



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	#36906
Cited WASPA members	CM Telecom South Africa (Pty) Ltd (1583)
Notifiable WASPA members	n/a
Source of the complaint	Public
Complaint short description	Sending unsolicited direct marketing messages after repeated opt-out requests sent by the complainant
Date complaint lodged	2017-11-08
Date of alleged breach	Same as above
Applicable version of the Code	v15.2
Clauses of the Code cited	3.5., 3.6., 4.2., 5.15., 5.16., 16.4., 16.5(a), 16.9., 16.10(a,b), 16.11., 16.12., 16.13., 16.14.

Related complaints considered	34293
Fines imposed	n/a
Other sanctions	Formal reprimand and member required to terminate services to non-member, SMS Global Marketing
Is this report notable?	No
Summary of notability	n/a

Complaint

1. This complaint was lodged by the complainant after they continued to receive numerous unsolicited SMS direct marketing messages from SMSS Globalized Marketing ("SMSS") on behalf of its customer, Pizza Del Forno; despite previous opt-out requests being sent to the sender.

2. In support of their complaint, the complainant gave a detailed account of the background to the current complaint. I do not intend repeating the full background here, but the salient facts are as follows:
 - 2.1 the complainant received 4 unsolicited SMS messages from SMSS, on behalf of Pizza Del Forno during June 2017;

 - 2.2 the complainant sent an opt-out request by replying "STOP" to the number provided in the body of the message;

 - 2.3 the complainant also lodged a complaint with WASPA against SMSS, who was a member of WASPA at that time;

- 2.4 the complaint (# 34293) was subsequently resolved informally on 7 July 2017 between the parties;
 - 2.5 as part of the informal resolution of the complaint, SMSS apologised to the complainant and stated that the unsolicited messages had been sent to the complainant due to a technical error on its system;
 - 2.6 SMSS stated further that this was a once-off error that had been resolved, but it could not assure the complainant that the error would not happen again as the software it used could not be 100% guaranteed;
 - 2.7 However SMSS did state that every resource had been put into this not happening again.
3. Since the informal resolution of complaint # 34293, the complainant received further SMS messages from SMSS on behalf of Pizza Del Forno on 7 August 2017 and again on 1 September 2017.
 4. The complainant again replied "STOP" to the unsolicited message received on 1 September 2017.
 5. However, another two further messages were received by the complainant from SMSS on behalf of Pizza Del Forno on 29 September 2017 and 13 October 2017.
 6. The complainant replied "STOP" to the message on 13 October 2017. No further messages have been received since then.
 7. SMSS was not a member of WASPA on the date that this complaint was lodged. The complaint was therefore directed to the Member, whose platform had allegedly been used by SMSS to send the relevant messages to the complainant.
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Member's response

8. On receiving notice of the formal complaint, the member referred it onto SMSS.

9. SMSS responded as follows:

We confirm that MSISDN 27834142983 has been blocked from our services as of 2017-10-13 16:15:00 when we received a Message containing "STOP" (OPT OUT).

The server has blocked any transmission trying to send to the MSISDN.

After the above mentioned date and time there has been no transmission to this number, as it is flagged as invalid.

The OPT IN is still being investigated.

The number has been taken from customers ordering and used as a database. There was no formal opt in procedure.

That however has been implemented in July 2017, where the customer gives consent to receive messages containing specials.

10. In its own response to the complaint, the member stated that SMSS only became a customer of theirs on 20 September 2017 and that it could not be held responsible for any complaints prior to that date.

11. The member attached the logs of all messages that had been sent via its platform on behalf of SMSS to the complainant's number. The logs show that a message was sent on 29 September 2017 and another on 13 October 2017.

12. The member also attached another log showing that it received a stop command from the same number on 13 October 2017, which was then passed on to SMSS on the same day.

13. The member states further that on receiving notification of this complaint from WASPA, it immediately investigated, and responded accordingly. The member referred to the letter from SMSS which confirmed that the complainant's number had been removed from their platform after receiving the STOP command on 13 October 2017.
 14. The member confirmed that no STOP command was received via its platform for the first message that was sent on 29 September 2017 and that it was not responsible for any unsolicited messages that were sent prior to 29 September 2017.
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Sections of the Code considered

15. The complainant cited the following clauses of the WASPA Code of Conduct as the basis for their complaint:
 - 15.1 *Clause 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.
 - 15.2 *Clause 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.
 - 15.3 *Clause 4.2:* Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.
 - 15.4 *Clause 5.15:* Members must respect the constitutional right of consumers to personal privacy and privacy of communications.
 - 15.5 *Clause 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.

- 15.6 *Clause 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”).
- 15.7 *Clause 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,
- 15.8 *Clause 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.
- 15.9 *Clause 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.
- 15.10 *Clause 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.

- 15.11 *Clause 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.
- 15.12 *Clause 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.
- 15.13 *Clause 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.
- 15.14 No further clauses were assigned by WASPA.
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Decision

16. After some confusion regarding SMSS' membership status, it was confirmed that SMSS was not a member of WASPA on the date that this complaint was lodged. The complaint was therefore directed to the member, as the correct respondent.
17. It appears that the member was under the impression that SMSS was an affiliate member of WASPA. However, it was subsequently confirmed that SMSS were no longer a member of WASPA, as its membership had been revoked before this complaint was lodged.

18. I am satisfied that it was reasonable for the member to assume that SMSS was fully aware of the requirements of the Code since they had been members of WASPA previously.
19. The member has therefore not contravened the requirements of clause 3.5 of the Code.
20. The member stated in their response that SMSS only became a customer on 20 September 2017. This has not been placed in dispute.
21. Therefore, the member cannot be held responsible for any conduct by SMSS before 20 September 2017.
22. The member also stated that the first time it received an opt-out request from the complainant was after the message sent via its platform on 13 October 2017.
23. The member immediately responded to the complainant's opt-out request on 13 October 2017 by passing it on to SMMS, who then formally confirmed that the complainant's number had been blocked.
24. There is no evidence to suggest that the member had any knowledge of the previous opt-out requests sent by the complainant to SMSS regarding similar messages.
25. There is also no evidence that suggests that the member has failed to respect the rights of the complainant, or has acted otherwise in an unprofessional manner (even though the same cannot be said of SMSS).
26. I am therefore satisfied that the member has not contravened clauses 3.6, 4.2, 5.15, 5.16, 16.4, and 16.5 of the Code.
27. Regarding the alleged contravention of clauses 16.11 (which must be read together with the provisions of clause 16.9 and 16.10) and clause 16.13, SMSS confirmed, in their response to the complaint, the complainant's number had not been obtained from any formal opt-in process.

28. SMSS stated that the complainant's details were obtained from previous orders placed with Pizza Del Forno, when the complainant had consented to receive messages containing specials.
29. Neither the member, nor SMSS, has provided any further proof that the complainant gave their consent to receive the marketing messages from Pizza Del Forno, or alternatively that the complainant gave their contact details in the context of the sale of a product the same or similar to those being marketed.
30. The complainant has denied that they ever consented to receive marketing messages from Pizza Del Forno or had any dealings with them that could have resulted in the complainant being added to their customer database or mailing list.
31. There is no reason why I should not accept the complainant's version in this regard.
32. Based on the foregoing, the Member has not sufficiently demonstrated that, before permitting SMSS to use its facilities for the purpose of direct marketing, it had established that:
 - 32.1 the complainant had given their consent to receive messages from Pizza Del Forno or SMSS; or
 - 32.2 SMSS, or its customer, had obtained the complainant's contact details in the context of the sale of a product or services, and similar products or services were now being marketed.
33. The member has therefore contravened clauses 16.11 and clause 16.13.
34. Regarding the alleged contravention of clause 16.12, I am satisfied that the SMS messages sent to the complainant via the member's platform contained the details of the identity of the sender or the person on whose behalf the communication had been sent and an address or other contact details to which the complainant could send an opt-out request. The member has therefore not contravened clause 16.12.

35. Regarding the alleged contravention of clause 16.14, the member's logs do not show that the required confirmation message was sent to the complainant after they replied "STOP" on 13 October 2017. The Member has therefore also contravened clause 16.14.
36. Based on the foregoing:
- 36.1 The complaint in respect of clauses 3.6, 4.2, 5.15, 5.16, 16.4, 16.5, and 16.12 of the Code is dismissed.
- 36.2 The complaint in respect of clauses 16.11 (read together with clauses 16.9 and 16.10), 16.11, 16.13, and 16.14 is upheld.
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Sanction

37. I have taken into account, as mitigating factors, that no previous complaints have been upheld against the member and that the member took reasonable steps in response to the reported breach of the Code.
38. Although the continued infringements of the Code and the complainant's rights by SMSS would normally be viewed as an aggravating factor when considering the conduct of SMSS, the member cannot be held responsible for the conduct of SMSS before it became a customer of the member.
39. In light of the foregoing, the following sanctions are made against the member:
- 39.1 The Member is formally reprimanded to always ensure that:
- 39.1.1 It establishes, before permitting any member or non-member to use its facilities for the purposes of direct marketing, that:
- 39.1.1.1 the intended recipients of the direct marketing messages sent using its facilities have given their consent to receive such messages; or

39.1.1.2 the intended recipients' contact details were obtained in the context of the sale of a product or services, and similar products or services are being marketed to them.

39.1.2 It is able to provide proof that the intended recipient of a direct marketing message sent using its facilities has given consent to receive that message, or alternatively proof that the intended 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;

39.1.3 It sends a message to a recipient who has opted out, confirming the opt-out and specifying the marketing from which they have been opted out.

39.2 The Member is required to immediately stop all further use of its facilities by SMSS for the purpose of direct marketing.

40. Although I am required by clause 24.32A of the Code to only make a ruling against the member identified as the respondent to this complaint, it is apparent from the circumstances surrounding this complaint (and the previous complaint lodged by the same complainant) that SMSS has shown a blatant disregard for the requirements of the WASPA Code of Conduct when engaging in direct marketing campaigns, either via its own platform or the platforms of WASPA members.

41. I therefore recommend that the WASPA Secretariat issue an advisory notice to all its members that SMSS should not be permitted to use their facilities or services to engage in any form of direct marketing which involves any electronic communications that fall within the ambit of the Code.