following are examples of the complaints received by the ICO:
  - "It has raised concerns that they [have] so much detail about me and where I live etc. Makes me feel concerned about me and my young family".
  - "I was concerned that this call would have turned into a scam call as I have been ex-directory for a long time and registered with TPS for a long time also".

- “I lost my temper with the man, Phil was his name. It didn't even register with him when I told him that my phone is registered with the TPS, he said he was still allowed to make the call and wasn't selling me anything. He says he called last year and I said I would have told him (or whoever) the same then, this phone number is registered with TPS. He said they buy these number [sic] in and they are checked against the TPS list. That infuriated me even more as HE was responsible for checking whether it was TPS registered. He didn't give a damn”.
  - “First, how did they get my information, and second I am now concerned that they may try to visit my house in person”.
  - “It annoyed me that despite being registered with the TPS, "Brighter Homes" still cold-called me, and when the conversation wasn't going to their liking, hung up on me”.
16. On 20 July 2016, the ICO wrote to Brighter Homes to explain that the ICO could issue civil monetary penalties up to £500,000 for PECR breaches. The letter informed Brighter Homes that the ICO and the TPS had received complaints from individual subscribers in relation to unsolicited calls. Brighter Homes was asked a number of questions about its compliance with PECR.
17. The ICO received a response from Brighter Homes explaining that it purchases opt-in data from third party companies. The third party data providers had assured the Company that the data was “opted in”.
18. Brighter Homes further explained it then uses those details to call individual subscribers to market its products and services. However, Brighter Homes hadn't carried out any due diligence checks to ensure

that they had given their consent to Brighter Homes to receive such calls.

19. The Commissioner has made the above findings of fact on the balance of probabilities.
20. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by Brighter Homes and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

21. The Commissioner finds that Brighter Homes contravened the following provisions of PECR:
22. Brighter Homes has contravened regulation 21 of PECR.
23. The Commissioner finds that the contravention was as follows:
24. Between 4 January 2016 and 26 August 2016, Brighter Homes used a public telecommunications service for the purposes of making 187 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.
25. The Commissioner is also satisfied for the purposes of regulation 21 that 187 complaints were made by subscribers who had registered with the TPS at least 28 days prior to receiving the calls and they had not given their prior consent to Brighter Homes to receive calls.

26. The Commissioner is therefore satisfied that Brighter Homes was responsible for this contravention.
27. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

**Seriousness of the contravention**

28. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by Brighter Homes arising from its activities over an 8 month period, and this led to a significant number of complaints about unsolicited direct marketing calls to the TPS and the ICO.
29. In addition, it is reasonable to suppose that considerably more calls were made by Brighter Homes because those who went to the trouble to complain are likely to represent only a proportion of those who actually received calls. Between 1 January 2016 and 31 May 2016 Brighter Homes indicated that it had conducted a direct marketing telephone campaign in respect of which they admit that approximately 450,000 were connected to subscribers without conducting any due diligence on the data provided to them.
30. Individual subscribers have complained to the ICO that the calls were misleading because the callers gave the impression that they were calling from a local number and were misled into believing that they may have been contacted by Brighter Homes previously and agreed at that time to receive further calls in the future.

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

**Deliberate or negligent contraventions**

32. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that the Company's actions which constituted that contravention were deliberate actions (even if Brighter Homes did not actually intend thereby to contravene PECR).
33. The Commissioner considers that in this case Brighter Homes did not deliberately contravene regulation 21 of PECR in that sense.
34. The Commissioner has gone on to consider whether the contravention identified above was negligent.
35. First, she has considered whether Brighter Homes 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 Brighter Homes 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.
36. 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.

37. The TPS contacted the Company on each occasion a complaint was made to it which should have made the Company aware of the risk that these contraventions would occur. Brighter Homes did not respond to the TPS in relation to any of the complaints. Brighter Homes blame this failure on staffing issues.
38. It is therefore reasonable to suppose that Brighter Homes should have been aware of its responsibilities in this area.
39. Third, the Commissioner has gone on to consider whether Brighter Homes failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met.
40. Organisations buying marketing lists from third parties must make rigorous checks to satisfy themselves that the third party has obtained the personal data it is using fairly and lawfully, and that they have the necessary consent. It is not acceptable to rely on assurances of indirect consent without undertaking proper due diligence. Such due diligence might, for example, include the following:
  - How and when was consent obtained?
  - Who obtained it and in what context?
  - Was the information provided clear and intelligible? How was it provided – e.g. behind a link, in a footnote, in a pop-up box, in a clear statement next to the opt-in box?
  - Did it specifically mention live calls, texts, e-mails or automated calls?
  - Did it list organisations by name, by description, or was the consent for disclosure to any third party?

41. Organisations must ensure that consent was validly obtained, that it was reasonably recent and that it clearly extended to them specifically or to organisations fitting their description.
42. Brighter Homes is unable to provide sufficient evidence that it had undertaken appropriate due diligence in this case. The Commissioner is therefore satisfied that Brighter Homes failed to take reasonable steps to prevent the contravention.
43. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

**The Commissioner's decision to issue a monetary penalty**

44. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A(1) DPA have been met in this case. She is also satisfied that section 55A(3A) and the procedural rights under section 55B have been complied with.
45. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made by the Company on this matter.
46. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
47. The Commissioner has considered whether, in the circumstances, she should exercise his discretion so as to issue a monetary penalty.

48. 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.
49. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

### **The amount of the penalty**

50. The Commissioner has taken into account the following **mitigating features** of this case:
- There is a potential for damage to Brighter Homes' reputation which may affect future business.
51. The Commissioner has taken into account the following **aggravating features** of this case:
- Brighter Homes may obtain a commercial advantage over its competitors by generating leads from unlawful marketing practices.
  - Brighter Homes misled subscribers by displaying a false CLI that had the same area code as the subscriber. This led subscribers to think that the call was from someone in their local area. This was done as the subscriber was more likely to answer the telephone.

- The call script used by Brighter Homes contains the misleading statement “..[we] are calling everyone back who did not receive our call or who may have asked us to call back this year. It was a while back so don't worry if you do not remember receiving the call.” This was not necessarily always the case.
  - In October 2016 the Commissioner received evidence that although Brighter Homes had an up to date TPS registration, it had not accessed the system for at least the previous 4 months. As such, there was no evidence that the TPS had been screened against in order to avoid callings subscribers who did not wish to be called.
52. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£50,000 (fifty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

### **Conclusion**

53. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **14 June 2017** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.
54. If the Commissioner receives full payment of the monetary penalty by **13 June 2017** the Commissioner will reduce the monetary penalty by 20% to **£40,000 (forty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

55. There is a right of appeal to the First-tier Tribunal (Information Rights) against:
- (a) the imposition of the monetary penalty and/or;
  - (b) the amount of the penalty specified in the monetary penalty notice.
56. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
57. Information about appeals is set out in Annex 1.
58. The Commissioner will not take action to enforce a monetary penalty unless:
- the period specified within the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;
  - all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and
  - the period for appealing against the monetary penalty and any variation of it has expired.
59. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Dated the 12<sup>th</sup> day of May 2017

Signed .....

Stephen Eckersley  
Head of Enforcement  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

## **ANNEX 1**

### **SECTION 55 A-E OF THE DATA PROTECTION ACT 1998**

#### **RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER**

1. Section 48 of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice or variation notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the 'Tribunal') against the notice.
2. If you decide to appeal and if the Tribunal considers:-
  - a) that the notice against which the appeal is brought is not in accordance with the law; or
  - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

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

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

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

- a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.

- b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state:-
- a) your name and address/name and address of your representative (if any);
  - b) an address where documents may be sent or delivered to you;
  - c) the name and address of the Information Commissioner;
  - d) details of the decision to which the proceedings relate;
  - e) the result that you are seeking;
  - f) the grounds on which you rely;
  - g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
  - h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.
5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.
6. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).