



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Exactmobile
Information Provider (IP) (if any)	s/a
Service Type	SMS offers
Source of Complaints	Adjudicator's report 0629
Complaint Number	1020
Date received	15 February 2007
Code of Conduct version	4.8

Complaint

This complaint was instituted by the Secretariat pursuant to an instruction from the WASPA Adjudicator who adjudicated on complaint no. 0629. The Service Provider was the complainant in complaint 0629. In its response to complaint 0626, the information provider, Xcite Mobile, alleged that the Service Provider has contravened section 11.11 of the Advertising Rules on a number of occasions when sending commercial SMS messages on the following dates: 19 August 2006, 11 September 2006 and 17 October 2006.

The details of the complaint are as follows:

"The Secretariat is instructed to institute a complaint against the complainant in terms of Clause 11.11 of the WASPA Advertising Rules and to request from the IP details of the number on which such messages were received, in order to allow the complainant to respond thereto."

SP Response

The Service Provider responded as follows:

"This complaint has been lodged by the secretariat as a result of the response given by Xcite Mobile in complaint number 629.

Xcite Mobile alleges that he received marketing SMS messages on the Mobile number 0824500577. According to exactmobile's records, the following transactions have been processed by this number:

Date and Time	Message	PRS	Tarrif
2006/12/21 09:08	Wap nokia n70	33333	R 5.00
2006/11/13 15:46	Saver	33333	R 5.00
2006/10/18 12:36	Leeu	27820035022	R 5.00
			R
2006/08/10 22:58	Wg24359	40020	20.00
2006/07/26 18:04	Club	33333	R 5.00
			R
2005/10/31 19:43	Honey	38581	10.00
2005/08/24 11:07	1432	33333	R 5.00
2005/06/29 13:37	Paris	37607	R 7.50
2005/05/28 10:50	OB1	37393	R 7.50
2005/05/14 23:29	489299	35555	R 3.00
2005/05/14 23:27	140007	35555	R 3.00
2005/04/12 11:36	Super1	33333	R 5.00
2005/04/07 11:39	Race	33333	R 5.00
2005/01/19 22:47	Wild	37600	R 7.50
2005/01/14 08:22	P1	35555	R 3.00
2005/01/13 09:08	Ota2	32227	R 1.00
2005/01/13 09:01	Ota	32227	R 1.00
2004/12/24 15:05	P3	27820046024	R 3.00
2004/12/24 14:40	P1	27820046024	R 3.00
2004/06/18 11:28	ota	32227	R 1.00

Wireless Application Service Provider Association

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2004/06/17 17:44	Poly5	35555	R 3.00
2004/06/17 17:41	Poly4	35555	R 3.00
2004/06/17 17:38	Poly3	35555	R 3.00
2004/06/17 17:32	Poly2	35555	R 3.00
2004/06/09 08:35	Poly1	35555	R 3.00
2004/06/08 19:06	Mono1	35555	R 3.00
2004/05/15 17:52	143658	36669	R 5.00
2003/08/05 18:01	Golf eXTreme	27820030020	R 2.00
2003/06/27 09:37	Pin 724743438131	27820015021	R 1.00

Date and Time	Amount	Client
2007/03/03 15:46	R 4.00	Massive Saver Pass
2007/02/26 18:09	R 10.00	ExactmobileNOWCLub
2007/02/24 15:48	R 4.00	Massive Saver Pass
2007/02/17 15:47	R 4.00	Massive Saver Pass
2007/02/10 15:46	R 4.00	Massive Saver Pass
2007/02/03 15:46	R 4.00	Massive Saver Pass
2007/01/27 16:12	R 4.00	Massive Saver Pass
2007/01/26 18:09	R 10.00	ExactmobileNOWCLub
2007/01/20 15:47	R 4.00	Massive Saver Pass
2007/01/13 15:48	R 4.00	Massive Saver Pass
2007/01/06 15:49	R 4.00	Massive Saver Pass
2006/12/30 15:46	R 4.00	Massive Saver Pass
2006/12/26 18:07	R 10.00	ExactmobileNOWCLub
2006/12/23 15:49	R 4.00	Massive Saver Pass
2006/12/21 09:07	R 14.00	Exactmobile 33 333
2006/12/16 15:47	R 4.00	Massive Saver Pass
2006/12/09 15:49	R 4.00	Massive Saver Pass
2006/12/02 15:44	R 4.00	Massive Saver Pass
2006/11/26 18:07	R 10.00	ExactmobileNOWCLub
2006/11/25 15:49	R 4.00	Massive Saver Pass
2006/11/18 15:44	R 4.00	Massive Saver Pass
2006/11/13 15:44	R 3.00	Massive Saver Pass

2006/10/26 18:06	R 10.00	ExactmobileNOWCLub
2006/10/18 12:38	R 15.00	Exactmobile WAP
2006/09/26 18:06	R 10.00	ExactmobileNOWCLub
2006/08/26 18:02	R 10.00	ExactmobileNOWCLub
2006/08/10 22:53	R 16.50	Exactmobile WEB
2006/08/10 22:46	R 3.75	Exactmobile WEB
2006/07/26 18:03	R 5.00	ExactmobileNOWCLub
2005/07/08 18:16	R 15.00	Vodacom4meWAP
2005/05/14 23:30	R 3.50	Exactmobile 33 333
2005/05/14 23:29	R 3.50	Exactmobile 33 333
2005/05/14 23:15	R 3.50	Exactmobile 33 333
2005/05/14 23:08	R 3.50	Exactmobile 33 333
2005/05/14 23:03	R 3.50	Exactmobile 33 333
2005/05/14 22:43	R 3.50	Exactmobile 33 333
2005/04/12 12:59	R 13.50	Exactmobile 33 333

As can be seen from the regular activity of this user these messages were not sent out of the Blue and repeatedly and have been associated with user activity. These messages were sent as follow up messages to user activity.

I further wish to draw the adjudicators attention to ruling number 408 which was lodged on the 17th August 2006 and the ruling received on the 20th October 2006. As a result of this ruling, all Exactmobile SMS messages were changed to comply with this ruling.

The complainant in this case received messages on the 19th August 2006, 11 Sept 2006, and 17th October 2006. Therefore this infringement has already been ruled upon and should not be ruled upon again.

Furthermore if the complainant had an issue with these messages and that they did not conform to the WASPA code of conduct, then he should have lodged these complaints directly. We have also unsubscribed this user from all Exactmobile Services.”

Sections of the Code considered

Section 11.11 of the Advertising Rules was considered in its entirety with particular reference to the following:

- *If using SMS as the Access Channel and where there has been no communication to a user of that service from either the general participants in that service or the controllers of the service for a minimum of ten (10) calendar days, then any further communication to that user must, at the first communication to that user after the tenth (10th) day, indicate who the service is provided by and how the user may unsubscribe from the service, and the cost thereof.*

The cost of this unsubscribe process may not exceed a total of R1 if using SMS as the unsubscribe medium and may not be more than 120 seconds if using IVR or any other voice-based system as the unsubscribe medium.

- *Opt-Out: Any further communication with a consumer in a distribution list must contain a relatively easy and unambiguous method for immediately opting-out of any further communications from that distribution list:*
 - *Fax: No premium rated fax lines [eg 0866 fax-2-email type numbers] may be used for the mandatory opt-out procedure.*
 - *SMS: The total cost of opting-out from any distribution list using a premium rated SMSs Access Channel may not exceed R1 total cost.*
 - *IVR (or any other time-based method): Where applicable, any IVR systems used for any opt-out procedure must be designed so that a reasonable user will not need to exceed 120 seconds (from the start of the IVR call or time-based method) for the entire opt-out process.*

Decision

The party instigating this complaint, Xcite mobile, appears to have entered into a number of transactions with the Service Provider from the mobile number:

0824500577 over the period 2003 to 2006. The crucial dates in question are 19 August 2006, 11 September 2006 and 17 October 2006 and the crucial question is when did the last communication with the user prior to each of these dates take place and did that last communication take place within the prescribed minimum 10 day period.

The transaction records submitted by the SP only show when the user accessed one or more of the SP's services. These records do not reflect when communications were sent by the SP or other controllers of the service to the user. If one takes the dates when each of the commercial messages referred to above were sent, section 11.11 has been contravened because more than ten (10) days passed between each message and the messages in question did not indicate how the user may unsubscribe from the service, and the cost thereof.

However, the SP has also stated that its contravention of section 11.11 was previously ruled on in complaint no. 408, with the relevant ruling being communicated to the SP on 20 October 2006. As there is no evidence before me of contraventions that took place after 20 October 2006, I cannot adjudicate on an issue that has already been ruled upon.

The complaint is accordingly not upheld.