



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Mybeat Interactive
Service Type	Unsolicited SMS Message
Source of Complaints	Public
Complaint Number	#0045

Complaint

A complaint was received from a member of the public concerning an alleged unsolicited commercial SMS message. The complaint reads:

"Use of cell number without permission or business relationship

"AIG have a fantastic lifestyle plan offer. If u r interested pls reply "yes" and we will call u with more info, 2 opt out of the sms reply "no". Std rates apply"

I received this spam without any request or relationship with the company. I do no know where they got my cell no."

The complainant did not refer to a specific Section of the WASPA Code of Conduct, however, as the context of the complaint clearly identifies the complaint as being concerned with Sections 5.1., 5.2. and 5.3. of the WASPA Code of Conduct. The Adjudicator has previously held that he is authorised to consider Sections of the Code not specifically referenced in the complaint if they are sufficiently clearly identified in the complaint itself, so that the SP is aware of the case it is required to meet and the *audi alteram partem* principle is considered.

The relevant Sections indicate:

5.1. Sending of commercial communications

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

5.1.3. Where feasible, customers should be able to unsubscribe from any subscription service using no more than two words, one of which must be 'STOP'.

5.1.4. Any mechanism for allowing a recipient to remove his or herself from a database may not be premium rated.

5.1.5. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.

5.1.6. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the upfront description of the service.

5.2. Identification of spam

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.2.2. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

5.3. Prevention of spam

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

SP Response

The SP provided a detailed response, including an extensive e-mail trail. This is not repeated here, however can be summarised as follows:

- The message originator is AIG Life South Africa Limited ("AIG");
- AIG work through Action Ambro's, a specialist response advertising agency ("AA");
- AA in turn use the services of the SP to send promotional SMS messages, inter alia on behalf of AIG;
- AIG generally use SMS messages as a mechanism for communication with existing policyholders and as there is a prior commercial relationship with such message recipients, there is no contravention of the WASPA Code of Conduct;
- In the instant case, AIG acquired a third party database of contact details from an entity referred to as Les Donnees. They did not do sufficient verification to ensure that persons on the database had consented to receive commercial communications.
- All of AIG, AA and the SP have removed the complainant from their respective databases and the complainant was contacted.

The SP further indicated:

“To follow up with the WASPA Code of Conduct complaint #0045 please be aware that have done everything in our power to investigate the situation as required.

We do take these complaints very seriously and appreciate the work that WASPA has undertaken. With reference to the complaint, we have been in contact with our client to better understand why this person received the unsolicited message as described in the email below. As a result of the of the number of third parties involved (i.e. the agency - Action Ambrose, the end client - AIG and their other suppliers) it has taken us a number of days to get to the bottom of the issue and I have attached all the correspondence below that I have been privy.

With regard to Mybeat's responsibilities, we take the code of conduct very seriously and from the beginning of this campaign we informed the client of their responsibilities and criteria of the code of conduct and ECT act. Please also note that we made it clear to the agency in particular that any sms would require a prior commercial relationship with the customer and that the customer should reasonably expect to receive marketing communications from the company.

We do feel that it is our responsibility to advise the client as much as possible and this can be seen simply by the fact that the SMS included an clear opt-out option and information that the reply message was at standard rates. There could no be a cleaner and more honest way to communicate such a message. This is the level to which we advise clients and base on our discussions with them we believed that the database complied with regulations. We do not feel however that it is not our responsibility to verify that each MSISDN in the database complies with the above regulation as there are many practical issues surrounding dealing with this and the third parties involved.

ybeat simply provides the facilities for delivering messages and it is not liable for the content of the messages send nor the database to whom the messages are sent. This is the responsibility of the client and the client affiliates.

With regard to the complainant, the client did apparently get hold of him to rectify the situation. Apart from removing his details from our copy of the database (and the clients), we have also requested that the end client improves their processes with their call center to assist future clients of related issues even that the sms message itself did explain how to opt-out of future messaging. With regard to the database and particularly where the company obtain his number from, we were informed that AIG (the end client) did purchase a database from a third party database company. Unfortunately we do not have details of this company and are waiting for more information. It is clear that our client, Action Ambrose, is taking this issue very seriously will rectify the situation if there are any suspicions regarding the legitimacy of the database. All necessary actions will be taken.

Mybeat will certainly follow with WASPA should there be any other information that arises. We believe that Mybeat has acted correctly and should WASPA wish to take this forward we would recommend that this is takes place with the end client directly.”

Decision

The Adjudicator recognised the significant effort the SP and its client in addressing this complaint. The Adjudicator also recognised the clear, simple and cost-effective opt-out mechanism provided by the SP.

The Adjudicator accepted that an SP cannot check every MSISDN that is sent an SMS message using its system, however it is ultimately the SP who is responsible for the actions of its clients. Certain SP's deal with this by contractually binding their clients to the WASPA Code of Conduct, contractually obligating their clients to pay fines that may be levied on the WASPA member, or even taking a security deposit or withholding revenue (if the service generates revenue) to cover possible fines. The responsibility for enforcing compliance with the WASPA Code of Conduct on the SP's clients rests with the SP and not with WASPA.

In particular, the Adjudicator referred to Section 5.3.1. of the WASPA Code of Conduct and enquired whether the SP had taken "reasonable measures" to ensure that their facilities are not used by third parties for the transmission of spam. The Adjudicator accepted that the SP had informed its own clients of their obligations in terms of the Code, but had not done so in respect of the clients of its clients. Having regard to the business conducted by the SP, the Adjudicator was of the view that this oversight was not reasonable in the circumstances.

The Adjudicator accordingly found a contravention of Section 5.3.1. of the WASPA Code of Conduct and imposed the following sanction:

- The SP is reprimanded for its breach of the WASPA Code of Conduct;
- The SP is ordered to inform its clients of their obligations in terms of the WASPA Code of Conduct and Advertising Rules and take all reasonable efforts to ensure that such communication is passed on to any third parties who may use the SP's service but with whom the SP does not have a direct relationship.