



APPEAL PANEL'S REPORT

Complaint reference number:	16319, 16333, 16668 and 16735
WASPA member(s):	Sprint Media
Membership number(s):	1168
Date appeal was lodged:	28 September 2012
Date appeal heard:	19 November 2012
Relevant versions of the Code:	9.0 and 11.0

1. The Appeal

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

- complaint [16319](#)
- complaint [16333](#)
- complaint [16668](#)
- complaint [16735](#)

Sprint Media was concerned primarily with the adjudicator's rationale for his decisions which ultimately led to a finding that, among others, Sprint Media conducted itself dishonestly and ought to have its membership suspended.

The appeals in this matter were filed as a batch as, in Sprint Media's view, there was a single, problematic thread that ran through each of the adjudicator's reports in these matters

beginning with complaint number 16668. In addition to this problematic thread, there were further concerns raised which we have also considered and which we deal with below.

2. Sprint Media's service

Sprint Media's service, which forms the subject matter of these complaints, essentially comprises 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 passthrough" 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 helpful in the manner in which it described the service's mechanics and which were applicable to complaints 16319, 16333 and 16668.

3. Was Sprint Media untruthful?

3.1 Complaint 16319

In complaint 16319, the complainant received a series of messages from Sprint Media which, arguably, were the genesis of the adjudicator's ultimate conclusions regarding Sprint Media's conduct. Paragraph 9 in the adjudicator's report on complaint 16319 reads as follows:

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/)

In this particular complaint, when the complainant clicked on these links on his mobile device he was taken to Sprint Media's WAP page for the particular service. The adjudicator, in his discussion regarding the complainant's consent to subscription using this mechanism, states the following in paragraphs 16 and 17:

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 intended 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.

The adjudicator's statement that 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" is incompatible with the adjudicator's conclusion in paragraph 19 that Sprint Media breached the Code's provisions which forbid subscribing consumers "without their consent". If the complainant in complaint 16319 followed a double opt in process then the implication is that the complainant did consent and subscribed to the particular service. At least, this follows on from the mechanism involved. We will deal with Sprint Media's consent model below.

3.2 Complaint 16333

In complaint 16333, the adjudicator states the following after considering the question whether the complainant in that complaint subscribed to the service:

18 This scenario is one that often faces adjudicators dealing with such complaints. The complainant is adamant that he or she did not subscribe to a particular service, while the member provides logs to support its version that the complainant did indeed subscribe. The adjudicator must then take into account that consumers often click on links or buttons without realising they have done so, and without reading the text of the message or WAP page containing that link or button.

19 While logs can certainly be fabricated, the adjudicator is forced to take the logs at face value unless he or she has good reason to believe that the member has indeed fabricated them. As the

evidence of logs usually trumps the complainant's version of events, a complaint against a member that can support its version with believable logs usually does not succeed.

20 This matter is very similar to that found in complaint 16668, which I am adjudicating at the same time as this one. In that matter the Complainant was able to show convincingly that his version of events was correct, and accordingly I was forced to conclude that the IP had fabricated its logs.

21 In light of the facts in complaint 16668 I am naturally very dubious of the IP's version of events. In this matter however, the evidence is not compelling enough for me to find against the IP. Consequently I must find that the Complainant followed the double opt-in process described by the IP.

In paragraph 32, the adjudicator, in considering the allegation that Sprint Media conducted itself in a “misleading and deceptive” manner and having considered the messaging sent to the complainant, found that despite not having “grounds to find that the IP subscribed the Complainant without following a double opt-in process, I certainly agree with the Complainant that this practise is misleading and deceptive”. There is merit in this conclusion and we deal with this in greater detail below.

3.3 Complaint 16668

This complaint appears to have informed much of the adjudicator's approach to these complaints. This complaint is also the focal point of Sprint Media's attention in these appeals:

Sprint Media has chosen to deal with this Adjudicator's Report first as the decisions made in this Adjudicator's Report (which are fundamentally flawed and based on unfounded and damaging assumptions) are imported into, and poison, the Adjudicator's Reports made by the same Adjudicator in respect of complaints 163139, 16333 and 16735 which were adjudicated simultaneously.

Much of this complaint's focus is on when the complainant visited the WAP site concerned and the evidentiary value of logs Sprint Media supplied. The adjudicator incorrectly states in his report that he was not furnished with Sprint Media's logs where Sprint Media insisted that it did so. The complainant in this matter insisted that he did not subscribe to Sprint Media's service and while he ultimately found he could not dispute Sprint Media's contradictory data, he persisted with his complaint.

Faced with competing versions from the complainant and Sprint Media, the adjudicator made a bold assertion in paragraph 16:

The parties' versions of events are incompatible, and hence either the Complainant is mistaken about the facts, or the IP is being untruthful. I must use the submissions that have been given to me to decide which it is.

The appellant made a fair comment on the complainant's apparent inability to verify the date/s on which he visited the WAP site in question, particularly given the adjudicator's apparent reliance on this detail further on in his report and in arriving at a startling conclusion regarding the logs he was furnished with:

The Complainant was asked "if he had a record of whether his assigned IP address change between 27 February 2012 and 8 March 2012" but he did not have this information. Given the gravity of the decisions made by the Adjudicator to the effect that Sprint Media is untruthful and has falsified records, the Adjudicator should at least have requested the Complainant obtain the records from his service provider if he did not have the records himself.

The adjudicator reviewed the complainant's assertions contained in his submissions and these included –

- Reference to the complainant's status as a WASPA employee;
- The complainant apparently having "no reason to enter his work MSISDN into a mobile content site, especially as the MSISDN was for an account belonging to his employer";
- The adjudicator having no apparent reason to doubt that the complainant locks his computer while he is away from his desk or that his browser history only reflected a visit to the relevant WAP site on 8 March and not on 27 February when Sprint Media's data recorded a visit; and
- Surprise at Sprint Media's response to a request for logs reflecting the complainant's visit to the WAP site on 27 February which the adjudicator took "as an attempt to evade the question".

The adjudicator then engaged in a thought experiment of sorts drawing on the complainant's version which he assumed was the correct one for the purposes of the thought experiment. The adjudicator noted that the scenario he was about to outline "is not necessarily what actually occurred, but is a viable alternative theory". This thought experiment proceeded as follows:

17.8.1. The IP had the Complainant's MSISDN to start with. Whether it obtained the MSISDN from a third party or randomised it is of no consequence. It used the MSISDN to send the marketing messages to the Complainant on the 8th of March.

17.8.2. I note that the link contained in the first marketing message of the 8th of March contains the Complainant's MSISDN embedded in it. When the Complainant submitted the link using his computer's web browser (which the Complainant admits that he did), the browser would have sent the link to the server hosting the IP's WAP site. Contained within the link was the Complainant's MSISDN. The Complainant hence unwittingly informed the IP's WAP site server of his MSISDN, even though he was using a browser on his Mac and not his phone to access the WAP site.

17.8.3. When the Complainant visited the IP's WAP site, the IP's system captured the MSISDN from the server request, as well as the computer's details (which web servers routinely do). Hence the IP established the link between MSISDN and the Complainant's computer (with its specification details) on the 8th of March, not the 27th of February.

17.8.4. In this scenario the Complainant is not mistaken: he did not visit the IP's WAP site on the 27th of February, and neither did anyone else using his computer. The IP took information that it gleaned from his visits to its WAP site on the 8th of March to fabricate log entries to show a fictional visit on the 27th of February.

Following on from this thought experiment, the adjudicator stated the following:

If logs had not played a part in this complaint, I would have had no hesitation in believing the Complainant's version based on his submissions. In the circumstances I must balance the Complainant's word against the evidence of the logs. The logs would have been unassailable if the IP could only have linked the Complainant's MSISDN with his computer specifications if the Complainant had manually entered the MSISDN in the IP's WAP site. I have shown that this was not the only feasible method of doing so. When weighing up the Complainant's contentions against the now weakened evidence of the logs, I have no hesitation in concluding that the Complainant's version is the correct one.

The adjudicator's conclusion regarding Sprint Media's logs was the following:

The IP has stated a version of events which is incompatible with the Complainant's version. As the IP supported its position with logs that are themselves incompatible with the Complainant's version, the inescapable conclusion is that the IP falsified those logs.

The adjudicator found numerous breaches of the Code and we will address some of those below but the finding that Sprint Media falsified its logs in the absence of clear evidence is alarming. We asked Sprint Media's attorney and its representative whether logs could be

tampered with and we were informed that, frequently, more than one service provider involved in the services presented to consumers capture similar or the same data for each interaction and, aside from checks and balances implemented internally to preserve the logs' integrity, logs supplied by one party can usually be compared to logs supplied by other parties involved and discrepancies readily identified.

In Sprint Media's responses to complaint 16319, it stated the following in an email dated 14 June 2012:

The SP provided a proof of subscription as well as other documentary evidence in its capacity as SP. The SP referred to the logs as extracted from their system as well as the logs as furnished by the IP in the SP's proof of subscription. These two systems are hosted independently of each other in different countries. Thus the SP attempted to illustrate that the logs and proof of subscription provided by the SP confirmed and supported the proof of subscription provided by the IP.

There does not appear to be any evidence that contradicts the appellant's assertions regarding the logs' veracity and we consequently disagree with the adjudicator's statement that the "inescapable conclusion is that the IP falsified those logs". Conclusions that logs are falsified in the absence of clear evidence to support such conclusions are highly problematic. They undermine an important reference members have available to them when establishing facts in adjudications such as those under consideration and can have serious reputational consequences for the member accused of such misconduct.

We also did not see any clear evidence that Sprint Media's logs were tampered with and the reason for the adjudicator's finding in this respect appears to have been based, primarily, on the adjudicator's conclusions that –

- either the complainant was mistaken in his version or Sprint Media was untruthful, apparently without allowance for error on Sprint Media's part or untruthfulness on the complainant's part;
- the possibilities outlined in his hypothetical and "viable alternative theory" which included fabricated logs, had become fact; and
- the discrepancy between the complainant's version and Sprint Media's version could only be explained by Sprint Media's fabrication of its logs.

Beyond conflicting versions presented by the complainant and Sprint Media, there was no evidence to support the adjudicator's conclusions, even if we were to assume that allegations that Sprint Media engaged in a misleading campaign and spammed consumers (we deal with these issues below). Accordingly, we do not agree with the adjudicator's conclusions in paragraphs 18 and 22 that Sprint Media was untruthful and falsified its logs are supported by the evidence led.

3.4 Complaint 16735

In his report on this complaint, the adjudicator addressed the service's opt-in mechanism and found that it was misleading. He further found that Sprint Media failed to comply with provisions of the Code regulating subscription confirmation messages and reminder messages. We do not take issue with the adjudicator's findings regarding the message formats for the member's confirmation and reminder messages.

This complaint's significance is that it draws the adjudicator's findings in the previous complaints together in arriving at his conclusions and determining the sanctions he ultimately imposed.

4. Spam and Sprint Media's consent model

The various appeals before us concerning the complaints discussed in this report (with the exception of the service described in complaint 16735 which is a Web-based SMS service) as well as in complaints 15187 and 15567 (which we have dealt with in a second report) deal with essentially the same service. An example of this service's WAP pages is annexed to the adjudicator's report on complaint 16668 as Annexure "A" (for the purposes of this report, we'll refer to this as 'Annexure "A"' below).

The means by which a consumer arrives at this initial landing page is typically through a banner on a website. On arrival at the WAP landing page in Annexure "A" a consumer is faced with a call to action. In complaint 16319, the consumer was invited to click on a large link with the text "NEXT >" under a reference to "Mobmatic's Premium Wallpapers for your Cell" and an invitation to "Click next to join".

Immediately below this oversized link is a reference to a support email address and various terms and conditions which Sprint Media relied on fairly heavily when dealing with the

adjudicator's findings regarding Sprints Media's alleged violations of the Code's provisions dealing with spam and misleading campaigns. Given the importance of this text, we asked Sprint Media's representative how much of this text would be apparent to a consumer viewing the WAP page on a mobile device. Understandably, we were informed that the amount of text that a consumer would see would depend very much on that consumer's mobile device. At a bare minimum, a consumer with the smallest likely screen size would see a reference to the service being a subscription service and the associated cost; the call to action outlined above; the "Next" link and the support email address.

The remainder of the text in the terms and conditions reads as follows:

Mobmatic is a Subscription Service at R7/Day for mobile content. Mobmatic has requested that your mobile number be made available. Clicking on 'next' you're declaring to be 18+ and are accepting both the terms and conditions and to receive free promotional SMS relating to this and other services operated by Sprint Media S.L. To optout from promotions, sms STOP to 39325 or contact Support@mobmatic.com or call 0213002334. Privacy Policy.

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 this page tapped on or clicked the "Next" link, he or she would be taken to a further page similar to Annexure "C" to the Oxygen8 report submitted in complaint 16319. This further page reiterates the subscription nature of the service and the associated cost. Instead of the call to action on the previous page, this page has the following text below the subscription information:

Confirmation complete. Thank you, now click complete to finish the signup process.

Below this is a large hyperlinked word "Complete" which a consumer would click or tap on to continue the process. Below that is the same support email information and, below that, is the following terms and conditions:

Mobmatic is a Subscription Service at R 7/day for mobile content. Mobmatic has requested that your mobile number be made available. Clicking on 'complete' you are declaring to be 18+ and are accepting both the terms and conditions and to receive free promotional SMS relating to this and other services operated by Sprint Media S.L. To opt-out from promotions, sms STOP to 39325 or contact Support@mobmatic.com or call 0213002334. Privacy Policy.

These two pages form part of the so-called double opt-in process consumers are required to go through in order to subscribe to the particular subscription service. The initial page may be preceded by a “MSISDN entry” page which a consumer first sees after clicking on the initial banner and which will initiate a message to the consumer with a link to the first WAP page outlined above or the site may make use of “MSISDN pass-through” where the consumer’s mobile number is passed along to Sprint Media automatically by the network operator. In the latter case, the consumer will see the “Next” page after clicking on or tapping the banner in the initial website.

An important concern raised in many of the complaints was that complainants started receiving promotional SMS messages despite not completing the subscription process after clicking “Next”. Sprint Media’s submissions in various appeals currently under review made reference to the consumers having consented to receive “free promotional SMS relating to this and other services ...” in the terms and conditions. Sprint Media confirmed 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.

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.

The operative term in this context is “consent”. 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”.

Sprint Media did not lead evidence of prior commercial relationships so the first and last scenarios are relevant. The question is whether the complainants (and others in their 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 (this would apply to MSISDN pass-through mechanisms).

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 in the report on complaint 16333, the complainant’s intention may not have been to consent to receive promotional messages but rather to view a picture (in 16319 the reference was to a “photo message” or to a “picture message”):

The parties agree that on the 31st of October 2011 the IP sent the Complainant an MMS message containing a link to what was purportedly a picture. The Complainant admits to clicking on the link to the picture on the assumption that it had been sent by a friend. On the Complainant’s version her interaction with the IP ended there.

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 first page in complaint 16319 referred to “Mobmatic’s Premium Wallpapers for your Cell” and the subsequent page stated –

“Confirmation complete. Thank you, now click to finish the signup process”

These two messages were followed by large “Next” and “Complete” links and the support email address. The first reference of a consent to receiving 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. Sprint Media correctly draws a distinction between subscribing to the paid service and agreeing to receive free promotional messages. The Code defines a “subscription service” as –

any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction

The free content or promotional message option does not classify as a subscription under the Code but 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 consent and that consent is imputed to the consumer using 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 complainants’ assertions that they did not wish to receive promotional messages from Sprint Media and mistook the messages they received as invitations to view content items and not as part of a specific and informed opt-in to receive promotional messages where they declined the opportunity to subscribe to the appellant’s subscription service.

Accordingly, we agree with the adjudicator’s findings that Sprint Media sent unsolicited direct marketing messages to the complainants in complaints 16319, 16333 and 16668. Furthermore, the mechanisms used in these complaints were somewhat misleading and/or deceptive. Specifically, we uphold the adjudicator’s findings that 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;

- Clause 4.1.2 in complaint 16333; and
- Clause 5.3.1 in complaint 16668.

5. Remaining issues

5.1 Complaint 16319

We noticed that the logs placed before the adjudicator in this complaint did not reflect any interactions with Sprint Media's service prior to 26 June 2011 when the complainant received a message informing him that he had received a new "Photo Message" and inviting him to click on a link in the message to view this photo message. On the face of these logs, this ran contrary to Sprints Media's evidence regarding how consumers initiate contact with the service. In the other complaints regarding a similar service, the evidence led indicates that a consumer's first interaction with the service occurs when the consumer's MSISDN is either passed through to the service or the consumer enters it on the landing WAP page.

The logs before us seem to indicate that the initial contact differed from what we were informed. We queried this with Spent Media's representative and attorney and we were assured that there must have been a prior interaction with the service which was not reflected on the logs (while we do not have any reason to believe the logs were fabricated, we were not offered a satisfactory answer for why the first entry in the logs was the interaction on 26 June 2011).

Nevertheless, Sprint Media furnished us with logs indicating that the complainant's first interaction with the service took place on 18 June 2011 on the service website and this was followed by a message inviting the complainant to click on a link in order to "complete activation". We, the members of the appeal panel, discussed whether to admit these logs as evidence at this appeal stage and we concluded that it would be more expedient to receive these logs and deal with the complaint more completely and effectively than any likely prejudice which may result as a consequence of admitting this evidence at this stage.

Sprint Media raised a concern that, while the complaint was focused on whether the complainant subscribed to the service, the adjudicator also considered whether the appellant sent the complainant unsolicited direct marketing messages that did not give Sprint Media an

opportunity to make representations in this regard and on the specific point. The appellant only dealt with this issue peripherally in its submissions on the subscription issue.

At the same time, the adjudicator also considered whether Sprint Media engaged in misleading conduct and, similarly, did not appear to invite submissions from the appellant on this issue either.

From a procedural perspective, we find the adjudicator's failure to afford Sprint Media a reasonable opportunity to make submissions regarding apparent misleading conduct and spam to be somewhat irregular.

The adjudicator also found that Sprint Media failed to ensure that its messages "prominently and explicitly" stated that the service they invited the complainant to make use of was a subscription service. Sprint Media conceded that its initial messages did not comply with the Code's requirements in the discussion we had with Sprint Media's attorney regarding complaint 16333. We do note, however, that the landing WAP page clearly states the service's subscription nature and associated charges at the top of the page in large capital letters as well as in the beginning of the terms and conditions immediately below the support email address. While Sprint Media's messages were not compliant, our view is that a consumer would be sufficiently apprised of the service's subscription nature when the consumer first visits the WAP site.

5.2 Complaint 16333

The appellant argued that the service's description in the messages it sent to the complainant in this matter were "indeed prominent and explicit (particularly when combined with an opt in process that complies with the Code)". We do not agree and for reasons set out in our conclusion in section 4 above, we agree with the adjudicator that the message sent on 31 October 2011 was in violation of clauses 11.1.1, 11.3.1 and 11.6.2 of the Code.

As we mentioned above, the appellant correctly conceded that its confirmation and reminder messages did not comply with the Code's requirements and advised us both in discussion and in the appellant's appeal submissions that it has since remedied its message formats.

5.2 Complaint 16668

As with complaints 16319 and 16333, the adjudicator found that the initial message the complainant received from the appellant did not comply with the requirements in clause 11.1.1 that the “[p]romotional material for all subscription services must prominently and explicitly identify the services as ‘subscription services’”. We agree with this finding.

5.3 Complaint 16735

This complaint differs from the other complaints in that its subject matter is a web-based SMS service which the consumer likely discovered by clicking on an ad in a set of Google search results. A copy of such an ad may be found as annexure A1 to the adjudicator’s report. The text in the ad includes a heading “Send SMS” which is followed by the text “Get Unlimited SMS messages to send to anyone worldwide. R7/day”. The web address was www.veage.com/SA/sms+offer. The appellant explained that “Veage” is an old brand name which was consolidated into the Mobmatic brand along with other brands controlled by Sprint Media but that the service remained essentially the same.

After clicking on the ad, a consumer is taken to a landing page with fields to insert the consumers’ mobile number, the number the consumer wishes to send a message to, a text box for the message itself, a “Send” button and, importantly, an unchecked checkbox with the text “I agree to the terms of service. Subscribe and get unlimited sms credits for R7/day. Sms any phone”. Immediately below this checkbox is a set of terms and conditions which begins with the following:

Terms of use. Veage subscription service cost only R7 per day and offers you unlimited SMS to any phone.

On submitting a message, the consumer is then taken to a confirmation page which requires the consumer to enter a pin code which would have been sent to the consumer’s mobile phone on submission of the message on the previous page. When the consumer enters the pin code and submits it, the consumer is then subscribed to the service at the advertised rate.

In considering the verification message containing the pin code, the adjudicator found that the option in the message to also send an SMS with the word “Activate” resulted in the message being in contravention of clause 11.2.4 of the Code. The purpose of clause 11.2.4 is to require a mechanism by which a member may verify the consumer’s handset is a condition of the consumer’s subscription to the service. The message sent to the consumer included a pin code,

as required, as well as an additional verification method in the form of the SMS option. We don't agree that this is in violation of clause 11.2.4 of the Code. If anything, this SMS option presents an additional verification option which is beneficial to the consumer.

The adjudicator continued with a finding that the service violated clause 11.2.1 which prohibits a practice which has become known as “bundling” and where a consumer is subscribed to a subscription service as a result of a request for a non-subscription item. A typical scenario is where a consumer requests a specific content item and subsequently finds him or herself subscribed to a content service. The adjudicator commented that the subscription nature of this service was not apparent from the webpages the complainant visited and rather that the consumer would presumably have been under the impression that he or she was simply sending an SMS and not subscribing to a subscription service.

We believe it is clear from the screenshots annexed to the adjudicator's report and the texts which we have quoted above that the service is a subscription service and that it is therefore not in violation of clause 11.2.1.

Flowing from this finding, we disagree that the interface for the service is “blatantly misleading, and the IP is in effect tricking consumers into subscribing to its service”. The subscription nature of the service is clear. We also did not agree that “this system has been set up that the” appellant “intended to mislead consumers”. We therefore overturn the adjudicator's finding that Sprint Media infringed clause 4.1.2 of the Code on this basis.

We do, however, agree that the appellant breached clause 11.5.2 in that its reminder messages did not “adhere exactly” to the requisite format, flow, wording and spacing specified in the Code for such messages.

6. Sanctions

The adjudicator identified three complaints adjudicated in mid-2011 which dealt with similar breaches of the Code and in which Sprint Media was fined R20 000 in each complaint. The adjudicator went on to mention that aside from the complaints he discovered (there were two further complaints in which the adjudicator's reports were only published after the conduct giving rise to complaint 16375 took place), “the IP's previous record is of little assistance in helping to determine an appropriate sanction”.

The adjudicator found that Sprint Media breached clause 4.1.2 in each of the complaints he considered (save for complaint 16668) and falsified its logs in complaint 16668. Clause 4.1.2 is found in versions 9 and 11 of the Code and 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.

After reviewing the substantial sanctions handed down by adjudicators in matters where members have been found to have infringed clause 4.1.2, particularly where the members concerned were intentionally deceptive, untruthful or misleading, the adjudicator essentially found that Sprint Media was intentionally deceptive, untruthful and/or misleading. He further found that Sprint Media breached clause 14.3.13 which states the following:

Providing incorrect or fraudulent information in response to a complaint, or in response to any other request to provide information is itself a breach of this Code.

Based on the adjudicator's finding that Sprint Media breached clauses 4.1.2 and 14.3.13, he ordered the following sanctions:

- Sprint Media's WASPA membership be suspended for a period of six months; and
- the WASPA Secretariat was directed to issue a notice to other WASPA members in terms of clause 14.5 identifying Sprint Media and pointing out its breaches of the Code for the period of the suspension.

The cumulative effect of this sanction was to not only interrupt Sprint Media's services but also broadcast the adjudicator's findings to WASPA's members. We were informed that the monetary and reputational cost to Sprint Media was substantial and while this is hardly a consideration where a member is guilty of the appropriate breaches of the Code, we are unable to reach the same conclusions that the adjudicator reached and which led him to his sanctions described above.

Accordingly, we uphold the appeal against this aspect of the adjudicator's findings and we direct that the sanctions flowing from the adjudicator's findings that Sprint Media was in breach of clauses 4.1.2 in complaint 16735 and 14.3.13 in complaint 16668 be set aside. Furthermore, in light of the clause 14.5 notice, we direct that the WASPA Secretariat issue a similar notice to the members informing them of our decision to overturn this aspect of the

adjudicator's findings and that an appropriate notation to this effect be permanently associated with the adjudicator's reports on complaints 16319, 16333, 16668 and 16735 such that any person accessing these reports be informed of this particular decision.

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, in respect of which 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.

Even though the adjudicator asked, in his report of complaint 16735, that we substitute an appropriate fine or sanction for the infringements with respect to the remaining violations of the Code which the adjudicator identified and which we have discussed above (clauses 11.1.1, 11.3.1 (clause 11.2.4 in v9.0) and 11.6.2 (clause 11.5.2 in v9.0)) in case the sanctions for the breach of clauses 4.1.2 and 14.3.13 be overturned on appeal we do not impose any further sanctions with regard to these breaches.

In light of our opinion that the suspension of the appellant's services has already prejudiced the appellant, we do not regard imposing sanctions for these breaches as being appropriate. Because the appellant was found to have violated the Code these infringements can however be taken into account as an aggravating circumstance should the appellant be found to have breached similar clauses of the Code in future complaints.

The appeal fee is not to be refunded.

Lorraine Hartzler <lorraine@ff.co.za>

19 November 2012 1:19 PM

To: [REDACTED]

Logs to 16319 (when user 1st interacted)

1 Attachment, 3 KB

History: [REDACTED]

<<	2011-06-18 12:09:35	Web Registration	WebSite Non-Adult	Website Registration IP Address: 93.[REDACTED] (GB) URL: http://m.mobmatic.com/lps/picture/smsa1c/ Phone: RIM BlackBerry 9300 User-Agent: BlackBerry9300/5.0.0.846 Profile/MIDP-2.1 Configuration/CLDC-1.1 VendorID/168
>>	2011-06-18 12:09:40	Sent	31923 Non-Adult	Click http://ems.cx/w/1E5ZAFG7 to complete activation. help@mobmatic. com subscription service R7/day. to unsub sms stop 31923
>>	2011-06-18 12:09:56	Delivered On	31923 Non-Adult	Click http://ems.cx/w/1E5ZAFG7 to complete activation. help@mobmatic. com subscription service R7/day. to unsub sms stop 31923

James McNab
Chief Operations Officer & Chief Compliance Officer



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