



Report of the Adjudicator

Complaint number	#42784
Cited WASPA members	SMSPortal (Pty) Ltd (0139)
Notifiable WASPA members	Not applicable
Source of the complaint	Public
Complaint short description	Unsolicited marketing message
Date complaint lodged	19 March 2020.
Date of alleged breach	18 February 2020
Applicable version of the Code	16.9
Clauses of the Code cited	3.5; 3.6; 3.7; 16.9; 16.10, 16.11; 16.13
Related complaints considered	29916, 41820
Fines imposed	A fine of R30,000
Other sanctions	The Member must suspend services to O'Keefe & Swartz until such time that O'Keefe & Swartz have demonstrated that they have taken reasonable steps to ensure compliance by them and their clients with the Code.
Is this report notable?	Not notable

Summary of notability	
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Initial complaint

1. The Complainant was a client of Standard Bank Ltd. In 2010 he was declared insolvent. The court declaring the insolvency ordered that all of the Complainant's accounts had to be closed and claims raised against the insolvent estate.
2. On 18 February the Complainant received and sms messages from the Member on his cell phone:

Standard Bank will call you shortly with a valuable offer. Reply 1 to opt out of this offer. T&C's & Std SMS rates apply. Free & bundled SMS don't apply.

3. The Complainant's wife contacted the Member informally to obtain information on how the Complainant opted into receiving these smss, as provided for in clause 16.13 of the WASPA Code of Conduct. The Member's response was by way of a letter from consultants O'Keefe & Swartz, a client of the Member, who investigated the complaint on behalf of the Member. The letter makes the following submissions:
 - a. It is pointed out that the Member is only the messenger, ie a conduit, for the messages of third parties.
 - b. The marketing and promotion of financial products by O'Keefe & Swartz is not limited to their existing clients, but also on behalf of third parties. In this case it was Standard Bank.
 - c. In terms of O'Keefe & Swartz's standard agreement with banks, their bank clients may forward to them existing customers to whom they are legally entitled to perform direct marketing activities.
 - d. O'Keefe & Swartz refused to disclose the information requested as the information is regarded as confidential and disclosing it would be in breach of confidentiality.
 - e. It is stated the O'Keefe & Swartz respect the customer's right to privacy and not to receive unsolicited marketing material. They accordingly undertook to add the complainant's details to their do-not-contact list, but required the Complainant's full names and identity number.
4. The Complainant was not prepared to provide this information to O'Keefe & Swartz with whom he had had no dealings. In addition, there are indications that Standard

Bank retained the Complainant's personal details as he received regular calls from the bank's lawyers claiming payment despite the insolvency proceedings.

Member's response

5. The Member responded to the formal complaint by way of a lawyer's letter from Kerron Edmundson Inc. In the letter the following submissions are made:
 - a. The member is compliant with all of the clauses of the WASPA Code of Conduct mentioned in the complaint, namely 4.3, 4.3A, 16.10, 16.11 and 16.13.
 - b. The Member provides services to an entity called O'Keefe & Swartz, which in turn provides outsourced call centre services to what they call a 'Bank Client', in this case Standard Bank. Since neither O'Keefe & Swartz nor Standard Bank are WASPs, they are clearly not bound by the WASPA Code of Conduct. However, they are bound by the company's terms and conditions of service.
 - c. WASPs are, by their very nature, agents. Some WASPs initiate the messages themselves or directly through their own clients, but others, like SMS Portal, are reliant on large corporates who work through their own agents. This transport is provided to customers according to WASPA rules, and in general, these rules mirror either ethical practise or national legislation, regulations or codes. The requirement to obtain consent for direct marketing is contained in national law, and the obligation to maintain confidentiality in relation to its clients, applies to financial institutions, under various FICA-related laws and policies.
 - d. In all the circumstances, it seems that the complainant is correct in that Standard Bank has not removed his details from their system but uses another system to generate bulk messages to its entire banking base, through its third-party agency, O'Keefe & Swartz. This arrangement is not within Member's control and neither could it have been foreseen that the customer (Standard Bank) of their client O'Keefe & Swartz would disregard national law.
 - e. The Member has not generated the content of the message and to the extent that its client, O'Keefe & Swartz, has generated the message it has done so on the understanding that its client, Standard Bank, would be compliant with national and finance laws.
 - f. While the Member send several thousand messages for O'Keefe & Swartz, this is the only complaint they have received in relation to one of their services.
 - g. There are no other steps that can be taken by SMS Portal to remedy the situation, and it would be extremely unfair to penalise the company in these circumstances. It would be useful if WASPA could communicate the Code of

Conduct to all financial institutions and other large corporates on behalf of its members, alternatively report Standard Bank to the ombudsman on behalf of the complainant. Ultimately this is where the problem lies.

Sections of the Code considered

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.

16.9. 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.

Decision

6. The facts of this case are largely common cause as set out above. However, the Complainant and the Member differ in their interpretation of the Code of Conduct and the consequences of these facts.
7. The Complainant who used to be a client of Standard Bank may or may not have given consent to marketing at the time that he was a client of the Bank. However, that relationship was terminated in terms of a court order in insolvency proceedings. Any consent the bank may have had, lapsed on the termination of the bank-client agreement.
8. The Complainant received an unsolicited marketing message from the bank via O'Keefe & Swartz and ultimately the Member. O'Keefe & Swartz is a client of the Member and the bank in turn is a client O'Keefe & Swartz. Neither O'Keefe & Swartz nor Standard Bank are WASPA members and therefore use the services of the Member to distribute their marketing messages.
9. In terms of clause 16.13 a member must, upon request of the recipient of a direct marketing message, within a reasonable period of time, identify the source from which the recipient's contact details were obtained. This the Member commendably did and it also informed the Complainant, namely that the messages was originated by Standard Bank using the services of O'Keefe & Swartz. However, the Member has been unable to 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 as required by clause 16.13.
10. In terms of 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 in clause 16.9 and 16.10. Underlying all of these sections is the requirement that there must have been consent or implied consent to the direct marketing. In this instance there is no proof of any such consent.
11. There has therefor been a clear infringement of the provisions of clause 16.11 read with clauses 16.9, 16.10 and 16.11.
12. It is quite correctly pointed out on behalf of the Member that the Member is only a conduit and that the unsolicited direct marketing originated from O'Keefe & Swartz

and Standard Bank. That however does not absolve the Member from liability for the contravention of the Code where its services are used by third parties.

13. In terms of 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 the Code of Conduct, is aware of the requirements of the Code of Conduct. Additionally, clause 3.6 requires members to 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. The Member claims to have done so in accordance with their relationship with O'Keefe & Swartz.
14. In terms of clause 3.7 a member is liable for any breaches of the Code 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 the Code, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.
15. Clause 3.7 is aimed at exactly the type of situation that occurred in this case, preventing blame-shifting to third parties for infringements of the Code. The Code would be rendered ineffective in many respects if parties could be absolved from liability by simply shifting the blame to a third party.
16. This requires members to ensure compliance by their clients and, as in this case, the latter's clients. This is usually done by making third parties contractually liable for any contraventions of the Code by the member. For instance a fine imposed on the Member because the third party contravened the Code, can then be passed on to the third party, either as damages or a penalty for breach of contract.
17. The submissions on behalf of the Member was either made in ignorance of these provisions or it avoided to address them properly. The Member could not have been unaware of these provisions as they were fully addressed in a well-reasoned appeal panel decision of 18 November 2016 in complaints case no 29916.

Sanctions

18. Other than some vague submissions on what steps the Member has taken to ensure compliance by their client O'Keefe & Swartz, the Member has not provided any substantial evidence of reasonable steps that they have taken to ensure compliance. There is therefore not a great deal of evidence on mitigation of the liability as provided for in clause 3.7.

19. I have taken previous infringements of the Member in complaints case numbers 41820 and 29916 into account in determining the sanctions. Both of these complaints relate to unsolicited direct marketing messages by third parties using the services of the Member. In case no 41820 (3 December 2019) no fine was imposed, but the Member was ordered to suspend the services to the third party. In case no 29916 (12 December 2016) an appeals panel reduced the fine for a similar infringement from R45,000 to R25,000.
20. Taking into account the factors tabulated in clause 24.34, I am mindful that case no 29916 was adjudicated more than three years ago, but also that there has again been a more recent similar infringement in 2019 that must be taken into account. In case no 29916 the seriousness of infringements of this kind was set out as follows:

It can also not be accepted that the fact that there was no pecuniary loss to the complainant, should be a mitigating factor. In cases of spam there often is no direct pecuniary loss as in the case of subscription services, but the object of the protection provided by the Code in this case is not the prevention of pecuniary loss, but the infringement of the privacy of consumers. The infringement therefore is one of a personality right and a constitutional right usually entitling a person an award of nonpecuniary damages in civil law. These kinds of personal wrongs are viewed in a serious light as recent legislation such as the Protection of Personal Information Act illustrates.

I fully agree with this statement

21. The following sanctions are imposed:
- a. The Member must suspend services to O'Keefe & Swartz until such time that O'Keefe & Swartz have demonstrated that they have taken reasonable steps to ensure compliance by them and their clients with the Code.
 - b. A fine of R30,000.