



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	eXactmobile
Information Provider (IP): (if applicable)	N/A
Service Type:	Spam
Complainant:	Consumer
Complaint Number:	4827
Code version:	Code v6.1 and Ad Rules v1.6
Date of Report:	8 October 2008

Complaint & Response

1. On the 4th of September 2008 the Complainant entered an unsubscribe request through the WASPA unsubscribe service in respect of an unsolicited SMS received from the SP. The Complainant did not note the date upon which he received the SMS in question. The Complainant also wished to know the source from which the SP had obtained his MSISDN (cellphone number).
2. The following day, the SP confirmed that the Complainant had been removed from its distribution list. Notwithstanding, the Complainant persisted in his request to know where the SP had got his MSISDN from.
3. Without expounding a lengthy correspondence, two versions of the source of the information emerged – one from Vodacom and one from the SP. The Complainant was not satisfied that there were two contradictory versions, and requested that the complaint be escalated to a formal complaint.
4. On the SP's version, when one of its developers was compiling a list of MSISDNs for use in a marketing campaign for the SP, he mistakenly included the Complainant's MSISDN. To quote the SP:

Exactmobile runs numerous services for itself as well as for many external clients. The basic system is the same however Premium Rated SMS numbers for different clients are tagged with unique client ID reference numbers so that the messages are kept separate.

Exactmobile periodically uses SMS as a marketing tool to invite previous clients to purchase exciting new content and offer new services. Mobile numbers are carefully selected based on users' recent interactions with

Exactmobile. The criteria to select the mobile numbers for marketing campaigns are chosen by Management and the task is then allocated to a developer to extract the data. In this specific case, due to an external client PRS number being incorrectly allocated as an Exactmobile number, this user's mobile number was selected as a "valid" number.

5. The SP in its written submission and its correspondence with the Complainant is silent on how the Complainant's MSISDN came to be within the SP's ken in the first place. The Complainant however alleges that the SP's representative advised him:

...that Vodacom had sent out unsolicited competition sms's last year – and that I had rejected inclusion in the competition. (I am unaware of receiving such a sms – or responding to it). The 'rejection' list was then (erroneously) used by one of the Exactmobile programmers to send out further unsolicited sms's.

6. The Complainant followed up his enquiry with Vodacom and on his version their explanation was as follows:

[removed] (Vodacom, Cape Town) called to explain:

1. Vodacom DID send sms's to many subscribers re the 100 cars competition in December/January.

2. According to her (and a senior person "[removed]") Exactmobile was NOT given cell phone numbers for this competition.

7. So much for the facts. The SP made the following submission in mitigation:

After receiving the complaint, Exactmobile has done a very thorough check (with several layers of testing) on the systems and has now ensured that all numbers are correctly allocated. Hence we are confident that we will not inadvertently send the wrong people messages again. This was an honest error and Exactmobile apologizes to the user affected. After careful analysis we found there to be a small amount of numbers that received the message in error.

Portion of the Code Considered

8. The following sections of the Code of Conduct are relevant:

4.2. Privacy and confidentiality

4.2.1. WASPA and its members must respect the constitutional right of consumers to personal privacy and privacy of communications.

5. Commercial communications

5.1. Sending of commercial communications

...

5.1.7. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.

...

5.2. Identification of spam

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

(a) the recipient has requested the message;

(b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or

(c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.2.2. 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.

Decision

9. The Complaint has two heads: that the SP sent spam in contravention of section 5.3.1 read with section 5.2.1 of the Code of Conduct, and that the SP did not adequately identify the source from which it obtained the Complainant's personal information in contravention of section 5.1.7 of the Code of Conduct..

Spam

10. To deal with the question of the sending of spam first: it is common cause that the Complainant did not request that the SP send him SMS messages, nor did the SP have a direct and recent prior commercial relationship with the Complainant.
11. If Vodacom supplied the SP with the Complainant's MSISDN, and the Complainant had consented to Vodacom doing so for marketing purposes, then the message would not constitute spam. It is however clear that the Complainant gave no such consent.

12. Accordingly I can make no other finding but that the SP infringed section 5.3.1 of the Code of Conduct in that it sent spam to the Complainant.

Source

13. A slightly more challenging enquiry is whether the SP has adequately identified the source from which it obtained the Complainant's MSISDN.
14. While the SP apparently admitted to the Customer that it acquired the Complainant's MSISDN from Vodacom, Vodacom denies this, and the SP itself is silent on this aspect in its written submissions, merely stating that the MSISDN was included in its distribution list in error, but not explicitly identifying its source.
15. The Complainant denies that it ever received an SMS from Vodacom as allegedly described by the SP's representative, and as Vodacom denies that it ever sent the Complainant such an SMS, the Complainant draws the conclusion that the SP has sinister motives in failing to properly disclose where it got the Complainant's MSISDN from.
16. On the facts I am unable to conclude that there is anything sinister in the SP's failure to disclose the source from which it obtained the Complainant's MSISDN.
17. In order to satisfy the provisions of section 5.1.7 of the Code of Conduct, a member must provide specific information. The SP did not state in its submission that the information came from Vodacom, and Vodacom denies having provided it. It is not sufficient merely to state that the information was acquired from an "external client".
18. The SP has hence NOT disclosed the source from which it obtained the Coplainant' MSISDN, and has hence infringed section 5.1.7 of the Code of Conduct.
19. Unfortunately the failure of the SP to so disclose leads to an erosion of its credibility in this matter: it cannot fail to disclose and then expect an adjudicator to give credence to its submissions regarding steps taken to ensure that such an eventuality does not recur.
20. While I can not conclude from the papers that the SP's methods of collecting MSISDNs for marketing purposes have been insalubrious, the fact of nondisclosure does make me suspicious that they are. If the SP has been in any way underhand in obtaining consumer MSISDNs for marketing purposes it may also be infringing section 4.2.1 in violating the Complainant's right to privacy.

Sanction

21. I have taken the SP's speedy removal of the Complainant's MSISDN from its distribution list into account in imposing a sanction in respect of the infringement of section 5.3.1. I have also taken into account the need to combat spam in the industry. However given the SP's failure to disclose I have not taken into account the steps that the SP claims to have made to ensure that this kind of incident does not happen again.

22. The SP is fined an amount of R2 500 for the infringement of section 5.3.1 of the Code of Conduct.
23. The SP is fined an amount of R15 000 for its failure to disclose the source from which it obtained the Complainant's MSISDN. R 10 000 of this fine is suspended subject to the following conditions:
 - 23.1. that the SP does not infringe section 5.1.7 for a period of 6 months from the date hereof, and
 - 23.2. that the SP complies with the requirements of paragraph .
24. The SP must within 10 working days of receiving notice of this report present the WASPA Secretariat with a report containing the following information:
 - 24.1. the substance of the information received by it pertaining to the Complainant from which it acquired the Complainant's MSISDN,
 - 24.2. the source of such information,
 - 24.3. the date such information was received, and
 - 24.4. the purpose for which the information was provided to the SP.
25. The WASPA Monitor is requested to review the report and take further action should the manner in which the SP obtained the Complainant's MSISDN constitute a breach of the Code of Conduct.

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