

Appeal Panel's Report

Complaint reference numbers: 15187 and 15567

WASPA member: Sprint Media

Membership number: 1168

Date appeal lodged: 28 September 2012

Code versions: 11.0

The Appeal

The member, Sprint Media, appealed the adjudicator's decisions in the following matters on similar grounds:

- complaint 15187
- complaint 15567

We considered these two complaints as a batch for the purposes of this report. They share common threads and it is appropriate that the appeals in respect of these matters be considered together.

Sprint Media's service

Sprint Media's subscription services^[1], which form the subject matter of these complaints, essentially comprise a WAP site which a consumer generally visits after clicking on a banner or similar link on a different website. Once on this WAP site, the consumer may be prompted to enter his or her mobile number (depending on the network operator, a function known as "MSISDN pass-through" occurs where the network operator automatically passes the consumer's mobile number to the service provider without the need for the consumer to submit that mobile number).

Once submitted, the consumer receives a message by SMS or MMS inviting the consumer to visit a link contained in the message. That link takes the consumer to a mobile website where the consumer is presented with a so-called "call to action" in the form of an invitation to claim some reward or join a subscription service. The screenshots we were presented with, coupled with descriptions of the service in the adjudicator's reports and the appeal submissions themselves point to what is known as a "double opt-in" or even a "triple opt-in" mechanism where visitors to the WAP pages are required to confirm their intentions to proceed twice or even three times.

The purpose of this mechanism is to ensure that consumers are not unwittingly subscribed to services through a single action such as clicking on a button, banner or link, but are rather required to take a further step in order to confirm their desire to proceed after the initial action.

In each of these cases, the complainants raised concerns about receiving spam from Sprint Media or that they were subscribed to a service which they did not intend to subscribe to.

Each of the complaints in this batch, while being factually distinguishable in certain respects, raise common concerns about Sprint Media's service. Sprint Media's primary concern is the adjudicator's assumptions in one of the complaints which the adjudicator has carried through all of the complaints and which informed the adjudicator's severe sanctions and a number of statements about Sprint Media.

We found the Oxygen8 report on complaint 16319 (this was one of the complaints we considered as part of a related batch of appeals lodged by Sprint Media and which we have addressed in a separate report) helpful in the manner in which it described the service's mechanics and which were applicable to these complaints.

Complaint 15187

Incorrect submissions and new evidence

Sprint Media prefaced its appeal against the decision in this matter with an explanation of how an incorrect explanation of its service was forwarded to WASPA when the complaint was initially adjudicated. Sprint Media stated the following in paragraphs 3.3.1 to 3.3.3:

Sprint Media provided subscription logs showing that the Complainant had clicked on the WAP banner. The transaction flow provided to the WASPA Secretariat in response to the complaint showed the WAP landing page that a consumer would be directed to if that consumer was to be required to manually input his/her MSISDN ("MSISDN entry").

Unfortunately, an error was made on the part of the Sprint Media complaints officer who provided the information to the WASPA Secretariat. This error only came to the attention of Sprint Media at the time of preparing these representations. The landing, confirmation and completion pages for MSISDN entry were provided in response to the complaint and a line entry was missing from the logs that is relevant to MSISDN pass through. The landing, confirmation and completion pages for MSISDN pass through should however have been provided as these are the pages pertinent to the complaint and not the ones provided.

Primarily, the difference between MSISDN pass through and MSISDN entry is the process of collecting the MSISDN - the double opt in process is the same for both MSISDN pass through and for MSISDN entry. Sprint Media does however point out that the wording on the landing and confirmation pages was different for MSISDN pass through from that for MSISDN entry at the time that the Complainant accessed the landing, confirmation and completion pages.

Sprint Media provided corrected screenshots reflecting the correct landing, confirmation and completion pages as Appendix 1 to its appeal submissions and asked that we admit this updated annexure as evidence that the opt-in mechanism was MSISDN pass-through and not MSISDN entry as was originally explained to the adjudicator who heard the complaint. We agreed to admit this evidence in the interests of expediency. No purpose would have been served refusing Sprint Media permission to correct the record before us even though the adjudicator did not have an opportunity to do so due to Sprint Media's error. Referring the complaint back to the adjudicator would only have incurred unnecessary and additional costs and time.

In addition, the logs Sprint Media provided indicated MSISDN pass-through and supported the updated Appendix 1.

The subscription mechanism

Sprint Media explained the process whereby the complainant became subscribed to its service in some detail in its appeal submissions. According to Sprint Media's logs (which we had no reason to question), the complainant accessed a WAP landing page with an adult-appropriate content theme on 28 August 2011. Sprint Media annexed screenshots of this in Annexure 1 to its appeal submissions and they indicate that a button marked "Continue" would have been presented to the complainant directly underneath a mostly nude image of a woman with a strategically located button typically identified with a "play" button on videos found online.

Directly above the image is the following line of text:

Subscription Service R7/day

Directly underneath the image is the following text:

Video: Super booty shaker

15 new videos also available

Below that is the “Continue” button and, below that is the email address “help@hotmob.tv”. Below that is a set of terms and conditions stating the following:

hotmob.tv is a subscription service at R7/day that allows users to access adult mobile content through their mobile device. hotmob.tv has requested that your mobile number be made available. Clicking on the action link you’re declaring to be 18+ and are accepting both the terms and conditions^[2] and to receive free promotional SMS related to this and other services operated by Sprint Media S.L. Compatible handsets only. Network charges may apply. Seek bill payers permission before using. To opt-out from promotions contact help@hotmob.tv or call 0213002334 or send STOP to 39327. Privacy Policy^[3].

According to the logs, the complainant clicked on the “Continue” button and was directed to a confirmation page which looks almost identical to the landing page described above except the confirmation page contains the following text below the image –

Click to access videos:

instead of –

Video: Super booty shaker

15 new videos also available

The confirmation page is otherwise identical. What happened when the complainant proceeded to page by clicking on the “Continue” button, according to Sprint Media, is that the complainant’s MSISDN was passed across to Sprint Media by the complainant’s network operator automatically (hence the term “pass-through”).

The complainant was prompted to click on a button marked “Confirm”, apparently did so and was directed to a 3rd page which Sprint Media refers to as a “Completion” page. This triggered an SMS to the complainant, “instantaneously”, which stated the following:

WELCOME: 2SEE NAKED BABES PICS VIDZ 24/7 on Ur CELL Visit hotmob.tv password: 31259405
help@hotmob.tv 0213002334 subscriptionR7/day 2 unsub sms stop 31975 18

The following month, on 27 September 2012, the logs reflect that the complainant received a reminder message with the following text:

Reminder: 2SEE D HOTTEST BABES on ur CELL @ HOTMOB.TV! Help 0213002334. u r subscribed 2
S/Media Hotmob.tv/ cost R7/day 2 unsub, SMS stop 31975. free msg 18

In its discussion about the subscription process, Sprint Media went to some lengths to highlight the disclosures of the service’s subscription nature and the associated cost of R7 per day. These two facts are apparent from the screenshots of the landing and confirmation pages, as well as the messages the logs indicate were sent to the complainant on 28 August 2012 and 27 September 2012.

Sprint Media further pointed out that the subscription mechanism was a “double opt-in” mechanism and contended that the complainant both intended to subscribe (as evidenced by his progress through the double opt-in process described above and statements indicating the subscription nature of the service) and was aware that the service included multiple content items (the landing page made reference to “15 new videos also available”).

The adjudicator’s report includes the following in a discussion about the merits of the complaint and Sprint Media’s responses:

The WASP has provided no direct information on how a subscriber becomes prescribed by clicking on the “Download” link on the pages provided above. It is assumed that clicking on the Download link above, the potential subscriber receives the messages in the second screen shot above and that the potential subscriber then receives the sms in the third picture.

The landing page advertising the service in the first picture does not comply with section 6.2.12© of the Code. Although it indicates that the service is a subscription service and the relevant pricing quite clearly at the top, it does not include the price and frequency of payment “directly in the text of the WAP link” or “immediately adjacent to it”. I find therefore that the landing page advertising the service contravenes section 6.2.12(c) of the Code.

The same holds true for the sms in the third picture, where the opt-in link “DOWNLOAD” and the required notification that this is a subscription service is separated by the words “Video huge_tits_02.3gp”. These pages are also highly misleading in that they give no indication that clicking on “DOWNLOAD” initiates a subscription service. The word “download” creates the impression that a single item will be downloaded, namely “huge-tits.3gp”, not that a subscription is being initiated. The same holds true for the sms received by the potential subscriber in picture 3 above. There is no indication that the subscription is an independent transaction apart from the download of the specific item. This get-up is clearly aimed at deceiving potential customers by not clearly indicating that the customer is subscribing to the service by clicking on “DOWNLOAD”. This is an infringement of section 11.2.2 which requires that the initiation of 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.”

Here the impression is created that the customer is downloading a specific item, a video clip, whereas in fact it is the initiation of a subscription service. I accordingly hold that the WASP has also infringed section 11.2.2 of the Code.

It is apparent that the adjudicator’s reasoning was premised largely on the incorrect representation of the service’s subscription mechanism and its focus on a content download. The adjudicator’s perception of the service landing page Sprint Media originally presented as a mechanism for a single content download was not unreasonable, despite the text “SUBSCRIPTION SERVICE R7/DAY” and references to a subscription service in the terms and conditions on that page. At the very least, this could have been confusing to a person visiting the landing page, in isolation.

As we mentioned above, the adjudicator did not have the benefit of the correct information when considering the complaint so we reviewed the adjudicator’s decision with this in mind.

Considering the Code

Version 11.0 of the Code applies to this complaint. The adjudicator found that Sprint Media breached clauses 6.2.12(c) and 11.2.2.

Clause 6.2.12(c) seemed to have been misunderstood. Clause 6.2 deals with “Pricing of services” and clause 6.2.12(c) (with the lead-in sentence) states the following:

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.

Sprint Media contended that “[t]here is no WAP link in any of the pages as the transaction was not initiated using a WAP link at all” and this contention appears to be correct. The complainant likely arrived at the landing page after browsing the Web and clicked on a banner which brought him to the landing page in the first place. Once on the landing page, the complainant was presented with the cost of the service and informed about the service’s subscription nature.

Clause 6.2.12(c) does not appear to be designed to cater for this process and, in any event, the issue it seems to have been designed to address is adequately informing prospective subscribers about the costs of the subscription service in sufficiently close proximity to the actions which would result in a subscription to be integral to the prospective subscriber’s decision-making process. In other words, a prospective subscriber must be sufficiently informed about the nature and costs of the service prior to triggering a subscription to the service.

We are satisfied that the intention behind clause 6.2.12(c) was satisfied and there were adequate notices about the service’s costs at all material times prior to the complainant triggering a subscription. We do not agree with the adjudicator’s finding that Sprint Media infringed clause 6.2.12(c).

Clause 11.2.2, in turn, states the following:

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.

A finding that Sprint Media’s service breached this clause appeared to flow from the adjudicator’s conclusion that the service really offered a single content item download (or, at least, that was the impression it conveyed to the complainant). In light of the correct screenshots, supported by Sprint Media’s logs, the complainant must have understood that he was initiating a subscription service at a cost of R7 per day through which he would be able to access adult-appropriate content. In particular, the complainant would have been made aware of the subscription nature of the service at the following times:

1. On viewing the landing page with its advisories about the cost and subscription nature of the service;
2. On viewing the confirmation page with similar advisories;
3. On receipt of the welcome message which stated the subscription nature of the service and the associated costs shortly after confirming his subscription; and
4. On receipt of a reminder message a month later containing similar notices.

We therefore do not agree with the adjudicator’s finding that Sprint Media’s service breached clause 11.2.2.

Complaint 15567

This complaint differs from the previous one in that the complaint was not that the complainant subscribed to a subscription service^[1] but rather that the complainant allegedly received unsolicited messages from Sprint Media despite not subscribing to its subscription service (in this case, the Mobmatic content subscription service). In other words, the complaint is that Sprint Media was spamming the complainant.

The adjudicator questioned Sprint Media through a series of questions posed via the WASPA Secretariat. Without going into too much detail, the essence of Sprint Media's feedback is its contention that the complainant agreed to receive "free promotional SMS" by interacting with the initial landing page of the service. The consent mechanism in this case was the terms and conditions which were on the landing page. Sprint Media furnished the adjudicator with a helpful workflow diagram titled "Wallpaper Campaign Wap" and which the adjudicator included on page 9 of the adjudicator's report.

Sprint Media, in its appeal submissions, referenced this workflow in the adjudicator's report and described what the logs reveal with reference to the complainant:

1. On 10 November 2011, the Complainant clicked on a banner advertising 3-D wallpapers and was directed to a landing page.
2. On the landing page the Complainant manually inputted his MSISDN and pressed "Next".
3. An SMS was sent on 6 November 2011 with the next steps of the subscription process which forms part of Sprint Media's double opt in process – the double opt in process was not completed.
4. On 10 November 2011 a marketing message was sent to the Complainant - the Complainant alleges that this marketing message was unsolicited and therefore spam.

The terms and conditions on the landing page stated the following:

Mobmatic is a Subscription Service at R7/Day where users can download premium content to their cell. Mobmatic has requested that your mobile number be made available. Clicking on Next you're declaring to be 16+ and are accepting both the terms and conditions^[4] and to receive free promotional SMS relating to this and other services operated by Sprint Media S.L. To opt-out from promotions, contact Support@mobmatic.com or call 0213002334. Privacy Policy^[3].

Spam and Sprint Media's consent model

Leaving aside largely irrelevant variations in the terms and conditions text (for example the age warranty and the specific wording of the call to action), we were informed that this is essentially the same wording used for Sprint Media's various campaigns.

In the event a visitor to the landing page tapped on or clicked the "Next" link, he or she would be taken to a further "Optin" page with the following text:

IMPORTANT!

You will not receive a confirmation SMS to your mobile. You must open the message and click on the link to access the downloads area.

Support

0213002334

It's not clear whether the terms and conditions quoted above are repeated below the support details. Sprint Media's workflow indicates that a message in the following format would have been sent to the complainant:

Click the <http://ems.cx/x/XXXXXX> to complete the activation. help@mobmatic.com subscription service R7/day. to unsub sms stop XXXXXX

The logs indicate that the complainant received the following SMS on 2011-11-06 at approximately 19:48:

Click <http://ems.cx/w/1ERBAI98> to complete activation. help@mobmatic.com subscription service R7/day. to unsub sms stop 31923

This SMS was step 3 which we outlined above. The complainant did not activate the subscription using the link in the SMS and was therefore not subscribed to the Mobmatic service.

Sprint Media confirmed to us in the appeal hearing that unless a consumer clicked through the various pages and actually confirmed their subscription, they would not be charged the subscription charge for the service but clicking on "Next" would constitute their consent to receive these free promotional messages and, in some cases, even free credit for free content forming part of the same service.

In paragraph 3.3.5 of its appeal submissions, Sprint Media explained its position as follows:

Sprint Media also explained in its response that all consumers who manually input their mobile numbers via a banner advert automatically become "lite" members. "Lite" membership entitles consumers to access/browse certain content for free. However if a consumer wishes to access premium content which comes at a fee that consumer must upgrade the "lite" membership to become a premium member at a cost of R7 per day. In order to become a premium member, a consumer must complete the double opt in process to subscribe.

Sprint Media relied on legal principles which bind parties to terms and conditions which they are referred to or which are made available to them in this manner as the basis for its assertion that the various complainants agreed to these particular terms and conditions, including the consent to receive the promotional messages. This assumption is what concerns us about this mechanism and which speaks to the adjudicators' findings regarding spam and misleading conduct in breach of clause 4.1.2 of the Code.

With reference to clause 5.2.1 of the Code, the adjudicator stated the following:

It appears to be common cause between the parties that the complainant was not a subscriber to any service of the IP.

It also appears to be common cause that the message sent to the consumer was a commercial message in that it promoted a product or service.

Section 5.2.1 contains a presumption that “any commercial message is considered unsolicited (and hence spam) unless” the exceptions of 5.2.1 (a) – (c) exist. Due to the existence of this presumption, it is for the message sender to bear the onus of proving the existence of circumstances that would negate the complainant’s allegation of spam.

In light of the fact that the message was clearly a commercial message, the issue to be determined in this adjudication is therefore whether the IP has discharged the onus of disproving the allegation of spam.

The adjudicator went on to draw a distinction between “requesting” a message and “consenting to receive” a message. This analysis is informative, as is the adjudicator’s further reasoning.

A clear distinction exists between *requesting* a message and *consenting to receive* a message. The word “request” derives from the same Latin root (quir/ques/quis) as the words “quest” or “question”. To request something means to seek or to ask for something. By contrast, to “consent” means to permit something in the face of a proposal.

There is no evidence that the message was requested by the recipient in terms of section 5.2.1(a). In any event, I do not understand the IP to be alleging that the complainant actually requested the message. Rather, the IP alleges that:

“by clicking NEXT on the landing page they were agreeing to their MSISDN **being permitted to be targeted with promotional messages relating to services we provide.**”

The IP therefore appears to be alleging that the consumer consented to receiving promotional messages and, by implication, the IP is relying on the provisions of section 5.2.1.(b) of the Code to support its contention that the promotional message sent to the complainant was not “spam”.

The adjudicator referred to the message the complainant received as a “commercial message”. Given the content of the messages, these messages are not only commercial messages, they are “direct marketing messages^[5]”. The Code (version 11) considers a “direct marketing message” to be “unsolicited (and hence spam) unless the “recipient has requested the message”; where the recipient has a “prior commercial relationship with the message originator” (subject to certain conditions) or where the “organisation supplying the originator with the recipient’s contact information has the recipient’s explicit consent to do so”. The operative term in this context is “consent”.

As the adjudicator noted, Sprint Media did not lead evidence of prior commercial relationships so the first and last scenarios outlined in clauses 5.2.1(a) and 5.2.1(c) are relevant. The question is whether the complainant (and others in the complainant’s position) requested the promotional messages they received after clicking on or tapping the “Next” link or whether they explicitly consented to some other organisation passing that information across to Sprint Media using a MSISDN pass-through mechanism.

The Code does not define “consent” or set clear parameters for this concept. Sprint Media’s attorney agreed that the Code and WASPA members’ actions are also governed by our law and our law incorporates a notion of a legitimate expectation of privacy as an important factor when determining when consent is required in order to process a person’s personal information. Where a person has such a legitimate expectation of privacy, that person’s consent is required.

In the context of these complaints, the appellant seeks consent through its terms and conditions but, as the adjudicator pointed out –

An ordinary consumer, on reaching the landing page produced by the IP, would reasonably presume that the terms and conditions contained on the landing page relate to one service, i.e. a premium rated subscription service called Mobmatic. An ordinary consumer would therefore reasonably assume that aborting the subscription confirmation process would cancel his or her membership of Mobmatic.

The truth is that aborting the subscription confirmation process will only abort membership of the “premium” service but not the so-called “lite” service. As the IP explains, “if the user doesn’t subscribe to the service they automatically become lite members of Mobmatic”.

According to the IP, clicking on the “Next” button concludes a commercial relationship between the consumer and the IP with the “Complete” button merely changing the nature of that relationship.

When we considered the text on the WAP pages we discussed above, we noticed that the prominent text immediately below the subscription information and pricing did not reference a consent to receive promotional messages.

The only indication of an agreement to receive promotional messages is about halfway down the terms and conditions text (roughly the lower third of the page itself) which, for many phones, is below the fold, so to speak, according to Sprint Media’s representative’s evidence at the appeal hearing.

This begs the question what consumers are consenting to when they click through these pages, regardless of whether they subscribe or not. To answer this question we considered the nature of consent. Current legislation is not helpful but the Protection of Personal Information Bill which is currently making its way through the legislative process and is expected to be passed into law in the coming months defines consent as follows:

“consent” means any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information

Our concern with the wording on Sprint Media’s WAP pages is that it places much emphasis on the content or services offered by Sprint Media in close proximity to the call to action links (either “Next” or “Complete”) and makes no reference to the consequence of partially completing this process and not actually subscribing to the service.

The free content or promotional message option does not constitute a subscription under the Code but, as we pointed out above, the free promotional messages are almost certainly “direct marketing message[s]” as the Code defines the term.

Returning to consent, our concern is that, while the terms and conditions provide for a consent and that consent is imputed to the consumer by virtue of accepted legal principles such as the doctrine of quasi mutual assent, the form of consent obtained is flawed. Given the emphasis that concerns us, we find that the consent Sprint Media seeks through its terms and conditions in use in these campaigns was, in all probability, not specific or informed. This is borne out in the complainant’s astonishment at receiving messages after declining to complete the subscription process.

As we mentioned in a footnote above, Sprint Media furnished the adjudicator with far more detailed terms and conditions. These expanded terms and conditions draw a distinction between “Premium” and “Freemium” memberships which is not apparent from the terms and conditions on the WAP pages. Sprint Media did not seek to rely on these expanded terms and conditions in its submissions to us and rather focused on the terms and conditions set out on the landing and subsequent pages. It is also questionable whether the expanded terms and conditions would be binding on a consumer if incorporated in the manner in which Sprint Media

appears to intend it to be incorporated. Nevertheless, the expanded terms and conditions were not raised as an issue before us so we don't make a finding regarding their application or enforceability.

Returning to the consent issue, Sprint Media contended that the finding that its messages constituted spam was incorrect. It pointed to clause 5.2.1(c) which states that a direct marketing message is considered unsolicited (and, accordingly, spam) unless:

the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so

In this regard, Sprint Media argued as follows:

As the Complainant gave his explicit consent to receive the promotional material, the marketing message cannot be considered unsolicited and the exception contained at section 5.2.1 (c) of the Code applies.

Leaving aside whether the exception in clause 5.2.1(c) actually applies to this matter where there may not be an "organisation supplying" Sprint Media with the complainant's personal information, we do not find that competent consent was obtained through the mechanisms we have discussed above and, therefore, clause 5.2.1(c) does not assist Sprint Media.

Going further, Sprint Media argued that, with reference to clause 5.2.1(b), the complainant was afforded "a reasonable opportunity to object" to direct marketing communications –

With regard to the exception contained in section 5.2.1 (b) of the Code, the Complainant was, in effect, given an opportunity to object to receiving direct marketing communications at the time that he manually inputted his MSISDN into the MSISDN field. If he objected to receiving marketing messages relating to the Sprint Media services he ought not to have pressed "Next" and, in any event, he was given with a customer care and email to opt out of promotional messages in compliance with the Code.

This argument has no merit as it is premised on a pre-existing commercial relationship between the complainant and Sprint Media which Sprint Media did not establish. Furthermore, the terms and conditions published on the landing page do not adequately inform the complainant that, by clicking "Next" and subsequently refraining from confirming a subscription, the complainant's only option for avoiding becoming a "lite" or "Freemium" member was not to submit contact details at all. We agree with the adjudicator's conclusion that, even if clause 5.2.1(b) applied, the complainant was not given an adequate opportunity to object to receiving the direct marketing messages:

In this regard, the process utilised by the IP for its Mobmatic service is deficient because a consumer cannot object to the receipt of direct marketing communications at the time his or her personal information is collected. Rather, a consumer first has to submit his or her personal information by inputting their cell number on a WAP landing page. At this stage, they have no choice other than to simultaneously consent to the receipt of promotional messaging. On clicking the "Next" button, the user is automatically signed up to a promotional mailing list. A consumer would have to thereafter engage in the additional act of either emailing or telephoning the IP in order to request becoming unsubscribed from the promotional mailing list that they have, by process design, become automatically subscribed to by the IP.

Given the wording in the terms and conditions and their relative obscurity given their positioning on the WAP pages as well as the specific consent wording's location in those terms and conditions, we do not agree with Sprint Media's conclusion that the complainant competently and sufficiently consented to receive the direct marketing messages.

Remaining issues

The adjudicator found Sprint Media also fell foul of clauses 4.1.2 and Rule 9.2 of the Advertising Rules. Clause 4.1.2 provides as follows:

Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

As we have pointed out, the terms and conditions on the WAP pages does not adequately inform consumers that the consequence of them submitting their personal information immediately adds them to a direct marketing database, even if they decline to proceed further. Sprint Media may not have “knowingly” misled the complainant (certainly, there was no evidence before us indicating this) but we find that the mechanism for adding the complainant to Sprint Media’s direct marketing database was “likely to mislead by inaccuracy, ambiguity, exaggeration or omission”.

With respect to Rule 9.2 of the Advertising Rules, we do not agree with the adjudicator’s finding that Sprint Media breached this rule. As the adjudicator pointed out, Rule 9.2 provides as follows:

... if multiple offers are made on the same advertisement and the cost and T&C differ with each offering, each offering must show the cost and T&C separately and clearly.

The terms and conditions on the WAP pages or the wording elsewhere on the pages do not draw a distinction between “multiple offers” with differing costs and “T&C”. As Sprint Media points out in its submissions, at paragraphs 3.5.2.2 and 3.5.2.3:

Multiple offers are not being made in the same advertisement. The advertisement is for the premium service. **A consumer who enters his/her MSISDN automatically becomes entitled to the “lite” services** for which there is no charge. A consumer becomes a “lite” member as a step towards “premium” membership. A “lite” member is able to browse content and access certain content for free. If a consumer wishes to access “premium” content, the subscription process must be completed. The “premium” service is merely an upgrade on the “lite” service and Sprint Media is therefore not advertising multiple offers in the same advertisement.

Although there are “lite” and premium services, these are part and parcel of the same offering and cannot be separated from one another – for this reason, the terms and conditions applicable to the “lite” service and the “premium” service are contained in a single document. It is also clear from the terms and conditions that the “lite” service is a free service and that the “premium” service costs R7 per day.

We have added emphasis to both clauses. The manner in which Sprint Media has constructed its service essentially obviates Rule 9.2’s application. The “lite” membership can simply not be described as an offer as that implies an option not to take the offer up. As we pointed out above, we do not find that the complainant was given a meaningful choice in the matter.

Findings

Complaint 15187

We set aside the adjudicator’s findings that Sprint Media infringed clauses 6.2.12(c) and 11.2.2 of the Code for the reasons set out above.

Complaint 15567

We find that Sprint Media infringed the Code in the following respects:

- Sprint Media sent unsolicited direct marketing messages to the complainant in contravention of clause 5.3.1, as read with clause 5.2.1; and
- Clause 4.1.2.

We set aside the adjudicator's finding that Sprint Media breached Rule 9.2.

Sanctions

The adjudicator, in complaint 15567 –

- fined Sprint Media R15 000 for its infringements of clause 4.1.2 and Rule 9.2; and
- directed Sprint Media to deposit R100 into the complainant's bank account and fined Sprint Media R5 000 for infringing clause 5.3.1 of the Code.

As we alluded in the beginning of this report, we also adjudicated complaints 16319, 16333, 16668 and 16735 as part of the same appeal process as complaints 15187 and 15567. In our report dealing with Sprint Media's appeals against findings in complaints 16319, 16333, 16668 and 16735, we considered similar issues and infringements of the Code and imposed fines in respect of the infringements we concluded had occurred:

> As we pointed out above, Sprint Media breached the following provisions of the Code applicable to the complaints in question:

- Clauses 4.1.2 and 5.3.1 in complaint 16319, in respect of which we impose a fine of R70 000;
- Clause 4.1.2 in complaint 16333, in respect of which we impose a fine of R50 000; and
- Clause 5.3.1 in complaint 16668, we impose a fine of R20 000.

We have had regard to the adjudicator's research on fines for breaches of clause 4.1.2 in the past in determining these fines. We further order that these fines be suspended for a period of six months from the date on which this report is delivered to the appellant subject to the condition that the appellant is not found to have breached clauses 4.1.2 and/or 5.3.1 through the use of the same or similar mechanisms which formed the subject matter of these complaints. These fines will become payable in the event that such a finding is made by an adjudicator during this period.

Given that our findings in relation to complaints 15187 and 15567 relate to the same clauses of the Code we considered in 16319, 16333, 16668 and 16735 and, bearing in mind the sanctions we applied in those other matters, we do not believe it is appropriate to impose any additional sanctions in respect of complaints 15187 and 15567.

The appeal fee is not to be refunded.

1. The WASPA Code defines a “subscription service” as “is ”any service for which a **customer is billed** on a repeated, regular basis without necessarily confirming each individual transaction”. We added emphasis for the reasons set out below in this report.
2. The phrase “terms and conditions” was underlined, suggesting it was hyperlinked although, if so, its not clear what the link would have taken a person to as we were advised that these terms and conditions were the only terms and conditions applicable to the service.
3. As with the phrase “terms and conditions”, the words “Privacy Policy” was underlined, suggesting a hyperlink.
4. Sprint Media furnished the adjudicator with a 7 page PDF setting out more detailed terms and conditions. It is not clear whether these terms were linked to in the published terms and conditions on the landing and subsequent pages.
5. The Code defines a “direct marketing message” as “a commercial message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.”