



REPORT OF THE ADJUDICATOR

Complaint reference number:	16761
WASPA member(s):	Blue Label Data Solutions (IP) / Integrat (SP)
Membership number(s):	1234 / 0030
Complainant:	Public
Type of complaint:	Unsolicited SMS
Date complaint was lodged:	2012-03-19
Date of the alleged offence:	2012-03-15
Relevant version of the Code:	11.6
Clauses considered:	1.6; 4.2 and 5
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	Not applicable
Related cases considered:	14567

Complaint

The complainant logged an unsubscribe request via the WASPA unsubscribe system on 15/03/2012 and requested proof of subscription. The SP initially responded by stating "number not found". However, it was then confirmed that the complainant had received unsolicited SMS messages from the IP, who is a member of WASPA, and another customer of the SP, who is not a member of WASPA.

SP's response

The SP responded on behalf of its customer, MyTXT and itself. The SP states that it is an aggregator and has many clients who send bulk SMS. In cases where its clients are not WASPA members and they send unsolicited messages, then such

complaints are logged directly against Integrat. Consequently it may seem that Integrat is a repeat spam offender which is not the case.

The SP also stated that it was currently in the process of forcing each bulk reseller to become a WASPA member to try and resolve this problem.

The SP stated that it goes out of its way to educate and manage its clients in matters involving compliance with the WASPA Code and set out certain due diligence steps that are taken.

In this complaint, the bulk message send by MyTXT on 11/01/2012 did not contain an unsubscribe mechanism that cost R1.00 to use. Instead the opt-out mechanism is charged at standard rates, which was the lowest available rate at that time.

The complainant is also under the impression that a single entity has been spamming him relentlessly, which is not the case. MyTXT sent a single message and removed the user immediate when requested.

The SP's call centre did refer the complainant to the DMA database in an attempt to assist him in enforcing a general opt out, since he had received numerous unsolicited messages from different service providers.

If the complainant receives further messages which are sent via a non-operator route and by clients who are not WASPA members, he would have to opt-out again if he does not add himself to the DMA database.

The SP reassured the complainant that it was dealing harshly with clients who do not honour opt in, but opt out as per the Consumer Protection Act, while being WASPA members.

The SP stated that MyTXT was a challenging service to manage in terms of compliance. It is a bulk web product and a tick box is included which prompts each client to confirm that he/she is aware of the WASPA rules and regulations.

IP's response

The IP is a WASPA member and so it responded on its own behalf in respect of the unsolicited message sent to the complainant via its messaging services.

The IP states that the SMS campaign in question was inadvertently directed via the SP due to a technical glitch with a switch. The IP states that the primary and secondary routes were down and the switch automatically routed the message via the SP's facilities.

The IP's client was not a WASPA member and therefore does not subscribe to the opt-in rules provided for in the WASPA Code. However the client was a member of

the Direct Marketing Association and their campaign was aligned with the opt-out provisions of the Consumer Protection Act.

The IP acknowledged that its complaints department had received an opt-out request from the complainant previously in August 2011. The IP states that it did remove the complainant's details from its database. However due to the technical error experienced, the further message which is the cause of this complaint was sent.

The IP checked with their client and confirmed that they had removed the complainant from their database.

Sections of the Code considered

1.6. Applicability of the Code to non-members

Some companies may be required to comply with the WASPA code by virtue of a contract with one or more network operators and/or a contract with one or more voting WASPA members. In such cases, all clauses in the Code of Conduct and the WASPA Advertising Rules that are binding on WASPA members shall be deemed to be binding on those companies, irrespective of whether or not those companies are members of WASPA.

4.2. Privacy and confidentiality

4.2.1. WASPA and its members must respect the constitutional right of consumers to personal privacy and privacy of communications.

4.2.2. Members must respect the confidentiality of customers' personal information and will not sell or distribute such information to any other party without the explicit consent of the customer, except where required to do so by law.

5. Commercial and bulk messages

5.1. Sending of commercial messages

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 direct marketing database, so as not to receive any further direct marketing messages from that message originator.

5.1.3. For commercial messages, 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 commercial messages, 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. 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.

5.1.6. Non-commercial bulk SMS services (such as newsletters) must have a functional opt-out procedure consistent with that described in clause 5.1.3.

5.1.7. Notwithstanding clauses 5.1.3 and 5.1.6, members are not obliged to honour an opt out request for communications that are necessary for the conclusion or performance of a contract to which the recipient is a party.

5.1.8. Notwithstanding clauses 5.1.3 and 5.1.6, members are not obliged to honour an opt out request for communications required by law.

5.1.9. 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.

5.1.10. 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.

5.1.11. Upon request of the recipient of a direct marketing message, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained, and provide proof that the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.1.12. Direct marketing messages may not be sent on Sundays, public holidays, on Saturdays before 09:00 or after 13:00, or on all other days between 20:00 and 08:00, unless expressly agreed to in writing by the recipient.

5.2. Identification of spam

5.2.1. Any direct marketing 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
 - (iii) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.2.2. Any commercial message is considered unsolicited after a valid opt-out request.

5.2.3. 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

I will deal firstly with the complaint against the SP for the message sent to the complainant by its customer, MyTXT. The SP has stated that because the customer is not a WASPA member, it does not subscribe to the default opt-in rule prescribed in the Code of Conduct. Instead, the SP states that the customer is a member of the DMA and adheres to the opt-out rule prescribed in the Consumer Protection Act.

However, in terms of clause 1.6 of the Code, the provisions of clause 5 are binding on the SP's customer regardless of whether the customer is a member of WASPA or not.

It is common cause that the message sent by MyTXT was unsolicited and is regarded as SPAM for the purposes of clause 5.2.1.

The complainant's opt-out request was actioned by MyTXT and he has been removed from their database.

I have noted the SP's comments regarding the challenges it faces in terms of compliance for web-based bulk SMS services on its system. I have also noted that the SP is now making it compulsory for its customers to become members of WASPA and thereby forcing them to subscribe to the provisions of clause 5 of the Code.

It is also noted that the SP provides new customers with guidance regarding compliance with the requirements of the Code insofar as they relate to bulk messaging services and that it requires customers to acknowledge that their bulk messages are compliant with the Code using a tick box.

In light of the foregoing, I am satisfied that the SP has taken reasonable measures in terms of clause 5.3.1. Therefore, I find that there has been no contravention of the Code insofar as the SP is concerned.

I turn now to the complaint made against the IP, who is a member of WASPA. The IP has acknowledged that the complainant had previously unsubscribed from its database. In terms of clause 5.2.2, any further messages sent to the complainant would be regarded as SPAM.

I have noted the IP's explanation regarding the technical problem that caused messages to be re-routed via the SP's facilities. However, this does not explain why the complainant was a designated addressee in the first place if he had previously opted-out.

The complainant has stated in his complaint that he had been advised by another message originator on a previous occasion that it had obtained his contact details from the IP. It appears that this was again the case in the present circumstances.

I am not satisfied that the IP has taken reasonable measures to prevent SPAM from being sent to the complainant using its facilities. I therefore find that the IP has contravened clause 5.3.1.

Sanctions

The previous request by the same complainant to the IP to remove him from its database, and the IP's misguided attempt to absolve itself by citing technical problems, are seen as aggravating factors.

In light of the foregoing, the following sanctions are made:

1. The IP is fined an amount of R 75 000.00.
2. The IP is formally warned to refrain from providing the complainant's contact details to other parties.