



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	MIRA Networks
Information Provider (IP):	US Cellcom
Service Type:	Subscription
Complainant:	Competitor
Complaint Number:	22492
Code Version:	12.4
Advertising Rules Version:	Not applicable

Complaint

The complainant explained what happened when he received an unsolicited SMS and summarised the complaint as follows:

This company is using underhanded and unacceptable practices that include the following:

1. unsolicited sms messages
 2. contracting users to sign up with key words that definitely include STOP and perhaps others that are inappropriate
 3. they have no double opt-in
 4. their sms' are worded to confuse and mislead with regard to pricing and generally trap UNwilling and UNaware cell phone users who become consumers of their services
-

WASP's response

The WASP submitted a detailed response which I will canvas as relevant in my decision below.

Sections of the Code considered

I have considered the following clauses of the Code as it was at the time:

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.

6.2.10. Pricing on any promotional material must use one of the following generally accepted formats for prices in Rands: "Rx" or "Rx.xx".

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.

11.3.1. 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.

Decision

I will consider each issue raised by the complainant individually.

The first issue is that of unsolicited or spam sms's. The complainant contends that he did not consent to the receipt of these sms's.

The WASP has, in essence, made three submissions on this point:

- [That "All our messages are accordingly applied to provider and approved as valid and not misleading as well as the landing pages." While this submission unfortunately makes no sense to me, it is clear from the rest of the same submission that the WASP does not provide an explanation as to how the complainant's number came to be in their possession.
- [They do say, in a later submission, "Would you like to know from where we got your number?" but do not actually answer the question.
- [Later still they state, "When are you claiming you received unsolicited message for the number: [number removed]? We have never send you our bulk / free promotional message. Please specify to which message you are referring. We have never sent you bulk. As Vodacom has double opt in procedure they are running from their side as well you can not be billed for something you havent approved."

However, the later submissions explain the beginning of the process as follows:

The service TopPhoto is including subscription process. STEP 1: User clicks on the link in the free promotional message received from service provider.

It is clear to me that the WASP has provided no proof that the complainant consented to receiving any marketing material, and that they in fact seem to pride themselves on sending this "free" message.

There is therefore nothing before me, despite the many opportunities to provide same, to show that Clause 5.2.1 has not been breached. **I therefore find that there is an ex facie breach of Clause 5.2.1.**

The complainant submitted that he was signed up by the use of the word “STOP”. While it is clearly undesirable that the word “STOP” should trigger a subscription, the Code has no specific rules on what words CAN trigger a subscription. I would imagine that this is because any problems in this area should be covered by the double opt-in process. I will therefore consider this together with the complaint regarding a lack of double opt-in.

What is confusing in this matter is that the Code has one process for sms triggered subscriptions (in Clause 11.2.5), and another for WAP triggered subscriptions (Clause 11.3.1). However, the opt in mechanism that the WASP has outlined in its submissions is a hybrid.

It appears that the following occurs:

- [The consumer responds to an SMS by clicking on a link.
- [The link takes them to a WAP.
- [At the WAP, the clicking of an “activation button” finalises the subscription.

In the sense that the user has to click twice, this is a double opt in. However, both Clause 11.2.5 and 11.3.1 envisage an active cross checking process. Both processes envisage that after the commencement of the subscription process, an sms will be sent to the consumer with the relevant instructions. This has not occurred – the only sms was the arguably unsolicited sms at the beginning of the process. The records support this.

I therefore find that the WASP is in breach of Clauses 11.2.5 and 11.3.1 read together.

The final leg of the complaint is that the SMS's are worded in a misleading and confusing manner with regard to pricing.

In matter 22466 and 22635, which were considered together, the adjudication says:

6.2.10. *Pricing on any promotional material must use one of the following generally accepted formats for prices in Rands: “Rx” or “Rx.xx”.*

As is apparent from what I have quoted above, many of the messages in this matter utilise a small "r" instead of a capital "R". While this may appear at first glance to be a nit-picking requirement, it in fact goes to the core of the question of whether or not the recipient understood the communication correctly. The use of the "r" prevents the recipient from easily identifying that there is a charge related to the service.

There is therefore a breach of Clause 6.2.10.

Similarly, there is a breach of this clause in this matter. In the previous matter the date of the sms was 13 August 2013. The matter at hand occurred on 13 November 2013 which is before the above adjudication was issued. I will therefore regard it as part of the same breach.

Sanctions

I impose the following sanctions:

1. I consider a breach of Clause 5.2.1 as serious and impose a fine of R100 000,00.
2. With regards to the breach of Clause 11.2.5 and 11.3.1, I am going to give the WASP the benefit of the doubt based on the hybrid process and the language barrier they appear to experience. I expect that this subscription process should be corrected within 10 working days from receipt of this ruling, and request that the Monitor perform tests thereafter to ensure that this has occurred.
3. With regards to Clause 6.2.10, I impose no further sanction. However, I request that in performing the tests referred to above, the Monitor also check that the pricing appears correctly.
4. In the event that either of these clauses is found by an adjudicator to be breached subsequent to those tests, I impose a suspended fine of R200 000 in addition to any fine that adjudicator may impose.