



REPORT OF THE ADJUDICATOR

Complaint reference number:	12662
WASPA member(s):	SMS Portal
Membership number(s):	SP -
Complainant:	Anonymous Competitor
Type of complaint:	Unsolicited SMS
Date complaint was lodged:	2011-04-14
Date of the alleged offence:	2011-04-14
Relevant version of the Code:	10.0
Clauses considered:	5.1, 5.2 and 5.3
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	N/A
Related cases considered:	0350

Complaint

The Complainant alleged that he received unsolicited messages from the SP, in contradiction to the code and new "Electronic Communications Act".

The Complainant was not satisfied with the response offered by the SP.

Service provider's response

The SP in its response stated that it does comply with the WASPA Code of Conduct. It stated that it complied with section 5.3 of the Code by responding immediately to the email received and that it does not promote the sending of SPAM.

It further contends that it complied with section 5.1.2 in that it ensured that the message contained instructions on how the Complainant could remove itself from the database.

It further claimed that it also complied with section 5.1.3 in facilitating a STOP opt-out request to facilitate the enforcement of section 5.1.2 at the lowest possible tariff.

The SP also stated that it complied with section 5.1.7 in affording the Complainant the opportunity to receive more information as to how the SP's client obtained the said information. It stated that the source of the information was Intimate Data via the South African Post Office. The SP explained that the Complainant refused the proposal.

Sections of the Code considered

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. For SMS and MMS communications, a recipient should be able to stop receiving messages from any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply 'STOP' procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

5.1.4. For SMS and MMS communications, a message recipient must be able to opt out at the lowest tariffed rate available (with the exception of reverse billed rates). If replying 'STOP' as set out in 5.1.3 will result in a charge greater than the lowest tariffed rate available, then instructions for the lowest tariffed rate opt-out must be included in every message sent to the customer.

5.1.5. Once a recipient has opted out from a service, a message confirming the opt-out should be sent to that recipient. This message must reference the specific service that the recipient has opted-out from, and may not be a premium rated message.

5.1.6. Where the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the service provider must honour the opt-out request as if the word 'STOP' had been used.

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.

5.1.8. 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 (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.

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

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent reply.

First and foremost it is necessary to stress that the Adjudicator in this matter only adjudicates on the version of the WASPA Code of Conduct applicable at the time of the alleged breach. The Adjudicator will not be drawn into allegations of National Legislation being breached. The Adjudicator does however want to iterate to the Complainant that the only "new" legislation regarding SPAM, is the Consumer Protection Act of 2008 and the so-called "Electronic Communications Act", which the Adjudicator assume is to be meant by the Complainant as the "Electronic Communications and Transactions Act of 2002", has not changed.

Therefore, in coming to a decision the Adjudicator will first evaluate whether the message received by the Complainant can be considered as SPAM in terms of the WASPA Code of Conduct version 10.

Section 5.2.1 states that a commercial message is considered 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.

In drawing from the Complainant's allegations, it would seem that none of the three pre-conditions have been fulfilled.

The SP's response however would seem to indicate that there was compliance with section 5.2.1(c) in that the organisation (seemingly Hippo, via Intimate Data via SA Post Office) supplying the SP with the Complainant's details, had the Complainant's explicit consent to do so.

The Complainant strongly denies that he had provided such consent.

Without having an explanation from Intimate Data as to how they obtained the explicit consent, the Adjudicator finds it impossible to rebut the Complainant's allegation. In this instance, the onus of proof lies with the SP, whether the Complainant wanted to enter into a telephone conversation or not.

Such proof must be indicative of the Complainant giving the SA Post Office, NOT by way of *implied* consent, but by way of *explicit* consent (voluntary, specific and informed expression of will), permission to pass his information onto third parties, and that Intimate Data, has obtained subsequent permission to pass the information onto other parties, which in this instance would be Hippo via the SP.

It is the SP's responsibility to ensure that it validates the explicit consent through processes that are both practical and reasonable. This coincides with section 5.3.1 which states that 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.

It is unclear from the facts provided whether the SP had taken reasonable measures to ensure whether the organisation supplying it with the information, had the Complainant's explicit consent.

It can therefore not be established whether the SP has taken reasonable measures to ensure their facilities is not used for SPAM.

With absence of proof, the Adjudicator finds the SP in breach of section 5.3.1.

The Complaint is upheld.

Sanctions

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct; and
- The SP's subsequent response.

The SP is formally reprimanded for its breach of section 5.3.1.