



## Report of the Adjudicator

Complaint number	<b>#52430</b>
Cited WASPA members	<b>SMS Portal (Pty) Ltd (0139)</b>
Notifiable WASPA members	<b>N/A</b>
Source of the complaint	<b>Public</b>
Complaint short description	<b>Unsolicited marketing message</b>
Date complaint lodged	<b>25-05-2021</b>
Date of alleged breach	<b>25-05-2021</b>
Applicable version of the Code	<b>16.15</b>
Clauses of the Code cited	<b>16.5 c</b>
Related complaints considered	<b>N/A</b>
Fines imposed	<b>Suspended fine of R15k</b>
Other sanctions	<b>N/A</b>
Is this report notable?	<b>Not notable</b>
Summary of notability	<b>N/A</b>

### Initial complaint

The Complainant indicated that she received an unsolicited message that originated from the Member's platform and / or system irrespective of the fact that her number was registered on the WASPA DNC.

### **Member's response**

In its initial response the Member confirmed sending the message. It alleged that the number was sourced in 2015 from a database list provider and further stated that the number was checked against the DMA DNC as a courtesy. It further iterated that it did not receive any opt-out requests and alleged that its client therefore had full legal right to communicate with the Complainant in this matter.

The Member also removed the Complainant's number from its direct marketing database.

### **Complainant's response**

The Complainant in its further response stated the following:

"I am not satisfied with this resolution.

Clause 16.5.(c) for the WASPA Code of Conduct clearly states that:

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: (c) a person who has registered a pre-emptive block with a registry established by WASPA.

The Code also states:

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.

As mentioned before, my number has been on the WASPA DNC list since 2019. It is a requirement of WASPA member to check this list.

Whether or not my number is listed in the DMASA database is not relevant. WASPA's Code does not permit unsolicited direct marketing. It does not specify that unsolicited direct marketing is permitted to numbers as long as they are not listed in the DMASA database.

## **Member's further response**

After having received an extension the Member considered the alleged breach and provided a detailed response of which most parts are replicated here:

### **"Scope of the complaint**

6. Our understanding is that the scope of the complaint is narrow and limited to an alleged breach of clause 16.5.(c) of the Code, which reads as follows:

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:

...

(c) a person who has registered a pre-emptive block with a registry established by WASPA.

7. Clauses 3.5 and 16.5A of the Code are also relevant (although no breaches of these clause are alleged):

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.

....

16.5A. Members must take reasonable steps to block only direct marketing messages to numbers listed in the WASPA Do Not Contact registry and must not automatically block all messages (e.g. transactional and commercial) to those numbers.

8. We do not understand that the complaint alleges that the SMS was unsolicited other than in the narrow sense of non-compliance with section 16.5.(c) and note that proof of consent was provided in the informal response from SMSPortal, and this has not been disputed.

### **Source of the complaint**

9. SMSPortal notes that this is not the first time that a complaint has been lodged against it by WASPA staff, acknowledging that such staff members do interact with service providers outside of the scope of their employment.

10. Our instructions are that SMSPortal has raised this matter with WASPA's general manager as a result of the same member of staff lodging repeated complaints and SMSPortal's perception that such staff member is not willing to entertain resolving matters informally.

SMSPortal believes that it has done everything in its power to resolve this matter for the complainant and to ensure that there is no recurrence of the unwanted SMS, but that it appears that only imposition of a fine or other sanction will be satisfactory.

### **Substantive response**

11. SMSPortal has engaged and continues to engage in an ongoing manner with its customers that use its platform for the sending of direct marketing on the requirements of the WASPA Code of Conduct as they are revised from time to time.

12. SMSPortal therefore denies any breach of clause 3.5 of the WASPA Code to the extent that this is alleged in the complaint.

13. Issues canvassed with customers have included the launch of the WASPA DNC in August 2020 and new requirements for direct marketing flowing from this. [We assume that the complainant's MSISDN was registered with the DNC in 2019 as part of the testing phase but note that the clause 16.5.(c) requirement only came into operation once the DNC was established.]

14. The requirement to implement a WASPA DNC block in respect of direct marketing but not in respect of transactional and commercial messages (see clause 16.5A): 14.1. is complex and requires extensive engagement with customers who want to be in control of their marketing lists; and

14.2. Can only be implemented by SMSPortal's customers who would need to establish and maintain distinct lists for different types of traffic, taking into account the critical nature of transactional and commercial messages.

15. SMSPortal has received substantial resistance from its customers to the implementation of the WASPA DNC block. This is understandable given both the resources required and the further restriction of marketing databases. The difficulty of the engagement has been exacerbated by COVID-19 and the impact of lockdowns on companies in South Africa.

16. Commercial reality is that SMSPortal has limited ability to force large FMCG retailers (such as the one involved in this complaint) to maintain separate lists and check the WASPA DNC list.

17. Notwithstanding the above, SMSPortal recognises that a direct marketing SMS was sent to the complainant in breach of clause 16.5.(c). As indicated above, SMSPortal itself has taken steps to ensure that there is no reoccurrence of this event and will continue to engage with the retailer regarding future compliance.

### **Further considerations**

18. SMSPortal wishes to raise the following additional items: 18.1. SMSPortal is in no way disregarding the requirements of the Code of Conduct but submits that implementation requiring compliance from third parties cannot always be achieved within a short period of time, such as that between the launch of the DNC and the lodging of the complaint (the shortness of which was aggravated by the COVID-19 pandemic and lockdown restrictions).

18.2. As such SMSPortal submits that the non-compliance alleged in this matter arose through no fault of its own.

18.3. Notwithstanding its position as the largest bulk SMS provider in South Africa with hundreds of millions of SMS messages sent through its platform every month, SMSPortal has an excellent track record in respect of compliance with the WASPA Code of Conduct. The low volume of complaints contrasted against the massive volume of messages sent itself speaks to the seriousness with which SMSPortal approaches compliance with the Code.

18.4. The adjudication and sanction imposed in complaint 47076 is noted. The matter is however clearly distinguishable from the current complaint in that there were a number of confirmed breaches of the WASPA Code, including a failure to include an opt-out mechanism.

Should a fine be imposed in this matter it would be logical to expect the quantum to be substantially lower than that imposed in complaint 47076.”

## **Sections of the Code considered**

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.

3.7. 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

16.5. 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:

(c) a person who has registered a pre-emptive block with a registry established by WASPA.

16.5A. Members must take reasonable steps to block only direct marketing messages to numbers listed in the WASPA Do Not Contact registry and must not automatically block all messages (e.g. transactional and commercial) to those numbers.

## **Decision**

In reaching a decision the Adjudicator relies on all the information provided by both the Complainant and Member in this matter.

Unsolicited communication and / or direct marketing or so-called “spam” is an unwanted consequence of the digital age we all live in and a menace to society. Not only does it cause irritation, but it also leads to a sense of anxiety and fear for those on its receiving end. It is an invasion of one’s privacy, outlawed in section 69 of the Protection of Personal Information Act and rightly so, also in WASPA’s Code of Conduct.

Organisations have made massive progress in stemming the tide with various filters but this has not fully resolved the problem. Apart from utilising technology, organisations have an obligation to ensure that their systems and platforms do not get abused by others and organisations / Members, therefore also need to take organisational measures to root out the problem.

One way of achieving this is by ensuring that individuals or entities utilising a system / platform, are compelled to adhere to relevant terms and conditions and the WASPA Code of Conduct that underscore the importance of the problem. It is also important to ensure that the contracting party is properly informed of any amendments so that any breach of the said terms or Code of Conduct would have consequences for the breaching entity.

This leads to section 3.5 of the Code and its implementation.

The Adjudicator does not dispute the Member's contention that it has conformed with section 3.5 of the Code, seen from its own perspective. The Adjudicator does however doubt whether the Member has familiarised *itself* with the workings of the Code and its subsequent communication thereof to any of its clients.

This opinion of the Adjudicator stems from the Member's initial response wherein it alleged that its client acted within its "full legal right" to communicate with the Complainant, without making any reference to the Complainant's own reference to section 16.5 (c) of the Code. The conclusion or take-away from this response is that the Member in its initial response itself seemed to have, at a maximum, no knowledge of, or at a minimum, ill-regard for the workings of section 16.5 (c).

It was only once counsel was sought by the Member, that the full extent of its client's "full legal right" was in fact exposed as an actual breach of the Code, leaving the Adjudicator to guess as to the Member's, or its counsel's contention, that it has made its clients aware of the requirements of the Code, if such requirements, and more specifically those detailed under section 16.5 (c), seem to be absent from its initial legal argument.

The Adjudicator has taken note of the Member's argument about the various difficulties involved with the practicalities behind the implementation of section 16.5 (c) and is also sympathetic to the realities associated with the COVID-19 pandemic which followed shortly after the introduction of the said section. However, the Adjudicator feels that such practicalities should be levied against the WASPA Board.

The Adjudicator also wants to bring it to the attention of the Member that the WASPA DNC became mandatory for every member in March 2020 and not August 2020, as incorrectly stated by the Member as the DNC's launch date.

It is also to be noted that section 16.5 (c) was included in version 16.9 of the WASPA Code of Conduct which had an effective date of 13 February 2020. This further leaves the Adjudicator at a surprise as to why the Member felt it necessary to communicate same to its clients only in August 2020. Refer to paragraph 13 in Member's response: "13. Issues canvassed with customers have included the launch of the WASPA DNC in August 2020 and new requirements for direct marketing flowing from this."

The Member's argument that it and / or its clients had a short period to implement the said requirement therefore falls wayside, since more than a year has lapsed from the date of section 16.3 (c)'s inception to the date of its infringement as alleged by the Complainant.

The Adjudicator wants to caution the Member to be mindful of implementation dates or any amendments to the Code that might influence any new and / or additional requirements.

Although mindful of the Member's contention of mitigating circumstances, the Adjudicator is not convinced thereof, and taking sections 3.5 and 3.7 into consideration, finds the Member in breach of section 16.5 (c) of the Code of Conduct.

In conclusion the Adjudicator wants to reprimand the Member for making assumptions as to the intention of WASPA staff lodging frivolous complaints. The Member inter alia stated the following:

"SMSPortal believes that it has done everything in its power to resolve this matter for the complainant and to ensure that there is no recurrence of the unwanted SMS, but that it appears that only imposition of a fine or other sanction will be satisfactory."

The Complainant in the opinion of the Adjudicator escalated the complaint to formal based on the incorrect conclusion reached by **the Member's** initial response wherein absolutely **no reference was made to section 16.5 (c)**. The Complainant also made a written declaration declaring that the complaint was lodged in good faith.

The Complainant therefore wanted to draw the Member's attention to the alleged infringement of section 16.5 (c).

In this regard, the Member's attention is drawn to section 4.2 of the Code that states that members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

The complaint is upheld.

## Sanctions

The Member is fined R 15 000-00 (Fifteen Thousand Rand) for the breach of section 16.5 (c), suspended for 6 months from the date hereof.

## Matters referred back to WASPA

N/A