



## Report of the Adjudicator

Complaint number	47076
Cited WASPA members	Celerity Systems t/a Bulk SMS (0003)
Notifiable WASPA members	N/A
Source of the complaint	Public
Complaint short description	Unsolicited marketing message
Date complaint lodged	17 November 2020
Date of alleged breach	17 November 2020
Applicable version of the Code	16.10
Clauses of the Code cited	16.4, 16.5, 16.6, 16.9, 16.10, 16.13, 16.15, 17.1, 3.1 - 3.7
Related complaints considered	N/A
Fines imposed	The Member is fined R15 000.00 to be payable upon publication of this report.
Other sanctions	The Member must also suspend the client in question's use of their services until such time as they have satisfied themselves that the messages sent will be in compliance with the Code both in terms of opt out mechanism but also in terms of consent.

Is this report notable?	Not notable
Summary of notability	N/A

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### **Initial complaint**

The Complainant complained of receiving an unsolicited direct marketing message notwithstanding the fact that his number was on the WASPA do not contact list (DNC). He requested that the Member provide proof of from where the Member had obtained his contact details. In addition, he noted that there was no opt out mechanism on the message.

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### **Member's response**

The Member responded by stating that due to an error their system had not been updated with the latest DNC list, but they had manually rectified the problem and were implementing a new solution so that this didn't happen again. In addition, they advised that their client (who sent the message) obtained the Complainant's details as they had acquired a hosting service provider who hosted the Complainant's website. The client also stated that they were not aware of the opt out requirement for all marketing messages.

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### **Complainant's response**

The Complainant requested details of the company who was the hosting provider and disputed this version of events due to the fact that he self-hosted his websites.

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

The Member advised that they had required their client to implement the opt out mechanism on all marketing messages going forward. In addition, they had blocked the Complainant's number in respect of their client so no further messages could be sent.

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## **Sections of the Code considered**

### **Extent to which the Code applies to third party services**

3.1. If a client, 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 client, 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.

**Third parties who are also WASPA members**

3.3. In the case of a client, supplier, affiliate or sub-contractor who is also a member of WASPA, any complaint regarding the services provided or marketed by that member should be directed to that member. WASPA's members must assist WASPA in identifying services that belong to third parties who are also members of WASPA.

3.4. A member is not liable for any breaches of this Code of Conduct resulting from services offered or marketed by a third party, if that party is also a member of WASPA, provided that 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.

**Third parties who are not WASPA members**

3.5. Members must ensure that any client, 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 client, 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 client, 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.

**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. Unless the target person has expressly or implicitly requested or agreed otherwise, 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,
- (b) a person who has registered a pre-emptive block with a registry established by the National Consumer Commission, or
- (c) a person who has registered a pre-emptive block with a registry established by WASPA.

16.6. If an opt-out request or a pre-emptive block is specified as being limited to a particular service, or to a particular category of services, then the member may apply that block only to the services specified. If it is not abundantly clear that a limited block has been requested, then the member must assume that the block request applies to all services and all marketing.

### **Rights of consumers regarding direct marketing**

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.

### **Disclosure of source of contact details**

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.

### **Reply STOP option for SMS messages**

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.

### **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.

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## **Decision**

### **Extent to which the Code applies to third party services**

3.1. If a client, 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 client, 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.

### **Third parties who are also WASPA members**

3.3. In the case of a client, supplier, affiliate or sub-contractor who is also a member of WASPA, any complaint regarding the services provided or marketed by that member should be directed to that member. WASPA's members must assist WASPA in identifying services that belong to third parties who are also members of WASPA.

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3.6. Members must ensure that any client, 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 client, 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.

- I find the Member to have breached this section. This is due to the fact that the DNC list was not adhered to and the fact that their client was able to send a marketing message via their bulk messaging platform without an opt-out mechanism.
- Accordingly as the client of the Member breached sections 16.4, 16.5 and 16.6, 16.9 and 16.10 and as the client is not themselves a member of WASPA, the Member is therefore liable for these breaches.

#### **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. Unless the target person has expressly or implicitly requested or agreed otherwise, 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,
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16.6. If an opt-out request or a pre-emptive block is specified as being limited to a particular service, or to a particular category of services, then the member may apply that block only to the services specified. If it is not abundantly clear that a limited block has been requested, then the member must assume that the block request applies to all services and all marketing.

- I find the Member to have breached this section.

### **Rights of consumers regarding direct marketing**

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.

- I find the Member to have breached this section.

### **Disclosure of source of contact details**

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.

The Member provided these details but was unable to provide the proof of consent. - I find the Member to have breached this section.

### **Reply STOP option for SMS messages**

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.

- No opt out facility provided.

- I find the Member to have breached this section.

### **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.

- I find no breach as this was not a subscription service.

## **Sanctions**

Although the Member breached the Code of Conduct, the sanctions will be mitigated due to the provisions of 3.7, the manner of response and the fact that the Member has not breached the Code recently.

However unsolicited marketing messages are the scourge of the WASP industry. The fact that the Member's facilities can be used without the very simple requirement of an opt out being present and in contravention of the DNC list this is a serious breach of the Code.

I fine the Member R15 000.00. The Member must also suspend the client in question's use of their services until such time as they have satisfied themselves that the messages sent will be in compliance with the Code both in terms of opt out mechanism but also in terms of consent.

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## **Matters referred back to WASPA**

Not applicable.

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