



REPORT OF THE ADJUDICATOR

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| Complaint reference number: | 16319 |
| WASPA member(s): | Sprint Media (IP) / Opera Interactive (SP) |
| Membership number(s): | 1168 / 0068 |
| Complainant: | Public |
| Type of complaint: | Subscription Service |
| Date complaint was lodged: | 3/2/2012 |
| Date of the alleged offence: | 3/11/2011 |
| Relevant version of the Code: | 11.0 |
| Clauses considered: | 4.1.2; 5.2.1; 5.3.1; 11.1.1; 11.2.1; 11.3 |
| Relevant version of the Ad. Rules: | Not Applicable |
| Clauses considered: | None |
| Related cases considered: | See report in complaint 16735 |

Complaint and Response

- 1 This complaint revolves around contested subscription to a subscription service.
- 2 The Information Provider (IP) in this matter is Sprint Media, which provided the service complained of using the systems of Opera Interactive, which accordingly takes the role of the Service Provider (SP) here. As the IP is an affiliate member of WASPA, it is responsible for its infringements of the Code of Conduct.

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- 3 On the 16th of January 2012, the Complainant, who is a member of the public, entered an unsubscribe request using WASPA's online unsubscribe facility. The request was initially directed to the SP, but subsequently re-directed to the IP, which was providing the service complained of. The relevant WASPA record shows that on the 19th of January 2012 the Complainant was unsubscribed from the service in question. The IP also provided proof of the Complainant's subscription to the service.
- 4 However, the Complainant was not satisfied, on the basis that he had not knowingly subscribed to the subscription service in question, but had nonetheless been billed for the service. He decided to take the matter further on the 3rd of February on the following basis:
- Not acceptable still as how do they Sprint Media S.L come the amount of R188.99 if the service was stopped 8 Jan already. This does not add up with the value of R7pd for whatever service I don t even know as indicated by Vodacom, and I have no means or way to talk to Sprint. Just the fact that these pigs are using you and can't talk directly talk to me, surely indicates that they are not legit? How many more unsuspected customers must tricked.
- As per the Consumer Protection Act I need to know at least what I was paying for and how do they actually come to R188.99, and will also log it on their ombudsman site if I do not come right here.
- However I cannot believe that you guys really support WASPs that do this to you and to end customers. Please do the right thing here, we count on you.
- 5 The matter was escalated to a formal complaint, of which notice was sent to the IP on the 13th of February. Notice was also sent to the SP on the same date.
- 6 On the 14th, the IP emailed the Complainant with an offer of re-imbusement of all amounts charged, being an amount of R 518.00. This refund was duly paid (by the SP it should be noted) and was accepted by the Complainant.
- 7 The Complainant was not satisfied for several reasons, of which these are relevant to the complaint:
- 7.1 He was not convinced that the records provided by the IP as proof of his subscription were authentic, and expressed the belief that they could be easily manufactured. The person who was using the phone allegedly used to subscribe denied visiting the IP's site, and on the Complainant's version did not know how to use a browser.
- 7.2 The amount paid back to the Complainant did not square with the services to which the Complainant was subscribed; he did not know for what period or services the refund was for.
- 8 The SP replied to the complaint on the 12th of March. I requested clarification from the SP as to whether this submission was made on behalf of the SP, to which the SP responded that the submission should be taken in addition to any submission made by the IP.
- 9 The fine detail of the SP's submission is not necessary for the purposes of this adjudication. The salient information given is that the IP sent several push marketing messages to the complainant's phone containing an advertisement for the Mobmatic service. These messages were sent on the 26th of June, 4th

of July, 27th of October and 3rd of November 2011 respectively, and read as follows:

You Have Been Sent 1 New Photo Message! Click To View
[http://ems.cx/w/?m=\[MSISDN REMOVED\] /2optout/click/r7/Day/subscr/](http://ems.cx/w/?m=[MSISDN REMOVED] /2optout/click/r7/Day/subscr/)

You have received 1 new picture message. Click to view
[http://ems.cx/w/?m=\[MSISDN REMOVED\] /2optout/click/r7/Day/subscr/](http://ems.cx/w/?m=[MSISDN REMOVED] /2optout/click/r7/Day/subscr/)

You have been sent a a picture. Click to open: [http://ems.cx/w/?m=\[MSISDN REMOVED\] /2optout/click/r7/Day/subscr/](http://ems.cx/w/?m=[MSISDN REMOVED] /2optout/click/r7/Day/subscr/)

1 new message on your account: 'Your account [MSISDN REMOVED] has 500 cr...' - Click to read full message [http://ems.cx/w/?m=\[MSISDN REMOVED\] /r7/day-sub/unsub:sms-stop/](http://ems.cx/w/?m=[MSISDN REMOVED] /r7/day-sub/unsub:sms-stop/)

- 10 The Complainant clicked on the link contained in each message and was taken to the IP's WAP page for the service concerned. The only exception to this was the message sent on the 27th of October, where the Complainant took no action.
- 11 Finally on the 3rd of November the Complainant followed the double opt-in procedure described by the SP, which included responding to a confirmatory message sent to the cellphone in question. After subscription was affected, the IP sent the Complainant a welcome message per SMS as required by the WASPA Code of Conduct.
- 12 The SP supported its submission with detailed log entries to prove that the Complainant had subscribed to the "Mobmatic" subscription service. I assume, though this is nowhere stated, that the SP runs the subscription system, and the IP has an agreement with the SP to host its content on that system. As this is a common model in the industry, the assumption is a reasonable one.
- 13 The IP did not make a submission beyond providing an initial proof of subscription.

Sections of the Code considered

- 14 The conduct complained of took place on or about 3 November 2011, and consequently version 11.0 of the WASPA Code of Conduct is applicable. The following clauses have relevance:

5.2. Identification of spam

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.

5.2.2. Any commercial message is considered unsolicited after a valid opt-out request.

5.2.3. 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. Prevention of spam

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.

11.2. Subscription process

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.

11.3. 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.

Sections of the Advertising Rules considered

15 Not Applicable

Decision

Subscription without Consent

- 16 A number of push messages were sent to the Complainant's MSISDN, and in all save one someone clicked on the incorporated link. Of these, only one was "carried through" to subscription stage. In the circumstances I consider it most unlikely that the user of the phone intended to subscribe to a service, but was rather clicking on the link to see what it was, or even unintentionally while reading the message. I believe the Complainant's submission that he (or whoever was using his phone at the time) did not intend to subscribe to the service in question.
- 17 There is nothing in the facts to contradict the SP's version that the Complainant was indeed subscribed to the Mobimatic service by following a double opt-in process. The Complainant did not intend to do so, but if the IP followed the prescribed process, it has not infringed the Code of Conduct in subscribing the Complainant.
- 18 As an aside, much is made of the fact that the logs correctly identify the make and model of the Complainant's mobile phone. The assumption is that the system could only link this data to the Complainant's MSISDN if the Complainant had entered his MSISDN into the IP's WAP site and thus created a connection (in the forensic sense) between MSISDN and phone browser. I do not place much reliance on this. Note that the push messages sent to the Complainant all contain the Complainant's MSISDN in the links that they contain. By clicking on the links, the Complainant would unwittingly transmit his MSISDN to the IP's WAP server, allowing the IP to make this link.
- 19 That said, the IP did conform to the relevant provisions of the Code, and I cannot find that it has infringed either section 11.3 dealing with the procedure

for subscriptions, or in the wider clause 11.2.1 that forbids subscribing customers to subscription services without their consent.

Promotion of Subscription Services

20 The methodology complained of in this matter is identical to that followed in complaint 16333, which I am adjudicating at the same time as this one. The push marketing messages do not state "prominently and explicitly" that they are in respect of subscription services. For my reasoning on the point, see the report in complaint 16333.

21 The IP has infringed clause 11.1.1 of the Code of Conduct.

Misleading Conduct

22 My findings regarding misleading conduct made in complaint 16333 are applicable here, as the conduct of the IP in using a "you have mail" message as a hook was used in both complaints.

23 The IP has infringed clause 4.1.2 of the Code of Conduct.

Spam

24 The SP states that the IP sent four push marketing messages to the Complainant, while the Complainant in response to my request for further information denied having any prior relationship with the IP. In the circumstances I have no hesitation in finding that the messages sent to the Complainant do not fall under any of the exceptions set out in clause 5.2.1 and hence constituted spam.

25 In the circumstances the IP has infringed clause 5.3.1 of the Code of Conduct.

Sanctions

26 One gains the impression in reading the record that the IP's strategy was to spam out marketing messages and hope that consumers will inadvertently click through the double opt-in process. By using a hyperlink rather than a PIN in the message sent to the consumer to confirm the subscription request one certainly increases the chances of this happening. While this practice is in-line with the Code of Conduct, it is in my view a loophole that requires closing.

27 The WASPA Secretariat is requested to recommend that the Codecom revisit the provisions of clause 11.3.1 with a view to amending or deleting sub-clause 11.3.1 (b) thereof.

28 I have adjudicated complaints 16319, 16333, 16668 and 16735 together. For the sake of convenience I have dealt with sanctions for all these complaints in my report for complaint 16735.