



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	#38080
Cited WASPA members	Channel Mobile CC (0104)
Notifiable WASPA members	SMSPortal (Pty) Ltd (0139)
Source of the complaint	Public
Complaint short description	Unsolicited marketing message Prohibited times of marketing No functional opt-out process
Date complaint lodged	20 February 2018
Date of alleged breach	8 to 20 February 2018
Applicable version of the Code	15.4
Clauses of the Code cited	3.5 - 3.7, 16.4, 16,(5)(a), 16.8(c), 16.14, 17.1
Related complaints considered	Not applicable
Fines imposed	Channel Mobile CC (0104) is fined R 30,000 for an infringement of sections 16.4 and 17.1, suspended for 12 months, provided that the Member does not infringe any of the provisions related to unwanted marketing during this period.
Other sanctions	Not applicable

Is this report notable?	Not notable
Summary of notability	

Initial complaint

The Complainant, a member of the public started receiving marketing messages from random cell phone numbers on 8 February 2018. The messages were from CMH Volvo Cape Town. The Complainant had made use of their services 'years ago' to service his vehicle. This relationship, however, did not extend to new sales or any expectation to receiving marketing messages. He had also previously received unsolicited messages from CMH and in most cases responded to the messages saying "STOP" or "NO" as indicated.

In February 2018 the campaign escalated. The Complainant elected to opt-out of receiving the messages. He also called CMH about the matter and was assured that the messages would stop, but to no avail.

The Complainant provided the following examples:

Feb 8th from 2787050010084761 at 05:33:12 GMT+2

'Financial Year End Clearance Sale. Prices this low, only to be seen this month. Visit us at CMH Volvo Cars Cape Town. T&C's apply. Opt out Reply No'

He received a near identical messages on 9 February 2018 to which he replied "STOP" and a similar message on 14 February to which he replied "NO".

A further message on 15 and 16 February 2018:

15 Feb 09:33:37 GMT+2 from 2787050060029452: 'Cars in stock at cost price. Financial Year End Clearance. Visit us at CMH Volvo Cars Cape Town or call us on 021 413 9800. T&C's apply. Opt out Reply No'

Despite opting out again he received a further message on 20 February 2018.

According to the examples provided the messages of 8 and 14 February 2018 were apparently sent during prohibited times, i.e. between 21:00 and 08:00. The other examples indicate sending times at allowed times.

Member's response

The complaint was initially referred to SMSPortal (Pty) Ltd (0139) who indicated that the responsible WASPA member was Channel Mobile CC (0104). Upon notification of the complaint Channel Mobile responded that its client had been notified and the Complainant had been opted

out and would no longer receive messages from the dealership. The Complainant responded that he was not satisfied with the Member's response.

The Member responded that it did not know what else was required from it and that if there was any information outstanding it wanted to be informed.

Mindful of the fact that the Member did not contest any of the allegations made in the complaint, I posed a number of questions to the Member to clarify its response. I quote the request and response verbatim:

Request:

The complainant in this matter has complained of being sent numerous unsolicited marketing messages, more particularly infringements of the following sections of the WASPA Code of Conduct (version 15.4) during February 2018.

The WASPA Member's only reply to these complaints were that "Our client has been notified and the user has been opted out. They will no longer received messages from that dealership." This reply does not address the substance of the alleged infringements as set out below, only confirming that the alleged infringing conduct will be stopped.

Does Channel Mobile confirm that there has been a number of infringements of the following clauses of the Code of Conduct as its failure to address any of these issues would suggest?

- (a) Clause 16.4 (a failure to implement appropriate procedures to facilitate opt-out requests);
- (b) Clause 16.5(a) (failure to stop further unwanted direct marketing after receiving an opt-out request);
- (c) Clause 16.8 (sending of marketing messages during prohibited times);
- (d) Clause 16.14 (failure to confirm opt out); and
- (e) Clause 17.1 (absence of a functional opt-out facility)

If Channel Mobile does not admit to these infringements, it needs to address each issue by providing the necessary facts to sustain a defence as there is at present a prima facie case based on the facts provided by the complainant.

Is Channel Mobile aware that in terms of Clauses 3.5-3.7 a WASPA member is responsible for the actions of third parties who are not WASPA members making use of the services of the WASPA member?

Member's response

- (a) Clause 16.4 (a failure to implement appropriate procedures to facilitate opt-out requests);

We have automated opt out processes enabled. Opt out instructions are also automatically appended to each message for the client.

- (b) Clause 16.5(a) (failure to stop further unwanted direct marketing after receiving an opt-out request);

We are looking into why the user received a marketing messages after they opted out. Tests were run yesterday and today and the automated opt out worked successfully for all. See screenshot attached.

(c) Clause 16.8 (sending of marketing messages during prohibited times);

Messages were not sent to this user during prohibited times. See screenshot attached.

(d) Clause 16.14 (failure to confirm opt out); and

Opt out was confirmed

(e) Clause 17.1 (absence of a functional opt-out facility)

The member also attached screenshots confirming testing that was done on 4 May 2018 (Annexure A) confirming the opt-out procedure and logs for the period 8 February 2018 to 30 April 2018 confirming the sending of the messages and the times when these messages were sent to the Complainant.

Sections of the Code considered

The following sections of the Code of Conduct version 15.4 were considered:

Right to restrict unwanted direct marketing

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").

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,

Prohibited times for direct marketing

16.8. Unless a consumer has expressly or implicitly requested or agreed otherwise, a member may not engage in any direct marketing directed to a consumer on:

- (a) Sundays, public holidays contemplated in the Public Holidays Act, 1994;
- (b) Saturdays before 09:00 and after 13:00; and
- (c) all other days between the hours of 20:00 and 08:00 the following day.

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.

17. Messaging services

Opt-out facility

17.1. With the exceptions noted below, all subscription services, notification services, contact and/or dating services and other bulk SMS services (such as free newsletters) must have a functional opt-out procedure, including the option to reply 'STOP' to SMS messages.

Decision

The logs provided by the Member confirm the facts alleged by the Complainant that a number of marketing messages for CMH Volvo Cape Town was sent to the Complainant on 8, 9, 14, 15 (2 messages), 16 (2 messages) and 20 February 2018 (2 messages). One can understand the irritation of the Complainant receiving such a spate of unwanted marketing messages in a short period of time, especially where the Complainant according to his version chose to opt-out on several occasions in response to the messages.

The logs do not provide any evidence of either the receipt of an opt-out message or the sending of a confirmation of opt-out message by the Member. The evidence of the testing of the opt-out functionality was conducted on 4 May 2018 and only proves that the opt-out facility was properly functioning on that date. There is no evidence before me contradicting the evidence of the Complainant that he elected to opt-out of the messaging service.

I find that at the time of that the marketing messages were sent to the Complainant, the Member failed to 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") as required by section 16.4 and 17.1 of the Code. If that functionality was not functioning properly, then it is unlikely that the member received the opt-out demands making an infringement of sections 14.5 and 16.14 impossible.

The Complainant also complained that some of the marketing messages were sent during prohibited times, i.e. between 20:00 and 08:00 hours. However, the examples provided by the Complainant are ambiguous as the times mentioned (05:33 and 4:25) give no indication of AM or PM as the Member's logs do. The Member's logs prove that the messages were all sent during permitted times. There is accordingly no infringement of section 16.8.

To sum up, there was no infringement of the Code by SMSPortal (Pty) Ltd (0139) to whom the complaint was initially referred. There was an infringement of sections 16.4 and 17.1 of the Code by Channel Mobile CC (0104).

Sanctions

Channel Mobile CC (0104) has not previously been sanctioned for contraventions of the Code and this seems to be the first complaint against the Member. The Member took immediate and effective steps to address the complaint once it became aware of the complaint. However, there is a clear infringement of sections 16.4 and 17.1 of the Code. As the conduct under these two

sections is essentially the same, the sanction is imposed jointly for the infringement of these sections.

The member is accordingly fined and amount of R 30,000 for the infringement of the Code, suspended for 12 months from the date of this adjudication provided that the Member does not infringe any of the provisions related to unwanted marketing during this period.

Matters referred back to WASPA

Not applicable.

Annexure A

CMH sms.co.za

Helpline: 0860 104 671
shauntest (user) | unlimited credits | Logout

Home | Run Campaigns | Reports | Maintenance

Send Ad-hoc Message | Manage Campaigns

Create Ad-hoc Message

Recipients :
[Find in address book](#)

Distribution List :

Email Replies?

Replies sent to:
(comma separated list if more than 1 email address)

Template:

Message:

Message Preview:
Opt Out test. **Opt out Reply No**
Characters: 30 Messages: 1 Total Recipients:1

Send Immediately:

Schedule:

Override default set times :

CMH sms.co.za

Helpline: 0860 104 671
shauntest (user) | unlimited credits | Logout

Home | Run Campaigns | Reports | Maintenance

Send Ad-hoc Message | Manage Campaigns

Create Ad-hoc Message

Your message with the following details has been sent!

Recipients: | Not sent (user opted out)

Message: Opt Out test. Opt out Reply No

Send another message?

Annexure B

Generated On :

04 May 2018 14:06:08

Range :

01 February 2018 00:00:00 - 30 April 2018 23:00:00

Sub Company Level Usage Report For : CMH Volvo Cape Town

Date	Time	Received At	Source	Destination	Extension	Message (First 50 Characters)	Status
2018-02-08	05:33:12 PM	n/a	+7677718360			Financial Year End Clearance Sale. Prices this low ...	Delivered to Handset
2018-02-09	04:32:37 PM	n/a	+7677725124			Financial Year End Clearance Sale. Prices this low ...	Delivered to Handset
2018-02-14	04:25:12 PM	n/a	+7677754509			Buy any Volvo Selekt vehicle from CMH Volvo Cars C ...	Delivered to Handset
2018-02-15	09:34:10 AM	n/a	+7677755982			Cars in stock at cost price. Financial Year End Cl ...	Delivered to Handset
2018-02-15	04:45:01 PM	n/a	+7677761993			Buy any Volvo Selekt vehicle from CMH Volvo Cars C ...	Delivered to Handset
2018-02-16	11:49:30 AM	n/a	+7677766721			Cars in stock at cost price. Financial Year End Cl ...	Delivered to Handset
2018-02-16	04:47:40 PM	n/a	+7677772464			Buy any Volvo Selekt vehicle from CMH Volvo Cars C ...	Delivered to Handset
2018-02-20	10:07:21 AM	n/a	+7677783636			Buy any Volvo Selekt Vehicle from CMH Volvo Cars C ...	Delivered to Handset
2018-02-20	04:25:06 PM	n/a	+7677787206			Cars in stock at cost price. Financial Year End Cl ...	Delivered to Handset