



Report of the Adjudicator

Complaint number	42087
Cited WASPA members	InfoBip (0143)
Notifiable WASPA members	n/a
Source of the complaint	WASPA Compliance Department
Complaint short description	Direct marketing message sent in contravention of various provisions of the Code
Date complaint lodged	25 October 2019
Date of alleged breach	Not known.
Applicable version of the Code	16.8
Clauses of the Code cited	3.1.; 3.2.; 3.5.; 3.6.; 3.7.; 16.2.; 16.3.; 16.4.; 16.7.; 16.8(a;b;c); 16.9.; 16.10 (a;b); 16.11.; 16.13.; 16.14.; 16.15.
Related complaints considered	26196 and 20095
Fines imposed	R50 000.00
Other sanctions	Client contracts to be updated to align with the provisions of 3.5 and 3.6.
Is this report notable?	Not notable.
Summary of	n/a

notability	
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## Initial complaint

### **RE: DIRECT MARKETING TIME AND OPTING OUT COSTS**

1. On or about Wednesday, 9 October 2019 at 22.48 CAT, the complainant with MSISDN +27 72 804 2206 received a SMS originating from +27 87 240 6503.
2. The contents of the SMS read as follows :

***“\* BOLT PROMO ALERT\****

***Discounts have been added to your account!***

***Get 40% OFF your next few rides. Hurry up as the offer expires!***

***SMS STOP to +61488810871 to opt out.”***

Please find attached hereto a screenshot of the SMS for ease of reference marked as “Annexure A”.

### **TYPE OF MESSAGE:**

3. Based on the contents of the SMS, an offer was made to the complainant for 40% off the next few rides using BOLT. The SMS is therefore a Direct Marketing Message communicated electronically, as set out in the WASPA Code of Conduct:
  - 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.

### **CONSENT TO RECEIVE MARKETING:**

4. The complainant has indicated that he does not have a BOLT account and has not explicitly given consent to BOLT to receive Direct Marketing communications, alternatively does not remember giving consent to receive marketing messages from this

company. The complainant furthermore did not provide his contact details to BOLT during the sale of a product or service.

5. The WASPA Code of Conduct states:

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.”

16.9 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.

16.10. 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...

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.

16.13 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.

6. The complainant therefore believes that the member, alternatively the member’s client making use of the members platform to send Direct Marketing Messages, has breached the WASPA Code as the complainant did not give consent to BOLT to send him Direct Marketing communications. Furthermore, the complainant did provide his contact details to BOLT during the sale of a product or service and as such there are no grounds to send Direct Marketing messages to the complainant.

7. If the member, alternatively the member’s client making use of the members platform to send Direct Marketing Messages, disagrees with paragraph 6, the burden of proof is placed on the member to provide the sources/documentation setting out when and where consent was provided, alternatively where the complainant provided his contact details during the sale of a product or service related to BOLT.

**PROHIBITED TIMES FOR DIRECT MARKETING:**

8. The complainant received the Direct Marketing Message on the 9<sup>th</sup> of October 2019 at 22:48 CAT.

9. The WASPA Code of Conduct states:

*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.*

(own emphasis added). Therefore, the complainant believes that the member, alternatively the member’s client making use of the members platform to send Direct Marketing Messages, has breached the WASPA Code as the message was sent to the complainant during a prohibited time for sending Direct Marketing messages.

#### **OPTING OUT FROM RECEIVING DIRECT MARKETING:**

10. On or about 11 October 2019 the complainant attempted to submit a request to opt-out from receiving Direct Marketing communications originated by BOLT by following the steps set out below:

- The complainant checked the airtime balance on their phone by dialing \*100# - the returned balance was R59.43;
- The complainant opened the Direct Marketing SMS and replied to the originating sender’s number (+27 87 240 6503) by submitting the keyword “Stop”;
- The complainant checked the airtime balance on their phone by dialing \*100# - the returned balance was R58.91 (the message cost was R0.52);
- The complainant waited for 4 minutes in the hope of receiving an opt-out confirmation message – however no message was received;
- The complainant checked the airtime balance again, the returned balance was still R58.91;
- The complainant proceeded to open a new message, entered the number provided in the Direct Marketing SMS and submitted the keyword “Stop” (SMS STOP to +61488810871);
- The complainant checked the airtime balance on their phone by dialing \*100# - the returned balance was R57.17 (the message cost was R1.74);
- The complainant waited for another 4 minutes or so in the hope of receiving an opt-out confirmation message – however once again, no message was received.

Initial starting balance: R59.43

Balance after first STOP request: R58.91

Balance after second STOP request: R57.17

Cost of first STOP message: R0.52

Cost of second STOP message: R1.74

Refer to the video outlining the steps taken to submit the opt-out request marked and attached as “Annexure B”.

11. It is worth specifically noting that after some investigation, the number provided in the Direct Marketing Message to send the opt-out request to, has an international area code (+61) and is assigned to the Australian territory.

12. The WASPA Code of Conduct states:

*16.4. Any member authorizing, 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”).*

*16.15. 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. The complainant did in fact reply to the Direct Marketing Message by sending the keyword “Stop” to the originating sender. No response message in the form of acknowledgement of receipt or confirmation of opt-out was received, so it is uncertain if this opt-out functionality works.

14. The complainant then followed the instructions to opt-out from receiving Direct Marketing Messages by sending the keyword “Stop” to the number supplied in the message (+61488810871) - an international number. No response message in the form of an acknowledgement of receipt or confirmation of opt-out was received, so it is uncertain if this opt-out functionality works.

15. As such, the complainant believes that the member, alternatively the member’s client making use of the members platform to send Direct Marketing Messages, has breached the WASPA Code as no functioning opt-out process and/or functionality was provided and the complainants request to opt-out from receiving marketing was not received/processed/honored as required.

**COST TO SUBMIT OPT-OUT REQUEST/PROCESS OPT-OUT REQUEST:**

16. The WASPA Code of Conduct states:

16.7 A member may not charge a consumer a fee for processing an opt-out request or for registering a pre-emptive block.

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:

(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.

(our emphasis added)

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.

17. The complainant was charged R0.52 (replying to a message with the word "Stop"), but more importantly R1.74 (for following instructions for opting out as set out in the Direct Marketing Message – "SMS STOP to +61488810871") – which is a premium rated charge/fee/cost and is above the standard rated cost for sending a SMS.
18. As such, the complainant believes that the member, alternatively the member's client making use of the members platform to send Direct Marketing Messages, breached the Code in that a charge/fee/cost was charged for submitting/processing the opt-out request, alternatively, the opt-out request was not processed/received free of charge.
19. This type of activity is extremely disconcerting, as this is not only in breach of the WASPA Code of Conduct but also in contravention of the provisions of the Consumer Protection Act dealing with Direct Marketing – and can impact and negatively affect multiple consumers attempting to opt-out from receiving Direct Marketing communications from BOLT.

#### **CONFIRMATION OF OPT-OUT:**

20. The WASPA Code of Conduct states:

*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.*

21. As set out above and showcased on the video (Annexure B), the complainant did not receive any message confirming the opt-out request despite following the instructions on how to opt- out. To date, no confirmation message has been received.

22. Therefore, the complainant believes that the member, alternatively the member's client making use of the members platform to send Direct Marketing Messages, is in breach of the requirements as set out in the WASPA Code.

As such we respectfully submit that the member is breach of various provisions of the WASPA Code of Conduct. In the event that the member was not the originating sender of the Direct Marketing message – and their client was responsible – then the provisions of Clauses 3.1, 3.2, 3.5, 3.6, 3.7 of the WASPA Code places liability and responsibility for the members clients' actions on the member.

We request the member to take immediate action to rectify these breaches to prevent further consumer harm and to align their systems with the Direct Marketing provisions as set out in the WASPA Code of Conduct.

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#### **Member's response**

The Member responded to state that after having done investigations they found that their client did not comply with the Code of Conduct and that they as the Member were liable for breaches of the Code of Conduct resulting from services offered or marketed by their client as their client is not a member of WASPA. Furthermore, that they have taken reasonable steps to ensure that their client provides and markets services in a manner consistent with the requirements of the Code of Conduct.

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#### **Complainant's response**

No further response.

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#### **Member's further response**

No further response.

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#### **Sections of the Code considered**

- 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.

- 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.
- 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.
- 16.4. Any member authorizing, 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").
- 16.7. A member may not charge a consumer a fee for processing an opt-out request or for registering a pre-emptive block.
- 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.
- 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.
- 16.10. 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.

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.

16.13. 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.

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.

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.

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## **Decision**

After having considered the information presented by the Complainant and the Member as well as a copy of the Member's standard contractual terms I find as follows:

In respect of 16.8 of the Code, the Member breached the Code in that the Complainant was contacted within the prohibited hours of contact for direct marketing.

In respect of 16.9, 16.10, 16.11 and 16.13 I find the Member to have breached the Code of Conduct. The Complainant failed to align with the requirements of the Code in that no consent was obtained to engage in direct marketing with the Complainant, nor could the Complainant demonstrate any prior relationship wherein the contact details were provided to the Member. Finally, the Member could not demonstrate the source of the contact details.

Additionally in respect of 16.10 the Complainant was not only charged for an opt out but the designated number to use to opt out was a premium rated SMS. Accordingly I find the Member to have breached 16.10 in this regard as well.

In respect of 16.4, 16.14 and 16.15, I find the Member to have breached the Code as they do not appear to have a functioning opt out mechanism nor did they send the required confirmation of opt out to the Complainant on opt out.

As the Member's client is not a member of WASPA in terms of 3.7 of the Code the Member is liable for breaches of the Code by such client. If the Member implemented the measures required by 3.5 and 3.6 any sanction on the Member in terms of liability arising out of 3.7 would be mitigated. However on review of the Member's standard contract there is no provision requiring the client to comply with the provisions of the WASPA Code of Conduct. Accordingly I find the Member to be in breach of 3.5 and 3.6 and without recourse to the mitigation in 3.7.

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### **Sanctions**

For breaches of section 16.8 I fine the Member R10 000.00.

For breaches of sections 16.9, 16.10, 16.11 and 16.13 I fine the Member R20 000.00

For breaches of sections 16.4, 16.14 and 16.15 I fine the Member R10 000.00

For breaches of sections 3.5, 3.6 I fine the Member R10 000.00 and order the Member to update their contracts with clients to align with the requirements of 3.5 and 3.6.

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### **Matters referred back to WASPA**

N/A

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