

REPORT OF THE ADJUDICATOR

Complaint reference number: 15568

WASPA member(s): Opera Interactive (SP) (0068)

Sprint Media (IP) (1168)

Membership number(s): See above

Complainant: Competitor

Type of complaint: Spam

Date complaint was lodged: 2011-09-0

Date of the alleged offence: 2011-0

Relevant version of the Code: 11.0

Clauses considered: 5.1.8, 5.2.1, 11.3 and 11.9

Relevant version of the Ad. Rules: N/A

Related cases considered: 15569 and 15574

Complaint

Complaint 15568 was logged by a competitor regarding an unsolicited sms message received for a subscription service.

The complaint progressed as follows:

- Complaint 15568 was logged by a competitor regarding unsolicited marketing messages promoting a subscription service.
- The formal complaint was sent WASP on 2011-11-15 and they responded on 2011-
- The SP was also notified of this complaint on 2011-11-15.
- The complainant refused resolution on 2011-11-15.
- The WASP provided further feedback on 2011-11-16.

The Complainant alleges that he received an unsolicited message advising him he had been subscribed to a service. He opted out of the service but received no confirmation message as required by the Code.

In summary the complaint sets out the following having been breached:

- Opting out of commercial messages;
- Sending of spam;
- Subscription process; and
- Termination of service.

Service provider's response

The SP referred the complaint to the IP.

Information provider's response

The IP responded in detail

With regards to the allegations of spam they advised that the message was not unsolicited in that the complainant had entered his MSISDN on their website which confirmed with all of the requirements of the WASPA code.

With regards the sending of a confirmation message with regards to the opt out from the receiving of commercial messages, the IP denies receiving the message and states that the complainant was unsubscribed on receipt of the WASPA complaint.

With regards to both the complaint about the subscription process and the termination of service process, the IP states that the complainant was never subscribed and as such this is irrelevant.

Sections of the Code considered

- **5.1.8.** Once a recipient has opted out from a service, a message confirming the opt-out should be sent to that recipient. This message must reference the specific service that the recipient has opted-out from, and may not be a premium rated message.
- **5.2.1.** Any direct marketing message is considered unsolicited (and hence spam) unless:
- (a) the recipient has requested the message;
- (b) the message recipient has a prior commercial relationship with the message originator and has been given a reasonable opportunity to object to direct marketing communications
- (i) at the time when the information was collected; and
- (ii) on the occasion of each communication with the recipient; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

11.3. Subscription initiated via a browser (web or WAP)

- 11.3.1. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must be sent to the customer's mobile handset in order to prove that the number entered matches the customer's mobile handset number. This message may either:
- (a) contain a PIN which is then confirmed or validated on the web page, or
- (b) contain the name of the service, an explanation of the confirmation process, and a URL with a unique identifier, which, when clicked, validates the handset number.
- 11.3.2. For any subscription services that are initiated via WAP, it is a requirement for the service provider who has a direct contract with the network operator to display a WAP confirmation page to the potential subscriber. This confirmation page must be displayed after the subscriber has first indicated an interest in the subscription service by clicking on a "join" or similar link.
- 11.3.3. The WAP confirmation page must display the following information in a clear and easy to read manner:
- (a) The name of the service and an indication that it is a subscription service
- (b) The price and frequency of billing
- (c) A phone number for customer support
- 11.3.4. Where it is necessary for a consumer to confirm that their MSISDN may be made available to an application, this may be done by including the following wording on the WAP confirmation page: [Application name] has requested that your mobile number be made available.
- 11.3.5. The information listed in 11.3.3 and 11.3.4 above must be presented as text and not as an image.
- 11.3.6. The WAP confirmation page described above must also present a confirmation button. It must be clearly communicated to the customer on the confirmation page that clicking the confirmation button will initiate a subscription service.
- 11.3.7. The WAP confirmation page may not contain any marketing messages or other content that is likely to distract the customer from the required confirmation information and process.
- 11.3.8. The WAP confirmation page must offer all languages used in the promotional material for that service.

11.9. Termination of a service

- 11.9.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.
- 11.9.2. Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.

- 11.9.3. The 'STOP' request described above must be charged at the lowest tariffed rate available (with the exception of reverse billed rates).
- 11.9.4. Where the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in a request, the service provider must honour the opt-out request as if the word 'STOP' had been used.
- 11.9.5. Where a service is linked to a specific short code in advertisements for that service, then sending a 'STOP' request to that short code should result in the termination of that service. If a request to a short code could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.
- 11.9.6. If a message sent by a customer cannot be parsed by a WASP, then the resulting response to the customer should contain sufficient information for the customer to be able to unsubscribe from that service, or to be able to contact the service provider's customer support.
- 11.9.7. For services where the primary means of interacting with the service is via USSD or WAP, and for which the reminder message set out in clause 11.7.1. or 11.8.1. is used, clause 11.9.2. does not apply.
- 11.9.8. Members must ensure that the termination mechanism is functional and accessible at all times.
- 11.9.9. For USSD services, the unsubscribe option must be listed on the top-level menu, under the heading "UNSUBSCRIBE".
- 11.9.10. When a customer has requested that they be unsubscribed from a service, an unsubscribe notification must be sent to that customer, and must use the following text format, flow and wording: You've been unsubscribed from [service name].

or

You've been unsubscribed from [service name]. To resubscribe [service activation instructions]. You'll then be resubscribed at [cost of service and frequency of billing].

- 11.9.11. A user must be removed from a subscription service if no successful bills have been processed for that service for more than three months, or if there is an indication from one of the mobile networks that the number is no longer in use.
- 11.9.12. If a user ports their number from one operator to another, that number must be removed from all subscription services.
- 11.9.13. If a customer sends an unsubscribe request directly to a member, and the request cannot be acted on immediately, the customer must be informed (for example, via a notification of the form "This may take up to 24 hours"). In any case such a request must be acted upon with two working days (48 hours).
- 11.9.14. If a consumer lodges a request with WASPA to be unsubscribed from a subscription service, the WASPA member concerned must honour that request within two working days (48 hours) of that request being passed on by WASPA.

Decision

I will now deal with each section of the Code that the Complainant alleged the IP infringed.

In respect of section 5.1.8, the Complainant alleges he opted out but that no opt out confirmation was received as per the requirements of the Code. The Complainant states that they sent a stop message on 14 November 2011. The IP states that they received an opt out to marketing messages not to be unsubscribed from a service as the Complainant was not subscribed to any service and as such section 5.1.8 does not apply.

In respect of section 5.2.1, the Complainant alleges that the commercial message sent to him was spam. The IP stated that the Complainant had entered his MSISDN into their website and as a result of such entering of the number, the commercial message was sent, and the message was thus not spam. This brings up again the point of messages being sent as a result of an MSISDN being entered on a web or wap site. There is no mechanism to determine whether or not the Complainant entered the number or someone else entered a number incorrectly.

The IP stated that a Sony Mylo phone was used to access the services on both the 7th and the 14th of November 2011. The Complainant denies owning such telephone and states that they did not access the service on the 7th and on the 14th accessed it via their PC and not via their mobile telephone. The IP's logs show that a Sony Mylo mobile device was utilised.

The Complainant also alleges breaches of the subscription process as set out in 11.3 and the termination of a subscription service as set out in 11.9. However, due to the fact that the Complainant was not subscribed to any service, I am not going to delve into 11.3 and 11.9.

This case once again raises the difficulties of proving wrongdoing particularly in instances where the chain of events is allegedly intiatited by entering in a MISDN onto a wap or website or from clicking on a banner ad. The IP's advertising of the subscription services including all the necessary opt out information complies with the Code. The issue arises as to whether or not the Complainant themselves entered their number. But without my alleging dishonesty on the part of the IP and a full forensic audit of the logs to ascertain whether or not anything has been tampered with I must take the evidence presented at face value, trusting that both parties will provide a correct and accurate version of events.

Sanctions

I am not going to sanction the IP in this case.