

## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	18419
<b>WASPA member(s):</b>	US Cellcom LLC
<b>Membership number(s):</b>	1046
<b>Complainant:</b>	Public
<b>Type of complaint:</b>	Subscription Service
<b>Date complaint was lodged:</b>	11/9/2011
<b>Date of the alleged offence:</b>	16 March 2012
<b>Relevant version of the Code:</b>	11.6
<b>Clauses considered:</b>	5.1.11, 11.2.1, 11.2.5, 11.10.2
<b>Relevant version of the Ad. Rules:</b>	Not Applicable
<b>Clauses considered:</b>	Not Applicable
<b>Related cases considered:</b>	17131, 18262 & 18328

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### Complaint & Response

1. The member is a full member of WASPA, having joined in May 2008 according to WASPA's records.
2. The service complained of was provided by the member as the information provider; another WASPA member, Mira Networks (Pty) Ltd, was the service provider. In other words the member provided the service complained of using another member's infrastructure. As there has been no complaint made against the service provider, and as there is nothing in the record to indicate that the service provider was implicated in the conduct complained of, the service provider can be excluded from the ambit of this complaint.
3. On the 6th of September 2012 the complainant, a member of the public, lodged the following complaint via the WASPA website:

Dear Sir Madam I am very unhappy as Altech Autopage has disconnected my cellphone twice as I have not paid the R188 which apprantly (*sic*) is for services charged from Myranet. I have never used any services and therefore demand that the amount which has been recovered from Altech Autopage be refunded with immediate effect. If this is not done and confirmed by Friday afternoon I will resort to legal action to ensure that it is done.

4. On the 11th of September the complainant elected to escalate the matter to a formal complaint on the following ground:

uick (*sic*) response. I want to know how they got my cellphone number which I requested the network in 2000 not to provide it to any person company

5. "Myranet" is of course Mira Networks (Pty) Ltd, the service provider, and the member was identified as the party running the actual service complained of.
6. Unsubscribe logs provided by the member read as follows:

16.03.2012					
in	15:06:47	43635	MTN		BONUS
out	15:07:22	43635	MTN	[free]	Send YES to 43635 to receive your Mobile Points and complete your subscription. For help call 0861106472 R7/day. www.smsone.biz
in	15:08:57	43635	MTN		OK
out	15:09:22	43635	MTN	[free]	Welcome: You are now subscribed to BONUS SMS, R7/SMS, 7 SMS/week, reply Stop to unsubscribe, support: 0861106472. www.smsone.biz
out	15:09:37	43635	MTN		CONGRATS! Exchange now your Mobile Points for unlimited SMS. Visit www.smsone.biz to activate. Your username is: [REDACTED] password: 652460

7. The WASPA Secretariat sent a formal notice of complaint to the member on the 20<sup>th</sup> of September 2012, and also sent a notice to the service provider on the same day.
8. Despite several reminders, the member failed to make a further response to the complaint.
9. The service provider made no response either, but as the complaint was not directed against it, it had no cause or requirement to do so.
10. It is often difficult to determine exactly what the basis of a WASPA complaint is, as complainants are not familiar with the WASPA Code of Conduct (and have no reason to be). In this instance the complainant appears to have two grounds for complaint: that he did not subscribe to certain services provided to him by an entity identified as "Myranet", and that he had wanted to know where this entity had obtained his cellphone number.
11. The first ground of complaint is in essence that he was subscribed to a service which he did not request to be subscribed to.
12. The second ground of complaint is that he requested that the member advise him how it obtained his personal information but it did not advise him of this.

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### Sections of the Code considered

13. According to the logs provided, the conduct complained of took place on the 16<sup>th</sup> of March 2012, and accordingly version 11.6 of the Code of Conduct is applicable. The following provisions thereof have relevance here:

5.1.11. Upon request of the recipient of a direct marketing message, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained, and provide proof that the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

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

11.2.5. If a subscription service is initiated by a customer sending an SMS to the service provider, then a separate confirmation message must then be sent to the customer's mobile handset. Only once the customer has followed the activation instructions in the confirmation message can they be subscribed to the subscription service.

11.10.2. When requested to do so by WASPA, a member must provide clear logs for any subscription service customer which include the following information:

- (a) proof that the customer has opted in to a service or services;
- (b) proof that all required reminder messages have been sent to that customer;
- (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and
- (d) any record of successful or unsuccessful unsubscribe requests.

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## Decision

14. I will deal with each ground of complaint separately.

### Source of Contact Details.

15. The complainant alleges that he did not subscribe to the subscription service complained of, but the logs provided by the service provider purport to show interactions between the complainant's MSISDN (cellphone number) and the member's systems. Subject to my misgivings as to the quality of the logs as expressed below, there is nothing in the record which gives me cause to doubt the veracity of these logs, such as they are.

16. If it were clear that the member had initiated this contact by way of an unsolicited SMS message, I would have little hesitation in finding that such a message constituted direct marketing and that the member has a duty as set out in clause 5.1.11 of the Code of Conduct to inform the complainant of the source from which it obtained the complainant's contact information. The log however does not assist in this regard, commencing as it does with a message from the complainant, and not the member. Accordingly, as I cannot find that the contact was commenced by means of an unsolicited message I cannot find that the member has infringed clause 5.1.11 by not providing the complainant with the information he requested.

### Subscription without Consent

17. There is nothing in the record to make me doubt the authenticity of the logs provided, but then again the logs themselves are so deficient in information as to be of little value. They do not reflect the complainant's MSISDN, except in the body of one of the text messages. Accordingly they do not show interaction between the member and the complainant's MSISDN
18. If I accept that these logs do indeed relate to the complainant then they appear to show that the complainant consented to the subscription, and that the member has accordingly not infringed clause 11.2.1 of the Code of Conduct.
19. However, clause 11.2.5 of the Code of Conduct requires a member to follow its own subscription instructions. By accepting any answer other than "YES" as a confirmation of subscription the member has infringed clause 11.2.5. Consequently the complainant should never have been subscribed to the service in question.

#### Quality of Logs

20. Turning back to the member's logs, clause 11.10.2 requires members to keep adequate logs of interactions with subscribers and to provide these to WASPA when requested to do so. It is clear that the member has not done this, and has hence infringed clause 11.10.2 of the Code of Conduct.

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#### **Sanctions**

21. The member was found to have infringed clause 11.2.5 by the adjudicator in complaint 17131, and no fine was imposed. The conduct that led to that complaint took place in the same period as the conduct that led to this complaint, and accordingly I see no scope for imposing a further sanction on the member in this regard. The member is to refund the complainant in full for all amounts paid by the complainant in respect of the subscription service in question.
22. The member is to ensure that its systems capture logs that accurately reflect the interactions between it and consumers as required by clause 11.10.2 of the Code of Conduct. A fine of R50 000 is imposed on the member for its breach of clause 11.10.2, wholly suspended for a period of six months on condition that the member is not found to have provided WASPA with inadequate logs during this period.