

REPORT OF THE ADJUDICATOR

WASPA member(s):	Infobip Africa (SP)
Membership number(s):	#0143
Complainant:	Competitor
Type of complaint:	Unsolicited Communication (SMS)
Date formal complaint was lodged:	2013-07-09
Date of the alleged offence:	2012-04-04
Relevant version of the Code:	12.1
Clauses considered:	5.1, 5.2 and 5.3, 3.9.2, 3.9.3 and 3.9.4
Relevant version of the Ad. Rules:	Not Applicable
Clauses considered:	Not Applicable

Complaint

The complaint is the escalation of a formal complaint.

The complainant is a competitor who filed a complaint against the SP pertaining to an unsolicited commercial message received at “3am” in the morning.

The complainant noted that the relevant user had not opted in to the message.

In asserting a breach of the WASPA Code of Conduct, the complainant referred to clause 5.2 pertaining to the identification of spam, more specifically

- 5.2.1 - *pertaining to whether the recipient had in fact requested the direct marketing message; and*
- 5.1.12 – *pertaining to the express limitation on the sending of direct marketing messages 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.*

Informal Complaint Notification

The WASPA Secretariat in its discretion opted to make use of the informal complaint procedure to process the complaint received.

The Secretariat forwarded the complaint to the SP concerned on 2013-04-29 notifying the member of the five working days permitted to effect an appropriate remedy as well as providing for further notices in accordance with the informal complaint procedure and 14.2 of the Code.

Service Provider's Response

The SP responded on 2013-04-29 confirming receipt of the notification of the complaint and noted a difficulty in obtaining further details regarding the complaint. For the purposes of investigating the complaint, the SP requested the date and time of the complaint and the message text associated with the message in question in order to identify the SP's client.

The Secretariat responded on 2013 – 06-04 identifying the MSISDN, the date of the message as 2013-04-04, the time of receipt as 03:50 and the message text as:

To see Alan's photos on facebook : link – reply stop to stop getting facebook texts.

The Secretariat requested in a follow up email dated 2013-06-26 to the SP - a response to the complaint.

The SP responded on 2013-06-27 to inform the Secretariat that:

The relevant message recipient's number has been blocked on the SP's system and the recipient will not be receiving any further messages.

The Secretariat forwarded the SP's response on 2013-07-05 to the complainant requesting a response as to the adequacy of the SP's response visavis the complaint lodged or an indication as to whether the complainant seeks to proceed to a formal complaint.

The complainant opted to proceed to a formal complaint.

Formal Complaint Notification

In accordance with 14.3 of the Code, the formal complaint was sent to the SP on 2013-07-08. Notice of the relevant formal complaint procedures and a request for further information relevant to the complaint were included in the notification.

SP's Response to Formal Complaint

The SP responded to the formal complaint on 2013-07-09 asserting as follows:

- *That the recipient (subscriber) in question was “unsubscribed” and “blocked” to prevent receipt of further messages on 2013-06-27.*
- *An SMS confirming the above was sent to the recipient’s cited (relevant) number and contact number (as cited in the complaint)*
- *The text of the message read “Dear Subscriber, the numberas per the WASPA complaint #20095 has been unsubscribed and blocked from further SMS”*
- *That the above actions were in accordance with 14.3 of the Code of Conduct as requested by the Secretariat in the formal complaint notification email.*

The SP noted that at no time was the actual complaint searchable or viewable on the WASPA website, despite attempts by the SP to locate the complaint information via the available search tools.

The Secretariat forwarded the SP’s response to the formal complaint to the complainant on 2013-07-09 requesting an indication of whether the SP’s response has been an adequate resolution to the complaint. The complainant refused resolution on 2013-07-09 asserting that:

- The SP has not at any time made any attempt to provide for the explicit consent required by the Code (in connection with the message received)
- The SP has not explained the receipt of the message the relevant time.

The Secretariat notified the SP on 2013-07-09 that the complainant refused resolution as above and that the matter would proceed to adjudication. Furthermore the SP was requested to provide additional information relevant to the complaint to the Secretariat within 5 working days.

Sections of the WASPA Code of Conduct Considered

Clause 5.1 pertains to the sending of commercial messages. Notably, sections 5.1.1 and 5.1.12 provide as follows:

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.

Clause 5.2 pertains to the identification of spam. Notably, section 5.2.1 provides as follows:

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
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

Clause 5.3 pertains to the prevention of spam. Notably, 5.3.1 and 5.3.2 provides as follows:

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.

3.9.2. Where any information provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider.

3.9.3. Notwithstanding clause 3.9.2, where an information provider makes use of a member's facilities for the sending of spam or fails to comply with the provisions of 5.1.11, the member shall not be liable for any such breach unless the member failed to take the reasonable measures contemplated and provided for in 5.3.1.

3.9.4. A WASPA member shall, by obtaining the information provider's signature on the WASPA template agreement, be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and this shall be considered as a

mitigating factor for the WASPA member when determining the extent of any possible liability for the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider.

Decision

Taking account of the content of the various correspondences exchanged during the informal and formal complaint processes, and the relevant sections of the Code, the SP finds itself with two contentions of the complainant that have not been adequately responded to or resolved:

- The issue of the time of the message in question; and
- The issue of the request from the complainant of the recipient's explicit consent to receive the message in question.

Furthermore, and in accordance with the remaining sections of 5.2, the SP has not delivered an alternative consideration to indicate that the message was not in fact spam.

The SP has taken steps to prevent further transmission of spam to the recipient but this does not detract from the above outstanding challenges.

The SP has not tendered any proof of the reasonable measures deployed to ensure that their facilities are not used by the client to send spam.

Hence, I find the SP is in breach of 5.1.12 and 5.3.1 of the Code.

It is unclear as to whether the SP has in place expeditious methods in its dealings with its clients to respond to the requests for explanations as requested by the complainant.

Sanctions

In the circumstances, the SP is fined R2,500.

The SP is strongly encouraged to carry forward the requirements of 5.3. in its dealings with clients, in particular:

- (i) the deployment of reasonable measures to prevent the distribution of spam; and
- (ii) the deployment of expeditious methods to procure information from the SP's client(s) when responding to a complaint,

to avoid more stringent sanctions at a later date.