



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	28328
Cited WASPA members	Stouf Communications (Pty) Ltd (0058) (Respondent)
Third Party	Lifeline Debt Solutions (Non-WASPA Member)
Source of the complaint	Public
Complaint short description	Unsolicited marketing messages, source of contact details and proof of consent
Date complaint lodged	12 November 2015
Date of alleged breach	November 2015
Applicable version of the Code	Version 14.3
Clauses of the Code cited	16.5(a), 16.9, 16.11, 16.12, 16.13 and 16.14
Related complaints considered	27715
Fines imposed	R30 000.00
Other sanctions	None
Is this report notable?	Not notable
Summary of notability	N/A

COMPLAINT

The Complainant received a number of unsolicited direct marketing messages and attempted to resolve the issue with the Respondent and Third Party (non-WASPA member, Respondent's client) involved, regarding the source of his contact details and proof of consent. The following are unsolicited messages received by the Complainant:

*“Origin Address: +27 82 559 9724
Destination Address: +27 xxxxxxxxx
Date: 2015-11-11 16:38 GMT+2
Message: REFUSED a LOAN, STRUGGLING to pay your DEBTS, in ARREARS, we can HELP you NOW & SAVE YOU MONEY EVERY MONTH; sms KJ50 to 45648 cost R1.50 or reply top std rate“;*

*“Origin Address: +27 71 460 1505
Destination Address: +27 xxxxxxxxx
Date/Time: 2015-11-11 09:25 GMT+2
Message: LIFE INSURANCE from just R99 pm NO MEDICAL; couldn't be EASIER to get COVER; Premiums FIXED 2 YEARS; sms LIFE to 45648 cost R1.50 or reply stop opt out“;*

and

*“Origin Address: +27 79 4102207
Destination Address: +27 xxxxxxxxx
Message: REFUSED LOAD, in ARREARS, STRUGGLING to pay your DEBTS, we can HELP you NOW & SAVE YOU MONEY EVERY MONTH; sms LS48 to 45648 cost R1.50 or reply stop std rate”*

In an attempt to resolve this issue, the Complainant approached the Respondent as they are the registered holder of the short code mentioned in the messages, i.e. 45648 short code. The Complainant was however informed that the messages to his handset did not originate from the Respondent's systems, and was therefore directed to the Third Party for resolution of the issue. Subsequently, the Complainant resolved to make a formal complaint to WASPA as he continued to receive further unsolicited messages after raising this issue with the Respondent and Third Party.

The Complainant submits that the Respondent is in contravention of the WASPA Code of Conduct.

MEMBER'S RESPONSE

The Respondent acknowledged receipt of the complaint from the Complainant and undertook to investigate the matter and provide findings accordingly.

The Respondent confirmed that short code 45648 does belong to one of its clients namely, Lifeline Debt Solutions, the Third Party in this regard. However, the Respondent advised the Complainant that it does not send out SMS's for the Third Party and apologized to the Complainant for any inconvenience caused. The Respondent then contacted the Third Party seeking a report there from on what it has done on its side to appease the complaint and that it (Respondent) views the complaint in a serious light as it has never in 14 (fourteen) years received a complaint of this nature. The Respondent further advised the Complainant that it has contacted the Third Party to apologize accordingly and also indicated that it does not condone the fact that its client sent the Complainant SMSs.

The Respondent also made the Third Party aware that penalties from WASPA can be quite harsh and that this issue needs to be addressed with WASPA swiftly.

THIRD PARTY'S RESPONSE

Third Party submits that it had a business associate that wanted to run a SMS marketing trial/pilot and as a result provided the associate in question with a couple of sim card numbers and the following message for testing:

"REFUSED a LOAN, STRUGGLING to pay your DEBTS, in ARREARS, we can HELP you NOW & SAVE YOU MONEY EVERY MONTH; sms KJ50 to 45648 cost R1.50 or reply top std rate."

Third Party confirms that the SMSs received by the Complaint were from its business associate who wanted to try SMS marketing for its life business and that it (Third Party) offered the use of its short code to assist the business associate with the pilot.

Following an informal complaint, Third Party assured the Complainant that he will receive no further unsolicited marketing messages from it or any of its business associates, which was not the case (I deal with this further on in the report). Third Party submits that it and the Respondent were not responsible for sending SMSs to the Complainant and that the Respondent merely facilitated the replies to the short code.

COMPLAINANT'S RESPONSE

The Complainant submits that according to him, the Third Party agrees to the following:

1. That the message content was provided by the Third Party;
2. That the SIM from which the message originated was provided by the Third Party; and
3. That the short code, through which responses were solicited, was provided by the Third Party using the Respondent.

MEMBER'S FURTHER RESPONSE

The Respondent submits as follows:

1. That it believes, in light of Third Party's information, the Third Party has indeed concocted a story instead of coming outright and apologizing.
 2. That its findings is that the Third Party has gone around in circles without getting to the point, and in the Respondent's opinion the Third Party has attempted to smokescreen the whole process.
 3. That prior to this complaint, the Respondent has never received a complaint like this nor has it ever been penalized for any complaint of any nature whatsoever.
 4. That the Respondent believes it has acted in good faith, and could not have acted quicker without first obtaining all the facts.
 5. That as a result of all this the Respondent has terminated all binds that allow the Third Party to use any of the Respondent's services.
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CLAUSES OF THE CODE RAISED IN THE ORIGINAL COMPLAINT

16. Direct Marketing Messages

Right to restrict unwanted direct marketing

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.

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.

16.11. 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.

For completeness sake I also considered the following definitions in terms of clause 16:

Definitions

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.

Decision

The issues for me to considered in determining whether or not there is contravention on the part of the Respondent in respect of clauses of the Code raised in the original complaint are the following:

1. whether the Respondent has permitted its facilities to be used for the purpose of direct marketing to the Complainant who has given his consent;
2. whether upon request by the Complainant, the Respondent within a reasonable period of time, identified the source from which the Complainant's contact details were obtained;
3. whether the Respondent provided proof that the Complainant has given consent to receive the messages; and
4. whether the Complainant opted out and was accordingly sent a message confirming the opt-out in the manner specified by the Code.

Clause 16.5(a) provides that *“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 person who has submitted an opt-out request to that member.”*

The evidence before me does not indicate and/or suggest that the Complainant ever opted-out by way of SMS (bearing in mind there was no consent ever given in the first place, which issue I deal with further on in the report). However, following some of the marketing messages received, the Complainant sent an email to the Respondent and Third Party on the 11th of

November 2015 at 9:55am, requesting that *“please acknowledge that my details have been removed from your list and that both Stouf and Lifeline have added these details to a pre-emptive block system in accordance with §16.4 of the WASPA code of conduct.....”*. Third Party responded at 11:57am on the same day indicating the following *“Be assured, that you will receive no further sms marketing from us or any business associate”*. However, despite this communication, the Complainant received another marketing message later on in the day at 4:38pm.

Based on the foregoing I find that the Respondent has contravened clause 16.5 of the Code. Additionally, I wish to immediately deal with clause 16.14., i.e. **“Confirmation of Opt-Out”**, as it is relevant herein. I acknowledge that once the Complainant opted out, a message confirming the opt-out was sent to the Complainant by way of an email, except that it was not implemented accordingly. As a result, I also find that the Respondent has contravened clause 16.14 of the Code.

Clause 16.9. and 16.11 provide 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 given his or her consent.”* and that *“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.”*, respectively. Furthermore, **Clause 16.13.** provides that *“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.”*

The evidence before me indicates that the Complainant never granted consent to the Respondent and/or Third Party in this regard. The Respondent and Third Party do not dispute this fact or produce evidence that proves otherwise. Evidence indicates that on the 3rd of November 2015 the Complainant notified the Respondent by way of an email, of a direct marketing message which he received and requested the Respondent to identify the source from which his contact details were obtained, and proof that he consented to receive that message. The Respondent failed to provide proof of consent until the Complainant lodged a formal complaint on the 12th of November 2015. However, insofar as identifying the source from which the Complainant’s contact details were obtained, I believe this has been done and cannot be taken any further, even though it may have not been done within a reasonable time.

I therefore find that the Respondent has contravened Clauses 16.9, 16.11 and 16.13.

Sanctions

I have taken into account a number of factors including previous complaints upheld against unsolicited communications in considering the sanction to be given in this complaint.

It would appear the practice of sending unsolicited communication to recipients who have not consented is a serious breach of the Code. In light of the foregoing, and previous sanctions that were handed down by Adjudicators the Respondent is fined the sum of R30 000.00 (thirty

thousand rand) as this is a first offence and that the Respondent took reasonable steps to remedy the situation.

The Respondent is also formally warned to ensure that its clients implement reasonable measures to ensure compliance with the Code, particular that consent is granted in respect of marketing communication.

Matters referred back to WASPA

I note that the Code limits me to dealing only with clauses raised in the original complaint. I refer to other potential breaches which I believe are relevant but were not cited in the original complaint herein below. It may have just been an oversight on the part of the Complainant or probably because the cited clauses also addresses the same concerns.

3. Services Provided or Marketed by Third Parties

Extent to which the Code applies to third party services

3.1. If a customer, supplier, affiliate or sub-contractor of a member provides or markets services covered by this Code of Conduct, those services are subject to the relevant provisions of this Code, as if the party providing or marketing them was a member.

3.2. If a customer, supplier, affiliate or sub-contractor of a member is found to have breached this Code of Conduct, that member must abide by any order to suspend or terminate the services offered by that party.

Third parties who are not WASPA members

3.5. Members must ensure that any customer, supplier, affiliate or sub-contractor who is not a member of WASPA, but is providing or marketing services covered by this Code of Conduct, is aware of the requirements of this Code of Conduct.

3.6. Members must ensure that any customer, supplier, affiliate or sub-contractor who is not a member of WASPA, but is providing or marketing services covered by this Code of Conduct, provides and markets those services in a manner consistent with the requirements of this Code of Conduct.

3.7. A member is liable for any breaches of this Code of Conduct resulting from services offered or marketed by a customer, supplier, affiliate or sub-contractor if that party is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that party provides and markets services in a manner consistent with the requirements of this Code of Conduct, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.

5. Customer Relations

Privacy and confidentiality

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.
