



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Integrat
Information Provider (IP):	Sprint Media
Service Type:	Subscription
Complainant:	Public
Complaint Number:	11997
Code Version:	10.0
Advertising Rules Version:	N/A

Complaint

In summary, the Complaint relates to an alleged unsolicited message and subsequent unwanted subscription.

The Complainant was subsequently unsubscribed by both the IP and SP.

The Complainant requested an escalation to a formal complaint since he claimed that he did not contract with the IP or SP, and that he wanted a refund, which at that stage, was not offered.

The IP subsequently offered a refund, but the Complainant re-iterated that he wanted the case to be adjudicated by an Adjudicator.

The Complainant further stipulated that he was not satisfied with the processes followed by WASPA and was uncertain whether WASPA was in fact an independent organisation.

Various communiqué went back and forth between the WASPA Secretariat, the IP, SP and the Complainant.

The Complainant felt that he did not receive answers to the questions asked and was in general unsatisfied with responses offered by both the IP, SP and Secretariat.

Service providers' response

The IP provided a detailed response as to how the Complainant subscribed, the handset used and timing of the alleged “subscription”. The SP (Integrat) also provided a detailed reply to some of the questions raised by the Complainant in this matter.

Sections of the Code considered

2.23. “**Spam**” means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.

4.2.1. WASPA and its members must respect the constitutional right of consumers to personal privacy and privacy of communications.

4.2.2. 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.

5.1.7. 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 (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.

5.2.2. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

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.

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

6.2.12. For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application:

- (a) ...
- (b) ...

(c) If the transaction is to initiate a subscription service, then the price and frequency of the service must be included directly in the text of the WAP link or immediately adjacent to it and must be visible on the same screen as the link.

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

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 and IP's formal response.

Although the Adjudicator does not imply that the Complainant in this matter is making false accusations, it cannot assume that the IP and SP's explanation of events is false either.

The IP (Sprint Media) gave detailed explanations as to how the Complainant's number landed on its database and how the Complainant subsequently double opted in via its WAP landing page with supporting evidence to sustain its reflection of events.

The WASPA code of conduct states in its section 14.3.2 that if the secretariat believes that a complainant has not provided sufficient evidence for an adjudicator to be able to make a decision regarding their complaint, the secretariat may request that the complainant provide additional supporting material for their complaint. Should the complainant fail to provide any additional information, the secretariat may close the complaint due to lack of evidence without it proceeding to adjudication.

This was brought to the attention of the Complainant by the Secretariat.

The Complainant subsequently responded but offered little evidence as to his claims. One fact that was confirmed was that his phone was a Blackberry.

In the IP's response, it was confirmed that the opt-in was received via a Blackberry, something that would be impossible to assume unless the Complainant, or somebody utilising his device, did in fact opt in.

Even though there was a lack of any real evidence, the Secretariat did allow the Complaint to be escalated to formal.

In the opinion of the Adjudicator, the Complainant has not provided the Adjudicator with any form of concrete evidence while the SP in this matter, did provide some proof of the fact that the Complainant subscribed.

It also has to be stated that the Complainant was unsubscribed and offered a re-imburement as a gesture of goodwill by the IP, which informal settlement was subsequently rejected.

This must imply that the Complainant in this matter truly believed he had not subscribed and wanted to defend this principle.

Whether somebody utilised the Complainant's handset without his knowledge is unknown and it would be unwise for the Adjudicator to speculate on such occurrence, but it could surely be argued.

However, the Adjudicator cannot make a ruling on hearsay alone and has to rule with the evidence in front of him / her.

The WASPA Code of Conduct in its section 14.3.14 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.

Therefore the Adjudicator has no alternative but to dismiss the allegation of spam and involuntary subscription.

Apart from the above however, there seems to be other irregularities in relation to the WASPA Code of Conduct.

The Adjudicator refers to Adjudication 12527:

"Section 6 of the Code deals with Advertising and Pricing. Section 6.2.12 (c) specifically states as follows:

"6.2.12. For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application:

(a) ...

(b) ...

(c) If the transaction is to initiate a subscription service, then the price and frequency of the service must be included directly in the text of the WAP link or immediately adjacent to it and must be visible on the same screen as the link."

In relation to subsection (c) above, while the subscription service is advertised at R7 per day, the price is not included directly in the text of the WAP link that initiates the

transaction, nor immediately adjacent to it (the WAP link being the "CLAIM NOW" link which initiates the subscription process). The pricing details appear well below the link, are not part of it, nor next to it, and are not clear either – but printed very small.

The IP is accordingly in breach of section 6.2.12(c) of the Code.

Section 11.2.2 states further as follows:

"11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz."

The word "independent" in section 11.2.2 has a clear and unambiguous meaning as the opposite of the word "dependent", which in turn means to be reliant upon something else. It follows that if a request to join a subscription service is dependent on any other request, it would not be an "independent" request. In the present matter, the subscription request is dependent on a consumer initiating and completing a request for "1500 points", i.e. the subscription request is not an independent transaction request but is wholly dependent on the consumer claiming points for the purpose of redeeming a product in the IP's online store. The service accordingly breaches section 11.2.2 of the Code."

The Adjudicator in this matter concurs with the above ruling and therefore finds the IP in breach of sections 6.2.12(c) and section 11.2.2.

Sanctions

The sanctions in Adjudication 12527 refer:

"Sanctions

The following sanctions are now imposed:

1. The IP shall refund the Complainant all sums debited against her account plus interest thereon at the rate of 15,5% per annum calculated daily and compounded monthly in arrears from date of debit until date of refund.
2. A fine of R20 000.00 is imposed on the IP, to be paid to the Secretariat within 10 working days of the date of delivery of this report failing which:
 - 2.1 the IP shall be suspended from WASPA; and
 - 2.2 the SP, Mira Networks, shall suspend all subscription services to the IP; until such time as the fine has been paid in full.
3. The SP and IP are directed to furnish to WASPA a list of all subscription services currently offered by the IP in conjunction with the SP and all such further information as may be required so as to enable the WASPA Monitor to assess the subscription initiation processes utilised by such services for compliance with the Code."