



Wireless Application Service Providers' Association

Adjudicator's Report

Complaint number	27715
Cited WASPA members	Tristar Trading Ltd (1452)
Notifiable WASPA members	<i>na</i>
Source of the complaint	<i>WASPA Secretariat</i>
Complaint short description	
Date complaint lodged	<i>28 September 2015</i>
Date of alleged breach	
Applicable version of the Code	13.6
Clauses of the Code cited	<i>16.9, 16.10, 16.11, 16.12, 16.15</i>
Related complaints considered	<i>26207, 26247</i>

Fines imposed	Breach of 16.9 – 16.11 – R50 000 Breach of 16.12 – R5000
Is this report notable?	<i>“Not notable”</i> .
Summary of notability	<i>n/a</i>

Background and complaint

The history of this matter is as follows:

- Complaints 26207 and 26247 were lodged in March 2015;
- These matters were first referred to an Emergency panel hearing, and then to adjudication;
- During the course of the adjudication, the adjudicator referred the matter back to WASPA for consideration under new clauses. (ref clause 24.30 of v13.6).

It is this referral that is now before WASPA.

The original complaints related to messages following the format “Someone has sent you a photo message. . .”, which leads to a link to a subscription service. It appears ex facie that an actual person has never sent the recipient a photo message.

Member’s response

The WASP submitted that it is unable to respond to clauses 16.9 to 16.12 as the complaint specifically states that it relates to no particular number and it is therefore unable to provide the required information.

It submitted that it provides users with sufficient means to opt out.

It noted that the campaigns have been stopped and that it has already paid fines for the two formal complaints linked to this matter.

Clauses

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.

16.15. 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

While it is true that the complaint itself states that it relates to no particular MSISDN number, it is abundantly clear that this matter stems from the original complaints in matters 26207 and 26247. It is also clear that the WASP is perfectly well aware of this as they raise the fines in these matters as mitigation.

In the original complaints in those matters, which were attached to the complaint at hand, a number of MSISDN numbers were specifically identified.

I therefore consider it disingenuous of the WASP to avoid this issue by relying on the failure of WASPA to restate the numbers in the cover letter of the complaint.

There is no evidence before me to indicate that any of the recipients identified in the original complaints gave any form of consent to receive marketing material. **I therefore find the WASP in breach of Clauses 16.9, 16.10 and 16.11.**

Clause 16.12 states:

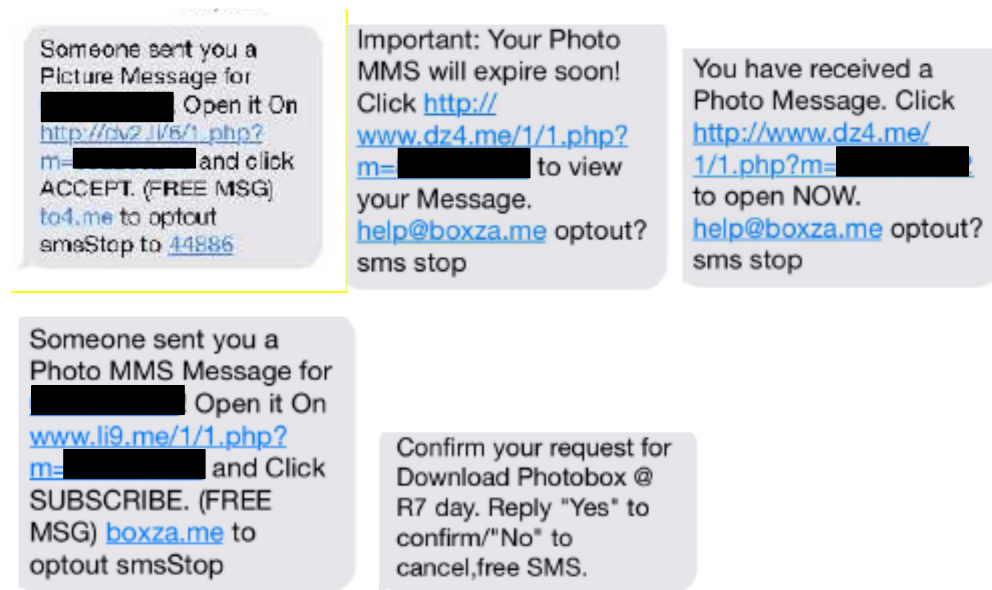
Any communication for the purpose of direct marketing must contain the details of the identity of the sender or the person on whose behalf the communication has been sent and

an address or other contact details to which the recipient may send a request that such communications cease.

This requirement is twofold: the identity of the sender (which is often done by shortcode) and an opt out “address”.

I note that the version of the message that the WASP provided in its latest response is of no relevance to this matter – it is the messages in the original complaints that have relevance.

These original messages are:



I am satisfied that all the original messages have opt out instructions, and I consider that in the case where there is no number given for the opt-out, it is reasonably clear that one must reply to the sender. However, there is no identity of the sender in the original messages.

The messages are therefore in breach of Clause 16.12.

Finally, Clause 16.15 states:

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.

There is nothing before me in the original complaints to indicate that the “stop” message does not work, and there is no basis given in the new complaint. **I therefore find no *prima facie* basis to rule on Clause 16.15.**

Sanctions

I note the WASP's submissions that it has stopped the campaigns and paid fines in respect of the original complaints. Those fines were, however, wholly in respect of the misleading nature of the messages.

The main issue at hand is the practice of sending unsolicited spam sms's to recipients who have not consented. This is a serious breach of the Code and possibly of other laws. It goes to the heart of ethical direct marketing. I note also that the WASP failed to address this matter, attempting to bypass the issue on a technicality. This is, to me, an aggravating factor.

I therefore fine the WASP a further R50 000,00 in respect of the breach of Clause 16.9 – 16.11.

The breach of Clause 16.12 is of a more technical nature, and I fine the WASP R5000 in this respect.