



Wireless Application Service Providers' Association

Adjudicator's Report

Complaint number	27180
Cited WASPA members	Interactive Telephony (Pty) Ltd (1281) Panacea Mobile (Pty) Ltd (1377) Cellfind (Pty) Ltd (0019)
Notifiable WASPA members	<i>n/a</i>
Source of the complaint	<i>Public</i>
Complaint short description	Unsolicited spam SMS
Date complaint lodged	<i>31 July 2015</i>
Date of alleged breach	
Applicable version of the Code	<i>14.0</i>
Clauses of the Code cited	<i>16.1, 16.2, 16.3, 16.4, 16.5, 16.9, 16. 10, 16.11, 16.12, 16. 13, 16.14, 16.15, 16.16</i>
Related complaints considered	<i>n/a</i>

Fines imposed	Against Interactive Telephony IRO Clause 16.10(b) and 16.12 – R50 000.00 IRO Clause 16.5 – R 5 000.00 - R15 000.00 suspended.
Is this report notable?	<i>Notable</i>
Summary of notability	<i>Only in respect of suspended fine.</i>

Initial complaint

The complainant received an unsolicited SMS from Dischem and questions where they got his contact details. He submitted that he is on the DMA no-contact list and did not consent to receive the sms.

Member's response

Cellfind indicated that the matter was the responsibility of Panacea Mobile as one of their customers was responsible. Panacea in turn indicated that Interactive Telephony was responsible.

Interactive Telephony responded, submitting that the member was an “opt in” member, and that he has now been removed from receiving SMSs or newsletters. They submitted that they have tried to liaise directly with him. The response will be canvassed more fully below.

Clauses

16.1. “**Consent**” means any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information.

16.2. “**Direct marketing**” means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of (a) promoting or offering to supply, in the

ordinary course of business, any goods or services to the person; or (b) requesting the person to make a donation of any kind for any reason.

16.3. “**Electronic communication**” means communication by means of electronic transmission, including by telephone, fax, SMS, wireless computer access, automated calling machine, email or any similar technology or device.

Right to restrict unwanted direct marketing

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.

Rights of consumers regarding direct marketing

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.

Disclosure of source of contact details

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.

Confirmation of opt out

16.14. Once a recipient has opted out, a message confirming the opt-out must be sent to that recipient. This confirmation message must specify the marketing from which the customer has been opted out, and the customer must not be charged for this message.

Reply STOP option for SMS messages

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.

16.16. If the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the member must honor the opt-out request as if the word 'STOP' had been used.

Decision

At the core of the complaint is the question of whether the complainant consented to receive marketing material from Dischem.

In response to this, the WASP presented proof that shows, at best, that the complainant is a member of BMW Owners Circle. It is quite clear from the submissions that the complainant is not a customer of either Dischem or Liberty, the other two entities that appear to be linked to the Legacy Lifestyle Rewards Programme. This was, in essence, confirmed by the WASP which said, "The member was definitely opted in through BMW Owners Circle and BMW's affiliation to the Legacy Lifestyle Rewards Programme".

The original SMS states:

"We have something just for you! Link your Legacy Lifestyle & Dis-Chem Memberships to receive 1000 Dis-Chem Benefit Points. Link. . .".

It would therefore appear that the WASP is arguing that the complainant, in signing up to the BMW Owners Circle, signed up to the Legacy Lifestyle Rewards Programme. The SMS relates to this rewards programme, and a benefit that members can get with another partner.

I requested both the complainant and WASP to provide clarity on this issue. The complainant submitted that while he has not driven a car for the last three years, it is possible that the WASP bought very old information. He questioned the legality of this and pointed out that he is on the DMA do-not-contact list. The WASP noted described the sign up process for the BMW Owners Circle and Legacy Lifestyle Rewards Programme as they currently are, but provided no proof that the complainant had opted in to the marketing provisions.

Reading between the lines of the complainant's submissions, it seems that he may at some point have been a member of the BMW Owners Circle, and it is possible that he may at that point have consented to receive marketing material. However:

- This was some time ago and it appears that he received this SMS without an intervening history of similar marketing;
- No proof was provided that he did in fact consent to the marketing material;
- It is highly unlikely that the consent that he may or may not have signed over three years ago was in the same form as that now submitted to me, as the relevant laws have significantly changed and tightened;
- There is also no explanation before me to explain why he was not cross-checked against the DMA list.

I am uncomfortable making a definitive finding on the question of whether or not the complainant consented to receive marketing material at some historical point. I therefore find no breach of 16.9, 16.10 9(a) and 16.11. Although somewhat incomplete and outdated, the WASP was able to give some explanation as to how it came to have the complainant's details. I find no breach of Clause 16.13, although this finding is based more on the fact that I have no definitive evidence either way, and a prima facie case indicating from where the consent may have originated.

There is also no evidence before me that the complainant was not immediately able to stop the SMSs. I therefore find no breach of clause 16.4, 16.15 and 16.16. there is also no evidence that a confirmatory SMS would not be sent in that situation so there is no breach of clause 16.14.

That being said, the SMS has no instructions for opt out.

Clause 16.10 (b) states that 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 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.** (my emphasis)

Clause 16.12 says:

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.** (my emphasis)

I find that the failure to give an opt out instruction is in breach of Clause 16.10(b) and 16.12.

Finally, what remains is the failure of the WASP to explain why the complainant, who claims to be on the DMA opt-out list, was still sent marketing material. **This is a *prima facie* breach of Clause 16.5.**

Sanctions

In respect of the breach of clauses 16.10 (b) and 16.12, I find that the breach is of one of the most basic tenets of direct marketing by way of SMS, and the WASP has simply failed to give any account in this respect. **I therefore fine the WASP R50 000 in this respect.**

As to the breach of clause 16.5, I suggest that the WASP conduct an audit of the numbers on its data bases vis-à-vis the DMA opt-out list. It is not within my power to enforce such a request (ref clause 24.43 of the Code).

I also impose a fine of R5000.00 and a suspended fine of R15 000 should another incident of this nature come to light in the next six months.