

REPORT OF THE APPEALS PANEL

Date: 26 August 2015
Appellant: Cellfind
Complaint Numbers: 20887
Applicable version: 12.1

1 BACKGROUND TO THE APPEAL

- 1.1 This is an appeal against the finding against and sanction imposed on the Appellant by the adjudicator in complaint 20887. The adjudicator found that the Appellant had breached clause 5.3.1 of the WASPA Code of Conduct in that it had not taken reasonable measures to ensure that its facilities were not used for the sending of spam.
 - 1.2 The adjudicator – taking into account prior sanctions imposed for the same breach by the Appellant – imposed a fine of R30 000 and ordered further that the Appellant provide the complainant with the source from which her personal information was obtained.
 - 1.3 The Appellant is a full member of WASPA.
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2 THE APPLICATION OF THE CODE AND AD RULES

The Code, v12.1

- 2.1 The following provisions were considered:

3.9. Information providers

- 3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct or the Advertising Rules.
- 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.

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- 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.
- 3.9.5. The member may suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.
- 3.9.6. The member must act in accordance with the WASPA complaints and appeal process and if appropriate, suspend or terminate the services of any information provider

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.

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- 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.

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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.

3 GROUND OF APPEAL

3.1 The Appellant's grounds of appeal are set out in full below:

With reference to the Report of the Adjudicator relating to the above, Cellfind, hereby submit the following to appeal both the decision and the sanction:

1. The message originator and information were clearly identified and acknowledged throughout the complaint. The complainant received multiple communications from the same source via multiple Service Providers not related to Cellfind. For the purpose of this appeal, it must be noted that the complainant received a single message from the message originator via the Information Provider and was transmitted via the Cellfind network. Any previous opt-out instruction in response to any prior communication transmitted to the complainant would have been directed at the responsible WASP and therefore, no opt-out instruction was ever received or recorded by Cellfind.
2. According to clause 5.2.2. of the Code of Conduct: "Any communication is considered unsolicited after a valid opt-out request". As explained in paragraph 1, should this request have been made outside of Cellfind's facilities it is unfortunately impossible to establish if any such request was made/received.

In the event that the message originator did receive an opt-out instruction, as claimed by the complainant, there is no question that the message originator was acting in contravention of 5.2.2. Cellfind had no history of transactions relating to the complainant. The Information Provider transmitted the offending communication on behalf of the message originator to the complainant. This transmission was made in good faith with the assumption that no such previous opt-out request was received by the source. Cellfind merely facilitated the transmission on its network.

3. Once again, it is important to note that in the event where a subscriber issue an 'Opt-Out' request in response to any service service/message transmitted in any other WASPA member/Service Provider/IP etc., regardless of the source; any other WASPA member will not record it. To clarify further, any Opt Out request received in response to an originator for messages sent outside of Cellfind network, is not directed or known by Cellfind and such request is therefore not recorded.

As a standard service, Cellfind provide an automated universal Opt-Out system that control all transactions transmitted via its network. Any opt-out request received by Cellfind in response to any message, regardless of the source, is intercepted and recorded by Cellfind resulting in the prevention of ANY further communication to that subscriber for ANY source on its network.

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It may be considered as unreasonable to prevent any further legitimate communications from any other source within the Cellfind network to the subscriber, but since it is impossible for Cellfind to confirm or assume that any explicit consent, contrary to an Opt-Out request received from a subscriber, such communication request will be rejected.

4. The failure of the message originator to comply with the required format of commercial messages, as required by the WASPA Code of Conduct, with specific reference to the opt-out instruction, contributed to its message being classified as spam. This omission by the message originator has no effect on the operations of the opt-out facility provided by Cellfind. Any standard opt-out request received in response to the offending message would have been recorded as a valid opt-out instruction. The opt-out service provided by Cellfind is automatic, applies to all service regardless of the source, and is not dependant on message format or instruction. It must however be note that no opt-out response was recorded from the complainant.

The assumption by the adjudicator that the opt-out facility provided by Cellfind was not satisfactory is incorrect. The omission of the opt-out instruction by the message originator has no effect on the faculty or its operation.

5. The adjudicator acknowledges the Cellfind was not directly responsible for the sending of the unsolicited messages to the complainant, but found that clause 5.3.1 was "clear" in this regard.

Unfortunately, clause 5.3.1 is not clear at all since:

- Cellfind did not send or promote sending of spam; Cellfind provided the network to facilitate the transmission. (Please refer to paragraph 6)
- Cellfind has taken 'reasonable measures' to ensure its facilities were not used by others for this purpose.

The transmission to the subscriber was not the end result of non-compliance, negligence or wrongdoing on Cellfind's behalf. It would further imply that Cellfind was aware of the non-compliance or the contravention of the code when it transmitted the message via its network, which is not the case.

As discussed in paragraph 3, as a standard service, Cellfind provide an automated universal Opt-Out system that control all transactions transmitted via its network. Cellfind further acted in full compliance with clause 3.9 of the Code of Conduct as discussed below.

These measures exceed the required 'reasonable measures' as required by 5.3.1.

6. Cellfind acted in full compliance with clause 3.9 of the Code of Conduct relating to the Information Providers. Clause 3.9.3 specifically makes provision for the failure of the Information Provider to comply with 5.1.11 and that the member would not be liable for any breach provided it complied with clause 5.3.1. In compliance with 3.9.4 the Information Provider did complete the WASPA template agreement and the member would therefore be deemed to have taken reasonable steps to ensure that the Information Provider was fully aware of the terms of the code of conduct.
7. The complainant acknowledged that Cellfind was not the source of her personal information and that Cellfind was not involved in the collections or unauthorised use of such information, including the transmission of spam. The complainant further

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recognises the involvement of the Information Provider. The complainant knows the identity of the message originator and she is aware of where/when her personal information was collected.

Cellfind has been in communication with the complainant to assist in establishing if the message, Mc Carthy Motors, did record any request and/or explicit consent from the complainant as opt-in or given a reasonable opportunity to her opt out.

It must be noted that Cellfind has no direct commercial relationship with the message originator and have been communicating on behalf of the complainant and Information Provider.

8. In its sanction the adjudicator incorrectly took into account/refer to previous complaints which have been upheld against Cellfind involving the sending unsolicited communication.
 - a. Complaint #0409: Complaint in respect of clause 5.1.2 and 5.1.3 of the Code of Conduct were dismissed and therefore not applicable.
 - b. Complaint #15620: Relating to an unsubscribe/cancellation request for a Subscription Services and therefore not applicable.
 - c. Complaint #17872: Decision under appeal.
 - d. Complains#19043: Decision under appeal.

4 FINDINGS OF APPEALS PANEL

- 4.1 It is clear that there have been multiple breaches of the WASPA Code:
 - 4.1.1 Clause 5.1.2 and 5.1.3 in that the STOP mechanism was not in place.
 - 4.1.2 Clause 5.1.5 in that the opt-out procedure was not set out in the message or did not function properly.
 - 4.1.3 The message is spam as defined in clauses 5.2.1 and 5.2.2.
- 4.2 The Appellant acknowledges that its customer ("the IP") was responsible for these breaches but contends that it cannot be held responsible for these breaches, basing its arguments on the provisions of paragraph 3.9 of the Code. In this regard the panel notes that:
 - 4.2.1 The IP was not a member of WASPA at the time that the breaches occurred.
 - 4.2.2 In its original response to the complaint the Appellant stated:

"Sanctions against Cellfind would be unfair as our customer did not comply, however a fine given to Cellfind will be passed on to Hi-Pixel as in fairness, this is where the complaint originated."
 - 4.2.3 On 5 July 2013 the Appellant notified WASPA that the IP in this matter was not Hi-Pixel Communications, which it had originally cited as the IP, but Panacea Mobile, which was then in the process of joining WASPA as an affiliate member

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- 4.2.4 Notwithstanding that the Appellant responded to the initial unsubscribe request by stating that the complainant's number had not been found, it also appears that WASPA verified that the originating number in respect of at least one of the messages was utilised by the Appellant. The panel accepts on a balance that the Appellant considered only its subscription services databases before responding in this manner, as its systems clearly were used to send spam to the complainant.
- 4.2.5 In the same vein, the Appellant states in its appeal that "no opt-out response was recorded from the complainant", yet it appears from the facts that the complainant did send at least one such response to the Appellant or to the Appellant's IP.
- 4.2.6 In terms of section 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. In terms of section 3.9.3 read with section 5.3.1 a member shall be liable unless it has taken the necessary steps to ensure that others do not use its facilities for sending spam.
- 4.2.7 In terms of section 3.9.4 by obtaining the information provider's signature on the WASPA template agreement, a WASP shall 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.
- 4.2.8 The Appellant has provided no evidence that it had obtained Panacea Mobile's signature on the WASPA template agreement, which would have been a mitigating factor in this instance, but not necessarily a defence against the contravention of the section.
- 4.2.9 The Appellant's contentions as regards the correctness of referring to complaints 0409 and 15620 as matters in which the Appellant had previously been sanctioned for the sending of spam are accepted. The adjudicator refers to matters "upheld against the [Appellant] involving the sending of unsolicited commercial communications" (our emphasis) and in the panel's view this formulation is too wide.
- 4.2.10 The Appellant notes further that the adjudications in complaints 17872 and 19043 were taken on appeal. The panel notes that these appeals have now been disposed of and that the appeal in complaint 17872 was dismissed while the relevant finding in complaint 19043 was not upheld.
- 4.2.11 In the appeal of case no 17872 dated 06-05-2014, considered by the Adjudicator in this case, the Appellant was found to have infringed section

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5.3.1 in that it had failed to take reasonable steps to prevent an information provider from using its facilities to distribute spam. The infringement in case no 17872 took place on 29-06-2012. In this case the alleged infringement took place on 5-6-2013. It can be taken that at the time that this complaint was lodged the Appellant should have been well aware of its obligations under section 5.3.1

- 4.2.12 The panel finds that the Appellant failed to take reasonable steps to prevent Panacea Mobile from utilizing its facilities as a service provider to send spam messages.
- 4.2.13 As regards the sanction imposed by the adjudicator: In case no 17872 a fine of R20,000 was imposed on the Appellant by the Adjudicator. The fine was upheld on appeal.
- 4.2.14 In this case the Adjudicator imposed a fine of R30,000. Taken into account that this is not the first case in which a complaint of this nature has been upheld against the Appellant the panel finds that the fine imposed by the Adjudicator was reasonable. The appeal against the fine is accordingly also dismissed.
- 4.2.15 As this appeal has been unsuccessful, the appeals fee is forfeited.