



Wireless Application Service Providers' Association

Report of the Adjudicator

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| Complaint number | #27172 |
| Cited WASPA members | Connet IT Systems Pty Ltd (1036) SMSPortal (Pty) Ltd (SP) (0139) |
| Notifiable WASPA members | n/a |
| Source of the complaint | Public |
| Complaint short description | Unsolicited marketing message |
| Date complaint lodged | 12 August 2015 |
| Date of alleged breach | 22 July 2015 |
| Applicable version of the Code | Version 14.0 |
| Clauses of the Code cited | 5.15; 5.16; 16.4; 16.5; 16.9; 16.10; 16.11; 16.12; 16.13; 16.15 |
| Related complaints considered | 20187, 26148 |
| Fines imposed | R15 000 for an infringement of clauses 16.5, 16.11, 16.12 and 16.15 of the Code. |
| Other sanctions | n/a |
| Is this report notable? | No |

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| Summary of notability | n/a |
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Initial complaint

The complainant received a promotional SMS from Food Lovers Market advertising various items and the prices as follows:

*Food Lovers Market-Tray Seedless Naartjies 19.99 Assorted Apples 8-Cup 19.99 Papaya Prepack R19.99 each *See In-Store or Click 4 all deals <http://goo.gl/5JjVdN>*

The complainant contacted the Food Lovers Market head office in Cape Town, but was not provided with any information about the SMS other than it was sent by an external party.

It was subsequently determined that Food Lovers Market used the services of Connet IT Systems for this campaign.

The member initially responded to the complaint by advising that the complainant's number had been captured on the relevant database in error. However the complainant was not satisfied with this explanation and remained of the view that his number had been bought from someone else.

The complaint was then referred to the formal adjudication process.

Member's response

The member initially requested that the Head of Complaints review the complaint in terms of clause 24.11(c), i.e. that the complaint is vexatious, taking into account factors such as malicious motive and bad faith.

The member states that clause 24:11 of the WASPA Code is in place to prevent overzealous people lodging and following through with overly aggressive complaints, and that this is the case in the present matter.

The member was advised that the Head of Complaints had already reviewed the complaint before it was referred to the formal adjudication process.

The member then sent their response stating that the message content itself was a marketing message that was sent to clients for specials at Food Lovers Market.

The relevant database consisted of numbers from customers of Food Lovers Market who had filled in an information document at a cashier, who tells the customer that their information will be used for marketing purposes. A sample was attached to the member's response.

The customer numbers from these information forms are then captured on an excel spreadsheet and added to Food Lovers Market's database, which is used by the member for the promotional campaign.

The member is of the view that allowance should be made for human error during the data capturing process. However, it has asked its client to review the procedure to minimise the risk of incorrect numbers being captured and used.

The member states further that their client does following strict rules regarding opt-out requests and the complainant's number was removed immediately from the relevant database on receipt of an opt-out request. His number was also blocked on the member's system.

The member submits that this was a simple case of human error and it has acted to mitigate any further risk.

The member submits that an opt-out facility was included in the link provided in the message content.

The member also stated that the message in question was only sent to the complainant once and he did not receive any further messages again.

Complainant's response

The complainant responded further to the member's response by reiterating that the SMS message received by him was an unsolicited marketing message. The message did not contain an opt-out function in the message.

The complainant also stated that he is registered on the National Opt-out list, which was not checked before sending the message.

The complainant also argued that the photograph of the form on which the phone numbers of customers are captured meant absolutely nothing. He pointed out that the second to last number is listed as a nine-digit number, which isn't a cellphone number at all.

The number that was mistaken for his number does not exist and he placed the authenticity of this evidence in dispute.

Member's further response

The member continued in its version to state that the promotional message sent to the complainant was in error and was intended to be sent to another customer who had 'opted in' to receive marketing messages.

The member also maintains that an opt-out function was included in the message through the link provided. However, they also indicated that they have encouraged the client to include the opt-out function in the actual content of the message in future.

The member also believes that the complainant's registration on the National Opt-out list is not a WASPA matter.

Regarding the evidence provided, the member states that this was not submitted as a piece of verified evidence, but merely to act as a sample of the collection method used. The member again stated that this method of data capturing is open to human error.

Sections of the Code considered

5.15. Members must respect the constitutional right of consumers to personal privacy and privacy of communications.

5.16. 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.

16.4. Any member authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate the receipt of a demand from a person who has been approached for the purposes of direct marketing to desist from initiating any further communication (an "opt-out request").

16.5. Any member authorising, directing or conducting any direct marketing must not direct or permit any person associated with that activity to direct or deliver any communication for the purpose of direct marketing to:

- (a) a person who has submitted an opt-out request to that member,

(b) a person who has registered a pre-emptive block with a registry established by the National Consumer Commission, or

(c) a person who has registered a pre-emptive block with a registry established by WASPA.

16.9. A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who has given his or her consent.

16.10. A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who:

(a) has provided the party responsible for sending the direct marketing communication with his or her contact details in the context of the sale of a product or services, and the responsible party's own similar products or services are being marketed, and

(b) has been given a reasonable opportunity to object, free of charge, and in a manner free of unnecessary formality, to such use of his or her details at the time when the information was collected and on the occasion of each subsequent direct marketing communication sent to that person.

16.11. A member may not engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing other than as provided for above.

16.12. Any communication for the purpose of direct marketing must contain the details of the identity of the sender or the person on whose behalf the communication has been sent and an address or other contact details to which the recipient may send a request that such communications cease.

16.13. Upon request of the recipient of a direct marketing message, the member must, within a reasonable period of time, identify the source from which the recipient's contact details were obtained. The member must also provide proof that the recipient has given consent to receive that message, or alternatively provide proof that the recipient has provided his or her contact details in the context of the sale of a product or service the same as that being marketed.

16.15. If technically feasible, a recipient must be able to opt out of any further direct marketing messages sent by SMS by replying to a message with the word 'STOP'. If this is not technically feasible then clear instructions for opting out must be included in the body of each marketing message.

Decision

There is no evidence before me that the complainant's number was purchased from a third party and I am prepared to accept the member's explanation that the complainant's number was incorrectly captured and added to its client's database and that the promotional message was then sent to the complainant in error.

However, the member did not consult the National Opt-out register before using the complainant's number and I am not satisfied with the member's response that this is not a WASPA matter.

I am therefore of the view that there has been a contravention of clauses 16.5 and 16.11 of the WASPA Code, for which the member is held responsible.

Furthermore, the promotional SMS in question did not enable the complainant to opt out of any further direct marketing messages by replying to the message with the word 'STOP'. There is no evidence before me that this was not technically feasible, and even if it wasn't, the message should then have contained clear instructions for opting out in the body of the marketing message.

The provision of a link is not sufficient to comply with this requirement of the code. As a result, I am of the view that there has also been a contravention of clauses 16.12 and 16.15 of the Code.

In light of the foregoing, the complaint is accordingly upheld.

Sanctions

I have taken into account two other complaints of a similar nature which have been upheld against the member.

In complaint 20187, the adjudicator strongly encouraged the member to carry forward the requirements of clause 5.3 of the WASPA Code in its dealings with clients to avoid more stringent sanctions at a later date.

The fact that a proper opt-out facility or instructions was not included in the content of the message is a blatant contravention of a fundamental requirement for promotional messages.

Taking these aggravating factors into account, and the sanctions given in the other adjudicated complaints, Connet IT Systems Pty Ltd, is fined R15 000.00.
