



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	eXactmobile
Information Provider (IP):	Not applicable
Service Type:	Unsolicited messages
Complainant:	Jeff Hermert
Complaint Number:	5284
Code Version:	6.2
Advertising Rules Version:	Not applicable

Complaint

The Complainant in this matter received various unsolicited messages over a period of 5 days whereafter he lodged a complaint. WASPA tried to resolve the complaint informally but the complaint was later escalated to a formal complaint due to the fact that the Complainant kept on receiving unsolicited messages.

Service provider's response

In its initial response the SP stated the following:

"As indicated on the informal response, Exactmobile has not sent and SMS to this client during the period 2008-09-01 00:00:01 to 2008-11-30. The client would need to give more details so that Exactmobile can assist in ascertaining who sent these SMS. If we know which company is advertising then we can assist in finding who the WASP is."

The SP, after a delay of three months then sent the following response:

"Exactmobile has now ascertained that this subscriber received MMS messages from one of our IP's. When a MMS is sent to the client, the MMS is sent once to the network MMSC. The network will then attempt to deliver the MMS for a period of 5 days, often attempting many times per day.

The way MMS works is that a SMS is sent to the user's phone from the network. The handset will then automatically attempt to retrieve the MMS from the network. Should the handset not retrieve the message, then the network will send another SMS to the handset in order for the handset to retrieve the

MMS. On most handsets the SMS is hidden from the user as it is sent in a binary format which the phone understands and knows to automatically retrieve the MMS. Should the phone not be configured correctly or there be network issues, the SMS will be sent multiple times in order for the handset to retrieve the MMS.

All MMS sent to this user were submitted to the network MMSC before 15:00 each time. The network was unable to deliver and therefore retried multiple times.

This client has been removed from the IP's marketing database and will no longer receive marketing MMS from this IP."

Sections of the Code considered

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.5. Members must have a complaints procedure allowing their customers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.

5.1. Sending of commercial communications

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 database, so as not to receive any further messages from that message originator.

5.1.3. For SMS and MMS communications, 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.

5.1.4. For SMS and MMS communications, 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. 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.

5.1.6. 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.

5.1.7. 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.

5.1.8. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the upfront description of the service.

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.

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the SP's response and has reviewed the subsequent logs provided by the SP.

In this matter the Adjudicator can sympathize with the frustrations the Complainant had to endure. It is regrettable that the SP in this matter has taken such a long time before submitting its various replies. The first response was only received 3 weeks after the Complaint was escalated to a formal Complaint. This is a direct breach of the 5 day response time. The final response was only received 4 months later. This is unacceptable in the opinion of the Adjudicator.

The Complainant had made several requests to have its number unsubscribed from the SP's marketing list but had to endure numerous SMSs sent at undesirable times, some of which account for 4 AM in the morning.

This is in stark contradiction of the Code's section 5.1.8 which clearly stipulates that no commercial messages may be delivered between 20h00 and 06h00.

Whether these messages indeed amount to spam is uncertain since there are no clear indication whether the Complainant had indeed requested the messages, had a prior commercial relationship with the SP / IP or whether the Complainant had indeed provided his explicit consent for receiving these messages.

Although this might be the case, it is the opinion of the Adjudicator that WASPA, in conjunction with the network operators has seemingly failed the Complainant in providing a mechanism to identify the message originator timeously.

This failure however can not be attributed to WASPA alone, since WASPA has done everything reasonably possible to resolve the Complaint. The contributing factor must reside with the SP. The Code clearly states that all commercial messages must contain a valid originating number and/or the name or identifier of the message originator. In this case the originator was identified as the SP, although the SP could not establish the origin itself. Although the SP has indicated that it was one of their IPs, it has failed to adhere to sections 5.3.1 and 5.3.2. It also amounts to a breach under section 4.1.5.

The Code further requires any message originator to have a facility to allow the recipient to remove him or herself from the message originator's database, so as not to receive any further messages from that message originator.

The procedures are described in 5.1.3 – 5.1.6 of the Code. These procedures were not followed by the SP or its IP.

The SP also did not fulfill the "reasonable period of time" requirement of section 5.1.7.

The Adjudicator has perused the SP's reasoning of the delivery of the MMSs, but is still not satisfied that these factors alone could justify the Complainant's inability to unsubscribe itself from receiving any further messages. Neither has

the SP provided enough reasoning why it took it so long to respond to the Complaint nor did it explain why it could not identify the IP at an earlier and more convenient time to the Complainant.

The Complaint is subsequently upheld.

Sanctions

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct;
- The SP's response time.

For its breach of section 5 the SP is fined R 100 000-00 of which R 50 000-00 is suspended for a period of six months subject to the following conditions:

The SP must within 10 working days of receiving notice of this report present the WASPA Secretariat with a report containing the following information:

- The source of the Complainant's information,
- The date such information was received, and
- The purpose for which the information was provided to the SP.

The WASPA Monitor is requested to review the report and lift the suspension should the manner in which the SP obtained the Complainant's information constitute a breach of the Code of Conduct.

The fine must be paid to the WASPA Secretariat within five (5) days of notification hereof.