



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	#39304
Cited WASPA members	iTouch Messaging Services (0121)
Notifiable WASPA members	n/a
Source of the complaint	Public
Complaint short description	Failure 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").
Date complaint lodged	2018-05-31
Date of alleged breach	Same as above
Applicable version of the Code	v15.5
Clauses of the Code cited	16.4

Related complaints considered	n/a
Fines imposed	R5 000 for contravention of clause 16.4
Other sanctions	n/a
Is this report notable?	n/a
Summary of notability	n/a

Complaint

1. This complaint relates to a SMS sent by the Member on behalf of ABSA Bank to the complainant on 31 May 2018. The content of the message read as follows:

"Absa Hatfield tak het valutadienste. Reis jy oorsee of oorgrens? Ons kan jou met veilige oplossings help om die geld oorsee rond te dra. 0124320600. Gem FDV"

2. The complainant alleges that the message was a direct marketing message that did not contain any opt-out mechanism and was therefore in breach of clause 16.4 of the WASPA Code of Conduct.
3. The complaint was initially dealt with via the informal complaint process. However despite accepting an apology from ABSA management regarding the message, the complainant was not satisfied that the complaint had been resolved and the complaint was then referred to adjudication via the formal complaint process.
4. The submissions made by both parties during the informal complaint process were provided and no further submissions were made for the purposes of this adjudication.

Member's response

5. After receiving the initial complaint, the Member referred the matter to its customer, i.e. ABSA Bank. The Member was advised that the complainant was an existing ABSA customer at its Hatfield branch, and that the message sent was an operational notification that had been sent to all account holders from the branch.
6. The Member therefore held the view that because the message sent to the complainant was an operational communication and/or because it was merely informative, it was not necessary to include an opt-out mechanism.
7. After the complainant had denied that they were an existing ABSA customer, ABSA investigated the matter and further correspondence was then exchanged directly between ABSA and the complainant.
8. In a letter to the complainant (which appears to be incorrectly dated 29 July 2018), ABSA advised the complainant that it had discovered that the complainant's credit card account had not been properly closed and they were still listed as a client on ABSA'S systems. Their details had been pulled from the system for the purpose of sending the communication on 31 May 2018.
9. ABSA apologised to the complainant for the error and inconvenience caused and offered for a senior manager to meet with the complainant in person to again offer its apologies.
10. The complainant confirmed to ABSA via email on 2 July 2018 that they accepted the apology given and that it was not necessary for an in-person meeting to be held.
11. Notwithstanding their acceptance of the apology from ABSA, the complainant was not satisfied that the complaint to WASPA had been adequately resolved and requested that the complaint be referred to the formal complaint process.
12. In its response to the formal complaint, the Member provided copies of the correspondence that had been exchanged between ABSA and the complainant. It did not make any further submissions.

Sections of the Code considered

13. The complainant cited clause 16.4. of the WASPA Code of Conduct as the basis for their complaint.
14. Clause 16.4 states:

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. No further clauses were assigned by WASPA.

Decision

16. *"Direct marketing"* is defined in clause 16.2 of the WASPA Code as follows:

"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"
17. I don't agree with the initial submissions made by the Member (and by ABSA) that the SMS sent to the complainant on 31 May 2018 was an *"operational communication"* and/or that it was merely *"informative"* in nature.
18. It is clear from the content of the message that ABSA was *"promoting"* or *"offering to supply"* its Forex services to the complainant (and other intended recipients).

19. It is also notable that ABSA, in its subsequent letter of apology to the complainant, referred to the message sent to the complainant as being part of an *"awareness campaign"*.
 20. The SMS sent to the complainant on 31 May 2018 was a direct marketing message, as defined in the Code, and the requirements of clause 16 are therefore applicable.
 21. The pertinent question is then whether the Member complied with its obligations in terms of clause 16.4 of the WASPA Code, i.e. did the Member, when authorising, directing or conducting this direct marketing campaign on behalf of ABSA, 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").
 22. It is apparent from the contents of the message sent to the complainant, via the Member's facilities and/or services, that no opt-out mechanism was provided.
 23. I am satisfied on the basis of the evidence presented that the Member has contravened the requirements of clause 16.4 of the WASPA Code.
 24. The complaint is therefore accordingly upheld.
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Sanction

25. The sending of unsolicited and unwanted direct marketing messages is potentially intrusive and may adversely threaten the privacy rights of the recipients of such messages.
26. A number of statutes in our law regulate direct marketing, particularly direct marketing via electronic communication tools, by prescribing certain requirements, conditions, and restrictions for sending direct marketing messages.

27. These legal requirements have been largely incorporated into the WASPA Code of Conduct.
28. Members are well aware of the privacy risks and consumer frustration that can arise from unsolicited and unwanted direct marketing messages; and the resultant harm to the industry's reputation as a whole.
29. Even though WASPA members cannot always guarantee that their facilities are used appropriately by their customers for direct marketing campaigns; they must, as a minimum, ensure that consumers have the ability to stop further unwanted marketing messages from being sent by providing a valid and functioning opt-out mechanism.
30. The Member's failure to do so must therefore be viewed in a serious light and taken into account as an aggravating factor when considering an appropriate sanction in this matter.
31. However, I have also taken into account, as relevant mitigating factors, that the Member took immediate steps to notify its customer and to ensure that the complainant's details were added to the relevant opt-out lists.
32. It is also noted that no other complaints for the same or similar contraventions of the Code have been upheld against the Member.
33. Based on the foregoing, the member is fined an amount of R5 000.00 for its contravention of clause 16.4 of the WASPA Code.