

**Privacy and Electronic Communications (EC Directive) Regulations
2003 ("PECR") as amended and the Data Protection Act 1998**

Monetary Penalty Notice [PECR]

Dated: 5 July 2013

Name: Tameside Energy Services Ltd

**Address: Crossgate House, 53b Manchester Road, Denton,
Manchester, M34 2AF**

Statutory framework

1. Tameside Energy Services Limited, ("Tameside ") whose registered office is Crossgate House, 53b Manchester Road, Denton, Manchester, M34 2AF (Companies House Registration Number: 4884766) is the person in this notice alleged 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 the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR") as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2004 and by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 ("PECR 2011").

2. PECR came into force on 11 December 2003 and revoked the Telecommunications (Data Protection and Privacy) Regulations 1999. PECR adopted Part V entitled, 'Enforcement', and Schedules 6 and 9 of the Data Protection Act 1998 (the "Act"). By virtue of Regulation 31 subparagraph 2 of PECR the Information Commissioner (the "Commissioner") was made responsible for the enforcement functions under PECR.
3. On 26 May 2011, PECR 2011 amended Regulation 31 of PECR to adopt sections 55A to E of the Act and introduced appropriate adaptations to those sections.
4. Under sections 55A and 55B of the Act the Commissioner may, in certain circumstances, where there has been a serious contravention of the requirements of PECR, serve a monetary penalty notice on a person requiring the person to pay a monetary penalty of an amount determined by the Commissioner and specified in the notice but not exceeding £500,000.
5. The Commissioner has issued statutory guidance under section 55C (1) of the Act about the issuing of monetary penalties ("Guidance"). The Guidance was approved by the Secretary of State and laid before Parliament. The Guidance was amended to take the changes to PECR into account and was published on 30 January 2012 on the Commissioner's website. It should be read in conjunction with the Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 and the Data Protection (Monetary Penalties) Order 2010.

Power of Commissioner to impose a monetary penalty

6. Section 55A

Section 55A of the Act as adopted by PECR 2011 states:-

- (1) The Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that –
 - (a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person,
 - (b) the contravention was of a kind likely to cause substantial damage or substantial distress, and
 - (c) subsection (2) or (3) applies.
- (2) This subsection applies if the contravention was deliberate.
- (3) This subsection applies if the person–
 - (a) knew or ought to have known –
 - (i) that there was a risk that the contravention would occur, and
 - (ii) that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but
 - (b) failed to take reasonable steps to prevent the contravention.”

Background

7. Tameside was incorporated on 2 September 2003. It has been operating under its current name since 18 July 2012. It has four Directors on record. Gary Thomas O'Brien, who describes himself as the Managing Director, Ian Jeffrey Gibson, Suzanne Jean Gibson and Lindsay Elaine O'Brien. Tameside is a national company which describes itself on its website as a company that offers a range of energy efficiency improvements, such as wall or loft insulation, solar panels, double glazing and central heating upgrades. It is formally registered at Companies House as a business of, 'Other construction installation'. Companies House records show that the company changed its name from Tameside Insulation Ltd on 18th July 2012.

8. OFCOM is the Office of Communications established by section 1 of the Office of Communications Act 2002 to facilitate the regulation of communications. Under Regulation 26 PECR, OFCOM 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. Telephone Preference Service Limited ("TPS") is a limited company set up by OFCOM to carry out this role. Businesses who wish to carry out direct marketing by telephone can subscribe to TPS for a fee and receive from them monthly a list of numbers on that register.

9. Tameside's business involves direct marketing to consumers by telephone. It is a fundamental requirement of the PECR, and well-known throughout the direct marketing industry, that a consumer's consent must have been notified to the company before it makes direct marketing telephone calls to that consumer if the consumer is registered with TPS. Therefore, it is a necessary step for businesses undertaking telesales to make arrangements to ensure that they do not make direct marketing calls to those consumers who have

subscribed to TPS, unless the business holds records showing that those consumers have given their informed consent to that business to receive such calls.

10. To that end, it is also a necessary step for a business involved in direct marketing to register with the TPS, to ensure that the business has access to a monthly update of the TPS list which is updated as consumers apply to be registered. Furthermore, the business should hold a 'suppression list' of those consumers who have informed the business directly that they do not wish to receive direct marketing calls.
11. Between 26 May 2011 and 31 January 2013, ("period of complaint") TPS received 1,010 (one thousand and ten) complaints from persons registered with them who had received unsolicited direct marketing calls. 398 of those complaints were received between 26 May 2011 and 28 May 2012 and then a further 612 were received between 28 May 2012 and 31 January 2013 during a time when Tameside was engaged in correspondence with the Commissioner about the contraventions of PECR. TPS referred all those complaints to Tameside and also notified the Commissioner.
12. In addition, during the period of complaint, the Commissioner has received 13 complaints about unsolicited marketing calls to individual subscribers registered with the TPS. There are also 47 separate complaints also from TPS subscribers on the Commissioner's on-line survey directly attributable to Tameside making a total of 60. (Of those 8 are also on the TPS list of complaints referred to in paragraph 11 above.)

13. The overall total of complaints both to TPS and the Commissioner in this case during the period of complaint is 1,010 plus 52 (60 minus the 8 duplicate complaints referred to in paragraph 12 above) which makes a total of 1062.
14. The Commissioner examined the complaints he received between 4 August 2012 and 31 January 2013 because these were complaints received long after Tameside knew of the Commissioner's interest in their activities. 38 of the 47 complaints about Tameside on the online survey were received within that period. 36 of these complaints related to calls made to subscribers of the TPS 'do not call' list and 25 related to repeat calls made by Tameside to TPS subscribers 15 of which were complaints by people who had previously told Tameside to stop calling them.
15. Also in the period 4 August 2012 to 31 January 2013 TPS received 356 of the 1,010 complaints referred to in paragraph 11 above. Attached at **Annex 2** is a spread sheet detailing the 356 complaints made by individual subscribers to the TPS. This list includes the subscribers name and telephone number together with the date and time of the call (under the headings, 'complaint date' and 'complaint time') and the date that the complaint was processed by the TPS. In all cases, by virtue of the fact that the subscribers have placed their number on the TPS "do not call list", the company has breached Regulation 21 of PECR by calling those numbers.
16. On 14 May 2012 the Commissioner first contacted Tameside by letter. The letter explained the amendments to the Regulations contained in PECR 2011 and stated that they enable the Commissioner to issue civil monetary penalties up to £500,000. The letter also stated that

Tameside were the subject of a number of complaints to TPS and asked Tameside the following questions;

- What is the source of their marketing information?
- If information is obtained from third parties what checks are carried out to confirm 'third party opt ins' ?
- Is the information screened against the TPS register?
- Do they operate an internal suppression list?
- What is the process that they have in place to run any marketing list against the TPS register and their in-house suppression list.
- Could they offer any explanation for the number of complaints made to the TPS?

The letter gave Tameside the opportunity to provide information to assist the Commissioner in his decision as to what action to take and required a response within 21 days.

17. On 28th May 2012 Tameside responded to the Commissioner's letter as follows:

- They source their data from various third party suppliers and receive information directly from managing agents, clients and various industry associations;

- They have no process in place to talk to either customers or potential customers to enquire whether or not they would like to receive a marketing call;
- They purchase all data in good faith and expect their suppliers to have applied any necessary filters pre-purchase;
- They purchase the TPS register daily and apply the screening process before any marketing calls are made;
- When they are informed that a resident does not want any further contact from them, they remove the telephone number from their database within 24 hours;
- They have made over 2 million outbound calls as of May 2012 and have only received in the region of 150 complaints and that the majority of their issues are caused by human error on their part when loading tables of data.

The letter was signed by the Managing Director, Gary O'Brien. It was notable that no copies of any corporate policies, procedures or guidelines were provided.

18. Despite these assurances made by the Managing Director, from the date of this letter until the end of January 2013, TPS received 612 of the total 1,010 complaints to TPS about unsolicited marketing calls made by Tameside.
19. On 4 August 2012 the Commissioner wrote to Mr Gary O'Brien, the Managing Director of Tameside asking the following:

- Who cleanses the data list used by Tameside? Is it the list providers or is it done internally?
 - Does Tameside monitor the source of data which is the subject of complaints to the TPS? If so does this lead to your data suppliers being challenged as to the quality and source of the data?
20. The letter also informed Tameside that the Commissioner would be reviewing the matter in October 2012 to see if there had been a reduction in the number of complaints received by TPS during the months of July, August and September and invited a response by 24th August 2012.
21. On the 8 August 2012 the Commissioner received a response from Gary O'Brien as follows:
- "We cleanse our data in house through our dedicated IT team and the TPS update is done every 28 days."
 - "We monitor all data that we source and have found all problems to be internal so have not had to challenge any of our suppliers regarding data quality."
 - "We have made a number of slight adjustments to our systems that will hopefully make a positive difference."
22. On 15 August 2012 the Commissioner wrote to Tameside again asking for clarification of the details of the internal problems that were mentioned and also asking for details of the remedial action that was taken in relation to those problems.

23. Mr O'Brien responded by a letter dated 12 September 2012 in which he explained that in July 2012 it had been identified that one of their databases had been pulling data from an old source, which should have been deleted and that a junior member of the IT team had been unknowingly pulling records directly from that source. Mr O'Brien explained that "the corrupt file had been removed and procedures had been in put in place to ensure that similar instances are avoided".
24. On 14 January 2013 the Commissioner responded to Mr O'Brien stating that the Commissioner had monitored the number of complaints received by the TPS against the company and that as a result of the large number of complaints, he was considering initiating formal action against Tameside for breaches of regulation 21 of PECR and invited Tameside to comment on the number of complaints recorded by the TPS.
25. Mr O'Brien responded with a letter dated 29 January 2013 explaining that the company had overhauled all their call making systems in order to reduce the number of TPS monthly complaints. It is notable that no explanation was given as to how the changes to the call making systems were being made.
26. Mr O'Brien concluded by requesting that the ICO's monitoring of complaints began from that date onwards as he was confident that all the issues in this area had now been resolved and stated that any sanctions at that stage could have a drastic effect on the business and employees as a significant amount of money has been spent in order for the company to be ready for the onset of 'Green Deal' and 'ECO'.

27. After examining the 47 complaints received by the Commissioner on the on-line survey during the period of complaint it was noticed that many of the complainants refer to receiving several calls even after requesting the caller to stop calling. In addition the following individual complaints were identified ("Complainant" has been abbreviated to C):

- One C is 83 years old and his wife has passed away. The son has made a complaint that the caller is ringing daily asking to speak to Mr or Mrs despite being told of the death of the lady that is being called. This is extremely distressing to the complainant.
- One C is an 80 year old lady who says she is "intimidated" and "offended" by the calls she receives from this company and has told them "20 times or more" to stop calling.
- One C works shifts and only uses the landline for emergencies for his children to contact him and he complains that Tameside call him 3 or 4 times a day despite being registered with the TPS and he describes the calls as an "inconvenience".
- One C stated that she is getting several unwanted calls every day from Tameside and is getting fed up fending them off as she is trying to study and is getting interrupted.
- One C stated that even though they are TPS registered, Tameside call at least once a week despite continually being told to remove the number from their database.
- One C explained that he had repeatedly told Tameside that he was registered with the TPS and not to call him. One particular day, in November 2012, he stated that he received a further call from

Tameside and again explained that he was registered with the TPS and not to call again. Within 3 hours they had called again. This C went on to say that on some days he gets 3 calls a day from Tameside.

28. The following are examples of individual complaints received by the Commissioner from amongst the 13 he received referred to in paragraph 12 above. (Complainant has been abbreviated to C).

- C said he received a call from Tameside who told him that they were checking on behalf of the Government to see if they had received their home insulation grant. He told them that they shouldn't be calling as the number was TPS registered. The caller maintained they were behaving perfectly properly as an agent of the Government. C stated that messages of this type cause him unwarranted disturbance.
- C said that Tameside have called on 3 occasions to see if she had taken out a government grant for insulation and to ask if she wanted to take part in a survey. She stated that this was a thinly disguised sales call and asked to be removed from their database as she was TPS registered. The caller was reluctant to speak further.
- C said that they were awaiting an urgent family call and getting a telephone call from Tameside prevented real caller access which caused considerable distress.
- C said that they have received at least 8 other calls from Tameside in the last month.

- C said that the caller from Tameside asked to speak to his wife who has recently died. Despite telling the caller that he wasn't interested "he carried on regardless trying to sell me insulation".
29. The vast majority of responses to TPS complaints from Tameside cited "human error" as the reason for the breach of Regulation 21. When a person complains to the TPS, TPS always refer the complaint to the caller. Tameside were contacted by TPS on 1,010 occasions. Of those, on 809 occasions Tameside responded citing 'Human Error'. On 190 occasions no response was given. On 9 occasions the company replied stating that "the call was not made by us" and on 2 occasions the company replied to say that the complaint "was a duplicate".
30. Tameside stated in their letter of 28th May 2012 that they 'purchase the TPS list daily and apply the screening process' before making any calls. However, despite that assurance and further such assurances in their later correspondence, TPS have confirmed that although Tameside have held a TPS licence since March 2006, that list was not downloaded until 14 January 2013 and then again on 25 January 2013, 4 February 2013 and 18 February 2013. Also the number of complaints against Tameside increased during the period when the correspondence referred to was entered into, rather than decreased. (TPS have the facility to monitor remotely the use made by the organisations of the lists.)

Grounds on which the Commissioner imposes the monetary penalty

Breaches of Regulation 21

31. The relevant provision of PECR is Regulation 21 paragraph (1) (a) and (b) which provides that,

"..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."(c.f. the TPS register see paragraph 10 above)

Regulation 21 paragraphs (2), (3), (4) and (5) provide :-

- "(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."

Definitions

- 32. The term "person" applies to limited companies as well as individuals. It is defined in Schedule 1 of the Interpretation Act 1978 as follows:
 - " 'Person' includes a body of persons corporate or unincorporate".

- 33. The following are defined in Regulation 2 (1) of PECR :
 - (a) The term "public electronic communications service" is defined as having the meaning given in section 151 of the Communications Act 2003 which states that it means any electronic communications service that is provided so as to be available for use by members of the public.
 - (b) The term, "individual" is defined as, "a living individual and includes an unincorporated body of such individuals;"
 - (c) The term, "subscriber" is defined as, "a person who is a party to a contract with a provider of public electronic communications services for the supply of such services;"
 - (d) The term "call" is defined as "a connection established by means of a telephone service available to the public allowing a two-way communication in real time;"

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

34. 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 TPS, then that individual must have given their consent to that company to receive such calls.

The Contraventions

35. The Commissioner is satisfied that on various dates during the period of complaint, Tameside used, or instigated the use of a public telecommunications service for the purposes of making of the order of 1,062 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 OFCOM in accordance with Regulation 26, Contrary to Regulation 21 (1) (b) of the Privacy and Electronic Communications (EC Directive) Regulations 2003 as amended.

36. The total of 1,062 is made up of 1,010 unsolicited marketing calls complained about to TPS, referred to in paragraph 12. above and a further 52 unsolicited marketing calls complained about to the Commissioner referred to in paragraph 13. above. (All of the subscribers who complained to the Commissioner were registered with the TPS.)

37. The Commissioner is also satisfied for the purposes of Regulation 21 that the 1062 complaints were made by subscribers who had registered with TPS at least 28 days prior to receiving the calls and they had not given their prior consent to Tameside to receive the calls.
38. A sample of those complaints namely the 356 that were processed by TPS well after the Commissioner's involvement between 4 August 2012 and 31 January 2013 (see paragraph 15. above) is attached to this notice at **Annex 2** showing the dates the complaints were made, the telephone numbers the calls were made to and the response given by Tameside to the complaint.
39. In addition 15 of the 60 complaints received by the Commissioner within the period of complaint were by individuals who had received calls from Tameside despite having previously informed the caller, namely Tameside, that they did not want any further calls. Therefore the Commissioner is satisfied that in relation to these complaints, Tameside is in breach also of Regulation 21 (a).
40. Therefore the Commissioner is satisfied that Tameside has acted in breach of Regulation 21.

Serious (S55A (1) (a))

41. The Commissioner is satisfied that these contraventions of PECR have been serious as required by Section 55A (1) (a) because there have been multiple breaches of Regulation 21 by Tameside arising from its activities over a long period of time and these led to a very large number of complaints about unsolicited direct marketing calls to TPS. In addition, it is reasonable to suspect that considerably more calls

were made by Tameside in breach of Regulation 21 because those who went to the trouble to complain are likely to represent only a proportion of those who actually received calls.

42. These complaints were from individuals who were registered on the TPS 'do not call' list, but had not given their consent to Tameside to receive calls. Every one of the 1,010 complaints was sent by TPS to Tameside inviting a response, but Tameside's responses were inadequate.
43. The Commissioner received 60 complaints about unsolicited marketing calls from individual subscribers with 47 of those coming from an on-line survey. (8 of those were duplicate complaints when matched to the TPS 1,010)
44. During the period of complaint, according to records held by TPS and the Commissioner, Tameside were one of the organisations about which the most complaints were being received nationally.
45. In determining whether the contravention was serious consideration has to be given to the Commissioner's Guidance. The guidance gives an example of a serious contravention on page 13 as follows:

"Making a large number of automated marketing calls based on recorded messages or sending large numbers of marketing text messages to individuals who have not consented to receive them, particularly if distress and anxiety is caused to the recipients."

This is a case which is comparable to that example.

46. Therefore the Commissioner is satisfied that the case meets the 'seriousness threshold' because of the nature, duration and extent of the breach.

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

47. The Commissioner is satisfied that the contravention is of a kind likely to cause substantial damage or substantial distress as required by section 55 (1) (b) because of the large numbers of individuals who complained about these unsolicited calls and the nature of some of the complaints they gave rise to.
48. The Commissioner has in particular taken into account each of the complaints referred to in paragraphs 28 and 29 above in making this decision as evidence of the likelihood of substantial distress.
49. Although the distress in every individual complainant's case may not always have been substantial, the cumulative amount of distress suffered by the large numbers of individuals affected, coupled with the distress suffered by some individuals, with some receiving multiple calls, means that overall the level was substantial.
50. When looking at the meaning of "substantial" in terms of the levels of distress, the Commissioner has had regard to section 2, page 14 of his Guidance. This says that the Commissioner considers that "if damage or distress that is less than considerable in each individual case is suffered by a large number of individuals the totality of the damage or distress can nevertheless be substantial".

51. The Commissioner is satisfied that the above evidence shows not only that the unsolicited marketing calls are of a kind “likely to cause substantial distress” as required by Section 55, but that in fact they have, in the case of some particular individual complainants, actually done so.

Deliberate

52. Tameside acted deliberately in using or instigating the use of a public telecommunications system for the purpose of making unsolicited calls for direct marketing purposes as stated in paragraph 36 above. It is evident from the correspondence from Tameside that the Managing Director knew what action to take to prevent the breaches from occurring but failed to take such action during the period of complaint, choosing instead to wait until the middle of January 2013 long after being contacted by the Commissioner. He claimed to be putting in place ‘procedures to ensure similar instances are avoided’, but he failed to do so as can be seen by the increase in complaints.

Knew or ought to have known that there was a risk that the contravention would occur and that it would be of a kind likely to cause substantial damage or distress (S55A (3)(a)(i) and (ii)).

53. The following factors are indicative of the fact that Tameside knew or ought to have known there was a risk of contravention and that it would be of a kind likely to cause substantial damage or distress.

- Due to the nature of the business of Tameside and the fact that it relied heavily on direct marketing, and the fact that this issue of unsolicited calls was widely publicised by the press as being a problem, it is reasonable to suppose that they should have been aware of their responsibilities in this area and aware that there was a high risk of a contravention.
- During the period of complaint the TPS had written to Tameside on over 1,010 occasions reminding them of their responsibilities under the regulations and Tameside had responded to the majority of those.
- Complaints continued to be received by TPS even after the Commissioner's letters and Tameside's assurances by way of responses referred to in the Background above. These assurances show that the Managing Director of Tameside knew of the risks of contravening the Regulations.
- Complainants asked Tameside employees to stop calling them but despite this Tameside continued to do so.
- Tameside admitted internal problems and failed to screen calls effectively against a current TPS list.

54. The sheer volume and nature of the complaints received from TPS regarding the marketing calls should have indicated to Tameside that they were continually breaching the regulations.

55. The fact that Tameside knew, because the company was being told, that people were complaining about calls they were receiving and the fact that Tameside knew, therefore, that the recipients of those calls

had not agreed to receive those calls, shows that Tameside knew of the risk of contraventions . Therefore Tameside's Managing Director as the directing mind of the company ought to have known this also and ought to have known that it was only a matter of time before substantial distress to recipients of the calls was likely to be caused.

56. The Commissioner is therefore satisfied that section 55A (3) of the Act applies in that during the period of complaint Tameside knew or ought to have known that there was a risk that the contravention would occur, and that such a contravention would be of a kind likely to cause substantial damage or substantial distress.

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

57. Tameside is a company which had been in existence since 2003 and has been operating under these regulations since then. Tameside's business is heavily reliant upon direct marketing to consumers. It is a fundamental requirement of the PECR that TPS registered numbers have to be suppressed and that consent is required from consumers who are TPS registered before marketing calls can be made to them.
58. Tameside has provided no evidence of any formal policies and procedures in place for the staff to follow to ensure they know how to comply with PECR. Tameside should have been able to demonstrate that they had effective systems in place to prevent the breaches of PECR.
59. Tameside said they had purchased a daily TPS list for it to use but it was not being used effectively so as to prevent PECR breaches.

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

60. Nature of the contravention:

- Some of the complainants said that despite informing the caller that they did not want to receive calls they nevertheless did continue to receive them.
- Some callers used underhand methods in that at least one caller pretended to be acting for the government and at least one pretended that they were doing a survey about government grants.

61. Effect of the contravention:

- Substantial distress was actually caused to a number of particular individuals.

62. Behavioural issues by Tameside:

- Tameside only engaged with the Commissioner in a limited way in its responses to the Commissioner's letters,
- Tameside exhibited a complete disregard for PECR by failing to change its business practices and to use the TPS list effectively despite a very large number of complaints made to it via TPS.

- No reasonable steps were taken during the period of complaint to ensure the business was complying with PECR and there was no evidence given to the Commissioner of any policies or procedures for Tameside's staff to follow or evidence of checks made on any bought-in lists of data.

63. Impact on Tameside:

- Tameside is a private organisation within a competitive direct marketing industry where continuous breaches of PECR could create an unfair advantage.

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

64. Behavioural issues:

- Tameside did co-operate with the Commissioner but only to the extent that it provided responses to correspondence sent to it.
- Tameside's Managing Director may have believed that the personal data/telephone numbers the company was purchasing had been screened by the seller of the data and therefore that the telephone numbers belonged to people who had consented to receive the calls.

65. Impact on Tameside:

- Tameside has limited financial resources available to pay the penalty proposed without suffering undue financial hardship.
- There is a potential for damage to reputation of Tameside which may affect future business.

Other considerations

66. The Commissioner's underlying objective in imposing a monetary penalty is to promote compliance with the 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 the calls.
67. It is to be noted that Tameside is a company that processes a substantial amount of personal data and therefore ought to have been registered with the Commissioner under section 17 Data Protection Act 1998. Failure to notify under s17 is an offence.

Notice of Intent

68. A notice of intent (NOI) was served on Tameside dated 15 April 2013 inviting representations to be made by Tameside. The Commissioner considered the representations made to him by Tameside's solicitors dated 28 May 2013 and after considering those the Commissioner gave Tameside a further opportunity until the end of June 2013 to provide independent evidence about its finances. No further representations were received. The Commissioner has considered the written representations made in relation to the notice of intent prior to his decision whether to serve this monetary penalty notice. In particular, the Commissioner has taken the following steps:

- reconsidered the amount of the monetary penalty generally, and whether it is a reasonable and proportionate means of achieving the objective which the Commissioner seeks to achieve by this imposition;
- ensured that the monetary penalty is within the prescribed limit of £500,000; and
- ensured that the Commissioner is not, by imposing a monetary penalty, acting inconsistently with any of his statutory or public law duties and that a monetary penalty notice will not impose undue financial hardship on an otherwise responsible data controller.

Amount of the monetary penalty

69. The Commissioner considers that the contravention of the PECR is serious and that the imposition of a monetary penalty is appropriate. Further, that a monetary penalty in the sum of £45, 000 (forty five

thousand pounds) is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

70. In reaching this decision, the Commissioner has taken into account all the facts and all the aggravating and mitigating features referred to above. This case was originally considered to attract a higher penalty of £90,000. However, having given consideration to the financial position of the company as he must do after applying the aggravating and mitigating features, the Commissioner considered that it was necessary to reduce the amount to £45,000 (Forty five thousand pounds) so as not to cause the company undue financial hardship.

Payment

71. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by 5.00 pm on 5 August 2013 at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.

Early payment discount

72. If the Commissioner receives full payment of the monetary penalty by 5.00pm on 1 August 2013 the Commissioner will reduce the monetary penalty by 20% to £ 36,000 (Thirty Six Thousand Pounds).

Right of Appeal

73. 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.

Any Notice of Appeal should be served on the Tribunal by 5pm on 2 August 2013 at the latest. If the notice of appeal is served late the Tribunal will not accept it unless the Tribunal has extended the time for complying with this rule.

Information about appeals is set out in the attached Annex 1.

Enforcement

74. The Commissioner will not take action to enforce a monetary penalty unless:

- the period specified in the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;

- all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and
- the period for the data controller to appeal against the monetary penalty and any variation of it has expired.

In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court or any sheriffdom in Scotland.

Dated the 5 July 2013

Signed:

David Smith
Deputy Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 55B (5) of the Data Protection Act 1998 which was adopted by Regulation 31 PECR gives any person upon whom a monetary penalty notice or variation notice has been served a right of appeal to the (First-tier Tribunal) General Regulatory Chamber (the "Tribunal") against the issue of the notice and the amount of the penalty specified in the notice.

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

- a) that the notice against which the appeal is brought is not in accordance with the law; or
- b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

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

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

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

- a) The notice of appeal should be served on the Tribunal by 5pm on 2 August 2013 at the latest.

- b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state:-
- a) your name and address/name and address of your representative (if any);
 - b) an address where documents may be sent or delivered to you;
 - c) the name and address of the Information Commissioner;
 - d) details of the decision to which the proceedings relate;
 - e) the result that you are seeking;
 - f) the grounds on which you rely;
 - d) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
 - e) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.
5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.
6. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)). Also Article 7 of the Data Protection (Monetary Penalties) Order 2010 (SI 2010/910), s.49 of, and Schedule 6 to, the Data Protection Act 1998 have effect in relation to appeals for PECR as they have effect in relation to appeals under the DPA, s.48(1).

Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR") as amended and the Data Protection Act 1998

Monetary Penalty Notice [PECR]

Dated: 5 July 2013

Name: Tameside Energy Services Ltd

Annex 2 – SAMPLE LIST OF 356 COMPLAINTS