Wireless Application Service Provider Association

REPORT OF THE ADJUDICATOR

Complaint reference number:	22961
WASPA member(s):	Always Active Technologies (Pty) Ltd (SP) / Vodacom Service Provider (Pty) Ltd (IP)
Membership number(s):	0018; 0005
Complainant:	Public
Type of complaint:	Unsolicited commercial message
Date complaint was lodged:	2013-12-13
Date of the alleged offence:	2013-12-10
Relevant version of the Code:	12.4
Clauses considered:	5.1
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	Not applicable
Related cases considered:	12546

Complaint

The complaint was initially dealt with according to the WASPA informal complaint procedure. Correspondence was exchanged between the complainant and the IP, but the complaint was not resolved to the satisfaction of the complainant. It was then escalated to the formal complaint procedure.

The complainant states that he received the following SMS on 10/12/2013 at 08:02am:

"Drive a new car from R699 p/m, Valid SA drivers license. Monthly basic salary R6500, SMS 699 to 35393 Cost @ R3 per SMS, to opt out sms STOP to 43447 std rate"

The complainant contacted his network service provider and was referred to the SP. The SP, in turn, referred the complainant to its client, Just Group Africa. The

complainant requested information regarding where they obtained his number, notwithstanding the fact that his number is registered on the DMASA's national opt-out list.

IP's response

The IP referred the complaint to its client who delivered a substantive response to the complainant. The pertinent issues raised in the response were as follows:

1. The client receives incoming ''leads'' from two main sources: inbound SMSes to its short code and web based 'contact me' forms.

2. In this case, the lead was entered into one of its web application forms by another customer (logs were provided).

3. It was not clear why the complainant's number was used but it may have been entered in error as the real customer's number was similar to the complainant's number.

The client stated further that it is not easy for them to verify numbers entered on the contact forms but that they were working on possible solutions.

They confirmed that they were aware of the DMA's ''do not contact'' list but this was not without its problems, some of which were discussed further in the client's response.

The client stated that it currently makes sure that all messages sent include an opt-out short code at standard rates.

The client also said that they would meet with the network service providers to see how they could better synchronize their opt-out lists with those of the network service providers as well as the DMA's national opt-out database.

The IP confirmed that the complainant's number was not purchased on a list and has been permanently opted-out from its contact database.

Sections of the Code considered

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

The first issue to be determined is whether the commercial message received by the complainant on 10/12/13 was unsolicited, and hence spam.

From the IP's client's response, it appears that another of its leads or customers may have entered the complainant's number on a ''contact me'' web form in error.

There is not enough evidence before me to accept or reject this version.

However, what is clear is that the complainant himself was not a pre-existing customer and/or did not opt-in to receive commercial messages from the IP's client.

I therefore find that the message received by the complainant on 10/12/13 was unsolicited and should be regarded as ''spam''.

In terms of clause 5.3.1 of the Code, members are obliged to not send spam and must take reasonable measures to ensure that their facilities are not used by others for this purpose.

In the current matter, although it is possible (if not probable) that another person entered the complainant's number on a ''contact me'' web form, the IT director of the IP's client states, in his response to the complainant, that certain measures could be taken to prevent errors such as this from taking place and that these were being investigated.

Based on the aforegoing, I do not believe that the fact that an error was made absolves the IP or its client from its obligations under clause 5.3.1. After receiving the contact details, the client still had an opportunity to validate the number given before sending any commercial messages.

I therefore find that the IP has contravened clause 5.3.1.

Insofar as the complainant requested an explanation as to where his number was obtained, I believe he has received an explanation which, even if not satisfactory to the complainant, cannot be taken any further. I therefore find that the IP has not contravened clause 5.1.11.

Sanction

I have taken into account previous complaints which have been upheld against the IP involving the sending of unsolicited communications in considering the sanctions to be given in this complaint. (See complaint 12546).

In light of the aforegoing, and the previous sanction that was handed down by the adjudicator in that complaint, the IP is fined the sum of R18 000.00 as this is a second offence. The IP is also formally warned to ensure that its clients implement reasonable measures to ensure that all numbers provided to it as leads are properly validated before any commercial messages are sent.