

## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	18914
<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>	15 November 2012
<b>Date of the alleged offence:</b>	20 February 2012
<b>Relevant version of the Code:</b>	11.6
<b>Clauses considered:</b>	5.3.1., 11.2.1, 11.10.2
<b>Relevant version of the Ad. Rules:</b>	Not Applicable
<b>Clauses considered:</b>	Not Applicable
<b>Related cases considered:</b>	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 29th of October 2012 the complainant, a member of the public, lodged the following complaint via the WASPA website:

Good Afternoon

I have given your details by Mira Networks. They say that I had registered for a service called Froggie. I have no recollection of this.

Please provide me proof of me registering. This has been costing me R135.00 a month.

I await your response

Kind regards

[removed]

4. It appears from WASPA's unsubscribe log that the member had subscribed the complainant to a service called "FROGGIE", and that the member unsubscribed the complainant from this service on the 7<sup>th</sup> of November 2012. No refund was offered to the complainant.
5. On the 15<sup>th</sup> of November 2012 the complainant elected to escalate the matter to a formal complaint on the following ground:

Yes, I see that, but firstly, the reply was meant to be "yes" and not "Bonus OK" to activate this subscription, and secondly, more importantly, how does the attached prove that these messages came from my cell phone.

I say this again. I did not subscribe to any of these services. It has happened in the past when a subscription was linked to this same cell number in error and I was refunded.

6. Unsubscribe logs provided by the member during initial interactions with the WASPA Secretariat and named "18914.003.unsub.3685700.logs" in the record read as follows:

20.02.2012					
in	13:43:20	43635	MTN		BONUS
out	13:43:21	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	15:06:26	43635	MTN		BONUS OK
out	15:06:30	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	15:06:31	43635	MTN		CONGRATS! Exchange now your Mobile Points for unlimited SMS. Visit www.smsone.biz to activate. Your username is: [REDACTED], password: 472912

7. The WASPA Secretariat sent a formal notice of complaint to the member on the 21<sup>st</sup> of November 2012, and also sent notice to the service provider on the same day.
8. The member responded the next day as follows:

Further to your request, please find attached informations (*sic*) as follows:

- logs, valid double opt-in

- information on how this service was advertised – via SMS, free promo message is attached as well

- a copy of the advertisement/marketing material – date and time and text of a free promo message sent from our side to user

- a copy of a last free reminder sent to the user (free monthly reminder sent within 30 days of the initial notification message and once per calendar month thereafter)

9. The member provided the attachments in the order as stated above:

20.02.2012					
in	13:43:20	43635	MTN		BONUS
out	13:43:21	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	15:06:26	43635	MTN		YES
out	15:06:30	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	15:06:31	43635	MTN		CONGRATS! Exchange now your Mobile Points for unlimited SMS. Visit www.smsone.biz to activate. Your username is: [REDACTED], password: 472912

Note:

\*YES = BONUS OK, since this is an original log, sometimes YES may apply as /KW/ OK but text that user has been sent to /SC/ is always keyword YES. This surely can be doublechecked with operator.

20.02.2012					
out	13:28:24	43635	MTN	[free]	Your account [REDACTED] shows unclaimed mobile points in February! To redeem send BONUS to 43635. Top SMS Subscription. R7/day. Optout Txt Stop.

20.10.2012					
out	02:05:40	43635	MTN	[free]	Reminder: You are subscribed to Top Sms. Cost R7/day. HELP: 0861106472. To unsub, sms STOP SMS to 43635.

10. The complainant was not satisfied with the member's response, responding on the 23<sup>rd</sup> of November as follows:

I am certainly not satisfied with the outcome of this query thus far.

Something is definitely fishy. Referring to the attachments, how can the communications change? They seem to be manipulated to say what this company wants it say. One says "Bonus OK" and the other says "Yes"

Once again I stress, that there is no conclusive proof provided to me that I have subscribed to this service.

This has already happened in the past where I was wrongfully registered, and I was refunded so my information must be on the system, and as I said I suspect that it has happened again.

11. The member responded on the same day as follows:

As we explained, and per your requested, you have received an original log from our side with a note for KW sent after sending the first message BONUS. This is only a technical issue, how our system is recording data (in order to link each keyword sent with a Short Code). So, user sent "YES" as a confirmation. Further to that, it's simply not true that there's no conclusive proof provided since:

- We have provided one
- This can be proved and checked with MTN network

12. The service provider made no response, but as the complaint was not directed against it there was no cause or requirement for it to do so.

13. The complainant is not familiar with the WASPA Code of Conduct and has not cited the particular clauses which he considers the member to have breached. From the above however it appears that the complainant is alleging that the member subscribed him to a subscription service without his consent.

14. It certainly appears from the record that the marketing SMS received by the complainant on the 20th of February 2012 was most likely unsolicited. However as the complainant has not alleged that the member sent spam to him, I will not include an allegation of transmission of spam in this adjudication.

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### Sections of the Code considered

15. According to the logs provided, the conduct complained of took place on the 20<sup>th</sup> of February 2012, and accordingly version 11.6 of the Code of Conduct is applicable. The following provisions thereof have relevance here:

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.

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.

11.10.2. 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

16. The first subscription log provided by the member to the WASPA Secretariat showed the complainant being subscribed to the subscription service after replying "BONUS OK" to the subscription confirmation message. The log provided on the 22<sup>nd</sup> of November, however, reflects that same response as reading "YES". The member explains the difference by saying that the second log provided was in fact the "original" log, and that while the response was really "YES", the member's system reflected it as "BONUS OK" in the first log provided so as to link the keyword provided with the relevant short code.
17. I can draw two conclusions from the member's version: either the member's log does not accurately record the complainant's response, substituting other information for that contained in the response, or the member has changed the initial log entry to a more palatable response. In the first case the member cannot rely on the logs to prove subscription; in the second the member has falsified its logs, which is a very serious allegation.
18. I also note that none of the logs provided reflect the complainant's MSISDN, thus not constituting of interaction between the member and the complainant. The adjudicator in complaints 18262 & 18328 which related to the same conduct by the member had the same concerns in this regard.
19. An adjudicator will not lightly conclude that a member has falsified its logs, and in the absence of clear evidence I cannot make this finding. In the circumstances I must then find that the member did not accurately record the complainant's response. A log cannot change, and if it does change for "technical reasons" then the log is inaccurate and must be disregarded. The member can hence not prove subscription by the complainant to the service.
20. In the circumstances the member has infringed the second sentence of clause 11.2.1 of the Code of Conduct.
21. In light of the deficiencies in the logs provided, the member has clearly also infringed clause 11.10.2 of the code, in that it is seemingly incapable of providing adequate logs of its interactions with its subscribers.

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## Sanctions

22. The member has been found to have infringed clause 11.2.1 of the Code of Conduct in similar circumstances and during the same period as the complaints dealt with by the adjudicator in complaints 18262 & 18328. Accordingly the fine imposed by the adjudicator in complaint 18262 in respect

of the breach of that clause is to apply to this instance – this complaint arises from the same conduct.

23. The member is to refund the complainant all amounts charged to the complainant in respect of the disputed subscription.
24. 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. The fine imposed on the member in complaint 18419 in this regard will have application to this complaint.