



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	iTouch Messaging Services
Information Provider (IP):	Fontera
Service Type:	Various
Complainant:	Public
Complaint Number:	11153 (2)
Code Version:	10.0
Advertising Rules Version:	N/A

Complaint / Appeal decision

The Secretariat has been instructed to re-lodge this claim against the correct WASP member. The Adjudicator has therefore included the IP, which shall be deemed the subject of this matter. The original complaint, response and adjudication are left as is and reflected in italics, with the only difference that the SP will be replaced with the IP where appropriate. The Adjudicator is however of the opinion that the breach of section 4.1.12 was levied against the SP in this matter, and not the IP.

In its complaint the Complainant raised various issues of concern. As several of his questions were answered, the Complainant in his final response, which would form the basis of this Adjudication, indicated inter alia that he can't access the various links to assess whether there is a link to WASPA's Code of Conduct, alleging a breach of section 4.1.12.

He further stated that the IP used a premium rate short code for opting out instructions, alleging a breach of section 5.1.4.

He then concluded by querying his so-called "consent" as alleged by IP in receiving marketing messages, alleging a breach of section 5.2.1.

Information / Service Providers' response

The IP in its subsequent response, complained about the process, but did not facilitate the Adjudicator with any new information. It alleged that it did receive the necessary consent, but did not further substantiate it, apart from re-iterating that WASPA did not investigate the matter properly.

The IP responded to the allegations pertaining to section 5.2.1 by stating that it received the Complainant's details from a company that guaranteed it had the necessary consent.

The IP further stated that it is of the opinion that section 4.1.12 relates to the correctness of the message which it alleged is in fact accurate.

To conclude, the IP mentioned that its opt-out pertaining to 5.1.4 is in fact charged at the lowest rate and that the word "STOP" to the given number will lead to automatic opt-out.

Sections of the Code considered

4.1.12. Members' web sites must include a link to the WASPA web site and/or this Code of Conduct.

5.1.4. For SMS and MMS communications, a message recipient must be able to opt out at the lowest tariffed rate available (with the exception of reverse billed rates). If replying 'STOP' as set out in 5.1.3 will result in a charge greater than the lowest tariffed rate available, then instructions for the lowest tariffed rate opt-out must be included in every message sent to the customer.

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 (within the last six months) 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

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's formal response.

The Adjudicator in this matter also took note of the IP's subsequent response.

The Adjudicator in this matter tried to access various websites:

www.itouch.co.za (this website led to the buongiorno website)
www.itouchsa.co.za

www.blinko.co.za (No access)

Where the Adjudicator did gain access (itouch and itouchsa) it can be confirmed that none of those sites contained any link to the WASPA Code of Conduct.

On its list of members, iTouch Messaging Services provided www.itouchsa.co.za as its homepage, where no link is provided.

The SP assumed wrong when it contended that section 4.1.12 deals with the correctness of the message.

The Adjudicator therefore has no hesitation in finding the SP in breach of section 4.1.12.

The Adjudicator cannot infer from the email message sent from MLD Marketing, whether in fact it had validly obtained the explicit consent of the Complainant in this matter.

The Adjudicator also cannot infer from the further response of the IP in the re-lodging of the complaint against the IP, whether explicit consent was indeed obtained. Mere mention of the fact that the list was obtained from a list brokering company (with opt-in list) does not in itself justify explicit consent.

Section 14.3.14 of the Code states that on the basis of the evidence presented, the adjudicator will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits.

No record illustrates this.

As correctly contended, the email message in question was sent a whole year prior to the alleged breach (which in itself seems rather strange and fictitious) and it would almost be impossible to ascertain, that even if explicit consent was given, that such consent should be argued to subsist longer than 6 months, without having to validate consent again.

The Adjudicator re-affirms his position on this.

The Adjudicator also verified that the list provider did indeed appear under address resellers on the ISPA Hall of Shame in February 2010, well after the email was sent.

It is impossible to gain access to the so-called mld-marketing website and the company seems to be a fictitious entity since the domain name is in fact available for registration.

The Adjudicator therefore finds that the message was indeed SPAM as defined in section 5.2.1(c) and subsequently finds the SP in breach of section 5.3.1.

The Adjudicator has not concluded whether there is in fact a breach of section 5.1.4 and will suspend its decision on the said clause until clarity can be obtained from WASPA and its various sources.

The Complaint is upheld.

The Adjudicator re-affirms this position against the IP and SP where relevant.

Sanctions

In determining an appropriate sanction, the following factors were considered:

The prior record of the SP & IP with regard to breaches of the relevant sections of the Code of Conduct;

The SP' & IP's subsequent response.

The Adjudicator has taken note that there have not been any previous complaints against the SP or IP in this matter.

This does not deter from the fact that these breaches are of a serious nature.

Subsequent breaches might lead to stringent sanctions in the form of fines.

The SP is formally reprimanded for its breach of section 4.1.12.

This breach is tantamount to withholding information from the public and subsequent misleading and is viewed as a serious breach.

The IP is reprimanded for its breach of section 5.3.1.

The Secretariat is instructed to establish through its resources what rate was in fact the lowest available rate at the time of the breach.

Should it be found that this rate was less than R 1-00 the SP would also be found to be in breach of section 5.1.4 and would accordingly be subject to a formal reprimand or appropriate fine.



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Complaint

In its complaint the Complainant raised various issues of concern. As several of his questions were answered, the Complainant in his final response, which would form the basis of this Adjudication, indicated inter alia that he can't access the various links to assess whether there is a link to WASPA's Code of Conduct, alleging a breach of section 4.1.12.

He further stated that the SP used a premium rate short code for opting out instructions, alleging a breach of section 5.1.4.

He then concluded by querying his so-called "consent" as alleged by SP in receiving marketing messages, alleging a breach of section 5.2.1.

Service Providers' response

The SP responded to the allegations pertaining to section 5.2.1 by stating that it received the Complainant's details from a company that guaranteed it had the necessary consent.

The SP further stated that it is of the opinion that section 4.1.12 relates to the correctness of the message which it alleged is in fact accurate.

To conclude, the SP mentioned that its opt-out pertaining to 5.1.4 is in fact charged at the lowest rate and that the word "STOP" to the given number will lead to automatic opt-out.

Sections of the Code considered

4.1.12. Members' web sites must include a link to the WASPA web site and/or this Code of Conduct.

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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

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's formal response.

The Adjudicator in this matter tried to access various websites:

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On its list of members, iTouch Messaging Services provided www.itouchsa.co.za as its homepage, where no link is provided.

The SP assumed wrong when it contended that section 4.1.12 deals with the correctness of the message.

The Adjudicator therefore has no hesitation in finding the SP in breach of section 4.1.12.

The Adjudicator cannot infer from the email message sent from MLD Marketing, whether in fact it had validly obtained the explicit consent of the Complainant in this matter.

No record illustrates this.

As correctly contended, the email message in question was sent a whole year prior to the alleged breach (which in itself seems rather strange and fictitious) and it would almost be impossible to ascertain, that even if explicit consent was given, that such consent should be argued to subsist longer than 6 months, without having to validate consent again.

The Adjudicator also verified that the list provider did indeed appear under address resellers on the ISPA Hall of Shame in February 2010, well after the email was sent.

It is impossible to gain access to the so-called mld-marketing website and the company seems to be a fictitious entity since the domain name is in fact available for registration.

The Adjudicator therefore finds that the message was indeed SPAM as defined in section 5.2.1(c) and subsequently finds the SP in breach of section 5.3.1.

The Adjudicator has not concluded whether there is in fact a breach of section 5.1.4 and will suspend its decision on the said clause until clarity can be obtained from WASPA and its various sources.

The Complaint is upheld.

Sanctions

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct;
- The SPs' subsequent response.

The Adjudicator has taken note that there have not been any previous complaints against the SP.

This does not deter from the fact that these breaches are of a serious nature.

Subsequent breaches might lead to stringent sanctions in the form of fines.

The SP is formally reprimanded for its breach of section 4.1.12.

This breach is tantamount to withholding information from the public and subsequent misleading and is viewed as a serious breach.

The SP is fined R 10 000-00 for its breach of section 5.3.1.

The Secretariat is instructed to establish through its resources what rate was in fact the lowest available rate at the time of the breach.

Should it be found that this rate was less than R 1, the SP would also be found to be in breach of section 5.1.4 and would accordingly be subject to a formal reprimand or appropriate fine.