



REPORT OF THE ADJUDICATOR

WASPA Member	iTouch Messaging Services
Information Provider (IP) (if any)	Virgin Money
Service Type	Commercial SMS
Source of Complaints	Public
Complaint Number	11197
Date lodged	23 November 2010
Code of Conduct version	10.0

Complaint

1. The complainant received a number of unsolicited SMS messages through aggregation services provided by three different WASPA members. This adjudication results from the escalation of a unsubscribe request lodged by the complainant in respect of an SMS received through iTouch Messaging Services. The complainant requested escalation as a result of the failure of the WASPA member to provide details of where it or its client had obtained his MSISDN.
2. In response to the unsubscribe request the member indicated that it did not have any records of the complainant's MSISDN being on its system. The complainant thereafter provided screenshots of the SMS received and the WASPA Secretariat confirmed with Vodacom that the member used the long code in question.
3. The WASPA member initially provided documents of a general nature which did not shed any specific light on how the complainant had allegedly consented to receive SMS messages from the IP. This FAQ-type documentation is, however, noteworthy in that it on the one hand evidences an awareness on the part of the IP of legislation and Direct Marketing Association (DMA) processes relevant to marketing communications but on the other omits any mention whatsoever of the WASPA Code of Conduct.

4. Thereafter the member indicated that it had been informed that the complainant had had a membership with Virgin Active which had allegedly fallen into arrears. The complainant's contact details were therefore supplied by Virgin Active and the IP then sent an SMS to the complainant advising him the alleged arrears required settlement.
5. This response would appear to indicate that at this time the member had managed to locate the complainant's MSISDN on its systems (but had not, apparently, read the text of the SMS complained about).
6. The complainant replied that he had never had a membership of Virgin Active and regarded the responses received from the member to this point as fabrications. He took umbrage at the conflation of his complaint about an unsolicited commercial communication with an incorrect allegation regarding an outstanding debt.
7. This elicited an apology from the WASPA member:

"I am terribly sorry if I have offended you in any way. I have asked [name redacted] to get all the information regarding your complaint. I have asked him to complete this task before the end of the week. In my previous mail I said that the account that you had was with Virgin Active. That is incorrect, it was with Planet Fitness."

8. The member thereafter provided the text of two SMS messages regarding arrears allegedly due to Planet Fitness sent to the complainant's MSISDN on 28 June and 16 September 2010 respectively. The member further asserted that:
 - 8.1. The complainant had had a commercial relationship with the IP such as to constitute indirect consent to the receipt of commercial communications from the IP as permitted by section 5.2.1. of the WASPA Code and as such the abovementioned SMSs were not unsolicited.
 - 8.2. The complainant's details were in the public domain:

"Also if you do a Google search for [name redacted] he is in a public domain www.[name redacted].co.za with his contact cell number privy for all to see."
9. The last word in the correspondence leading to this formal adjudication belongs to the complainant:

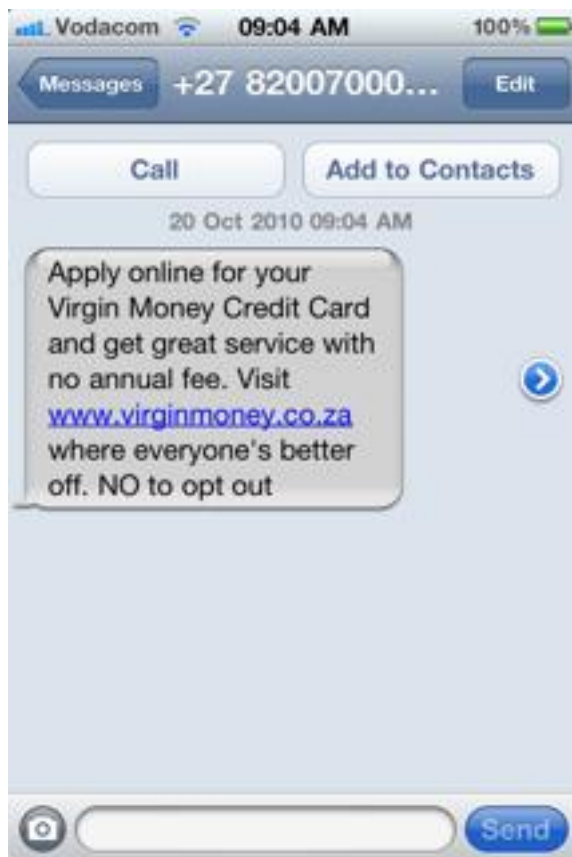
"1. I do not have a relationship with Planet Fitness and did not have at the time of this SMS although I did previously have a contract paid in advance in cash. BUT I am not going to discuss Planet Fitness business practices with WASPA nor iTouch.

2. This is a red herring and wasn't the message that was the subject of the complaint. I attach the screen shot which was the subject of the complaint that I sent to WASPA.

3. I believe that iTouch are creating this diversion in order to deflect the complaint.

4. The REAL issue here is the comment by this company – that assumes that if my telephone number is in the public domain that it is a licence for unscrupulous SPAM merchants to harvest it. If senior personnel of a WASPA member don't know this – then it is no wonder we are subject to SPAM on the scale we are.”

10. Below is the screenshot of the SMS which is the subject of the complaint:



Sections of the Code considered

The following sections of version 10.0 of the WASPA Code of Conduct were considered:

3.12. Employee awareness

3.12.1. Members must ensure that any relevant employees are made aware of this Code of Conduct and the requirements and procedures associated therewith.

5.1.7. 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.

5.2. Identification of spam

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- 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 (within the last six months) 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.

Decision

11. It is evident that the WASPA member has at no stage provided information which is directly relevant to that requested by the complainant.
12. Given the remarkable difficulty experienced by the member in identifying the IP and locating a record of the complainant's MSISDN, the adjudicator sought to verify with the ISPA Secretariat when the screenshot of the SMS – which clearly indicates the IP – had been provided to the WASPA member. While these are referred to as being appended to the unsubscribe complaint it is not possible to confirm receipt of thereof by the member prior to the complainant's email of the 19th June 2010.
13. The member failed to engage with the complaint in a constructive manner in that it has not responded directly to this screenshot.
14. The SMS is clearly of a commercial nature and is a promotional message having no direct relationship to any alleged contract with Virgin Active, Planet Fitness or any other third party.
15. The defence raised by the WASPA member based on the existence of an alleged commercial relationship cannot be sustained on the facts presented and given that such defence is presented in the context of SMSs originating from Planet Fitness whereas the originator of the SMS complained about appears to be a division of the Virgin Group.

16. As the complainant has correctly pointed out, the defence raised regarding his details being in the public domain can likewise not be sustained and evidences a misunderstanding of the opt-in requirements of the WASPA Code. A complaint to WASPA falls to be adjudicated within the text of the Code of Conduct: an adjudicator cannot make a determination in terms of section 45 of the Electronic Communications and Transactions Act 25 of 2002 (which falls within the jurisdiction of the courts) or, for that matter, under the DMA Code (which falls within the jurisdiction of the DMA).
17. It is accordingly held that the SMS complained about was unsolicited in that none of the forms of consent set out in section 5.2.1 has been shown to have been present.
18. The obligation on the WASPA member is to take reasonable measures to ensure that its systems are not used for the purpose of sending unsolicited commercial communications. No specific representations have been made by the member as to measures which it does take and as such it is reasonable to infer from (a) the finding that the complainant received an unsolicited commercial communication, (b) the difficulty experienced by the member in addressing the complaint and (c) the lack of appreciation for the opt-in provisions of the WASPA Code evidenced in the member's response, that the member is in breach of this obligation.
19. The member is accordingly found to have breached section 5.3.1 read with section 5.2.1 as well as section 5.1.7 of the Code.
20. In assessing an appropriate sanction the adjudicator has considered:
 - 20.1. The prior record of the SP with regard to breaches of section 5.3.1 read with section 5.2.1, noting that there have been a number of such instances but that the last finding of a breach was made in May 2008;
 - 20.2. The industry imperative to control the levels of unsolicited communications.
21. The member is issued with a fine of R8 500 in respect of the breaches identified above and required to make payment of this amount in accordance with the provisions of the Code.
22. The member's attention is drawn to section 3.12 of the Code and the member is required to ensure that its employees are aware of the provisions of the Code relating to unsolicited commercial communications.