



# Notification to Sambora Communications Incorporated of a penalty under Section 130 of the Communications Act 2003

Notification served on Sambora  
Communications Incorporated  
by the Office of Communications ("Ofcom")

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# Contents

Section		Page
	Notification to Sambora Communications Incorporated of a penalty under Section 130 of the Communications Act 2003	2
1	Subject of this notification	6
2	Background	10
3	Ofcom's decision on next steps	21
4	Determination of the amount of penalty	28
5	Table of Annexes	53

# Notification to Sambora Communications Incorporated of a penalty under Section 130 of the Communications Act 2003

## Subject of this Notification

1. This Notification is addressed to Sambora Communications Incorporated, registered company number 6776 and registered address 2 Avenue of the Republic, Georgetown, Guyana.
2. It notifies Sambora Communications Incorporated of the imposition by the Office of Communications (“Ofcom”) of the following penalty under section 130 of the Communications Act 2003 (the “Act”):
  - i) A penalty of £8,000.
  - ii) Ofcom imposes this penalty on Sambora Communications Incorporated, as it has, in one or more of the respects notified pursuant to a notification under section 128 of the Act, persistently misused an electronic communications network or electronic communications service between 1 September 2013 and 19 October 2013

## Background

3. Section 130 of the Act applies where:
  - (a) a person has been given a notification under section 128 of the Act;
  - (b) has been given an opportunity to make representations; and
  - (c) the period allowed for making representations has expired.
4. Section 130(2) of the Act allows Ofcom to impose a penalty upon that person if he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.
5. On 16 June 2014 Ofcom issued to Sambora Communications Incorporated, under section 128 of the Act, a notification that Ofcom had reasonable grounds for believing that between 1 September 2013 and 19 October 2013 (the “Relevant Period”), Sambora Communications Incorporated had persistently misused an electronic communications network or electronic communications service (the “Section 128 Notification”). The Section 128 Notification is at Annex 18 to this document.
6. Pursuant to section 128(3)(b) of the Act, Ofcom specified a period of not less than one month, during which Sambora Communications Incorporated had an opportunity of making representations about the matters notified in the Section 128 Notification. The deadline for representations was 21 July 2014. Ofcom did not receive any representations in relation to the Section 128 Notification.
7. On 1 October 2014 Ofcom served on Sambora Communications Incorporated a notification of a possible penalty under section 130 of the Act (the “Provisional

Notification”). The Provisional Notification set out Ofcom’s preliminary view that it should impose a penalty on Sambora Communications Incorporated as it had, in one or more of the notified respects set out in the section 128 notification, persistently misused an electronic communications network or electronic communications service during the Relevant Period. The Provisional Notification is at Annex 23 to this document.

8. The reasons for Ofcom’s provisional determination were set out in the Explanatory Statement accompanying the Provisional Notification.
9. The Provisional Notification gave Sambora Communications Incorporated until 29 October 2014 to make written representations to Ofcom about matters set out in the accompanying Explanatory Statement. This deadline was extended with Ofcom’s agreement, and written representations were submitted to Ofcom on 14 November 2014 (the “Representations”; Annex 24 to this Notification).
10. The Provisional Notification also gave Sambora Communications Incorporated the opportunity to make oral representations to Ofcom in relation to these matters. Sambora Communications Incorporated made its oral representations to Ofcom on 26 November 2014.

### **Sections 128, 129, 130 and 131 of the Act**

11. Section 128 of the Act says that, where Ofcom determines that there are reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services, they may give that person (the “notified misuser”) a notification under section 128 of the Act.
12. Ofcom may serve an enforcement notice under section 129 of the Act if, by the end of the period specified in the Section 128 Notification, Ofcom is satisfied that the notified misuser:
  - (a) has persistently misused an electronic communications network or an electronic communications service; and
  - (b) has not taken all such steps as Ofcom consider appropriate for:
    - (i) securing that its misuse is brought to an end and not repeated; and
    - (ii) remedying the consequences of the notified misuse.

Compliance with an enforcement notice under section 129 is enforceable in civil proceedings by Ofcom.

13. Section 130 of the Act applies where:
  - (a) a person (the notified misuser) has been given a notification under section 128;
  - (b) Ofcom have allowed the notified misuser an opportunity of making representations about the matters notified; and
  - (c) the period allowed for the making of the representations has expired.

14. Where these conditions are met, it provides that Ofcom may impose a penalty on the notified misuser if he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.
15. Section 130(4) provides that the amount of a penalty imposed is to be such amount not exceeding £2,000,000 as Ofcom determine to be:
  - a) appropriate; and
  - b) proportionate to the misuse in respect of which it is imposed.
16. It also provides, amongst other things, that in making that determination Ofcom must have regard to:
  - (a) any representations made to them by the notified misuser;
  - (b) any steps taken by him for securing that his misuse is brought to an end and is not repeated; and
  - (c) any steps taken by him for remedying the consequences of the notified misuse.
17. Ofcom may issue an enforcement notification under section 129 of the Act (as referred to above) and impose a penalty under section 130 of the Act (as referred to above).
18. Section 131 of the Act provides that Ofcom, in exercising the powers conferred on it by sections 128 to 130 of the Act, must have regard to the statement of general policy (as referred to at paragraph 20 below).

### **Determination made by Ofcom**

19. For the reasons set out in the Explanatory Statement, Ofcom determines that, pursuant to section 130(2) of the Act, Sambora Communications Incorporated has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.
20. In making this determination and in accordance with section 131 of the Act<sup>1</sup>, Ofcom has also had regard to the principles set out in its revised statement of policy on the persistent misuse of an electronic communications network or service 2010<sup>2</sup>, published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement*<sup>3</sup> (the "policy statement"). For ease of reference, a copy of the policy statement is at Annex 1 of this document.
21. Having had regard to the First, Second and Third Responses (as defined in the Explanatory Statement) and the Representations and Oral Representations; the steps taken by Sambora Communications Incorporated for securing that its misuse is brought to an end and not repeated, and the steps Sambora Communications Incorporated intends to take to remedy the consequences of the notified misuse, Ofcom has decided to impose a penalty in this case under section 130 of the Act, taking into consideration the nature of the persistent misuse involved in this case.

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2003/21/section/131>

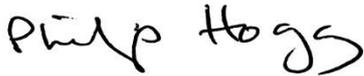
<sup>2</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>

<sup>3</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

22. Specifically, having regard to sections 130(4) and (5) of the Act, as well as the Penalty Guidelines published on 13 June 2011,<sup>4</sup> and to which Ofcom must have regard, under section 392 of the Act (the "Penalty Guidelines") and the policy statement, Ofcom has decided to exercise its regulatory judgment to impose a penalty of £8,000 on Sambora Communications Incorporated in relation to Sambora Communications Incorporated's persistent misuse of an electronic communications network or service in one of the respects notified in the Section 128 Notification. The Penalty Guidelines are at Annex 3 of this document.
23. The reasons for Ofcom's determination are set out in the following Explanatory Statement.

### Interpretation

24. Words or expressions used in this Notification and/or the Explanatory Statement have the same meaning as in the Act except as otherwise stated.



**Philip Hogg (Legal Director, Legal) and Neil Buckley (Director – Investigations, Competition Group) as decision makers for Ofcom**

**18 December 2014**

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<sup>4</sup> <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

## Explanatory Statement

# Subject of this notification

- 1.1 This document is a notification of Ofcom's imposition of a financial penalty (the "Notification") on Sambora Communications Incorporated under section 130 of the Communications Act 2003 (the "Act"). It sets out Ofcom's decision that such a penalty should be imposed on Sambora Communications Incorporated and our determination of what that penalty should be.
- 1.2 The issue of this Notification follows Ofcom's:
- (a) information request under section 135 issued to Sambora Communications Limited<sup>5</sup> dated 22 November 2013 (the "First Notice"<sup>6</sup>);
  - (b) analysis of Sambora Communications Limited's response to the First Notice received on 29 November 2013<sup>7</sup> (the "First Response"<sup>8</sup>);
  - (c) information request under section 135 issued to Sambora Communications Limited dated 8 January 2014 (the "Second Notice"<sup>9</sup>);
  - (d) analysis of Sambora Communications Limited's response to the Second Notice received on 17 January 2014 (the "Second Response"<sup>10</sup>);
  - (e) information request under section 135 issued to Sambora Communications Incorporated dated 7 March 2014 (the "Third Notice"<sup>11</sup>);
  - (f) analysis of Sambora Communications Incorporated's response to the Third Notice received on 14 March 2014 (the "Third Response"<sup>12</sup>);
  - (g) investigation into Sambora Communications Incorporated's compliance between the period 1 September 2013 and 19 October 2013 (the "Relevant Period") with section 128 of the Act, having regard to the principles set out in the policy statement<sup>13</sup>;

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<sup>5</sup> Sambora Communications Limited is a UK registered company (company number **08067346**) whose registered address is 189 Brighton Road, Brighton Road, South Croydon, Surrey, England, CR2 6EG.

<sup>6</sup> Annex 6, the First Notice. Sambora Communications Incorporated informed us on 21 November 2013 that Sambora Communications Limited, *'does not trade and has no role whatsoever in making calls into the UK, and was set up only for administrative purposes. It is a wholly owned subsidiary of Sambora Communications Limited Inc which is registered in Guyana, South America.'*

<sup>7</sup> The Section 128 Notification listed the date of the First Response as 13 December 2013. The date that this response was actually received was 29 November 2013.

<sup>8</sup> Annex 7, First Response.

<sup>9</sup> Annex 8, Second Notice.

<sup>10</sup> Annex 9, Second Response.

<sup>11</sup> Annex 10, Third Notice.

<sup>12</sup> Annex 11, Third Response. The Third Response confirmed, on behalf of the Guyanese parent company, that the information provided by Sambora Communications Limited (the UK subsidiary) relating to calls made by Sambora Communications Incorporated during the relevant period where the CLI number 02036170540 was correct. As a consequence of the Third Response, we have proceeded on the basis that the First Response and Second Response can be relied upon as responses relating to and agreed as accurate by both members of the corporate group (Sambora Communications Limited and Sambora Communications Incorporated).

<sup>13</sup> See paragraph 2.15.

- (h) information requests under section 135 issued to each of the six third parties on whose behalf Sambora Communications Incorporated told Ofcom it made calls during the Relevant Period<sup>14</sup>;
  - (i) determination that there are reasonable grounds for believing that, during the Relevant Period, Sambora Communications Incorporated persistently misused an electronic communications network or electronic communications service;
  - (j) service on Sambora Communications Incorporated on 16 June 2014 of a notification under section 128 of the Act (the "Section 128 Notification"<sup>15</sup>);
  - (k) service on Sambora Communications Incorporated on 1 October 2014 of a provisional notification of a possible penalty under section 130 of the Act (the "Provisional Notification"), setting out, amongst other things, Ofcom's preliminary view that we should impose on Sambora Communications Incorporated a penalty in respect of its persistent misuse of an electronic communications network or service between 1 September 2013 and 19 October 2013;
  - (l) Sambora Communications Incorporated's written representations of 14 November 2014 (the "Representations"). We have included the additional financial information that Sambora Communications Incorporated submitted on 24 November 2014 as part of these Representations;
  - (m) Sambora Communications Incorporated's oral representations to the Provisional Notification delivered to Ofcom on 26 November 2014 (the "Oral Representations"); and
  - (n) consideration of steps taken to secure that the misuse is brought to an end and not repeated and to remedy the consequences of the misuse notified in the section 128 notification.
- 1.3 Ofcom's decision is that a financial penalty be imposed on Sambora Communications Incorporated as it has, in one or more of the notified respects set out in the Section 128 Notification, persistently misused an electronic communications network or electronic communications service during the Relevant Period. Ofcom's determination is that the penalty will be £8,000.
- 1.4 Ofcom's determination is that this penalty is appropriate and proportionate to the contravention in respect of which it is imposed. In taking that view, Ofcom has had regard to:
- a) the First, Second and Third Responses;
  - b) the Representations and the Oral Representations;
  - c) the number and nature of occasions on which Sambora Communications Incorporated was not compliant with the persistent misuse provisions, having regard to the policy statement;

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<sup>14</sup> Annex 18, Section 128 Notification (1.32). Each of these parties confirmed to Ofcom that Sambora Communications Incorporated included questions on their behalf as part of consumer surveys made during outbound calls on which the Calling Line Identification ("CLI") number 02036170540 was presented during the relevant period.

<sup>15</sup> Annex 18, Section 128 Notification. Receipt of delivery is included as Annex 19.

- d) steps taken by Sambora Communications Incorporated for securing that its misuse is brought to an end and is not repeated; and
- e) the Penalty Guidelines in force under section 392 of the Act at the time that the decision to impose the penalty, and the determination of its amount, was made (the "Penalty Guidelines")<sup>16</sup>.
- 1.5 As set out in the policy statement, in deciding whether to take enforcement action for persistent misuse caused by abandoned and silent calls in a particular case, we will be guided by a sense of administrative priority determined by the level of consumer detriment and taking account of the steps that have been taken by Automatic Calling System ("ACS") users to reduce the degree of concern that silent or abandoned calls cause.<sup>17</sup>
- 1.6 The reasons for Ofcom's decision and determination are set out in the following sections of this Notification. In particular, aspects of Ofcom's decision and determination include that:
- a. Sambora Communications Incorporated has, in one or more of the respects notified in the Section 128 Notification, persistently misused an electronic communications network or service during the Relevant Period (and in respect of which, taking account of our policy statement, it is appropriate for Ofcom to take action) by:
- making multiple abandoned calls during each of six separate 24 hour periods. Ofcom estimates on the basis of the evidence available that Sambora Communications Incorporated made approximately 4,320 abandoned calls in total on those days. Ofcom considers it appropriate to take enforcement action in respect of these periods because the abandoned call rate exceeded three per cent of live calls;
  - failing to ensure that an information message was included in the event of an abandoned call between the period 2 October to 8 October 2013; and
  - in the event of an abandoned call, failing to include details of a *Special Services* (080 – no charge) or a *Special Services* basic rate (0845 only) or a *Geographic Number* (01/02) or a *UK wide Number at a geographic rate* (03) number the called person can contact so they have the possibility of declining to receive further marketing calls from the company (excluding the period 2 October to 8 October 2013);
- b. the central objective in imposing a penalty, set out in the Penalty Guidelines, is deterrence, and such persistent misuse is sufficiently serious as to warrant the imposition of a penalty in order to create a deterrent effect both for Sambora Communications Incorporated and for all those subject to regulation by Ofcom; and
- c. deterrence is also central in determining the amount of any penalty, so that it is an effective incentive to compliance for Sambora Communications Incorporated and others, whilst reflecting the seriousness of the contravention, Sambora's culpability and other relevant factors.

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<sup>16</sup> Annex 3, see <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>.

<sup>17</sup> Annex 1, policy statement (A1.12-A1.13).

d. We also take account that these deterrent effects will in turn help to further the interests of citizens and consumers, as well as those of fair-dealing businesses harmed by the wrongdoing of competitors.

1.7 Ofcom's determination is that a penalty on Sambora Communications Incorporated of £8,000 would be appropriate and proportionate to the contravention for which it would be imposed.

1.8 The following sections of this Notification set out:

- a) the background detail to this matter, including the applicable statutory framework;
- b) Ofcom's analysis of the options open to it and the basis for our decision to impose a penalty; and
- c) Ofcom's determination of the amount of that penalty and the basis on which that determination is made.

## Section 2

# Background

- 2.1 The following section sets out the background to Ofcom’s investigation into Sambora Communications Incorporated, both before and after the issue of the Section 128 Notification to Sambora Communications Incorporated on 16 June 2014.

## The statutory framework

- 2.2 Ofcom is the national regulatory authority for electronic communications networks and services. We have a number of duties and functions under the Act.

## Ofcom's duties and functions

- 2.3 Ofcom’s principal duty when performing our functions is set out in section 3(1) of the Act:

“(1) It shall be the principal duty of OFCOM, in carrying out their functions—

- (a) to further the interests of citizens in relation to communications matters; and
- (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.”

- 2.4 Section 3(3) of the Act says that:

“(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—

- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
- (b) any other principles appearing to OFCOM to represent the best regulatory practice.”

- 2.5 With section 3(3) in mind, Ofcom has published a statement of regulatory principles<sup>18</sup>. These include that Ofcom will:

- (a) regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives;
- (b) operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required;
- (c) strive to ensure our interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome; and
- (d) always seek the least intrusive regulatory mechanisms to achieve our policy objectives.

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<sup>18</sup> <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>

- 2.6 In performing Ofcom's relevant functions, we must fulfil the duties above and the powers we have to perform those functions are as follows.

### **Sections 128, 129 and 130 of the Act**

- 2.7 Section 128(1) of the Act enables Ofcom to issue a notification to a person where it determines that there are reasonable grounds for believing that a person has persistently misused an electronic communications network or electronic communications services. That notification is one which sets out our determination, specifies the use that we consider constitutes persistent misuse and specifies the period, of not less than one month (or not less than seven days in an urgent case), during which the person notified has an opportunity of making representations about the matters notified.

- 2.8 Section 128(5) of the Act defines "misuse" as follows:

"For the purposes of this Chapter a person misuses an electronic communications network or electronic communications service if—

- (a) the effect or likely effect of his use of the network or service is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety; or
- (b) he uses the network or service to engage in conduct the effect or likely effect of which is to cause another person unnecessarily to suffer annoyance, inconvenience or anxiety."

- 2.9 Section 128(6) of the Act defines what constitutes "persistent" misuse as follows:

"(6) For the purposes of this Chapter the cases in which a person is to be treated as persistently misusing a network or service include any case in which his misuse is repeated on a sufficient number of occasions for it to be clear that the misuse represents –

- (a) a pattern of behaviour or practice; or
- (b) recklessness as to whether persons suffer annoyance, inconvenience or anxiety."

- 2.10 Section 128(7) of the Act provides further guidance on determining whether misuse occurring on a number of different occasions is persistent as follows:

"(7) For the purpose of determining whether misuse on a number of different occasions constitutes persistent misuse for the purposes of this Chapter, each of the following is immaterial –

- (a) that the misuse was in relation to a network on some occasions and in relation to a service on others;
- (b) that different networks or services were involved on different occasions; and
- (c) that the persons who were or were likely to suffer annoyance inconvenience or anxiety were different on different occasions."

- 2.11 Section 129 of the Act provides that Ofcom may issue a further notification (known as an “enforcement notification”) in specified circumstances, as follows:

“(1) This section applies where –

- (a) a person (“the notified misuser”) has been given a notification under section 128;
- (b) OFCOM have allowed the notified misuser an opportunity of making representations about the matters notified; and
- (c) the period allowed for the making of the representations has expired.

(2) OFCOM may give the notified misuser an enforcement notification if they are satisfied –

- (a) that he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; and
- (b) that he has not, since the giving of the notification, taken all such steps as OFCOM consider appropriate for –
  - (i) securing that his misuse is brought to an end and is not repeated; and
  - (ii) remedying the consequences of the notified misuse.

(3) An enforcement notification is a notification which imposes a requirement on the notified misuser to take all such steps for –

- (a) securing that his misuse is brought to an end and is not repeated, and
- (b) remedying the consequences of the notified misuse,

as may be specified in the notification.”

- 2.12 If the notified misuser fails to comply with the section 129 enforcement notification, then under section 129(6) of the Act Ofcom can enforce compliance with the enforcement notification by way of civil proceedings.

- 2.13 Under section 130 of the Act, Ofcom may impose a penalty, as well as or instead of, serving a notification under section 129. Section 130 provides as follows:

“(1) This section applies (in addition to section 129) where –

- (a) a person (“the notified misuser”) has been given a notification under section 128;
- (b) OFCOM have allowed the notified misuser an opportunity of making representations about the matters notified; and

(c) the period allowed for the making of representations has expired.

(2) OFCOM may impose a penalty on the notified misuser if he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service.

(3) OFCOM may also impose a penalty on the notified misuser if he has contravened a requirement of an enforcement notification given in respect of the notified misuse.

(4) The amount of penalty imposed is to be such amount not exceeding £2,000,000<sup>19</sup> as OFCOM determine to be –

(a) appropriate; and

(b) proportionate to the misuse in respect of which it is imposed.

(5) In making that determination OFCOM must have regard to –

(a) any representations made to them by the notified misuser;

(b) any steps taken by him for securing that his misuse is brought to an end and is not repeated; and

(c) any steps taken by him for remedying the consequences of the notified misuse."

## Ofcom's relevant guidelines

2.14 In accordance with section 131 of the Act, Ofcom has published a statement of its general policy with respect to the exercise of its powers under sections 128 to 130 of the Act.

2.15 This most recent statement is the *Revised statement of policy on the persistent misuse of an electronic communications network or service 2010*<sup>20</sup>, published on 1 October 2010 and annexed to the document entitled *Tackling abandoned and silent calls: Statement*<sup>21</sup> (the "policy statement", see Annex 1).

2.16 Ofcom has also published Penalty Guidelines under section 392 of the Act (the "Penalty Guidelines"). As required under that section, Ofcom has had regard to the Penalty Guidelines in making our provisional determination, as set out in this document.

2.17 The Penalty Guidelines provide that:

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<sup>19</sup> Section 130(4) of the Act as amended by the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010, SI 2010/2291, article 2(1).

<http://www.legislation.gov.uk/ukxi/2010/2291/article/2/made>.

<sup>20</sup> Annex 3, <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/SilentCalls.pdf>

<sup>21</sup> Annex 3, <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

*“Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement.”*

- 2.18 The Penalty Guidelines also set out examples of potentially relevant factors in the determination of a penalty, such as:
- i) The degree of harm, actual or potential, caused by the contravention.
  - ii) The duration of the contravention.
  - iii) Any gain (financial or otherwise) made as a result of the contravention.
  - iv) Any steps taken for remedying the consequences of the contravention.
  - v) Whether the regulated body in breach has a history of contraventions.
  - vi) Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention.
  - vii) The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, it was occurring or would occur.
  - viii) Whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it.
  - ix) The extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body.
- 2.19 Ofcom has had regard to the need for transparency in applying such guidelines, particularly as regards the weighting of the factors considered.

## **The investigation and findings**

- 2.20 While reference is made to evidence received and made available to Ofcom (including representations, responses to statutory information requests and correspondence) and, in making this decision Ofcom has carefully considered this in its entirety, this Notification does not purport to be a comprehensive restatement of this evidence base. The documentary evidence is, however, annexed to this Notification and made available to Sambora Communications Incorporated.
- 2.21 On 22 June 2006 Ofcom opened an own-initiative programme of monitoring and enforcement in order to monitor compliance by companies with the persistent misuse provisions in the Act having regard to the principles set out in the policy statement as applicable from time to time<sup>22</sup>. The programme has been on-going since that time.

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<sup>22</sup> *Own-initiative investigation: Monitoring and enforcement of principles to reduce harm caused to consumers by silent and abandoned calls*(CW/00905/06/06)  
[http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_905/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/)

- 2.22 As part of the above programme, Ofcom reviews complaints data received by the Ofcom Consumer Contact Team (“CCT”) to decide whether enforcement action is appropriate and if so, in respect of which companies.
- 2.23 Within this review of complaints, Ofcom noted complaints regarding abandoned and silent calls allegedly being generated for or on behalf of Sambora Communications Incorporated using the CLI (“Calling Line Identification”) number 02036170540 between the period 1 September 2013 to 19 October 2013. Many of these complaints alleged that consumers had received two or more silent calls from this number during this time. Consequently, it was determined appropriate to conduct an investigation into Sambora Communications Incorporated’s compliance with the persistent misuse provisions in the Act having regard to the policy statement.
- 2.24 Ofcom’s investigation of Sambora Communications Incorporated’s compliance with the persistent misuse provisions of the Act, having regard to the policy statement, included:
- (a) analysis of complaint data received by the CCT in relation to the Relevant Period;
  - (b) issuing two information requests to Sambora Communications Limited under section 135 of the Act, the First<sup>23</sup> and Second<sup>24</sup> Notices on 22 November 2013 and 8 January 2014 respectively;
  - (c) issuing an information request to Sambora Communications Incorporated under section 135 of the Act (the “Third Notice”<sup>25</sup>) on 14 March 2014; and
  - (d) analysis of the First, Second and Third Responses<sup>26</sup> received on 29 November 2013, 17 January 2014 and 14 March 2014 respectively.
- 2.25 Following the investigation, the Section 128 Notification was issued to Sambora Communications Incorporated<sup>27</sup> on 16 June 2014. This notification set out:
- (a) Ofcom’s determination pursuant to section 128(1) of the Act that there were reasonable grounds for believing that, during the Relevant Period, Sambora Communications Incorporated persistently misused an electronic communications network or service;
  - (b) the specific use made of an electronic communications network or electronic communications services by Sambora Communications Incorporated that Ofcom considered constituted persistent misuse; and
  - (c) the period during which Sambora Communications Incorporated had the opportunity to make representations about the matters notified.
- 2.26 Ofcom took account that the policy statement sets out details of procedures that should be adopted to reduce the consumer detriment and/or the degree of concern that silent or abandoned calls cause. This includes monitoring the abandoned call rate using the formula set out in the policy statement to ensure that it does not exceed three per cent of live calls.

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<sup>23</sup> Annex 6, First Notice.

<sup>24</sup> Annex 8, Second Notice.

<sup>25</sup> Annex 10, Third Notice.

<sup>26</sup> Annexes 7, 9 and 11 (First, Second and Third Responses).

<sup>27</sup> Annex 18, Section 128 Notification.

- 2.27 Evidence provided in the Third Response shows that Sambora Communications Incorporated failed to do this, as it did not ensure that its abandoned call rate, as calculated in accordance with the policy statement, remained below three per cent of live calls on six separate 24 hour periods during the Relevant Period at the call centre it operated in Georgetown, Guyana. Based on the available evidence, Ofcom calculated that the abandoned call rates on those dates were between 3.02 and 3.83 per cent<sup>28</sup>.
- 2.28 Sambora Communications Incorporated also failed to include a recorded information message in the event of an abandoned call during the period 2 October to 8 October 2013 (and therefore generated approximately 2,537 silent calls).
- 2.29 In addition, in the event of an abandoned call in which it played a recorded information message, Sambora Communications Incorporated failed to include an appropriate phone number in the information message to enable the call recipient to decline further marketing calls from Sambora Communications Incorporated. Sambora Communications Incorporated failed to do this on 36 days of dialling during the Relevant Period in respect of approximately 13,791 relevant calls (this excludes the six days of dialling that occurred between 2 October to 8 October 2013 where no information message was played<sup>29</sup>).
- 2.30 Sambora Communications Incorporated had until 5pm on 21 July 2014 to make representations about the matters notified, to take steps for securing that the misuse was brought to an end and was not repeated, and to remedy the consequences of the notified misuse.
- 2.31 Ofcom did not receive any representations from Sambora Communications Incorporated to the Section 128 Notification<sup>30</sup>. Sambora has since stated in the Representations that it, “*accepts that there was no response received in respect of the Section 128 Notification.*” It has explained why this occurred and apologised for any difficulties that this may have caused (see paragraph 2.35(b)).

### **Ofcom’s provisional determination in relation to Sambora Communications Incorporated’s persistent misuse notified in the Section 128 Notification**

- 2.32 Taking into account the findings in the Section 128 Notification and the absence of any representations, we provisionally determined that Sambora Communications Incorporated had in one or more of the respects notified to it in the Section 128 Notification, engaged in persistent misuse such that it is liable to the possibility of a penalty under section 130 of the Act. In particular, Ofcom came to the preliminary decision that the effect or likely effect of Sambora Communications Incorporated’s use of an electronic communications network or service was to cause call recipients unnecessarily to suffer annoyance, inconvenience, or anxiety and that this misuse represented a pattern of behaviour, and accordingly that a penalty should be imposed.

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<sup>28</sup> <sup>28</sup> Annex 18, Section 128 Notification (Table 1: *Abandoned call rates in excess of 3 per cent during the relevant period.*

<sup>29</sup> Annex 20, this value has been calculated by adding the number of abandoned calls in the Relevant Period outside of the period 2 October to 8 October 2013 when no message was played in the event of an abandoned call.

<sup>30</sup> Annex 19, Receipt of delivery.

- 2.33 Sambora Communications Incorporated had until 29 October 2014 to make representations on the matters notified, to take steps for securing that the misuse was brought to an end and was not repeated and to remedy the consequences of the notified misuse. Following an extension requested by and granted to Sambora Communications Incorporated, Ofcom received its representations on 14 November 2014.

## The representations submitted by Sambora Communications Incorporated

### Representations

- 2.34 Sambora Communications Incorporated submitted its Representations to Ofcom on the matters set out in the Provisional Notification on 14 November 2014.
- 2.35 In summary, the Representations:
- (a) Apologised for any concern or inconvenience caused by their operations and expressed regret for the notified contraventions, noting the intention of the business to be fully compliant with Ofcom's requirements in respect of the Electronic Communications Network and Electronic Communications Service, and its previous compliance record.
  - (b) Provided an explanation as to why the company did not make representations to the Section 128 Notification. This focussed on sudden management departures taking place at the time of the Notification, which had led to difficulties for a relatively small company with limited resources, in the absence of a formal handover process.
  - (c) Noted that Ofcom had calculated the abandoned call rate by call centre, across two the campaigns in operation at the time, as provided for in Ofcom's policy statement . The Representations stated that the policy statement also referred to calculating the abandoned call rate per campaign, and that when these two centre campaigns were considered independently, "*...the campaigns both operated within the 3% limit, but it is when the two have been merged and treated as one campaign that the results exceed 3% collectively.*"
  - (d) Stated that in the 12 months since the Relevant Period there had been no reoccurrences of any non-compliance. This reflected the significant steps that Sambora Communications Incorporated had taken to ensure compliance. As a result, imposing a penalty on the grounds of deterrence was not necessary, "[Sambora Communications Incorporated] *has gone to a great deal of expense, time and resource to ensure full compliance with the Electronic Communications Service and therefore the imposition of a any penalty would simply be punitive, rather than a deterrent.*"
  - (e) Presented its financial position by enclosing audited *Balance Sheet and Profit and Loss* for 2011 and 2012; and a review by Sambora Communications Incorporated's accountants of its financial position for the period January to October 2014 based on draft financial statements.
  - (f) Committed to writing to all those recipients affected by the contravention to offer their sincere apologies for the inconvenience caused. Sambora Communications Incorporated stated it was unable, for financial reasons, to offer monetary compensation.

- (g) Made further submissions in relation to each of the penalty factors presented in the Provisional Notification. These points are addressed in sections 3 and 4.

## Oral Representations

- 2.36 Sambora Communications Incorporated made Oral Representations to Ofcom on the matters set out in the Provisional Notification on 26 November 2014. The company's founder and Commercial Director, Mr Faizal Khan, attended along with his legal advisor. A transcript is at Annex 25.
- 2.37 In summary, Sambora Communications Incorporated's Oral Representations once again accepted that the contraventions had occurred, addressed each of the penalty factors presented in the Provisional Notification and provided a detailed overview of its current financial position and the impact that the provisional penalty would have on Sambora Communications Incorporated.
- 2.38 The Oral Representations also:
- i) Reiterated Sambora Communications Incorporated's apology for the inconvenience caused.
  - ii) Noted that Sambora Communications Incorporated had engaged proactively with the enforcement process. Mr Khan had travelled a significant distance from Guyana to attend the oral representations in person and Sambora Communications Incorporated considered this underlined the seriousness with which the business took the matter.
  - iii) Explained the role and responsibilities of their technology provider, as well as other senior members of staff at the time in ensuring compliance, and reiterating that there was never any intention for the contraventions to occur.
  - iv) Reiterated that the failure to respond to the Section 128 Notification was due in part to the sudden departure of three key members of staff. It also noted that, in all other respects, Sambora Communications Incorporated had engaged with Ofcom in a timely way.
  - v) Noted changes made to both its operational and management structure. Sambora Communications Incorporated discussed how these changes had sought to address the notified contraventions and also ensured that it had operated compliantly from when it was made aware of the contraventions. In particular, Mr Khan had relocated from a United Kingdom commercial/sales role to oversee the call centre on a day-to-day basis. Two dialler managers had also been hired to ensure that the call centre always had the appropriate technical capacity when operating. Both of these dialler managers reported to a designated compliance manager. Sambora Communications Incorporated also noted that it was now working with a new technology provider who were due to visit the call centre in Guyana in December 2014, and described technical improvements in the way compliance was monitored and the call centre responded over the course of a typical day.
  - vi) Set out that Sambora Communications Incorporated was established relatively recently, had a small turnover, and its financial situation in 2013 meant the company had needed to consider carefully whether it would continue operating. Sambora Communications Incorporated went on to note

that its financial position had improved in 2014, while remaining extremely fragile.

- vii) Discussed the impact that the provisional penalty, if finalised, would have on its ability to continue trading and on the company's personal guarantor. It argued that Ofcom consider Sambora Communications Incorporated as an "exceptional case" in "exceptional financial circumstances" when considering the level of the penalty.
- viii) Demonstrated an awareness about how abandoned and silent calls caused UK consumers annoyance, inconvenience and anxiety. Mr Khan stated that, "*I would like to say that we care about our customers. I've got family here... We care about the brands reputation So this is long-term project. This isn't a fly-by-night organisation that is going to be doing all these creative things and coming up under different brand. That's not how we do it. That is not anywhere in our intention.*"

### **Ofcom's determination in relation to Sambora Communications Incorporated's persistent misuse notified in the section 128 notification**

- 2.39 Ofcom has considered carefully the points that Sambora Communications Incorporated has made in the Representations and the Oral Representations. Ofcom notes that Sambora Communications Incorporated did not dispute within these representations that it persistently misused an electronic communications network or service during the Relevant Period. In the Oral Representations Sambora Communications Incorporated stated, "*...it is rather out of character that [Sambora Communications Incorporated] have contravened, but they don't hide away from it. They don't shy from it. They accept that they did.*"
- 2.40 We take full account of the points Sambora Communications Incorporated has accepted and admitted. We determine that it persistently misused an electronic communications network or electronic communications services during the Relevant Period (and in respect of which, taking account of our policy statement, it is appropriate for Ofcom to take action) by:
- (a) making multiple abandoned calls during each of six separate 24 hour periods. Ofcom estimates on the basis of the evidence available that Sambora Communications Incorporated made approximately 4,320 abandoned calls in total on those days. Ofcom considers it appropriate to take enforcement action in respect of these periods because the abandoned call rate exceeded three per cent of live calls;
  - (b) failing to ensure that an information message was included in the event of an abandoned call between the period 2 October to 8 October 2013; and
  - (c) in the event of an abandoned call, failing to include details of a *Special Services* (080 – no charge) or a *Special Services* basic rate (0845 only) or a *Geographic Number* (01/02) or a *UK wide Number at a geographic rate* (03) number the called person can contact so they have the possibility of declining to receive further marketing calls from the company (excluding the period 2 October to 8 October 2013).

- 2.41 We have taken into account all of Sambora Communications Incorporated's representations when considering whether it would be appropriate to impose a penalty on Sambora Communications Incorporated and if so, at what level any such penalty should be set.

## Section 3

# Ofcom's decision on next steps

- 3.1 The following section sets out Ofcom's analysis of the options available to us in this matter, and our decision to impose a penalty on Sambora Communications Incorporated under section 130 of the Act.
- 3.2 Ofcom's options are:
- (a) taking no further action;
  - (b) issuing a notification under section 129 of the Act; and
  - (c) imposing on Sambora Communications Incorporated a penalty under section 130 of the Act, in addition to, or instead of, a notification under section 129.

## Ofcom's approach

- 3.3 Ofcom considers each case on its merits. Our approach to enforcing compliance with the persistent misuse provisions contained in the Act having regard to the principles set out in the policy statement is as follows.
- 3.4 The purpose of imposing a penalty is set out in Ofcom's Penalty Guidelines:
- "The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement<sup>31</sup>."*
- 3.5 The imposition of an appropriate and proportionate punishment of (penalty for) wrongful conduct, including in appropriate cases an element designed to have a proportionate deterrent effect, and the threat of such punishment (penalty) in future cases, should provide an incentive for compliance, and a corresponding deterrent to non-compliance. That would help to secure Ofcom's objective of furthering the interests of citizens and consumers, as well as those of fair-dealing businesses harmed by the wrongdoing of competitors, by helping to foster widespread compliance with legislation and regulatory rules.
- 3.6 Not taking action where it is appropriate and proportionate risks undermining not only the persistent misuse provisions but also the entire regulatory regime. It would mean that Ofcom was not providing appropriate incentive to compliance and deterrent to non-compliance.
- 3.7 Ofcom has considered the options available to us in the present case, in light of the above, in line with our statutory duties and powers. Having done so, we take the view that a penalty should be imposed on Sambora Communications Incorporated for the reasons we set out below.

## No further action

- 3.8 If we were to determine that Sambora Communications Incorporated had not, in one or more of the notified respects, persistently misused an electronic communications

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<sup>31</sup> Annex 3, Penalty Guidelines (paragraph 3).

network or electronic communications services during the Relevant Period, Ofcom would take no further action. Taking no further action is also an option open to Ofcom if we consider that, although Sambora Communications Incorporated had, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications services during the Relevant Period, it was not appropriate in all the circumstances of the case to take further steps.

- 3.9 Having carefully considered the evidence obtained during the investigation, Ofcom determines that Sambora Communications Incorporated has persistently misused an electronic communications network or service in one of the notified respects during the Relevant Period. In light of that determination, and for the following reasons, we also determine in our regulatory judgment that further action is appropriate in order to further the interests of citizens, consumers and fair-dealing businesses.
- 3.10 Evidence in Ofcom's market research most recently found that 61 per cent of participants received a silent call and 14 per cent received an abandoned call (in which the caller played an information message). In addition it found that abandoned calls were considered by consumers to be annoying (71 per cent of such calls) and distressing (6 per cent of calls)<sup>32</sup>. The research also reported that more silent calls were considered to be annoying (88 per cent of calls) and distressing (9 per cent of calls). Indeed, a higher proportion of silent calls were considered to be annoying compared to any other type of call; and a higher proportion of silent calls were also considered to be distressing (9 per cent of calls) compared to recorded sales calls (3 per cent of calls) and live sales calls (5 per cent of calls).
- 3.11 On those bases, our judgment is that the making of multiple abandoned calls, particularly where the rate at which a person makes them is above three per cent in a 24 hour period, the making of multiple abandoned calls where a person fails to play an information message, and the failure to include an appropriate number in the information message played in the event of an abandoned call, are all serious contraventions of the provisions relating to persistent misuse. Our further judgment is that it would further the interests of citizens and consumers to take further action in cases where we determine that unlawful persistent misuse, in the form of such calls, has occurred.
- 3.12 Whilst any action must, of course, be appropriate and proportionate to the specific misuse in respect of which it is imposed, the taking of further action of one or more of the kinds available to Ofcom, should serve to deter more widespread non-compliance with legislation and regulatory rules. This is intended to protect citizens and consumers from the harm the evidence shows they suffer from persistent misuse in the form of abandoned calls.
- 3.13 Whilst Ofcom welcomes the changes made by Sambora Communications Incorporated to address the notified contraventions (and this and other factors have been fully taken into account in determining the level of penalty), we still believe, in light of the above, that further action is appropriate in order to further the interests of citizens, consumers and fair-dealing businesses.

## **Issuing a notification under section 129 of the Act**

- 3.14 The following is Ofcom's consideration of whether any further enforcement action should involve serving on Sambora Communications Incorporated a notification

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<sup>32</sup> Market Research published on 23 May 2014, [http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance\\_calls\\_research/](http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance_calls_research/).

under section 129 of the Act. For the reasons set out, Ofcom's view is that it should not.

3.15 Ofcom may issue a notification under section 129 of the Act if it is satisfied that:

- (a) the notified misuser has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service; and
- (b) the notified misuser has not, since the giving of the notification, taken all such steps as Ofcom consider appropriate for-
  - (i) securing that his misuse is brought to an end and not repeated; and
  - (ii) remedying the consequences of the notified misuse.<sup>33</sup>

3.16 This option is open to Ofcom where, as in this case, we are satisfied that Sambora Communications Incorporated has persistently misused an electronic communications network or electronic communications service, if we are also satisfied that it has not taken all the appropriate steps to stop and prevent the persistent misuse from being repeated and remedy that which has occurred.

3.17 As previously noted, Sambora Communications Incorporated failed to submit any representations to the Section 128 Notification. However, the First Response set out the steps taken by Sambora Communications Incorporated to bring the notified misuse to an end. Specifically it stated the following:

- a) In relation to the silent calls generated between 2 October and 8 October 2013, the then Chief Executive Officer (CEO) of Sambora Communications Incorporated stated, "*We first heard there was a problem through an email from our technology provider [X] following communication from you on 8 October (2013). Our investigation revealed that the nuisance call recording, set up in the event of a caller not being connected to a live agent, had stopped working. This was rectified within an hour (email from [X] attached).*"
- b) "*On 19 November (2013) I received a draft information request which we queried with you (Ofcom) and were disturbed to hear on 22 November that the complaints had continued. We launched an immediate further investigation. We found that between 1 September and 19 October though the nuisance call ratio was a daily average of 1.48% (see above for average over the two surveys<sup>34</sup>) there were a few days at the end of this period when the daily total exceeded the legal limit. A meeting of Directors agreed the following:*
  - 1) *The (British) newly recruited Head of Operations would be dismissed, as any exceeding of the daily nuisance ratio was in contravention of company policy and instructions to him.*
  - 2) *The contract with the new Head of operations includes a specific instruction on keeping within the nuisance ratio, and he, the dialler manager and other managers were reminded that any repeat occurrence would result in further dismissals.*

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<sup>33</sup> Section 129(2) of the Act.

<sup>34</sup> Annex 7, First Response (see table titled, 'Survey 2, 1 September to 19 October').

- 3) *A Director, as well as of course the new Head of Operations, has been tasked with monitoring the nuisance ratio on a daily basis, and will be sent screen shots indicating the nuisance ratio at the end of each day.*
- 4) *Our technology provider [S&K] will also have a watching brief of the nuisance ratio with the instruction to send an alert to Directors if it looks close to exceeding the daily legal limit.*

*This has all been implemented. I believe this belts and braces approach will ensure there is no repeat of complaints and we will return to the fine record we had before this occurred. I attach a record of the ratio of the last week as an example which demonstrates that it is well below the legal limit.”*

- 3.18 Sambora Communications Incorporated responses’ to the First, Second and Third Information Request failed to note how it would make regular checks to ensure that an information message is being played in the event of an abandoned call. Nor did they note how they would amend the information message played in the event of an abandoned call to include an appropriate number so that the called person can return the call and decline to receive further calls.
- 3.19 The Representations and Oral Representations have, however, addressed these points. Specifically, the Representations stated that:
  - a) as soon as Sambora Communications Incorporated became aware that presentation of a CLI number was insufficient, it, *“created a recorded message to include a telephone number for people wishing to opt out of any further marketing calls. Likewise, they created a webpage at <http://samboracommunications.com/remove> which allows recipients of any calls to complete a short form to essentially opt out of the calling list.”*
  - b) The new dialler managers have been charged with, *“checking every hour that the appropriate [information] message is being played in the outbound calls.”*
- 3.20 In addition, Sambora Communications Incorporated noted additional steps that have been taken, including the following:
  - a) The abandoned call rate is now managed in-house rather than by an external IT provider. Sambora Communications Incorporated now employs two full time dial managers who are required to monitor the level of abandoned calls and have a, *“70 inch TV screen fixed overhead in the call centre, which shows the percentage of abandoned calls in real time. If this appears to be approaching the 3% limit then the dial rates are managed accordingly.”*
  - b) There is a red alert limit which is below the 3% limit and if that limit is exceeded, *“an alarm sounds, which is responded to immediately and the dialler managed to ensure conformity.”*
  - c) Hourly dialler reports are sent to the *“operations manager and other operational officials”*. The report is, *“scrutinised every hour by senior management .”*
  - d) It has ensured that there are clear communications channels between the technical staff and their IT provider to ensure that there is no delay in communications between both parties.

- 3.21 Sambora Communications Incorporated has appointed a Director of Compliance who has ensured that, “*extensive training has been provided in response to the contraventions and that there are no further issues.*”
- 3.22 On these bases, our judgement is that Sambora Communications Incorporated has taken the necessary steps required to ensure that the notified misuse is brought to an end and not repeated.
- 3.23 As to the steps Sambora Communications Incorporated has taken to remedy the consequences of the misuse notified to it, we take account that section 129(7) of the Act provides:
- “(7) References in this section to remedying the consequences of misuse include references to paying an amount to a person –
- (a) by way of compensation for loss or damage suffered by that person; or
- (b) in respect of annoyance, inconvenience or anxiety to which he has been put.”
- 3.24 The Representations stated that Sambora Communications Incorporated was not in a position to provide a financial remedy as it did not have the funds available. It did however state that it would identify and write to all affected consumers to apologise for any inconvenience caused. In the Oral Representations Sambora Communications Incorporated stated that it was in the process of, “*compiling a database of names and numbers and that is a list of those we believe are the recipients of abandoned silt calls and those that didn’t receive a proper message as well.*” It added that it intends to send out the letters, “*before Christmas*”.
- 3.25 Affected consumers suffered harm as a result of Sambora Communications Incorporated’s actions evidenced by the complaints Ofcom received (as summarised at paragraph 2.23). Ofcom notes that whilst Sambora Communications Incorporated intends to acknowledge the harm caused by writing letters to those affected to apologise for any inconvenience caused, it is not intending to include any payment such as a gift voucher to recognise the annoyance, inconvenience or anxiety that may have been caused. It is therefore our view that Sambora Communications Incorporated intends to take some but not all steps to remedy the consequences of the notified misuse.
- 3.26 On that basis, Ofcom considers that it could issue a notification under section 129 of the Act in this case. However, on balance, in light of the adequate steps that Sambora Communications Incorporated has told Ofcom it has taken to end the contravention, and of the circumstances relating to the relevant remedial steps, our view is that it would not be an appropriate regulatory response to serve such a notification on Sambora Communications Incorporated. Instead, we have reflected the failure to take all the necessary steps to remedy the consequences of the misuse in the level of the penalty.

### **Further enforcement action: imposing a penalty under section 130 of the Act**

- 3.27 The following is Ofcom’s consideration of whether any further enforcement action should involve imposing on Sambora Communications Incorporated a penalty under section 130 of the Act. Ofcom’s judgment is that we should do so. The reasons are as follows.

3.28 Ofcom may impose a penalty, as provided under section 130 of the Act, in circumstances, where -

“ ...

- (a) a person ("the notified misuser") has been given a notification under section 128;
- (b) OFCOM have allowed the notified misuser an opportunity of making representations about the matters notified; and
- (c) the period allowed for the making of the representations has expired.”<sup>35</sup>

3.29 Under section 130(2) of the Act:

“Ofcom may impose a penalty on the notified misuser if he has, in one or more of the notified respects, persistently misused an electronic communications network or electronic communications service”.

3.30 As set out in paragraphs 2.20 - 2.41, Ofcom is satisfied that Sambora Communications Incorporated persistently misused an electronic communications network or electronic communications service. On this basis, Sambora Communications Incorporated is liable to the imposition of a penalty under section 130 of the Act.

3.31 In the Oral Representations Sambora Communications Incorporated accepted that it exceeded the abandoned call rate of 3 per cent of live calls on six days during the Relevant Period, but added that:

- a) overall during the Relevant Period, the abandoned call rate was less than 2 per cent of live calls; and
- b) it was operating two campaigns during the Relevant Period and the abandoned call rate only exceeded three per cent of live calls when data from its two campaigns was aggregated together, whereas, *“Considered independently, the campaigns both operated within the 3% limit, but it is when the two have been merged and treated as one campaign that the results exceed 3% collectively.”*

3.32 The policy statement sets out that the abandoned call rate should be calculated over a *24 hour period* (paragraph A.130) and this is how Ofcom calculated the abandoned call rates in the section 128 notification when assessing Sambora Communications Incorporated’s use of an ACS. This prevents the masking of poor performance during individual 24 hour periods by compliant use on other days during the Relevant Period. The policy statement also sets out that the abandoned call rate should not exceed *“...three per cent of live calls per campaign (i.e. across call centres) or per call centre (i.e. across campaigns)...”* (paragraph A.130). In the Section 128 Notification, Ofcom found that Sambora Communications Incorporated’s abandoned call rate exceeded three per cent of live calls across campaigns on six days during the Relevant Period.

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<sup>35</sup> Section 130(1) of the Act.

- 3.33 Ofcom also considers that Sambora Communications Incorporated's failure to play an appropriate information message in the event of abandoned calls constituted persistent misuse against which, having regard to the policy statement we should take action.
- 3.34 Taking account of the matters in paragraphs 3.8 - 3.13 above, and that we are not minded to take action under section 129 of the Act, we are of the view that the imposition of a penalty would help to secure Ofcom's objectives of deterrence and of furthering the interests of citizens and consumers. We make the regulatory judgment that it is necessary and appropriate to impose a penalty on Sambora Communications Incorporated so as to reflect the seriousness of making abandoned calls in respect of those 24 hour periods where the rate is above three per cent and shortcomings in respect of the playing of a recorded information message, to deter non-compliance with the persistent misuse provisions of the Act, having regard to the policy statement, by Sambora Communications Incorporated and others.
- 3.35 Accordingly, we impose a penalty on Sambora Communications Incorporated in this case under section 130 of the Act. The following section sets out Ofcom's determination of the penalty amount, which is a matter of regulatory judgment and includes taking account of:
- (a) the First, Second and Third Responses;
  - (b) the Representations and Oral Representations;
  - (c) the number and nature of occasions on which Sambora Communications Incorporated was not compliant with the persistent misuse provisions, having regard to the policy statement;
  - (d) any steps taken by Sambora Communications Incorporated for securing that the notified misuse was brought to an end and not repeated;
  - (e) the absence of any steps taken by Sambora Communications Incorporated for remedying the consequences of the notified misuse; and
  - (f) other requirements of the Act, including that the penalty is appropriate and proportionate to the relevant misuse and has regard to the Penalty Guidelines.

## Section 4

# Determination of the amount of penalty

- 4.1 The following section of this document sets out Ofcom's determination of the amount of the penalty imposed on Sambora Communications Incorporated. It explains why we consider the penalty to be appropriate and proportionate to the contravention in respect of which it is imposed. Likewise, the regard we have had in exercising our regulatory judgment to:
- (a) the maximum level of penalty under the Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010 No. 2291;
  - (b) the First, Second and Third Responses;
  - (c) the Representations and Oral Representations;
  - (d) steps taken by Sambora Communications Incorporated for securing that the notified misuse is brought to an end and not repeated;
  - (e) the absence of any steps taken by Sambora Communications Incorporated to remedy the consequences of the notified misuse; and
  - (f) the Penalty Guidelines.

## Legal framework

- 4.2 Ofcom may impose a penalty if a person notified under section 128 of the Act has persistently misused an electronic communications network or an electronic communications service in one or more notified respect. The applicable legal framework is set out in detail in section two of this document.
- 4.3 Sections 130(4) and 130(5) of the Act set out the maximum level of penalty that Ofcom may impose and the factors that Ofcom must have regard to when setting the level of the penalty.
- 4.4 The maximum level of penalty was increased following an order<sup>36</sup> made by the Secretary of State under section 130(9) of the Act. The maximum level of penalty is now £2 million.
- 4.5 The upward revision of the maximum penalty followed a consultation by the Department of Business, Innovation and Skills ("BIS") entitled, "*Raising the maximum penalty for the persistent misuse of an electronic communications network or service, 2009*". The Government decided to increase the maximum penalty from £50,000 to £2 million to, "*broadly reflect the views of 126 respondents who felt that the maximum penalty should be increased to this level to deter persistent offenders. Most respondents felt that the current level failed to reflect the harm that was caused to consumers by silent and abandoned calls and this feeling was particularly strong*

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<sup>36</sup> [The Communications Act 2003 \(Maximum Penalty for Persistent Misuse of Network or Service\) Order 2010 No. 2291](#)

*where respondents had received calls and tried various methods to combat the problem*".<sup>37</sup>

4.6 This increased penalty was, "*designed to act as a stronger deterrent to potential offenders of persistent misuse, which includes a range of behaviours including silent and abandoned calls*".<sup>38</sup> In its impact assessment on the matter, the Government stated, "*the objective of the policy proposal is to minimise the number of silent and abandoned calls, which lead to anxiety and distress. To do that, full compliance with the current legislation needs to be incentivised by increasing the level of penalty that is applied to offending businesses. The current maximum penalty of £50,000 may be too low to act as an effective deterrent for companies where the productivity gains achievable by using predictive dialling technologies are very large*".<sup>39</sup>

4.7 Section 130 states:

"...

- (4) The amount of a penalty imposed is to be such amount not exceeding £2,000,000 as OFCOM determine to be-
  - (a) appropriate; and
  - (b) proportionate to the misuse in respect of which it is imposed.
- (5) In making that determination OFCOM must have regard to-
  - (a) any representations made to them by the notified misuser;
  - (b) any steps taken by him for securing that his misuse is brought to an end and is not repeated; and
  - (c) any steps taken by him for remedying the consequences of the notified misuse."

4.8 As previously noted, in accordance with section 392 of the Act, Ofcom prepared and published a statement containing the guidelines it proposes to follow in determining the amount of penalties imposed by it under the provisions of the Act or any other enactment apart from the Competition Act 1998 (the "Penalty Guidelines"<sup>40</sup>). By virtue of section 392(6) of the Act, Ofcom must have regard to the statement for the time being in force when setting the penalty amount. Issuing a penalty under section 130 is also referred to in the policy statement<sup>41</sup>.

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<sup>37</sup> Explanatory Memorandum to the Communications Act 2003 (Maximum penalty for persistent misuse of network or service) Order 2010, page 2:

[http://www.legislation.gov.uk/ukxi/2010/2291/pdfs/ukxiem\\_20102291\\_en.pdf](http://www.legislation.gov.uk/ukxi/2010/2291/pdfs/ukxiem_20102291_en.pdf)

<sup>38</sup> Ibid, page 1.

<sup>39</sup> Ibid, page 5.

<sup>40</sup> Annex 3, Penalty Guidelines.

<sup>41</sup> Annex 1, policy statement (A1.100 to A1.104).

## The Penalty Guidelines

- 4.9 As set out in our Penalty Guidelines, Ofcom considers all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of penalty. The regard we have had to these guidelines, in accordance with section 392 of the Act, is set out below.
- 4.10 The particular factors we have considered are as follows. In considering them, we have taken into account the maximum penalty that may be imposed (and the reasons for its setting at that level), the First, Second and Third Responses and the statutory requirements that a penalty is appropriate and proportionate:
- a) that, *“The central object of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement.”*
  - b) the following which appear to us to be relevant in this case in determining an appropriate penalty:
    - i. the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;
    - ii. the duration of the contravention;
    - iii. any gain (financial or otherwise) made by Sambora Communications Incorporated (or any connected body) as a result of the contravention;
    - iv. any steps taken for remedying the consequences of the contravention;
    - v. whether in all the circumstances appropriate steps had been taken by Sambora Communications Incorporated to prevent the contravention;
    - vi. whether Sambora Communications Incorporated has a history of contraventions;
    - vii. the extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, it was occurring or would occur;
    - viii. whether there has been a failure to keep adequate records;
    - ix. whether the contravention continued, or timely and effective steps were taken to end it, once Sambora Communications Incorporated became aware of it;
    - x. the extent of cooperation with Ofcom’s investigation;
    - xi. the extent to which the level of penalty is proportionate, taking into account the size and turnover of Sambora Communications Incorporated; and
    - xii. further considerations relating to the particular circumstances of Sambora Communications Incorporated.

- 4.11 We have also had regard to precedents set by previous cases, and to the need for transparency in applying the Penalty Guidelines, particularly as regards the weighting of the factors considered in making our provisional determination. We have also considered whether Sambora Communications Incorporated has failed to co-operate fully with Ofcom's investigation.

### **Deterrence and seriousness of the contravention**

- 4.12 As noted above, the Penalty Guidelines provide that, "*The central object of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement.*"
- 4.13 The Representations and Oral Representations both stated that this factor should not add to the amount of an appropriate and proportionate penalty. In the Representations, Sambora Communications Incorporated notes that, "... *there have been no reoccurrences of any non-compliance...* [Sambora Communications Incorporated] *has taken significant steps and imposed substantial measures to ensure that there are no further contraventions. The object of deterrence therefore is quite simply not required.*" Sambora Communications Incorporated included abandoned call rate calculations for 1 April 2014 to 31 October 2014, all of which show figures less than 3 per cent, to support its argument.
- 4.14 We take account, first, that part of Ofcom's principal duty is to further the interests of consumers in relevant markets. Section 128 of the Act provides Ofcom with enforcement powers so that it may take action to protect consumers and citizens from harm resulting from persistent misuse of an electronic communication network or an electronic communication service.
- 4.15 Ofcom accepts that Sambora Communications Incorporated has now taken all appropriate steps designed to secure that the misuse is brought to an end and not repeated, and notes that the founder of the business, Mr Khan, understood the seriousness of the issue and has taken personal responsibility for ensuring compliance. It also notes the funding arrangements for Sambora Communications Incorporated, which give Mr Khan a strong personal incentive to secure compliance and avoid a repetition of the breach. These matters have been taken into account in determining the appropriate penalty.
- 4.16 Ofcom has, however, as set out at paragraph 3.35, made its regulatory judgement that it is necessary to impose a penalty on Sambora Communications Incorporated to deter non-compliance not just by Sambora Communications Incorporated but also other ACS users.
- 4.17 We also have regard to the numbers of abandoned calls and their effects on consumers. Abandoned and silent calls will almost invariably result in consumer harm, which may range from inconvenience and annoyance through to genuine anxiety<sup>42</sup>. We give weight to the evidence to this effect in Ofcom's market research, which most recently found that abandoned calls with an information message were considered to be annoying (71 per cent of calls) and distressing (6 per cent of calls).

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<sup>42</sup> Annex 1, policy statement (1.6).

The research also reported that more silent calls were considered to be annoying (88 per cent of calls) and distressing (9 per cent of calls)<sup>43</sup>.

- 4.18 There is therefore, in our regulatory judgment, an inherent seriousness in persistent misuse by way of making abandoned calls and silent calls, such as that by Sambora Communications Incorporated. There is a need for enforcement action, including appropriate and proportionate financial penalties, to provide Sambora Communications Incorporated, and others, with an effective incentive to comply with the Act, having regard to the policy statement, and to deter non-compliance with the rules relating to such misuse to protect consumers from the relevant harm, pursuant to our principal duty.
- 4.19 Moreover, as set out in the policy statement, Ofcom's approach when assessing whether to take enforcement action in respect of abandoned and silent calls has been, and continues to be, to ensure that users of ACS technology take steps to avoid making abandoned and silent calls, and that when such calls are made, steps are taken to reduce the degree of harm caused<sup>44</sup>.
- 4.20 ACS technology is used by call centres to improve efficiency by maximising the amount of time call centre agents spend speaking to consumers. Persons using these technologies may pass the costs savings that these technologies allow on to consumers. However, if not robustly and properly managed, a side effect of these technologies may be the generation of abandoned and silent calls resulting in consumer harm.
- 4.21 Ofcom recognises that a balance is needed between the positive efficiency benefits of ACS on the one hand, and the potential for these technologies to cause consumer harm on the other. In recognition of the benefits of ACS when properly managed, Ofcom does not enforce the persistent misuse provisions of the Act against their use *per se*, but has put in place guidelines in respect of their use (the policy statement) so as to reduce the possibility of harm and to set out when we would prioritise enforcement.
- 4.22 For example, the policy statement sets out the, "*abandoned call rate formula*," which provides that the abandoned call rate shall be no more than three per cent of live calls per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over a 24 hour period. This provides ACS users with a margin for error, balancing possible efficiencies with the need to protect consumers from harm. It also means, however, that, where this threshold is breached, there is intrinsically serious conduct that Ofcom is all the more likely to regard as serious because a margin for error has already been allowed and has been exceeded.
- 4.23 Sambora Communications Incorporated's persistent misuse during the Relevant Period in respect of which Ofcom is taking this enforcement action involved it making multiple abandoned calls during each of six separate 24 hour periods. Ofcom estimates, on the basis of the evidence available, that Sambora Communications Incorporated made approximately 4,320 such calls in total on those days and on which the abandoned call rate exceeded three per cent of live calls.
- 4.24 Sambora Communications Incorporated's persistent misuse also involved it making multiple abandoned calls and failing to ensure that an information message was

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<sup>43</sup> Market Research published on 23 May 2014, [http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance\\_calls\\_research/](http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance_calls_research/)

<sup>44</sup> Annex 1, the policy statement (4.1).

played – we estimate it made approximately 2,537 such silent calls during the Relevant Period. Ofcom considers the failure to play an information message in the event of an abandoned call to be a more serious matter, as silent calls are more likely, as reflected in the evidence described in this statement, to give rise to anxiety and distress (and limit the means for consumers to mitigate those effects; i.e. the calling party's identity and a telephone number to make a return call).

- 4.25 In addition, Sambora Communications Incorporated's persistent misuse also involved the failure to include an appropriate number in the information message played in the event of an abandoned call. Sambora Communications Incorporated failed to do this on 36 days of dialling during the Relevant Period in respect of approximately 13,791 relevant calls (this excludes the six days of dialling that occurred between 2 October to 8 October where no information message was played). Ofcom considers the failure to play an appropriate information message in the event of an abandoned call to be a serious matter, as this would have hindered the ability of consumers to return the call and decline further marketing calls from Sambora Communications Incorporated.
- 4.26 Ofcom accordingly considers that in this case the contravention has serious aspects and there is a need for a penalty to deter contraventions of this kind.

### **Degree of harm caused by the contravention**

- 4.27 We have given consideration to the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants.
- 4.28 Sambora Communications Incorporated argued in the Representations that there was, "...no harm caused as a result of the contravention..." It has argued that:
- a) the period of 2 to 8 October 2014 when no information message was played was, "*very isolated*" and that, "*remedial action was taken immediately to avoid any further subsequent errors.*"
  - b) Call recipients could have identified the phone number for Sambora Communications Incorporated's call centre by dialling 1471; and the use of the name Lead Performance in the information message, "*..would not have caused any return caller difficulties in terms of declining to receive further calls*"; and
  - c) "*The abandoned call rate limit of 3 per cent was only exceeded for a limited period on six occasions between 5 and 18 October 2013.*" In addition, the average abandoned call rate across the whole relevant period was 1.99 per cent.
- 4.29 We have regard to section 128(5) of the Act, which provides that a person misuses an electronic communications network or electronic communications service if the, "... effect or likely effect of which is to cause another person to unnecessarily suffer annoyance, inconvenience or anxiety." As set out in the policy statement<sup>45</sup> and in the Section 128 Notification, and based on the evidence set out therein, it is Ofcom's view that the effect or likely effect of making abandoned and silent calls is to cause other persons to suffer unnecessary annoyance, inconvenience or anxiety<sup>46</sup>. This is

<sup>45</sup> Annex 1, policy statement (1.6).

<sup>46</sup> Annex 18, Section 128 Notification (1.5).

supported by the evidence in Ofcom's market research described elsewhere in this document.

- 4.30 We also take into account that, in our determination, Sambora Communications Incorporated exceeded an abandoned call rate of three per cent of live calls over six separate 24 hour periods making a total of approximately 4,320 abandoned calls. It also made multiple abandoned calls where no information message was played, resulting in approximately 2,537 silent calls between the period 2 October to 8 October 2013. The failure to play any information message in the event of an abandoned call means that the harmful effects of silent calls are greater because call recipients' abilities to identify who called them and make return calls declining further contact (and so mitigate the harm caused) is hindered (although, for completeness, we acknowledge that, in this case, Sambora Communications Incorporated did present a valid CLI number).
- 4.31 Sambora Communications Incorporated also made multiple abandoned calls where the information message included in the event of an abandoned call failed to include an appropriate number that the call recipient could use to opt out of future marketing calls (again hindering call recipients' abilities to limit the harm suffered). It failed to do this in respect of approximately 13,791 abandoned calls during the Relevant Period (excluding the period 2 October and 8 October 2013 where no message was played).
- 4.32 Ofcom acknowledges that Sambora Communications Incorporated did present a valid CLI number which would have enabled call recipients with caller display or who dialled "1471" to obtain a number and to then return the call to decline further calls. This helped to demonstrate that the non-compliance was not part of a wider strategy to frustrate attempts by consumers to identify the source of calls or decline further calls. However, in the information message played in the event of an abandoned call Sambora Communications Incorporated identified another organisation – Lead Performance – rather than itself as the person on whose behalf the abandoned call was made within the information message. The Representations stated that, "*Lead Performance*" was a survey name and would not have caused any return caller difficulties in terms of declining further calls from [Sambora Communications Incorporated]." However, it is Ofcom's opinion that the inclusion of "Lead Performance" in the recorded message is likely to have exacerbated the harm caused by excluding an appropriate number for the recipient to contact where recipients looked up the number for Lead Performance in an attempt to return the call and decline further ones from Sambora Communications Incorporated.
- 4.33 On these bases, Ofcom considers that Sambora Communications Incorporated would have generated actual or potential consumer harm during the Relevant Period in a significant number of those relevant cases, and that the harm was likely to have been serious in some cases. That harm should be reflected in the penalty imposed.

### **The duration of the contravention**

- 4.34 In relation to the issue of the duration of the contravention, it is important to note that for the purposes of exercising its enforcement powers in an efficient, appropriate and proportionate manner and so that parties do not have to provide undue amounts of information, Ofcom may select a timeframe within which it bases an investigation. This timeframe is known as the Relevant Period and its duration is determined on a case by case basis. In the present case, a seven week period was selected as the Relevant Period, between 1 September 2013 to 19 October 2013.

- 4.35 The Representations stated that, “... *the contravention was for a very limited period. The 3% abandoned call rate was only exceeded between 2 and 18 October 2013 and only on six of those days.*”
- 4.36 Our view is that the duration of the notified non-compliance cannot be dismissed in this way, not least because Sambora Communication Incorporated made multiple abandoned calls across 36 days where the information message played in the event of an abandoned call failed to include an appropriate number that the call recipient could use to return the call and opt out of future marketing calls. In addition, on the remaining six days on which Sambora Communication Incorporated made outbound calls during the Relevant Period, it failed to play an information message in the event of abandoned call. Significance attaches to these points.

### **Any gain (financial or otherwise) made by Sambora Communications Incorporated as a result of the contravention**

- 4.37 Sambora Communication Incorporated’s failure to maintain an abandoned call rate of less than three per cent during six separate 24 hour periods across the Relevant Period may have resulted in Sambora Communication Incorporated benefitting as a result of its failure to follow the principles set out in the policy statement and carrying out the persistent misuse. It may also have benefited by not including an appropriate number in the information message played in the event of an abandoned call in that this measure may have discouraged abandoned call recipients from contacting Sambora Communication Incorporated and opting out of future marketing calls.
- 4.38 The Representations argued that, far from making a gain, Sambora Communications Incorporated had incurred substantial trading losses in the period in question.
- 4.39 With regards to any gain, financial or otherwise made by Sambora Communications Incorporated as a result of the contraventions, we have not taken this factor into account in the determination of the penalty amount because we do not have direct evidence of any such gain in this case. We note the losses made by Sambora Communications Incorporated in the period, while noting more broadly that overall trading losses by a company do not necessarily mean there is no gain from a particular regulatory breach (i.e. losses may have been greater in the absence of the breach).

### **Steps taken by Sambora Communications Incorporated to remedy the consequences of the contravention**

- 4.40 Sambora Communications Incorporated noted in the Representations that they will, “...*write to all of those recipients affected by the contravention to offer their sincere apologies for any inconvenience caused. Whilst [Sambora Communications Incorporated] would have preferred to also offer monetary compensation, they are unable to do so, as they simply for not have the funds available.*” At the Oral Representations, Sambora Communications Incorporated provided an update on how it was progressing on this point, “*What the company are doing at the moment is compiling a database of names and number and that is a list of those we believe are the recipients of the abandoned silent calls and those that didn’t receive a proper message as well.*” Sambora Communications Incorporated indicated that it was aiming to complete this by Christmas 2014.
- 4.41 Affected consumers suffered harm as a result of Sambora Communications Incorporated’s actions evidenced by the complaints Ofcom received (as summarised at paragraph 2.23). As previously noted, Ofcom takes into account that whilst

Sambora Communications Incorporated intends to write to those individuals that received an abandoned or silent call during the Relevant Period to apologise, it is not intending to include any payment such as a gift voucher to recognise the annoyance, inconvenience or anxiety that may have been caused. Whilst appreciating the reasons why the company feels unable to offer further recompense in its current financial position, it is our view that Sambora Communications Incorporated is in the process of taking some, but not all, steps to remedy the consequences of the notified misuse and the penalty imposed should reflect this.

### **Whether in all the circumstances Sambora Communications Incorporated took appropriate steps to prevent the contravention**

- 4.42 In Ofcom's view, Sambora Communications Incorporated failed to take all appropriate steps to prevent the contravention.
- 4.43 In reaching this view we have regard to the following factors. These include that over the following periods of time, in addition to the publication of the policy statement, Ofcom took the following actions to raise ACS users' awareness of the importance of compliance:
- i) Ofcom published an open letter on 20 December 2010<sup>47</sup> addressed to industry stating that enforcement action would be taken should the policy statement not be followed and that companies would be expected to be operating in accordance with it by 1 February 2011. In particular, it alerted industry to the increase in the maximum penalty for persistent misuse from its previous level of £50,000 to £2 million.
  - ii) Ofcom published another open letter on 21 May 2012<sup>48</sup>. This letter was again addressed to industry and set out Ofcom's current approach when assessing whether to take enforcement action for persistent misuse caused by abandoned and silent calls. It described the steps we expect ACS users to take to avoid making these calls, and if such calls are made, to limit consumer harm. One of these steps was, "*ensuring an abandoned call rate ... of no more than 3 per cent of live calls per campaign.*"
  - iii) Ofcom published another open letter on 20 March 2013<sup>49</sup> in co-ordination with the Information Commissioner's Office. This letter was again addressed to industry and reinforced the importance of complying with the legal and regulatory measures in place to protect consumers from harm.
- 4.44 In this context we note that Sambora Communications Incorporated was incorporated under the Companies Act of Guyana on 7 June 2011<sup>50</sup>. Ofcom therefore believes that Sambora Communications Incorporated should have been aware of at least the two most recent open letters as they related specifically to Sambora Communications Incorporated's business practices through the use of a call centre contacting consumers in the UK. Sambora Communications Incorporated should have been fully

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<sup>47</sup> Annex 2, First open letter to industry stakeholders dated 20 December 2010,

[http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/acs\\_users.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/acs_users.pdf)

<sup>48</sup> Annex 4, Second open letter to industry stakeholders dated 21 May 2012,

[http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/Open\\_letter\\_to\\_stakeholders.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/Open_letter_to_stakeholders.pdf)

<sup>49</sup> Annex 14, Third open letter to industry stakeholders dated 20 March 2013,

[http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/ICO\\_Ofcom\\_letter\\_200313.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/ICO_Ofcom_letter_200313.pdf)

<sup>50</sup> Annex 22, Companies Act of Guyana, Certificate of Incorporation: Sambora Communications Incorporated (company number 6776).

aware of the steps it, as an ACS user, should have taken to avoid persistently misusing electronic communications networks and services and the possible sanctions that may apply should it do so. In the Representations, Sambora Communications Incorporated stated that they were unable to confirm whether their former Chief Executive Officer was, "... aware of Ofcom's open letters of 20 December 2010, 21 May 2012 and 20 March 2013," but that does not really address its corporate responsibility.

- 4.45 Ofcom also notes that Sambora Communications Incorporated was a member of the Direct Marketing Association (the "DMA") during the Relevant Period. The DMA is an industry body whose membership is contingent on ACS users adhering to its *Direct Marketing Code of Practice*. Sambora Communications Incorporated produced a PowerPoint presentation that [redacted] – one of the third parties it made calls on behalf of during the Relevant Period – stated it used to, "explain its working practices and compliance procedures" to [redacted] when they were considering entering into a commercial agreement with Sambora Communications Incorporated. This presentation is also publicly available at the Sambora Communications website<sup>51</sup>.
- 4.46 The DMA confirmed to Ofcom on 14 August 2014 that Sambora Communications Incorporated was indeed a member during the Relevant Period. It also stated that, "Any new member undergoes a compliance assessment before becoming a full member. It is a requirement of membership that companies come up to the standard set by the DMA Code. If they are involved in telemarketing in any way they will be asked about their compliance with Ofcom's statement as well as PECR and other legislation"<sup>52</sup>. The *Direct Marketing Code of Practice* in place at the time of the Relevant Period, included within this document as Annex 22, provides the following conditions members agree to comply with<sup>53</sup>:
- i) Rate of abandoned calls (21.32) – "The dialling equipment must at all times be adjusted to ensure that the rate of call abandoned is no more than 3% of live calls per campaign (i.e. across call centres) or per call centre (i.e. across campaigns) over any given 24 hour period. If this this rate is exceeded the Commission will take action as defined under section 4 of the Code".
  - ii) Information message in the event of an abandoned call (21.33) – "In the event of an abandoned call (other than an AMD false positive), a very brief recorded information message must be played no later than 2.0 seconds after the telephone has been picked up or within two seconds of the call being answered i.e.: i) no later than two seconds after the telephone has been picked up; or ii) no later than two seconds after an individual begins to speak (or 'start of salutation') whichever is more applicable to the technology deployed".
  - iii) Contents of the information message (21.43) – "The information message must contain at least the following information: i) the identity of the organisation on whose behalf the call was made (which will not necessarily be the same organisation that is making the call) ii) details of a special services (080 – no charge) or a Special Services basic rate (0845 only) or a Geographic Number (01/02) or a UK wide number at a geographic rate (03) number the recipient can contact so they have the possibility of declining to receive further marketing calls from that organisation and iii) the message

<sup>51</sup> See slide 7 - <http://samboracommunications.com/media-pack/>.

<sup>52</sup> Annex 15, email correspondence between Ofcom and the DMA dated 14 August 2014.

<sup>53</sup> Annex 16, *Direct Marketing Code of Practice* (dated 2012).

*must not include any marketing material and must not be used as an opportunity to market to the recipient.”*

4.47 The above points draw on the wording in Ofcom’s policy statement. In the Representations, Sambora Communications Incorporated stated that, “[Sambora Communications Incorporated] *did take guidance from the DMA and were fully compliant with the high standards required by their Code of Practice.*” Ofcom therefore believes that as a DMA member during the Relevant Period, Sambora Communications Incorporated should have been sufficiently aware of the steps it, as an ACS user, should have taken to avoid persistently misusing electronic communications networks and services.

4.48 We also take account that Ofcom issued all six of the third parties that Sambora Communications Incorporated told Ofcom that it made calls on behalf of during the Relevant Period with information requests under section 135 of the Act<sup>54</sup>. Three of these parties provided copies of documents<sup>55</sup> evidencing their contractual arrangements with Sambora Communications Incorporated to include questions on its behalf in outbound calls made during the Relevant Period. The following are extracts from those documents that note the stipulation each of these parties made that Sambora Communications Incorporated act in accordance with the law relating to persistent misuse and Ofcom’s policy statement:

- i) *“The Supplier (Sambora Communications Incorporated/ Limited) further warrants that they have obtained all necessary permission to contact the consumer and where they do have permission to contact the consumer, they have carried out their screening obligations, for example (and as needed) TPS, MPS, Death Register, and Gone Away File **and shall comply staidly with all requirements of Ofcom, the Data Protection Act 1998, the DMA Code of Practice 2006, the Privacy and Electronic Communications Regulations 2003 and the Communications Act 2003 during the process of collecting these Consumer Leads and managing the data** (emphasis added).”*<sup>56</sup>
- ii) *“The Partner further warrants that they have obtained all necessary permission to contact the consumer and where they do have permission to contact the consumer, they have carried out their screening obligations, for example (and as needed) TPS, MPS, Death Register, and Gone Away File **and shall comply staidly with all requirements of Ofcom, the Data Protection Act 1998, the DMA Code of Practice 2006, the Privacy and Electronic Communications Regulations 2003 and the Communications Act 2003 during the process of collecting these Consumer Leads and managing the data** (emphasis added).”*<sup>57</sup>

This document also provides, “Data partner agrees to comply at all times with UK’s Ofcom regulations, including, but not limited to:

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<sup>54</sup> Annex 18, Section 128 Notification (1.32).

<sup>55</sup> The three third parties being [X],[X] and [X].

<sup>56</sup> Annex 12, *Campaign Service Agreement: [Deleted] Telephone Lead Generation* signed by [X] and Sambora Communications Limited on 22 August 2013 for commencement of services on 1 October 2013.

<sup>57</sup> Annex 13, *Campaign Service Agreement: [Deleted] Telesurvey* signed for and on behalf of by [X] and Sambora Communications Incorporated on 1 September 2013.

- *Dropped / Silent Calls. This needs to remain below 3% and where a dropped call take place there needs to be a voice mail message available.”*
- iii) *“All suppliers must adhere to the Data Protection Act 1998, Privacy and Electronic Communications Regulations and Ofcom Regulations and take relevant steps to ensure these are met. All records supplied must be reliable, accurate, updated and collected reasonably and lawfully. Abandon call rate, nuisance call rate and silent call rate and silent call rate must not go beyond maximum allowable rate of 3% of live calls. All suppliers must maintain and observe the Guidelines on the churning of leads.”<sup>58</sup>*

In its response to the information request, [S<] further state that, “[S<]’s purchase orders refer to our terms and conditions which require that Sambora must comply with the relevant legislation in this area.”<sup>59</sup>

- 4.49 These are further bases on which Sambora Communications Incorporated should have been fully aware of its obligations and the steps, as an ACS user, it should have taken to avoid persistently misusing electronic communications networks and services.
- 4.50 In its Representations, Sambora Communications Incorporated identified senior members of staff, who have since left the business, who had been allocated responsibility for compliance. Ofcom accepts that steps were taken to allocate responsibility at an appropriately senior level, and this has been taken into account in determining the level of the penalty.
- 4.51 However, that the misuse occurred indicates that the steps taken to prevent the contravention were not effective. Ofcom considers that it is Sambora Communications Incorporated’s responsibility to take steps to monitor and assess on-going compliance with the law on persistent misuse (in light of Ofcom’s policy statement), including non-compliance that may be the result of a mistake. Therefore Sambora Communications Incorporated should have ensured that the ACS was working correctly in the event of an abandoned call, including the playing an appropriate information message. For example, Sambora Communications Incorporated could have ensured that regular test calls were made to check it was acting consistently with the policy statement and could have had better processes in place to monitor and ensure that its abandoned call rate did not go above three per cent of live calls in any 24 hour period. Sambora Communications Incorporated could also have had in place the other measures it has told Ofcom it implemented on becoming aware of the contravention. The absence of any reference to a number included in the recorded information message played in the event of an abandoned call, indicates to Ofcom that Sambora Communications Incorporated does not consider this to be a necessary step to take during the course of its operations.
- 4.52 Accordingly, our regulatory judgement is that Sambora Communications Incorporated did take some, but did not take all sufficient effective steps, having regard to the policy statement, to prevent the relevant persistent misuse. We have taken this into account in our provisional determination of the penalty amount.

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<sup>58</sup> Annex 14, *Additional Lead Generation Terms and Conditions*. [S<] states, “*These terms and conditions are appended to [S<] General Terms and Conditions. A signed Order Confirmation confirms agreement of this appendix.*”

<sup>59</sup> Annex 14, Response from [S<] the information request received on 11 April 2014.

## **Whether Sambora Communications Incorporated has a history of contraventions**

- 4.53 Sambora Communications Incorporated does not have a history of contraventions in respect of the persistent misuse provisions. Accordingly, we have taken the absence of a history of contraventions into account in the provisional determination of the penalty amount.

### **The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur.**

- 4.54 Our assessment is that the persistent misuse in this case did not occur intentionally or recklessly.

- 4.55 In the Representations, Sambora Communications Incorporated stated that, *“it has always been and remains their intention to be fully compliant with Ofcom’s requirements ...”* The First Response stated the following:

*“We first heard there was a problem through an email from our technology provider [X] following communication from you on 8 October (2013). Our investigation revealed that the nuisance call recording, set up in the event of a caller not being connected to a live agent, had stopped working. This was rectified within an hour”*<sup>60</sup>.

- 4.56 Sambora Communications Incorporated also indicated that it took immediate steps to address what it refers to as the *“nuisance call ratio”* exceeding, *“the legal limit”* at the end of the Relevant Period. These steps are referenced at paragraph 3.17(b). The Representations provided further information on the steps taken, as outlined at paragraphs 3.20 – 3.21.

- 4.57 Sambora Communications has within the Representations detailed how it has addressed the absence of an appropriate phone number in the information message played in the event of an abandoned call. This was discussed at paragraph 3.19.

- 4.58 While Ofcom considers that Sambora Communication Incorporated should have done more to prevent the contravention, it is our view that Sambora Communication Incorporated’s contravention of the persistent misuse provisions did not occur intentionally. When contraventions came to the attention of senior management, the evidence indicates they took prompt measures to address the notified misuse with regards to the number of live calls it abandoned over separate 24 hour periods and including recorded information messages in the event of an abandoned calls once it identified this facility was absent between 2 October and 8 October 2013.

- 4.59 As to recklessness, we consider this to mean being aware of risk in a course of action and deciding to take that course ignoring the risk, or paying no heed to whether any such risk exists. Following consideration of the First Response, our view is that Sambora Communication Incorporated should always have had in place the measures it implemented once it became aware of the contravention. That is, a Director, *“tasked with monitoring the nuisance ratio on a daily basis, and will be sent screen shots indicating the nuisance ratio at the end of each day”* and its technology supplier having a, *“watching brief of the nuisance ratio with the instruction to send an alert to Directors if it looks close to exceeding the daily legal limit.”* In this regard, the

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<sup>60</sup> Annex 7, First Response (page 2).

notified misuse would have been identified earlier and possibly minimised. Ofcom believes that the ability to effectively monitor its call centre operations was within Sambora Communications Incorporated's capability based upon the quote in its Media Pack where it claims it has an, "*Experienced management team fit for purpose – over 100 years combined managing contact centres.*"<sup>61</sup> We do not consider these shortcomings amount to recklessness, however.

- 4.60 Accordingly, while we consider that not all steps were taken to prevent the notified misuse from occurring, we do not consider misuse was intentional or reckless, and note senior management responded promptly on becoming aware of breaches.

### **Whether there has been a failure to keep adequate records**

- 4.61 Ofcom issued Sambora Communications Limited information requests on 22 November 2013 and 8 January 2014 and to Sambora Communications Incorporated on 7 March 2014. The responses provided were timely, and gave the information requested. Ofcom therefore believes that Sambora Communications Incorporated has demonstrated an ability to keep adequate records. Accordingly, this has been taken into account in determining the penalty amount. In particular, the penalty amount has not been increased on account of any shortcomings in record-keeping.

### **Whether the contravention continued, or timely and effective steps were taken to end it, once Sambora Communications Incorporated became aware of it**

- 4.62 Following our careful consideration of the First, Second and Third Responses in addition to the Representations and Oral Representations, Ofcom's judgment is that Sambora Communications Incorporated took appropriate steps to bring the relevant misuse to an end once it became aware of it, as set out at paragraphs 3.17 to 3.21.
- 4.63 We have taken this into account in our determination of the penalty amount.

### **Co-operation with Ofcom's investigation**

- 4.64 Ofcom's ability to protect consumers and fair dealing businesses effectively, and to perform our statutory duties, is impeded if parties under investigation fail to provide accurate, and timely, co-operation with our investigations. In that light, the Penalty Guidelines state that, "*Ofcom may increase the penalty where the regulated body in breach has failed to cooperate fully with our investigation*"<sup>62</sup>.
- 4.65 In this case, Sambora Communications Limited and Sambora Communications Incorporated were punctual in their responses to Ofcom's statutory information requests. It also co-operated promptly where Ofcom sought clarifications to the information provided and Mr Faizal Khan, Commercial Director, attended the Oral Representations in person, despite being based in Georgetown, Guyana.
- 4.66 We note that Sambora Communications Incorporated did not make any representations on the Section 128 Notification. It was not obliged to do so, however and, notwithstanding the lack of such representations, our overall assessment is that Sambora Communications Incorporated co-operated with Ofcom in material respects. Accordingly, we do not propose to increase the provisional penalty on this account.

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<sup>61</sup> See slide 7, <http://samboracommunications.com/media-pack/>.

<sup>62</sup> Annex 4, Penalty Guidelines.

### **The extent to which the level of penalty is proportionate, taking into account the size and turnover of Sambora Communications Incorporated**

- 4.67 Sambora Communications Incorporated describes itself as, “*a high quality, cost effective provider of outsourced contact center services and solutions*”. In the Oral Representations, Sambora stated that it was a small call centre with 60 seats.
- 4.68 As a company based in Guyana, Sambora has not provided financial statements to Companies House in the UK. The Representations do, however, include audited *Balance Sheet and Profit and Loss* for 2011 and 2012 and a draft *Balance Sheet and Profit and Loss* for 2013. These state that revenue for 2012 was Guyanese \$[redacted] (approximately £[redacted]) and for 2013 was Guyanese \$[redacted] (approximately £[redacted]).
- 4.69 In Ofcom’s view, the level of its turnover and its size indicates that Sambora Communications Incorporated is a small business. Any penalty Ofcom imposes must be an appropriate and proportionate penalty for the misuse involved in this case such as would deter a business of that size from persistent misuse. We have taken that into account in determining the proportionality of the penalty amount.

### **Further considerations relating to the particular circumstances of Sambora Communications Incorporated**

- 4.70 Ofcom’s Penalty Guidelines state that, “*factors taken into account in each case will vary, depending on what is relevant*” but give examples of potentially relevant factors each of which are addressed in this notification. The Representations made a number of additional number of points emphasising exceptional circumstances that the company considers apply in this case.
- 4.71 These include that the business is a relatively new start-up by two businessmen, Mr Faizal Khan and his [redacted] ([redacted]), with no prior experience in this area. Loans were taken out by the company and secured personally. Sambora Communications Incorporated incurred substantial losses (in the context of a small business) in its first two years of operation and, although progress has been made toward operating profitability in 2014, the company’s position remains one of a small new business operating at the margins of viability, for whom a substantial fine may in itself affect its ability to continue. Sambora Communications Incorporated noted that Mr Faizal Khan had moved from a predominantly sales position in the United Kingdom to oversee changes to the business, including in relation to its compliance with regulatory requirements, in Guyana following the departure of the previous CEO. He had, Sambora Communications Incorporated said, personally overseen the operational changes referred to above which had secured substantial improvements in performance.
- 4.72 Ofcom does not consider that a trading loss, in itself and in general, is a factor that should reduce the level of a penalty (and nor should profitability necessarily increase a penalty). For this reason, our Penalty Guidelines explicitly refer to proportionality in relation to turnover rather than other measures of financial well-being. However, in the particular circumstances of this case, we consider that the detailed evidence provided indicates that this is an exceptional case where there is a material risk that a large penalty could make the difference between continued viability and closure of a business that (as noted above) has taken relevant steps since the contravention to ensure it is now operating within regulatory requirements.
- 4.73 Ofcom also does not consider that a business being a relatively new start-up and/or run by a relatively inexperienced businessman should necessarily reduce a

penalty. However, we have also taken into account that this is a case where the individual who has clearly taken on personal responsibility for securing future compliance, We note that Mr Khan travelled from Guyana to attend and make oral representations, that he demonstrated his understanding that the future success of the business is dependent, in part, on not repeating the regulatory failures that are the subject matter of this notification, and that he has personally overseen changes to the business since the contravention.

- 4.74 We have taken the exceptional aspects described into account as set out. They form part of our in the round assessment of the appropriate and proportionate penalty, having regard to our Penalty Guidelines, to secure the central objective of deterrence in all the circumstances of this case. That penalty would, absent these exceptional factors, have been significantly higher.

### **Relevant precedents set by previous cases**

- 4.75 The Penalty Guidelines also indicate that we will, in determining a penalty, have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and the context of each case. We have considered them here.
- 4.76 Under section 128 of the Act, Ofcom has taken action against companies for persistently misusing an electronic communications network or service, most notably in relation to the making of abandoned and/or silent calls. Under section 130 of the Act, Ofcom has imposed penalties for persistent misuse in respect of twelve companies since June 2006<sup>63</sup>.

### **Qualifications as to any weight which may be attached to the pre-2011 persistent misuse cases**

- 4.77 While, as noted above, Ofcom imposed penalties for persistent misuse of an electronic communications network or service prior to 2011, we consider these pre-2011 precedents to be of limited assistance in the determination of this case for the following reasons:
- the pre-2011 cases were determined prior to the introduction of secondary legislation<sup>64</sup> increasing the maximum financial penalty in respect of persistent misuse from £50,000 to £2 million;
  - the pre-2011 cases were determined on the basis of Penalty Guidelines which have now been superseded by the current Penalty Guidelines;
  - the pre-2011 cases related to persistent misuse having regard to a policy statement which has now been superseded by the current policy statement;
  - the period of investigation (i.e. Relevant Period) has been reduced in duration, for the purposes of assisting efficient enforcement, from approximately seven

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<sup>63</sup> [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_905/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/)

<sup>64</sup> [http://www.legislation.gov.uk/uksi/2010/2291/pdfs/ukxi\\_20102291\\_en.pdf](http://www.legislation.gov.uk/uksi/2010/2291/pdfs/ukxi_20102291_en.pdf)

months to seven weeks<sup>65</sup> and therefore the figures in respect of the number of abandoned/silent calls do not provide a helpful comparison; and

- the penalty in each case is assessed against the circumstances of that particular case in the round.

4.78 Accordingly, we do not consider the pre-2011 cases to be particularly relevant in light of the revised variables and this section does not therefore purport to be a comprehensive analysis of each case as compared to and distinguished from the present case. Nevertheless, we note that:

- Ofcom has held that there is a need for penalties to act as a sufficient incentive to comply with section 128 of the Act, and having regard to the policy statement, across industry and for the target of the investigation specifically.<sup>66</sup>
- Ofcom has held that the seriousness of harm is linked to the number of abandoned and/or silent calls made<sup>67</sup>, with silent calls being particularly serious<sup>68</sup>, but even a relatively small number of calls may be, “serious”<sup>69</sup>.
- In the majority of pre-2011 cases, Ofcom found no direct evidence to suggest that senior management were aware or ought to have been aware of the respective contraventions.
- Ofcom has held that, “*it is the Company’s responsibility to ensure that its call centres comply with its legal obligations...In these circumstances, Ofcom does not consider that the Company’s contraventions can be attributed to circumstances beyond the Company’s control nor to the actions of a third party*”<sup>70</sup>.
- In many of the pre-2011 cases, evidence was provided of steps taken to secure that the misuse was both brought to an end and not repeated<sup>71</sup>.

**Comparison and distinction between the present case and recent post 2011 persistent misuse cases, HomeServe PLC (“HomeServe”), RWE npower PLC (“npower”), TalkTalk PLC (“TalkTalk”), Ageas Retail Limited (“Ageas”), Green Deal Savings Limited (“GDS”) and MYIML Limited (“MYIML”).**

4.79 The most recent persistent misuse cases were determined on 18 March 2012, 6 December 2012, 18 April 2013, 1 October 2014, 1 December 2014 and 2 December 2014. The first imposed a penalty of £750,000 on HomeServe, the second imposed a penalty of £60,000 on npower, the third imposed a penalty of £750,000 on TalkTalk, the fourth imposed a penalty of £10,000 on Ageas, the fifth imposed a penalty of £20,000 on GDS and the sixth imposed a penalty of £20,000 on MYIML.

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<sup>65</sup> Note the duration of the Relevant Period in a particular case may vary depending on the facts and circumstances of that case.

<sup>66</sup> See, in particular, Complete Credit Management, March 2008.

<sup>67</sup> Annex 3, policy statement, A1.84.

<sup>68</sup> See e.g. Barclaycard, September 2008 [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_905/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/)

<sup>69</sup> See e.g. Complete Credit Management, March 2008 [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_905/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/)

<sup>70</sup> Space Kitchens and Bedrooms (Holdings) Ltd, January 2007.

<sup>71</sup> See e.g. Equidebt Limited (December 2008), Abbey National Plc (March 2008), Complete Credit Management (March 2008).

- 4.80 These cases were determined:
- a) on the basis of the (current) policy statement (published on 1 October 2010);
  - b) on the basis of the (current) Penalty Guidelines (published on 13 June 2011);
  - c) after the introduction of secondary legislation increasing the maximum financial penalty in respect of persistent misuse from £50,000 to £2 million;
  - d) in respect of a period of investigation (i.e. Relevant Period) of seven weeks; and
  - e) in consideration of the circumstances of the case in the round.

4.81 The key features of the HomeServe case, the npower case, the TalkTalk case, the Ageas case, the GDS case, the MYIML case and the present case are considered below in terms of the factors set out in the Penalty Guidelines.

*Deterrence and seriousness of the contravention*

- 4.82 Ofcom considered that the persistent misuse in the HomeServe and TalkTalk cases should be characterised as very serious. In both those cases, that seriousness was a significant factor in the substantial penalty imposed.
- 4.83 The contravention of section 128 during the seven week Relevant Period in the HomeServe case was significant, involving 42 separate 24 hour periods where it exceeded the three per cent abandoned call rate and generated 14,756 abandoned calls. Of those 42 days, 27 of them involved HomeServe making one or more calls to that specific number within the same 24 hour period, resulting in 36 218 calls which were inconsistent with the 24 hour policy set out in the policy statement.
- 4.84 TalkTalk, meanwhile, amongst other compliance failures, exceeded an abandoned call rate of three per cent of live calls over a 24 hour period by a substantial amount on at least four separate occasions during the Relevant Period (1 February 2011 to 21 March 2011). This translated to approximately 9,000 calls. It also failed to ensure that an information message was always played in the event of an abandoned call at the Teleperformance Cape Town call centre across at least one campaign, so these calls were in effect silent calls, which Ofcom considers to cause more serious harm than abandoned calls. It also persistently made 512 abandoned calls over 29 days at the McAlpine call centre. In the HomeServe case and in the TalkTalk case it was deemed appropriate to impose a penalty reflecting, amongst other things, a serious contravention which would send a deterrent message to the notified party and to industry.
- 4.85 In the npower case, Ofcom found that the relevant conduct was serious but at the lower end of the scale. npower exceeded an abandoned call rate of three per cent of live calls over a 24 hour period on eight separate occasions during the Relevant Period. On those eight days, the volume of abandoned calls made was 1,756.
- 4.86 The scale of harm in the Ageas case was also at the lower end of the seriousness scale. In the Ageas case a three per cent abandoned call rate was exceeded on three separate occasions. Ofcom estimated, on the basis of the available evidence, that Ageas made approximately 148 abandoned calls in total on these days. Ofcom considered that this was a relatively small and less serious example of what, in Ofcom's regulatory judgement is an intrinsically serious contravention.

- 4.87 The GDS case was also considered as serious but at the lower end of the scale in comparison to the TalkTalk and HomeServe cases. Similarly to the present case, GDS failed to play an information message on 12,703 occasions during the Relevant Period, leading to silent calls. Ofcom considers that such silent calls, where no information message is played, are particularly likely to give rise to consumer harm
- 4.88 Ofcom considers the degree of harm caused by MYIML is likely to be of a broadly similar level to that generated by HomeServe and TalkTalk. This was reflected in the level of the penalty issued to MYIML (relative to the varying size of MYIML and both HomeServe and TalkTalk).
- 4.89 In this case, Sambora Communications Incorporated:
- (a) exceeded an abandoned call rate of three per cent of live calls over a 24 hour period on six separate occasions during the Relevant Period, making approximately 4,320 abandoned calls on those six days;
  - (b) failed to include a recorded information message in the event of an abandoned call during the period 2 October to 8 October 2013 (therefore generating approximately 2,537 silent calls); and
  - (c) failed to include an appropriate phone number in the information message, played in the event of an abandoned call, to enable the call recipient to decline further marketing calls from Sambora Communications Incorporated across 36 days of dialling during the Relevant Period in respect of approximately 13,791 relevant calls<sup>72</sup>,
- 4.90 We have taken the view that Sambora Communications Incorporated's contravention, like that in some of the cases described, has serious aspects.
- 4.91 Nevertheless, while the cases are informative in different degrees in the present case, we also recognise the limitations in terms of comparability in each case. For example, the HomeServe, npower and TalkTalk cases involved companies with very considerably higher turnovers, whereas the MYIML and HomeServe involved sustained breaches of the 3% threshold over many 24 hour periods.

*Degree of harm caused by the contravention*

- 4.92 Ofcom was of the view that HomeServe, TalkTalk and MYIML generated a considerable degree of harm. It took into account the scale of the contravention and the harm suffered by recipients of the silent and abandoned calls during the Relevant Period. In contrast to the HomeServe, TalkTalk, MYIML and GDS cases, neither npower nor Ageas generated silent calls (which Ofcom considers cause more serious harm than abandoned calls), and both made smaller numbers of offending calls.
- 4.93 Like the HomeServe, TalkTalk, GDS and MYIML cases, there were a material number of silent calls in the present case, giving rise to particular concern (although the number was significantly lower than in the first three of those). A substantial number of abandoned calls were also generated; although there were fewer and over fewer days than in the MYIML and HomeServe cases. These factors are reflected in the level of the penalty (which would have been higher on this account, and given the

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<sup>72</sup> Annex 5, this value has been calculated by adding the number of abandoned calls in the Relevant Period outside of the period 2 October to 8 October 2013 when no message was played in the event of an abandoned call.

seriousness of the contravention, were it not for the presence of mitigating factors described in other parts of this document).

*Duration of the contravention*

- 4.94 In all of the most recent cases, persistent misuse occurring across all or most of a seven week period was considered, in itself, a significant duration for a contravention of a provision designed to prevent persons unnecessarily suffering annoyance, inconvenience or anxiety.
- 4.95 Ofcom holds a similar opinion with regard to the Sambora Communications Incorporated case, as set out above at paragraphs 4.34 to 4.36.

*Any gain (financial or otherwise) made as a result of the contravention*

- 4.96 In the present case, similarly to the most recent cases, Ofcom considers that it is possible Sambora Communications Incorporated derived *some* gain from its misuse, as described above. However, we do not have direct evidence of such gain and consequently this factor has not been taken into account in the level of the penalty.

*Steps taken to remedy the consequences of the contraventions*

- 4.97 HomeServe made representations regarding the steps it would take to remedy the consequences of its notified misuse. In summary, these stated that HomeServe would:
- a) provide compensation to a claimant upon HomeServe establishing from its records that the CLI of the claimant matched the CLI contacted while Answer Machine Detection technology was in operation;
  - b) issue a statement on its website about the offer of compensation;
  - c) communicated the offer of compensation in response to all press enquiries made to it; and
  - d) provide compensation to the individuals who lodged a complaint with Ofcom during the Relevant Period and to the individuals who had complained to HomeServe during the Relevant Period.
- 4.98 Ofcom concluded that HomeServe had committed to putting in place such steps as it considered appropriate for remedying the consequences of the notified misuse and this was taken into account in determining the penalty.
- 4.99 npower also took steps to remedy the consequences of its misuse. It stated that it would write to all those people who received abandoned calls on the eight relevant days and send them a £10 shopping voucher. npower was given due credit for this in Ofcom's determination of the penalty.
- 4.100 TalkTalk did not provide any evidence of steps taken to remedy the consequences of the contraventions (its representations denied liability in respect of the notified misuse). Accordingly, it was given no credit on this account in our assessment of the penalty imposed on it.

- 4.101 Ageas stated that it was taking steps to remedy the consequences of the notified misuse. Ofcom therefore also gave it due credit in respect of this factor in our determination of the penalty amount.
- 4.102 GDS did not provide any information on steps it has taken or intends to take to remedy the consequences of the notified misuse. Ofcom therefore gave GDS no credit on this account in our assessment of the penalty imposed on it.
- 4.103 MYIML took some (but not all adequate) steps to remedy the consequences of the notified misuse. We therefore gave MYIML some credit for taking these steps to remedy the harm. However, the reduction of the penalty was limited given that in our view MYIML did not take all adequate steps.
- 4.104 In the present case, and broadly similar to MYIML, Sambora Communications Incorporated intends to take some but not all relevant remedial steps. Accordingly, this has been reflected in our assessment of the penalty imposed on it, although we do also consider the detailed financial circumstances which limit the scope to provide compensation in this case.

*History of contravention*

- 4.105 Neither HomeServe, npower, Ageas, GDS or MYIML had a history of notification of contraventions in respect of the persistent misuse provisions. Consequently, in these cases, Ofcom did not consider this to be an aggravating factor in the penalty assessment. This is in contrast to TalkTalk whom Ofcom has penalised in respect of a previous persistent misuse contravention<sup>73</sup>.
- 4.106 Consistently with the HomeServe, npower, Ageas, GDS and MYIML cases, in the present case no previous persistent misuse contravention is to be taken into account in assessing the level of penalty imposed on Sambora Communications Incorporated.

*Whether in all the circumstances appropriate steps were taken to prevent the contravention*

- 4.107 In the HomeServe case Ofcom considered that HomeServe had failed to act consistently with the policy statement's principles and procedures (or do so effectively and promptly), or take other appropriate steps for preventing the notified misuse. It considered that the absence or ineffectiveness of the procedures had demonstrated HomeServe's failure to take appropriate (and timely) steps to prevent its notified contravention.
- 4.108 Similarly, Ofcom found that npower failed to take all appropriate (and timely) steps in order to prevent its notified misuse. Ofcom did however acknowledge that npower had taken steps to bring itself into compliance.
- 4.109 TalkTalk maintained that prior to its investigation it had in place a number of steps to meet the relevant requirements and to prevent possible contraventions. Ofcom determined in that case that if TalkTalk had better compliance strategies in place during the Relevant Period, it would have been able to identify compliance weaknesses and then been able to take steps to prevent them.

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<sup>73</sup> [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_905/carphonewarehouse/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/carphonewarehouse/)

4.110 Ofcom considered that Ageas, as an established ACS user, should have been fully aware of the steps it, as such a user, should have taken to avoid persistently misusing electronic communications networks and services and the possible sanctions that may apply should it do so.

4.111 In both the GDS and MYIML cases we considered that they had failed to take all appropriate steps to prevent the notified misuse before it occurred.

4.112 In our penalty assessment in the present case, we have similarly taken into account that Sambora Communications Incorporated failed to take all appropriate steps to prevent the notified misuse before it occurred (see paragraphs 4.42 - 4.52 above).

*The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur.*

4.113 In HomeServe, the senior management had received a report (during the Relevant Period) from an independent body engaged to assist a review of dialler operations. This report detailed findings and recommendations, and included a list of non-compliant matters. Ofcom stated that, *"it is apparent to Ofcom that senior management, upon receipt of this report, would have been aware not only that the Guidelines were not being followed but also of the seriousness and extent of the contraventions"* and that notwithstanding this was the state of their knowledge, it was not until two months later that testing was conducted which revealed a rate significantly higher abandoned call rate than three per cent.

4.114 In npower Ofcom accepted that senior management did not know that a contravention was occurring or would occur. In the TalkTalk case there was no evidence to suggest that senior management would have been aware of the contraventions, and this was also Ofcom's view in the Ageas, GDS and MYIML cases.

4.115 Our approach in the present case is consistent with these earlier ones. There is also no evidence to suggest that Sambora Communications Incorporated's senior management would have been aware of the contraventions, although we have noted that the lack of any reference to the inclusion of an appropriate phone number to be included in the recorded information message played in the event of an abandoned call, suggests this step was never part of Sambora Communications Incorporated operations during the Relevant Period. Despite this point, our penalty assessment does not include an amount on this account.

*Whether the contravention continued, or timely and effective steps were taken to end it, once Sambora Communications Incorporated became aware of it*

4.116 In the HomeServe and npower cases, Ofcom took the view that:

- they had not taken timely steps that were effective in bringing them into compliance once they had become aware of their contraventions; and
- this was another factor which added to the amount of any penalty imposed; but
- that exacerbation was mitigated by certain steps they took after Ofcom informed them of the investigation.

- 4.117 In the Ageas case Ofcom took the view that it took some steps to end the relevant misuse once it was aware, or should have been aware, of it, but it failed to take all the appropriate steps in a timely and effective manner.
- 4.118 In both the GDS and MYIML cases we considered that they took some, but not all, appropriate steps to end the relevant misuse once they became aware of it. We weighted this factor appropriately in our penalty assessment by giving GDS and MYIML credit and reducing the level of the penalties.
- 4.119 In the present case we consider that Sambora Communications Incorporated has taken all appropriate steps to end the misuse, as described above at paragraphs 3.17 - 3.21. Ofcom considers that Sambora Communications Incorporated has appeared to make these changes in a timely manner. This has been taken into account in our penalty assessment.

*Co-operation with Ofcom's investigation*

- 4.120 Ofcom acknowledged that in general HomeServe had provided full co-operation with the investigation. It had promptly provided the information as required and Ofcom stated that it, *"had no reason to believe that the information provided was inaccurate in any way."*
- 4.121 Ofcom found that npower had not cooperated fully with the investigation due to inaccurate material presented to Ofcom and this was taken into account in the level of its fine.
- 4.122 TalkTalk was punctual in its responses to Ofcom's statutory information requests and in the delivery of its representations. However, it did not provide all the required information in respect of one aspect of the investigation until after Ofcom made a number of requests.
- 4.123 Ageas did make some errors in the information used to calculate its abandoned call rates during the Relevant Period, but it co-operated promptly with Ofcom to resolve these errors.
- 4.124 Both GDS and MYIML were punctual in their representations to Ofcom's statutory information requests and in the delivery of their representations. It was therefore our view that both GDS and MYIML cooperated with our investigation and this was taken into account in assessing the level of penalties in these cases.
- 4.125 In the present case Sambora Communications Incorporated was punctual in its responses to Ofcom's statutory information requests and has provided representations to the Provisional Notification. It is therefore our view is that it cooperated with our investigation.

*Record-keeping*

- 4.126 In the TalkTalk case, in contrast to all of the other cases, there was a failure to keep records and a failure to take appropriate steps to provide a robust reasoned estimate of AMD false positives which meant that Ofcom was unable to determine the consistency of one call centre's actions with the policy statement. We regarded this as particularly serious.
- 4.127 We do not believe that the present case is similar to the TalkTalk case. Sambora Communications Incorporated was able to provide Ofcom with accurate information.

Therefore this has not been a factor Ofcom has taken into account in assessing the provisional penalty amount.

*The extent to which the level of penalty is proportionate, taking into account size and turnover*

- 4.128 In all of these cases the size and turnover is a relevant consideration in the determination of the proportionality of the penalty imposed. Ofcom considered that HomeServe, npower, TalkTalk and Ageas were all sizeable businesses with a significant turnover; whereas GDS and MYIML were relatively small companies and this indicated a much lower penalty.
- 4.129 In the present case, we note that Sambora Communications Incorporated is also a small business, and consistent with the GDS and MYIML cases, the penalty is set at a level taking this into account.

*Exceptional factors*

- 4.130 We also note that there are exceptional factors in Sambora Communications Incorporated's case as described in paragraphs 4.70 – 4.74 above. These reduce the penalty Ofcom would otherwise impose and account for some of the difference between that penalty and the penalties imposed in cases that, as set out above, had similar aspects.

### **Ofcom's conclusions on the penalty amount**

- 4.131 Any penalty Ofcom imposes on Sambora Communications Incorporated must be appropriate and proportionate to the contravention in respect to which it is imposed. Ofcom's central objective in setting a penalty is deterrence. An appropriate penalty would be one that secures this objective in a proportionate way. We have set out above the particular factors relevant to those requirements.
- 4.132 In particular, we have noted (having regard to our policy statement) that Sambora Communications Incorporated contravened the persistent misuse provisions during the seven week Relevant Period by exceeding an abandoned call rate of three per cent of live calls over a 24 hour period on six separate occasions, making in our estimate 4,320 abandoned calls; failed to include a recorded information message in the event of an abandoned call during the period 2 October to 8 October 2013, therefore generating 2,537 silent calls; and finally, failed to include an appropriate phone number in the information message to enable the call recipient to decline further marketing calls from Sambora Communications Incorporated across 36 days of dialling during the Relevant Period (it failed to do this in respect of 13,791 relevant calls).
- 4.133 As regards the weighting of the factors considered, it is our regulatory judgment that the following factors are of particular importance in the circumstances of this case and tend to add to the amount of an appropriate and proportionate penalty:
- (a) persistent misuse is inherently serious, more so in cases where a person exceeds the margin for error in the three per cent abandoned call rate;
  - (b) consumer harm is likely to have arisen from Sambora Communications Incorporated's notified misuse;

- (c) Sambora Communications Incorporated took some but failed to take all appropriate steps to prevent the misuse before it occurred and end it once it became aware (or should have been aware) of it; and
- (d) Sambora Communications Incorporated intends to take some but only limited steps, to remedy the consequences of the misuse notified to it under section 128 of the Act.

4.134 Ofcom's regulatory judgment is that the following factors tend to reduce the amount of an appropriate and proportionate penalty:

- (a) Sambora Communications Incorporated does not have a history of contraventions in respect of the persistent misuse provisions;
- (b) Sambora Communications Incorporated took appropriate steps to bring the relevant misuse to an end once it became aware of it; and
- (c) Sambora Communications Incorporated is a small business and as such there is a need to ensure that the penalty is proportionate to the size of the organisation.
- (d) We also take account of the exceptional circumstances currently being experienced by Sambora Communications Incorporated. On account of these, and the factors listed above, the penalty imposed on is significantly lower than it would otherwise have been.

4.135 On the basis of these factors, Ofcom's regulatory judgment is that a penalty of £8,000 would be appropriate and proportionate. This reflects that Ofcom considers cases of persistent misuse to be serious, even where this results from a mistake, since appropriate compliance checks should have identified this at an early stage; and that this is liable to be met with a penalty, to deter Sambora Communications Incorporated and others from engaging in that conduct. It also reflects each of the factors tending to reduce the penalty. Our judgment is that it will help deter contraventions of the law on persistent misuse, in the interests of citizens and consumer and of fair-dealing businesses.

## Section 5

# Table of Annexes

Annex 1	
The policy statement (the <i>Revised statement of policy</i> , and <i>Tackling abandoned and silent calls: Statement, October 2010</i> ).	
<a href="http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf">http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf</a>	
Annex 2	
First open letter to ACS users published on 20 December 2010	
<a href="http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/acs_users.pdf">http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/acs_users.pdf</a>	
Annex 3	
Ofcom Penalty Guidelines dated 13 June 2011	
<a href="http://www.ofcom.org.uk/files/2010/06/penguid.pdf">http://www.ofcom.org.uk/files/2010/06/penguid.pdf</a>	
Annex 4	
Second open letter to ACS users published on 21 May 2012	
<a href="http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/Open_letter_to_stakeholders.pdf">http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/annexes/Open_letter_to_stakeholders.pdf</a>	
Annex 5	
Third open letter to ACS users published on 20 March 2013	
<a href="http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/ICO_Ofcom_letter_200313.pdf">http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/ICO_Ofcom_letter_200313.pdf</a>	
Annex 6	Information request sent to Sambora Communications Limited under section 135 of the Act on 22 November 2013 (the “First Notice”) See Annex 1 of the s128 Notification - <a href="http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/Sambora.pdf">http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/Sambora.pdf</a>
Annex 7	Response from Sambora Communications Incorporated to the First Notice (the “First Response” received on 29 November 2013). [3<]
Annex 8	Information request sent to Sambora Communications Limited under section 135 of the Act on 8 January 2014 (the “Second Notice”) See Annex 3 of the s128 Notification - <a href="http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/Sambora.pdf">http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/Sambora.pdf</a>
Annex 9	Response from Sambora Communications Incorporated to the Second Notice (the “Second Response” received on 17 January 2014). [3<]
Annex 10	Information request sent to Sambora Communications Incorporated under section 135 of the Act on 7 March 2014 (the “Third Notice”)

	See Annex 5 of the s128 Notification - <a href="http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/Sambora.pdf">http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/Sambora.pdf</a>
Annex 11	Response from Sambora Communications Incorporated to the Third Notice (the "Third Response" received on 14 March 2014). [X]
Annex 12	Response from [X] to the information request received on 4 April 2014. <i>Campaign Service Agreement: [Deleted] Telephone Lead Generation</i> signed by [X] and Sambora Communications Limited on 22 August 2013 for commencement of services on 2 September 2013. [X]
Annex 13	Response from [X] to the information request received on 3 April 2014. <i>Campaign Service Agreement: [Deleted] Telesurvey</i> signed for and on behalf of by [X] and Sambora Communications Incorporated on 1 September 2013. [X]
Annex 14	Response from [X] to the information request received on 11 April 2014 <i>Additional Lead Generation Terms and Conditions</i> . [X] states, "These terms and conditions are appended to [X] General Terms and Conditions. A signed Order Confirmation confirms agreement of this appendix." Relevant invoices. [X]
Annex 15	Response from [X] to the information request received on 19 March 2014. Relevant invoices. [X]
Annex 16	Response from [X] to the information request received on 2 April 2014. Relevant invoices. [X]
Annex 17	Companies Act of Guyana, Certificate of Incorporation: Sambora Communications Incorporated (company number 6776).
Annex 18	Section 128 Notification issued to Sambora Communications Incorporated dated 16 June 2014. <a href="http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/Sambora.pdf">http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/Sambora.pdf</a>
Annex 19	Receipt of delivery. The Section 128 Notification was successfully couriered to Sambora Communications Incorporated on 24 June 2014 (receipt included) and also delivered in person by an agent in Guyana acting on Ofcom's behalf on 18 July 2014 (the front page of which was signed by a Sambora Communications Incorporated representative). [X]
Annex 20	Ofcom calculation of Sambora Communications Incorporated's Abandoned Call Rates using Sambora Communications Incorporated's data.

	See Annex 7 of the s128 Notification - <a href="http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/Sambora.pdf">http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/Sambora.pdf</a>
Annex 21	Email correspondence between Ofcom and the Direct Marketing Authority (DMA) dated 14 August 2014. [redacted]
Annex 22	DMA <i>Direct Marketing Code of Practice</i> (dated 2012). <a href="http://www.dma.org.uk/the-dma-code">http://www.dma.org.uk/the-dma-code</a>
Annex 23	Notification of a possible penalty under section 130 of the Act (the “Provisional Notification”) dated 29 September 2014. [redacted]
Annex 24	Sambora Communications Incorporated’s representations to the Provisional Notification (the “Representations”) comprising: <ul style="list-style-type: none"> <li>• written representations submitted to Ofcom on 9 November 2014;</li> <li>• record of conversation between Sambora Communications Incorporated and its former technology supplier;</li> <li>• financial statement submitted to Ofcom on 24 November 2014; and</li> <li>• a letter from [redacted], Chartered Accountants/ Business and Financial Services.</li> </ul> [redacted]
Annex 25	Sambora Communications Incorporated’s oral representations to the Provisional Notification made to Ofcom on 26 November 2014 (the “Oral Representations”). [redacted]