



**Wireless Application Service Providers' Association**

## Report of the Adjudicator

Complaint number	#37132 / #37136
Cited WASPA members	Blue Label Data Solutions (Pty) Ltd (1234)
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	2017-11-30
Date of alleged breach	Same as above
Applicable version of the Code	v15.2
Clauses of the Code cited	3.5., 3.6., 16.4., 16.5, 16.9, 16.10 (a,b), 16.11, 16.14, 16.15, 16.16
Related complaints	10854, 11231, and 18228

considered	
Fines imposed	R25 000 for contravention of clauses 3.6, 16.4, 16.5, 16.9, 16.10 (read together with clause 16.11), 16.14, 16.15 and 16.16
Other sanctions	Formal reprimand
Is this report notable?	No
Summary of notability	n/a

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## Complaint

1. This complaint was lodged by the complainant after they continued to receive numerous unsolicited SMS direct marketing messages despite previous opt-out requests being sent to the sender, Dischem Pharmacies ("Dischem").
2. After formally logging an unsubscribe request with WASPA and taking the matter up directly with Dischem, who undertook to remove the complainant from their database, the complainant continued to receive further unsolicited messages as follows:

*"Dis-Chem - Save an additional 20% off on Estee Lauder, Clinique.... Sat 2 & Sun3 December. SMS Stop to OPT Out"*

*87085101213392 - "POP a Balloon for a 10-50% Discount on any Epil Free Permanent ..... Opt Out STOP"*
3. Dischem is not a member of WASPA. The complaint was therefore directed to the Member, whose platform was used to send the relevant SMS messages to the complainant.

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## **Member's response**

4. The member confirmed that its client, Dischem, was not a member of WASPA. It provided a copy of a "WASPA Non-Member Agreement" signed by Dischem.
5. The member advised that upon receiving the first complaint from WASPA, the member referred the matter directly to Dischem. The member attached a report from Dischem and correspondence that had been exchanged between Dischem and the complainant to their response, as well as change logs from Dischem's system confirming that the complainant's opt out was in place.
6. In Dischem's report, it acknowledged that a valid opt out request had been received from the complainant on 1 September 2017, which was logged on its internal system on the same day.
7. Dischem advised that other direct marketing campaigns had already been pre-set before the complainant's opt-out request had been logged, which was the reason why the complainant received further marketing messages.
8. Dischem stated that they corrected their system again, but missed one of the pre-set files and a further marketing message was again sent to the complainant.
9. Dischem confirmed that the complainant had now been opted out from any further communications and it offered an apology to the complainant.
10. The member stated in its response that the complainant's opt out was only logged on its system on 1 December 2017.

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## **Complainant's further response**

11. The complainant responded further by stating that the member has ignored the fact that their opt-out process does not work, since they had replied "STOP" to numerous messages received.
  12. The complainant also alleged that they had never given permission to Dischem to send them any marketing messages.
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### Sections of the Code considered

13. The complainant cited the following clauses of the WASPA Code of Conduct as the basis for their complaint:
  - 13.1 *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.
  - 13.2 *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.
  - 13.3 *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").
  - 13.4 *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,

- 13.5 *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.
- 13.6 *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.
- 13.7 *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.
- 13.8 *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.
- 13.9 *Clause 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.
- 13.10 *Clause 16.16:* If the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the member must honor the opt-out request as if the word 'STOP' had been used.

14. No further clauses were assigned by WASPA.
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## Decision

15. Dischem is not a member of WASPA. This complaint was therefore correctly directed to the member.
16. I have reviewed the "WASPA Non-Member Agreement" executed between the member and Dischem and I am satisfied that it was reasonable for the member to assume that Dischem was fully aware of the requirements of the Code since the signed agreement contained an acknowledgement by Dischem to this effect  
  
*(See clause 2.7 of the signed agreement).*
17. The member has not contravened the requirements of clause 3.5 of the Code.
18. The member's "WASPA Non-Member Agreement", signed by Dischem, also creates a positive obligation on Dischem to implement and use its own Do-Not-Contact (DNC) and Global Opt-Out (GOO) lists, and to ensure that no unsolicited and/or marketing messages are sent through the member's systems to any subscribers who have duly opted out.  
  
*(See clause 3.3 of the signed agreement).*
19. The agreement also contains a warranty from Dischem that its DNC and GOO lists are accurate and up to date.
20. It is not in dispute that Dischem did not comply with the aforesaid obligations and warranty given under its agreement with the member. Dischem has acknowledged that the complainant was not removed from its internal system despite a valid opt-out request being logged on the system.

21. However, what is not clear is why the member allowed further marketing messages to be sent by Dischem to the complainant after the initial opt-out request was received from the complainant on 1 September 2017.
22. The member has offered no explanation as to why the complainant's opt out was eventually only logged on the member's system on 1 December 2017, when the initial opt out request was received from the complainant on 1 September 2017.
23. The member was fully aware of the first opt-out request from the complainant but continued to allow further marketing messages to be sent to the complainant via its system.
24. Although the member has created specific contractual obligations and warranties in its agreement with Dischem, I am not satisfied that the member has taken any further steps to properly ensure that Dischem's marketing is consistent with the requirements of the Code.
25. The member has contravened clause 3.6 of the Code.
26. Based on the evidence provided, I am also not satisfied that the member has, when conducting any direct marketing on behalf of Dischem, implemented 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").
27. The member has contravened clause 16.4 of the Code.
28. The member has also permitted its systems to be used to direct or deliver communications for the purpose of direct marketing to the complainant after they had submitted an opt-out request to the member.
29. The member has contravened clause 16.5 of the Code.
30. The complainant's allegation that they never opted-in to receive any marketing from Dischem has not been refuted by either Dischem or the member.

31. The member has therefore permitted its facilities to be used for the purpose of direct marketing to the complainant when they had not given their consent to such marketing.
  32. There has also been no evidence presented that the complainant had provided Dischem with their contact details in the context of the sale of a product or services similar to those being marketed.
  33. The member has therefore contravened clauses 16.9 and 16.10, read together with clause 16.11, of the Code.
  34. No evidence has been presented by the member (or by Dischem) that a confirmation message was sent to the complainant as required, confirming the opt-out and specifying the marketing from which the complainant has been opted out from.
  35. The member has contravened clause 16.14 of the Code.
  36. I am satisfied with the explanation given by Dischem as to why further marketing messages were sent to the complainant after their initial opt-out and there is no further evidence to suggest that the opt-out facility provided (i.e. reply "STOP") was not technically feasible and functioning correctly. The error was administrative rather than technical.
  37. I am therefore satisfied that the member has not contravened clauses 16.15 or 16.16.
  38. Based on the foregoing:
    - 38.1 The complaint in respect of clauses 3.5, 16.15 and 16.16 of the Code is dismissed.
    - 38.2 The complaint in respect of clauses 3.6, 16.4, 16.5, 16.9, 16.10 (read together with clause 16.11), 16.14, 16.15 and 16.16 is upheld.
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## Sanction

39. In considering whether there are any mitigating factors, I have taken into account that the member provides services to Dischem, who is ultimately responsible for correctly administering its customer database before any direct marketing campaign is undertaken to promote its products and services and for ensuring that marketing messages are not sent via the member's systems in breach of the WASPA Code of Conduct.
40. However in this case the member was aware, or ought to have been aware, that the complainant had opted-out from receiving direct marketing messages from Dischem as early as 1 September 2017. Despite numerous opt out requests from the complainant, further marketing messages were sent via the member's system.
41. There have also been previous complaints upheld against the member. See complaints 10854, 11231, and 18228 in this regard.
42. In light of the foregoing, the following sanctions are made against the member:
  - 42.1 The member is fined an amount of R25 000.00 which is payable immediately.
  - 42.2 The member is also formally reprimanded to always ensure that:
    - 42.2.1 It establishes, before permitting any member or non-member to use its facilities for the purposes of direct marketing, that:
      - 42.2.1.1 the intended recipients of the direct marketing messages sent using its facilities have given their consent to receive such messages; or
      - 42.2.1.2 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; and

- 42.2.1.3 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;
- 42.2.2 it does not permit its facilities to be used to send any direct marketing messages to any person who has opted-out from receiving such messages; and
- 42.2.3 it must send the required confirmation message to a person who has opted out, confirming the opt-out and specifying the marketing from which they have been opted out from.