



REPORT OF THE ADJUDICATOR

WASPA Member (SP) Nashua Mobile
Information Provider (IP) Club Leisure
(if any)
Service Type Unsolicited SMS
Source of Complaints Public
Complaint Number #0133 & #0134

Adjudicator's note: A single Report has been issued in respect of Complaints #0133 and #0134, both of which lie against the same SP.

Complaint

The Complainant submitted the following two Complaints on 23 January 2006 relating to receipt of unsolicited SMS communications from the SP.

“SMS spam promoting services and products of the Premier Vacation Club.”

“Unsolicited sms promoting services and products of the Golf Resorts Club.”

No further details were provided.

SP Response

The SP provided identical responses in respect of both Complaints:

“The complaint below was in respect of Club Leisure.

Upon investigation, Club Leisure has informed us that the complainant's details was added by one of it's members - the member being an acquaintance of the

complainant. Club Leisure has contacted the complainant and apologised for any inconvenience caused and removed complainant's details from their list."

Sections of the Code considered

The following sections of Version 3.2 of the WASPA Code of Conduct were considered:

'2.19. **"Spam"** means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.'

"5.1.5. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained."

"5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so."

"5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose."

Decision

Due to the lack of any other allegations or information about the communications received the determination is limited as to whether these communications were of a commercial and unsolicited nature.

The response provided by the SP is accepted and the prompt corrective action taken by the IP and SP is noted. The enquiry undertaken below is based on the facts as set out in the response.

The communications received by the Complainant were undoubtedly commercial. Section 5.2.1 of the Code holds that a commercial message is considered unsolicited unless:

- “(a) the recipient has requested the message;
- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient’s contact information has the recipient’s explicit consent to do so.”

[The above describes an “opt-in” system in terms of which explicit or clearly implied consent is required before a communication will be regarded as solicited.]

The messages under consideration could not be said to fall within (a), (b) or (c), and accordingly, for the purposes of the Code, the SMSs constituted unsolicited commercial messages or spam. Section 5.3.1 contains an absolute prohibition on the sending of spam (as defined) by WASPA members and, in the present case, the SP has breached this prohibition.

The Code does not make specific allowance for situations where, for example, an IP requests that its members provide the contact details of any third party whom the member believes will be interested in receiving information regarding a product or service. This is a common marketing practice often involving the incentivisation of the giving of third party contact details or personal information through promises of, for example, enhanced chances of winning a competition. This practice involves a high risk of the personal information of third parties being supplied without their consent, express or implied. The approach is opt-out, rather than the required opt-in.

For this reason it is my view that the sending of SMSs to MSISDNs obtained in this manner is *prima facie* a breach of the Code. It may well be possible to put in place

measures that ensure that the consent of the third party is obtained, but there is no indication of such measures having been adopted in the response received from the SP.

With regard to whether the SP could be said to have taken “reasonable measures” to ensure that their facilities are not used by third parties for the transmission of spam, I have consulted the Adjudicator’s Report in Complaint #0045¹ which considered a complaint regarding unsolicited commercial mail where the complainant’s details had been obtained from a third party database.

In this matter the Adjudicator held as follows:

“The Adjudicator accepted that an SP cannot check every MSISDN that is sent an SMS message using its system, however it is ultimately the SP who is responsible for the actions of its clients. Certain SP’s deal with this by contractually binding their clients to the WASPA Code of Conduct, contractually obligating their clients to pay fines that may be levied on the WASPA member, or even taking a security deposit or withholding revenue (if the service generates revenue) to cover possible fines. The responsibility for enforcing compliance with the WASPA Code of Conduct on the SP’s clients rests with the SP and not with WASPA.

In particular, the Adjudicator referred to Section 5.3.1. of the WASPA Code of Conduct and enquired whether the SP had taken “reasonable measures” to ensure that their facilities are not used by third parties for the transmission of spam. The Adjudicator accepted that the SP had informed its own clients of their obligations in terms of the Code, but had not done so in respect of the clients of its clients. Having regard to the business conducted by the SP, the Adjudicator was of the view that this oversight was not reasonable in the circumstances.

The Adjudicator accordingly found a contravention of Section 5.3.1. of the WASPA Code of Conduct and imposed the following sanction:

- The SP is reprimanded for its breach of the WASPA Code of Conduct;
- The SP is ordered to inform its clients of their obligations in terms of the

¹ See <http://www.waspa.org.za/code/download/0045.pdf>

WASPA Code of Conduct and Advertising Rules and take all reasonable efforts to ensure that such communication is passed on to any third parties who may use the SP's service but with whom the SP does not have a direct relationship."

I will assume that the SP has indeed informed the IP of its obligations in terms of the Code, but there is no indication that this extended to a prohibition on the gathering of MSISDNs without consent. The brevity of the SP's response and the lack of comment on the actions of the IP tend to favour an interpretation that the SP itself saw nothing wrong with the practice. It is accordingly found that the measures taken by the SP were not reasonable for the purposes of section 5.3.1 of the Code.

In considering a sanction I am mindful of the prompt action taken to redress the complaint and have considered the apparent lack of a clear precedent as regards strict application of an opt-in system.

The following sanction is imposed:

1. The SP is issued with a reprimand.
2. The SP is ordered to inform its clients of their obligations in terms of the WASPA Code of Conduct and Advertising Rules, with specific reference to the need for compliance with section 5 and particularly section 5.2.1 of the Code.