



**Wireless Application Service Providers' Association**

## Adjudicator's Report

Complaint number	29916
Cited WASPA members	SMSPortal (Pty) Ltd (0139)
Notifiable WASPA members	<i>na</i>
Source of the complaint	Public
Complaint short description	Unsolicited and non compliant sms
Date complaint lodged	24 March 2016
Date of alleged breach	25 February 2016
Applicable version of the Code	14.3
Clauses of the Code cited	3.1, 3.2, 3.5, 3.6, 3.7, 5.14, 5.16, 16.4, 16.5(b), 16.9, 16.10, 16.12, 16.13
Related complaints considered	<i>na</i>

Fines imposed	<ul style="list-style-type: none"> <li>• Clause 5.16 - R10 000.</li> <li>• Clause 16.9 and 16.10 - R10 000 cumulatively.</li> <li>• Clause 16.12 - R20 000</li> <li>• Clause 16.13 - R 5000.</li> </ul>
Is this report notable?	<i>Notable</i>
Summary of notability	<i>Guidance as to the type of proof WASPs can give to show compliance iro customers.</i>

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## Initial complaint

The complainant received the following SMS:

*Hi, Would you like to reduce your DEBT/ACCOUNT repayments up to 50% and have EXTRA CASH leG over each month?SMS YES to see if you qualify :-) WE CAN HELP YOU*

The complainant initially identified the following issues:

- There is no opt-out procedure in the message (16.4)
- I am registered on the DMA national opt out registry (section 16.5 (b))
- I never consented to receive messages of this nature. Provide me with proof of consent. (16.9, 16.10)
- The message does not identify the sender. (16.12, 5.14\*)
- I also requested that the IP responsible for supplying my details be identified.

The complaint details correspondence with SMS Portal and with their client in this matter, Debt International. It also referenced a previous WASPA decision against SMS Portal in matter 26148, and stated that Debt International appears to be the successor to the client in that matter. He further referenced matters 27172, 24456 and 27424.

The complainant requested that he be refunded for the time spent on this issue.

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## Member's response

Ellipsis Regulatory Solutions responded on behalf of the WASP in detail.

The WASP accepted that it has liability for the breaches of its customers and addressed each clause.

It noted, *inter alia*:

*SMSPortal is a bulk SMS aggregator which provides services to information providers in terms of which such information providers utilise SMSPortal's systems and relationships with the mobile network operators to send marketing / A2P (Application to Person) messages to mobile network subscribers.*

*27. Information providers originate A2P messages. This means that it is the information provider who holds and maintains a database of persons to whom it wishes to market and it is the information provider who obtains or who is in a position to obtain the consent or other authorisation from recipients of such marketing.*

*28. It is not possible for SMSPortal – or any other aggregator – to verify itself that the person to whom a particular MSISDN has been assigned has provided their consent to the information provider or whether another grounds exists which would make the sending of an A2P SMS to that MSISDN compliant with the requirements of the WASPA Code.*

*29. It is not possible for SMSPortal – or any other aggregator – to verify itself that the content of all direct marketing messages sent through its system are in all respects compliant with the WASPA Code of Conduct.*

*30. SMSPortal's client/information provider in this matter was "Debt International" ("the Information Provider"), with which it has an agreement regulating the provision of bulk SMS transmission services for the Information Provider. This agreement makes it clear that the Information Provider supplies the MSISDNs to be used in a campaign. This is effected through an online interface without any human intervention on the part of SMSPortal.*

*31. As set out in the complaint and above, SMSPortal has effected a direct line of communication between the IP and the complainant and the complainant indicated that he was happy to take the matter further with the IP.*

*32. At this stage there is no further information held by SMSPortal which would shed further light on the source of the complainant's personal information. This information is solely within the knowledge of the IP.*

*33. It further appears from the complaint that the IP was previously the subject of a WASPA complaint where it was using the services of another aggregator that is a WASPA member (i.e. in complaint 27424) but that it had subsequently changed to SMSPortal. Given the track record of this IP, SMSPortal is currently evaluating whether to terminate service provision to them.*

I will canvas the more specific responses below.

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## Clauses

3.1. If a customer, 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 customer, 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.

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.

5.14. Members must have a procedure allowing consumers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.

5.16. Members must respect the confidentiality of customers' personal information and will not sell or distribute such information to any other party without the explicit consent of the customer, except where required to do so by law.

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. 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:

...

(b) a person who has registered a pre-emptive block with a registry established by the National Consumer Commission, or

...

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.

16.12. Any communication for the purpose of direct marketing must contain the details of the identity of the sender or the person on whose behalf the communication has been sent and an address or other contact details to which the recipient may send a request that such communications cease.

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

Clauses 3.1 to 3.17 as cited relate to the liability of the WASP member for the actions of its customers and / or non members.

The WASP has essentially accepted that these clauses apply to the situation, and submitted, "SMSPortal refers to submissions made below regarding the steps taken to inform its customers who are not members of WASPA of the requirements of the WASPA Code and the steps taken to ensure they provide affected services in the required manner."

While the WASP goes on to explain its relationship with its customer (as set out above) and includes the heading "The obligations of SMSPortal under the WASPA Code", the heading references a paragraph that discussed the previous rulings that the complainant referred to. At the end of the complaint, it concludes, "SMSPortal refers further to the steps documented above taken to ensure that its clients adhere to the requirements of the Code, particularly those relating to direct marketing."

However, despite numerous readings of the submissions, I cannot find any explanation of how the steps taken to ensure that the customer was aware of the Code, and complied with the Code. On the contrary, the bulk of the response appears to make it clear that no steps are taken, as there is no human interface in the process and no checks in place (ref paragraph 29 and 30 of the response, for example). For the guidance of the WASP and other members, I note that I would have expected to see evidence such as (but not limited to) the contract with the customer, instructions given to customers on use, copies of the WASPA Code sent to the customer, records of random checks performed on customers messages and such like. None of this is before me, despite the references in the letter that suggest that it is. I am only able to rule on what is before me.

**Given this, there is currently no evidence to show that the WASP has taken any steps to ensure compliance with Clauses 3.1, 3.2, 3.5, 3.6 and 3.7. While this does not result in a finding of breach *per se*, it underlies any finding of breach in relation to the remaining clauses, and it acts as an aggravating factor in relation to possible sanctions.**

I therefore turn to the substantive clauses.

Clause 5.14 states, "Members must have a procedure allowing consumers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time."

The complainant raised this clause on the basis that he was unaware of who to complaint to, and therefore was denied access to the complaints procedure.

The WASP stated, "As noted by the complainant, SMSPortal received his initial complaint and responded with all the information at its disposal within a reasonable period of time. SMSPortal has the required procedure and responded as required: it accordingly denies being in breach of this clause of the WASPA Code or that any evidence of such a breach is raised in the complaint."

I am of the opinion that the complaint in this regard relates more properly to Clause 16.12 which I will canvas below. Clause 5.14 relates to the actual procedure and I am in agreement with the WASP that it appears to have facilitated the complaint and the WASPA complaint once actually received. **I therefore find no breach of Clause 5.14.**

Clause 5.16 states, “5.16. Members must respect the confidentiality of customers’ personal information and will not sell or distribute such information to any other party without the explicit consent of the customer, except where required to do so by law.”

The complainant raised this clause because after having responded positively to the sms in an attempt to get the sender’s details, he found himself inundated with debt related marketing attempts. His conclusion is that his details must have been sold or shared. The WASP responded to this clause saying, “SMSPortal denies that it has breached this clause or that there is any evidence of such breach – the selling or distribution of the complainant’s personal information - on the part of SMSPortal (or the IP) advanced in the complaint.”

While I am reasonably convinced that SMS Portal itself did not distribute the complainant’s details, I am not similarly convinced that the customer behaved correctly in this respect. All that is before me is the evidence offered by the complainant which certainly, in my opinion, indicates the probability that his information was shared. The WASP has not given any evidence to contradict this but more importantly has not given any evidence to show that it took steps to make the customer aware of the relevant requirements and to ensure that the customer was abiding by same.

**Given this, I find a breach of Clause 5.16.**

Clause 16.4 says, “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”).”

The WASP submitted:

*SMSPortal denies that it is in breach of this clause and confirms that it does have the required procedure to facilitate the receipt of an opt-out request. The complainant at no stage alleges that he attempted to opt-out and therefore cannot have any knowledge of the existence of this procedure. It is further evident from the complaint that the complainant became aware of the existence of this procedure through his interaction with the IP.*

*12. It should be noted that the obligation to have such a procedure is distinct from the obligation to provide instructions on how to utilise it in a direct marketing message.*

*13. SMSPortal responded to the initial complaint and request quickly and immediately ensured that no further unsolicited communications would be received by the complainant which had been sent through the SMSPortal systems.*

It is correct that there is no evidence before me to show that sending the word “stop” or similar would not have triggered an opt-out process in compliance with the Code. The WASP is also correct in saying that the failure to include the instructions in the message do not fall within the ambit of the clause.

(This in fact appears to be a lacuna in this version of the Code, as Clause 16.15 (not before me) frustratingly states, “If this is not technically feasible then clear instructions for opting out must be included in the body of each marketing message”, implying that opt-out instructions are only necessary if the word “stop” does not work; and Clause 17.1 says, “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” which does not explicitly require the opt-out instruction.) However, Clause 16.12 does mitigate this situation and I will consider it below.

While I find the WASP’s approach somewhat disingenuous, it is nonetheless in accordance with the letter of the Code and the clauses before me. **I therefore find no breach of Clause 16.4.**

Clause 16.5 (b) states, “16.5. 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:

...

(b) a person who has registered a pre-emptive block with a registry established by the National Consumer Commission . . .”.

The WASP defends this on the basis that there is no registry established by the National Consumer Commission, and the DMA registry is not recognised.

While I am again frustrated by the technicalities of this argument, and of the opinion that compliance with the DMA registry is one of the steps that WASPs could take to meet the steps that they are required to take in respect of customer behaviour, I can again find no breach of the clause before me. **There is therefore no breach of Clause 16.5(b).**

Clause 16.9 and 16.10 relate to permission to receive marketing messages. The WASP appears to accept that its customer is in breach of this clause, saying:

“SMSPortal does not dispute that the message received by the Complainant is unsolicited in the sense that it is not justified under any of the grounds set out in clauses 16.9 and 16.10 of the WASPA Code. In the absence of any evidence of consent being given from the Information Provider there is no basis to dispute the Complainant’s statement that it is unsolicited.”

We again then come back to the question of reasonable steps, and the WASPs failure to put evidence of same before me. As stated above, the implementation of the DMA registry would be one such step, showing at least an attempt to protect consumers from the delinquent behaviour.

**Given this, I find a breach of Clause 16.9 and 16.10.**

Clause 16.12 states, “16.12. Any communication for the purpose of direct marketing must contain the details of the identity of the sender or the person on whose behalf the communication has been sent and an address or other contact details to which the recipient may send a request that such communications cease.”

The WASP’s response in this regard is to say, “As noted by the complainant, the IP alleges that this was left out in error due to an inadvertent truncation of the messages sent out. The IP apologised directly to the complainant in this regard. SMSPortal has no control over the conduct of the IP in this regard. It is, with respect, ludicrous for the IP to claim it was not aware of the 160 character limit on SMS messages.”

Again, the WASP has accepted that the customer’s behaviour was unacceptable but provided no detail as to steps that it took to prevent this behaviour. This would include, for example, showing that customers upload messages following prescribed steps including a step requesting sender and opt-out information. Nothing of such a nature is before me. From the information before me it appears that the customer was allowed to upload any message that it wanted in any format with no instruction or guidance. I do not consider this reasonable control of the customer’s behaviour.

**I therefore find a breach of Clause 16.12.**

Clause 16.13 is the final clause before me. It says, “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 WASP submitted, “It is evident from the complaint itself that SMSPortal facilitated contact between the IP and the complainant upon receipt from the complainant that it identify the source of his contact details, and that the complainant was satisfied with this arrangement. SMSPortal cannot provide proof of consent. This – should it exist – is in the hands of the IP. It should be noted that it is not practically feasible for an aggregator of the nature of SMSPortal to verify whether consent has properly been obtained for every direct marketing message sent through its systems.”

In this regard, I have sympathy for the position of the WASP. They have, indeed, put the complainant in communication with the customer. In addition, I am in agreement that they cannot audit the consent for every SMS that passes through their portal.

I am, however, again distressed that there is no evidence that any step has been taken to inform the customer of this requirement and/or instruct the customer in this regard. While I would not expect the WASP to hold the information required by Clause 16.13 or to verify it in each singular case, I nonetheless find that the WASP has not even met the lowest standard of care in informing the customer of the requirement (or if they have there is no evidence or even assertion of that before me).

I therefore find a breach of Clause 16.13, although my sanction will reflect the above points.

### **Sanctions**

The complainant requested a refund of his time. I note that it is not within the ambit of my powers to award “damages” to a complainant (except in the form of a refund, which does not apply here.)

I am, however, empowered to fine the WASP, which fines are payable to WASPA, and I do so as follows:

- In respect of Clause 5.16, the breach is a serious one. I do, however, note that it was the actions of the customer and not the WASP – the WASP’s failure – as with all of the breaches – is that of reasonable oversight. I fine the WASP R10 000.
- On similar reasoning, I fine an amount of R10 000 in respect of Clause 16.9 and 16.10 cumulatively.
- I consider the breach of Clause 16.12 to have been particularly within the control of the WASP, relating as it does to message format, and fine R20 000 in respect of this breach.
- In relation to Clause 16.13, I refer to my comments above and fine the WASP R 5000.

The total fine payable is therefore R 45 000.

I urge the WASP to put in place better controls of its many customers to avoid heavier fines in the future.