



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	iTouch
Service Type	Unsolicited SMS Messages and opt-out mechanism not operating
Source of Complaints	Public
Complaint Number	#0061

Complaint

A complaint was received from a member of the public concerning alleged unsolicited commercial SMS messages promoting adult content as well as the failure of the SP to act on his request to have his number removed from the message originator's database so as to no longer receive such messages. The complaint reads:

"I have received SMS spam from the number +27820037012. It claims I can send a sms to 37777 to view certain pornographic images. In said SMS, I get told to sms STOP to 31519 to stop these SMS's. I've done this twice now, but still they send me these unsolicited messages"

The complainant referred to Section 5.1. of the WASPA Code of Conduct. The Adjudicator has previously held that he is not restricted to the Section of the Code of Conduct identified by a complainant in the complaint and may consider other sections of the WASPA Code of Conduct, as long as the complaint clearly indicates the possible breach of the WASPA Code of Conduct and/or the SP has been given an opportunity to respond thereto. As such, the Adjudicator considered the provisions of Sections 5.2. and 5.3. of the WASPA Code of Conduct as they are intrinsically linked to the complaint and the complainant's reference to "SMS spam" clearly calls these sections into consideration.

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 response, indicating:

"We investigated the complaint and found that the complainant had indeed opted out in the correct manner on two occasions. He sent the word "STOP" to 31519 on [2005-09-23 16:09:18.85] and again on [2005-10-12 15:11:42.21]. Both actions should have immediately changed his status on our database ensuring that he would receive no further promotional SMS correspondence.

Upon further investigation we discovered that there was a technical error with the report that pulls the "opted in" MSISDN's on our database, and that some of those with opted out status's were being erroneously being included in the report.

The error [the query behind the report] has subsequently been fixed and we would like to apologise to the complainant for the inconvenience caused, and assure him that he will no longer be receiving any promotional messages.

Decision

The SP's response amounts to an admission of a breach of Section 5.1.2. of the WASPA Code of Conduct.

The SP's response further indicates that the SP's practice is not to remove the details of a recipient of a message who now elects to not receive messages, from its

database but rather to move such recipient's details to a different database of "opted out" MSISDNs. This is not contrary to the letter of the WASPA Code of Conduct in that it has the result of the recipient choosing to "opt out" does not receive further messages, however it is possibly contrary to the spirit of the Code, depending on the use to which such "opted out" database is put.

The complainant alleged that the SMS message is "spam" (as defined in Section 5.2. of the WASPA Code of Conduct) and promotes access to an adult service. This is a potentially serious allegation and was not dealt with by the SP in its response. While the Adjudicator considered himself empowered to deal with such allegation as it is clearly stated in the complaint and the SP had an opportunity to respond thereto, as it has potentially serious repercussions for the SP, the Adjudicator elected not to do so without due regard to the *audi alteram partem* principle and accordingly required the SP to respond specifically to such allegations, as more fully set out in the sanction below.

As such, the Adjudicator imposed the following sanction:

- The SP is reprimanded for its breaches of the WASPA Code of Conduct;
- The SP is ordered to ensure that it complies with Section 5 of the WASPA Code of Conduct and specifically with the requirements of Section 5.1.2., dealing with removal of message recipients from its database;
- The SP is ordered to provide the WASPA Secretariat, by electronic mail and within 5 (five) working days of receipt of this report, with:
 - The source from which it obtained the complainant's MSISDN;
 - A reason (if any) why the messages sent to the complainant should not be considered spam in accordance with Section 5.2. of the WASPA Code of Conduct;
 - Copies of the promotional messages sent to the complainant, or if such copies are not available, copies of examples of the type of message sent to the complainant; and
 - Copies of one or more examples of the type of content advertised in the promotional messages referred to above,

and the WASPA Secretariat shall assess whether a further complaint needs to be investigated against the SP in respect of Section 5.3.1. of the WASPA Code of Conduct (read in conjunction with Section 5.2.1.) as well as Section 8. of the Code; and

- The SP is ordered to pay a fine of R2 500 in respect of the breach of Section 5.1.2. of the WASPA Code of Conduct.