



REPORT OF THE ADJUDICATOR

Complaint reference number:	24395
WASPA member(s):	Celerity Systems (Pty) Limited t/a BulkSMS
Membership number(s):	0003
Complainant:	Public
Type of complaint:	Unsolicited commercial message
Date complaint was lodged:	19 August 2014
Date of the alleged offence:	Unknown
Relevant version of the Code:	12.4
Clauses considered:	5
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	Not applicable
Related cases considered:	1678, 4555, 4662

Complaint

1. The complaint was initially dealt with according to the WASPA informal complaint procedure. Correspondence was exchanged between the complainant and the SP, but the complaint was not resolved to the satisfaction of the complainant. It was then escalated to the formal complaint procedure.
 2. In particular, the complainant has requested details of the source from where his number was obtained, proof of his opt-in to the relevant mailing list, and the method provided to remove himself from the mailing list.
 3. The complainant is registered on the DMA's national do-not-contact register.
-

SP's response

4. The SP provides SMS gateway services to its customer, Mobile Accord (IP). The IP provides toll-free market research services to its customers by administering surveys sent via SMS. The IP does not appear to be a member of WASPA.
5. The IP sourced the complainant's number from another WASPA member, SMSS Globalized Marketing (trading as SMSS-SA).
6. The IP's message flow was described in detail with accompanying diagrams showing the flow of messages sent and the content of each message.
7. The IP sends out an opt-in message to the phone number in question inviting the recipient to participate in a survey. It appears that recipients who opt in to the survey receive payment as consideration for their participation.
8. If the recipient of the message does not opt-in to the survey, the IP sends another message after 30 days.
9. The IP does have an opt-out procedure within its messaging flow. Opt-out information is stated to also be available online at the following websites: www.mobileaccord.com and www.geopoll.com.
10. The IP is not a member of the Direct Marketing Association of South Africa (DMA) and thus would not have access to the national opt-out list managed by the DMA.
11. Although the SP has taken the position that the messages sent to the complainant were not "direct marketing messages", it has requested clarification from WASPA as to whether these types of messages are deemed to be direct marketing messages or not.

Sections of the Code considered

12. The complaint was lodged on 19 August 2014 while version 12.4 of the WASPA Code of Conduct was still in force.
13. Section 5 of the Code reads as follows:

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

14. The pertinent issue in this complaint is whether the SMS messages sent to the complainant inviting him to participate in a market research survey are deemed to be *unsolicited commercial communications* or *direct marketing messages* in terms of the WASPA Code.

15. If the message is deemed to be spam, then the SP is responsible for ensuring that the provisions of section 5 of the WASPA Code are adhered to when the SP's services are used by its customers.
16. The IP describes its GeoPoll service as providing market research surveys to its customers. The surveys consist of, on average, 10 (ten) questions that are delivered and responded to via SMS.
17. An initial message is sent to the intended recipient, whose details are sourced from third party databases, based on geographic location and demographic information, inviting them to participate in a survey in order to source targeted information in near real-time.
18. As an incentive to complete the survey, the participant receives monetary compensation or airtime credit (typically the equivalent of \$0.50 USD).
19. In the modern economy, attention ("eyeballs"), information and time have commercial value. Transactions between consumers and suppliers where these new sources of value are bought, sold and exchanged must be regarded as commercial in nature.
20. Similarly, a message sent to a recipient inviting him or her to provide information (personal or otherwise) as part of a market research survey in exchange for the payment of money or some other benefit (e.g. airtime) must be viewed as a commercial message.
21. Even if consideration was not offered for the recipient's information, I am still of the view that the messages are commercial in nature for the purposes of section 5.
22. There is no evidence before me that the complainant had previously requested these types of messages, or that the complainant had a prior commercial relationship with the IP. Therefore, the messages sent to him must be regarded as unsolicited, and hence spam.
23. The SP is under a positive obligation to take reasonable measures to ensure that their facilities are not used by others for the purpose of sending spam.
24. In this complaint, I do not believe that they have done so.
25. Furthermore, although the IP does appear to offer opt-out facilities to allow recipients to remove themselves from the IP's database; in this case, based on the message flow diagrams provided by the SP as part of its response, it does not appear that the reply "STOP" or alternative opt-out procedure was included in the first messages sent to the complainant.

26. Regarding the requirement on the SP to identify the source from where the complainant's contact details were obtained, I am satisfied that the SP has complied with the Code in providing the name of the third party operator.
 27. However, the SP has not provided any proof that the third party operator who supplied the IP with the complainant's contact information had his explicit consent to do so.
 28. The SP has therefore contravened the provisions of section 5 of the WASPA Code.
-

Sanction

29. I have taken into account previous complaints which have been upheld against the SP involving the use of its facilities by its customers for sending unsolicited communications in considering the sanctions to be given in this complaint. (See complaints 1678 and 4555).
30. The SP is also well acquainted with the provisions of the Code relating to SPAM.
31. However, I have also taken into account that it may have been unclear to the SP whether the messages sent by the IP were of a commercial nature.
32. In light of the foregoing, the SP is fined the sum of R15 000.00.
33. The SP must also ensure that the IP is made aware of the provisions of the WASPA Code as they relate to the market research messages sent by the IP using the SP's services.