

REPORT OF THE ADJUDICATOR

Complaint reference number:	14349
WASPA member(s):	MTN Internal WASP Service (IWS) / SP
Membership number(s):	0035
Complainant:	Consumer
Type of complaint:	Unsolicited Commercial Message
Date complaint was lodged:	11 August 2011
Date of the alleged offence:	31 July 2011
Relevant version of the Code:	11
Clauses considered:	5.1.3, 5.1.5, 5.1.8, 5.1.10, 5.2.1, 5.3.1
Relevant version of the Ad. Rules:	N/A
Clauses considered:	N/A
Related cases considered:	0151; 1982; 2399

Complaint

Complaint 14349 is the escalation of unsubscribe request #1887001 regarding an unsolicited SMS. An unsubscribe request was logged on the WASPA unsubscribe system on 31 July 2011, wherein the Complainant stated as follows:

"I received a message from [redacted number] which reads: 'You qualify to stand in line to win one of the 9 MTN8 Golden Tickets. To activate your entry, SMS the word WAFA, your province, to 40570. SMS costs R1. T&C apply.' I sent a STOP request to this number, and got the following reply: 'Invalid entry. SMS the word WAFA and your province to 40570 to enter the MTN8 Golden Ticket competition. One entry per person. SMS costs R1. T&C apply.'"

MTN does not have permission to send me these SMS messages. I have warned them before."

The SP replied on 1 August 2011 as follows:

"Issue addressed with respective MTN parties, customer remains on the "Do Not Contact" database and this incorrect contact was caused by a technical error when the target database was extracted."

The Complainant responded on 11 August 2011 that he would not be satisfied with anything less than punishment for violations of the Code, and enquired how much the SP would be fined. The complaint was formally escalated and the SP and Complainant were formally notified on 12 August 2011.

The Complainant replied further to WASPA raising a query in relation to the informal / formal processes for resolving complaints (to which WASPA replied, clarifying same). In his correspondence of 12 August 2011, the Complainant also alleged that the SP had breached sections 5.1.3, 5.1.8 and 5.2.1 of the Code.

Service provider's response

The SP formally responded to the complaint on 17 August 2011, stating that it already apologised for the oversight and inconvenience caused, and confirming that the Complainant had been placed on its "Do Not Contact" database and that errors in this regard would not take place in future.

The Complainant refused resolution on 17 August 2011, stating as follows:

"Thanks for the apology but I don't understand why MTN sent the SMS to me in the first place. I notice the apology makes no attempt to explain how [the SP] managed to violate 3 different aspects of the WASPA code of conduct in a single message. [The SP] is a founding member of the Direct Marketing Association and you therefore have my details on their Do Not Contact database: my details have been on that database for years. My profile on the [SP] database also carries a Do Not Contact flag, and has done for several years. Where did you get my number? I assume it came from an internal database somewhere. If it came from an external database, I'd like to know which one. Also, WASPA sent out unsubscribe request #809898 in June, which you presumably received but ignored. In addition, your message did not contain the required STOP wording, nor did your system process my STOP request correctly. Does [the SP] consider itself "above the law" when it comes to the code of conduct? It seems to me that [the SP] doesn't take the WASPA code of conduct seriously, nor my privacy. MTN has a long history of sending me unsolicited, unwanted SMS messages."

Sections of the Code considered

Sections 5.1.3, 5.1.5, 5.1.8, 5.1.10, 5.2.1 and 5.3.1 of the Code state as follows:

5.1.3. For SMS and MMS commercial 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.

5.1.5. The reply "STOP" or alternative opt-out procedure must be included in all direct marketing communications. A "STOP" reply in this instance will refer to all direct marketing communications from the message originator.

5.1.8. 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.

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:
(a) the recipient has requested the message;
(b) the message recipient has a prior commercial relationship with the message originator and has been given a reasonable opportunity to object to direct marketing communications
(i) at the time when the information was collected; and
(ii) on the occasion of each communication with the recipient; or
(c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

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

I do not regard section 5.1.8 as being relevant to the facts of the present matter. That section deals with procedures to be followed and confirmatory messages to be sent after an opt-out request has been processed. On the facts alleged by the Complainant (which have not been disputed by the SP) his opt-out request was not processed. The Complaint is more correctly grounded in the other sections of the Code referred to by the Complainant (i.e. sections 5.1.3 and 5.2.1) as well as sections 5.1.5 and 5.3.1.

On the facts of the matter, sections 5.1.3, 5.1.5 and 5.3.1 of the Code have clearly been breached.

Sanctions

In assessing an appropriate sanction in this matter I have had regard for the following facts:

1. On 26 July 2006, in complaint number 0151, a similar complaint was upheld against the SP who was formally reprimanded. A fine of R5 000 was imposed and suspended for 12 months provided no similar breaches of the Code occurred in the 12 month period.
2. On 21 November 2007, in complaint number 1982, a fine of R5 000 was again imposed on the SP for unsolicited messaging, R3 000 of which was suspended for a period of 6 months provided no similar breaches of the Code occurred in the 6 month period.
3. On 30 November 2007, in complaint number 2399, the SP was again fined R5 000 for sending an unsolicited commercial message.

4. No complaints of unsolicited messaging have been upheld against the SP since 2007.
5. All non-suspended fines imposed on the SP have been paid by it.

The Complainant posed the question “**does [the SP] consider itself “above the law” when it comes to the code of conduct?”**

In my opinion, the SP does not demonstrate wilful disregard for the anti-spam provisions of the Code. Including this particular complaint, only 4 spam complaints have been upheld against the SP in more than 5 years and no other complaints have been upheld in the last 4 years. I do not regard heavy sanction as being either appropriate or required.

I accordingly impose a fine of R3 000 on the SP which fine shall be paid within 5 days of publication of this report.