



## Report of the Appeals Panel

Complaint number	<b>#42087</b>
Cited WASPA members	<b>InfoBip (0143)</b>
Notifiable WASPA members	<b>Not applicable</b>
Appeal lodged by	<b>WASPA Compliance Department</b>
Type of appeal	<b>Written appeal</b>
Scope of appeal	<b>[X] Review of the sanctions imposed by the adjudicator</b>
Applicable version of the Code	<b>16.8</b>
Clauses considered by the panel	<b>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.</b>
Related complaints considered	<b>Complaint #20095, 23610, 25719, 29820 and 26196</b>
Amended sanctions	<b>None</b>
Appeal fee	<b>Appeal fee not to be refunded</b>
Is this report notable?	<b>Not notable</b>
Summary of notability	<b>Not applicable</b>

## Initial complaint

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1. The facts as set out in the original adjudication are largely common cause since the conduct complained about did not originate from the Member but from a client of the Member ("BOLT").
2. On or about Wednesday, 9 October 2019 at 22.48 CAT, the WASPA Compliance Department ("Complainant") with MSISDN +27 [REDACTED] received an SMS originating from +27 [REDACTED]. The SMS consisted of a direct marketing message to which the Complainant had not consented. The message was received without any prior conduct with BOLTr and any prior consent. The Complainant also did not provide the infringing marketer with any contact details.
3. The Complainant therefore believed that the Member, alternatively BOLT making use of the members platform to send direct marketing messages, breached the WASPA Code as the Complainant did not give consent to BOLT to send it direct marketing communications. Furthermore, the Complainant did not provide its contact details to BOLT during the sale of a product or service and as such there were no grounds to send Direct Marketing messages to the Complainant.
4. The complainant received the Direct Marketing Message on the 9th of October 2019 at 22:48 CAT. The Complainant 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.
5. On or about 11 October 2019 the Complainant attempted to submit a request to opt-out from receiving Direct Marketing communications originated by BOLT. The number provided for opt-out was an Australian telephone number. The Complainant replied 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.
6. 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 or functionality was provided and the complainants request to opt-out from receiving marketing was not received as required.
7. 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 and is above the standard rated cost for sending a SMS.
8. 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.

9. The Member responded 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. The member submitted 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. No specific proof of these steps were provided to the Adjudicator at that time.

## **Adjudicator's findings**

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10. The Adjudicator considered the following Clauses of the WASPA Code of Conduct:  
(a) 3.1-3.7 – dealing with the responsibility of members for clients and affiliates who make use of their services;  
(b) Clauses 16.1 – 16.15 dealing with direct marketing.

11. 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.

12. In respect of 16.9, 16.10, 16.11 and 16.13 the Adjudicator found 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.

13. 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 it was held that 16.10 had been breached in this regard as well.

14. In respect of 16.4, 16.14 and 16.15, it was held that the Member had 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.

15. 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 the Adjudicator found the Member to be in breach of 3.5 and 3.6 and without recourse to the mitigation in 3.7.

16. The Adjudicator also stated that this type of activity as a whole 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. The Complainant however did not provide any specific evidence of widespread contraventions by BOLT in South Africa.

17. The Adjudicator ordered the following sanctions:

- (a) For breaches of section 16.8 I fine the Member R10 000.00.
- (b) For breaches of sections 16.9, 16.10, 16.11 and 16.13 I fine the Member R20 000.00
- (c) For breaches of sections 16.4, 16.14 and 16.15 I fine the Member R10 000.00
- (d) 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.

## **Appeal submissions**

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18. The Member admits that it was established in the case at hand that the message about Bolt's promo prices was sent contrary to the Code's provisions governing the manner in which direct marketing messages must be sent (more precisely provisions: 16.8, 16.9, 16.10, 16.11, 16.13, 16.14 and 16.15). It, however emphasised that it was not the originator of the message but that it was sent by one of its clients.

19. The member also acknowledges that its client is not WASPA Member, and that according to the Code when a client breaches Code's provisions, it is the Member that bears liability and responsibility for its client's actions, unless the Member fulfils the conditions set out in provisions 3.5 and 3.6 of the Code.

20. The Member submits that it has fully complied with the provisions of sections 3.5 and 3.6 of the Code which exempts a member from liability for a third party's actions in that:

(a) The client was fully aware of the requirements of the Code and the messaging service contract concluded with the client requires the client to comply with all applicable codes in relation to delivering SMS to mobile networks. In this regard the Member refers to its official website where clients are referred to such provisions in a general sense with a link to the WASPA website. Specific mention is made of the requirements of the Consumer Protection Act. There is also a reference to the times that marketing messages are allowed.

(b) It has taken reasonable steps to ensure that the party provides and markets services in a manner consistent with the requirements of this Code. In this respect it submits that immediately after receiving information on detected irregularities, it started its own investigation about the circumstances of the case and ensured that the client provides services in accordance with the Code by alerting the client about suspicious traffic.

21. The Member submits that it has fulfilled all the conditions necessary for full mitigation of its liability for the actions of its client since the client was aware of the Code provisions, the client was contractually obligated to comply with the Code and that it warned the client to comply with

the Code and applicable regulation immediately upon receiving information that the client failed to comply with the Code.

22. The member lodges this appeal with the purpose of reconsideration of in the first instance Decision given that it has met all the necessary requirements to fully comply with the provisions of the Code.

23. It also appeals the severity of the sanctions since in this case only one message was sent contrary to the Code and that the unsolicited message was not sent to a large number of SMS recipients. Thus, the amount of the sentence is disproportionately high in relation to the omission.

## Deliberations and findings

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24. As indicated above the facts are largely undisputed and correctly set out by the Adjudicator in the original adjudication.

25. There seems to be a misunderstanding by the Member of section 3.7 in particular of the Code of Conduct. This provision states:

*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.*

[Our emphasis]

26. The Member's appeal submission that complying with the requirements of the second part of the provision would absolve the member from liability cannot be sustained. The member remains liable for the infringements of the Code, it is only in regard to the remedies that the reasonable steps taken by the Member plays a role in mitigation of the sanctions imposed.

27. We therefore agree with the Adjudicator that there has been a breach of provisions 16.4, 16.7, 16.8, 16.10, 16.11, 16.14 and 16.15. However, we do not find evidence of a breach of section 16.13.

28. Apart from one paragraph (summarized in paragraph 16 above), the Adjudicator does not deal with any aggravating circumstances. The Adjudicator also concluded that there were no mitigating factors to be taken into account as the Member's standard terms and conditions contains no provision requiring the client to comply with the Code of Conduct.

29. In the appeal submission there is no indication that there is a contractual obligation on the Member's client to comply with the Code. It simply refers to the fact that compliance with the Code is referred to on their website. We agree with the Adjudicator that this does not go far enough in ensuring that there is compliant behaviour on the part of members' clients.

30. However, we do take into account the fact that the Member reacted immediately upon the complaint to ensure that no further infringements would take place as a mitigating factor. This must be weighed up against the seriousness of the infringements as pointed out by the Adjudicator.

31. Although not discussed in the report, there is an indication that the Adjudicator consulted complaint number 26196 where the Member was held liable in similar circumstances for the sending of an unsolicited sms by one of its clients in 2015. In that instance it was fined R50,000. The Adjudicator remarked in that case:

*Due to the number of complaints against the SP for similar breaches, the SP is fined R50 000-00 for its various breaches of clause 16 and subsequent breach of clause 5.15, payable to the WASPA Secretariat within five (5) working days after receiving notice hereof.*

32. We conclude that the totality of the sanctions imposed by the Adjudicator is reasonable taking into account the previous history of infringements by the Member in similar circumstances, even though 5 years have passed since the last similar transgression.

The appeal is dismissed.

### **Amendment of sanctions**

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The sanctions imposed by the adjudicator is confirmed.

### **Appeal fee**

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As the Member's appeal failed, the appeal fee is declared forfeited.