



## REPORT OF THE ADJUDICATOR

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| <b>WASPA Member (SP)</b>                     | Airborn Messaging / MTN |
| <b>Information Provider (IP)</b><br>(if any) | Dialogue Marketing      |
| <b>Service Type</b>                          | Subscription            |
| <b>Source of Complaints</b>                  | Public                  |
| <b>Complaint Number</b>                      | #0151                   |

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### Complaint

The Complaint was submitted on 27 January 2006. Although the Complainant is employed by MTN, the Complaint is better described as a consumer complaint as opposed to one originating from a competitor, particularly given that it later came to light that an MTN subsidiary was involved in the matter.

The Complainant pointed to a breach of section 5.1.2 of the WASPA Code of Conduct relating to the failure of a message originator to provide a working unsubscribe facility. The text of the detailed complaint states:

“There is no opt-out mechanism. I tried replying STOP but there was no response.”

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### SP Response

The Response identified Dialogue Marketing as the relevant IP. The IP advised that the Complainant had been “deactivated” and that the “organisation that supplied the originator has been advised accordingly”.

The IP continued:

“In accordance with international best practice, the MFSA code of conduct and section 5.1.2. of the WASPA code of conduct, Dialogue Marketing does have a facility to remove recipient's from the originator's database. This process is automatic, and is based upon a search for various phrases and words. Any request (amongst others), for example, with "remove" or "stop" in the phrase will be removed. This process is dynamic, meaning that it constantly evolves. “

And further:

“However Dialogue Marketing makes every effort to unsubscribe within the boundaries of current technology.

I thank you for bringing the replies to our attention, however requests for deactivation are, and always will be a part of everyday business. The mere fact that we receive such requests by no means establishes causality.”

The IP also raised, seemingly without any prompting, a defence to an unspecified allegation that it was in the habit of sending batches of messages out late:

“As regards our timing of messages, we acknowledge that recently a batch of messages went out late. This fact was brought to our attention by our client. However any inference that this is an ongoing practice is simply untrue.”

The SP later confirmed that the IP had contacted their customer who had in turn contacted their customer and requested that the relevant MSISDN be removed from their database. After obtaining the Complainant's consent the SP also passed on the Complainant's details to the IP's customer's customer to allow this and any future matters to be dealt with directly between the parties.

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### **Sections of the Code considered**

The following sections of Version 3.2 of the WASPA Code of Conduct were considered:

“5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator’s database, so as not to receive any further messages from that message originator.

5.1.3. Where feasible, customers should be able to unsubscribe from any subscription service using no more than two words, one of which must be ‘STOP’.”

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## **Decision**

The Response proffered by the IP through the offices of the SP is somewhat cryptic and less than satisfactory. It is clear from the Complaint that the Complainant specifically used the word “STOP” in attempting to remove herself from the relevant database yet, despite the employment of the dynamic unsubscribe system described in the Response, this failed to have the desired result.

This raises the question as to whether the unsubscribe facility detailed by the IP was in fact functioning properly. There is no explanation raised in the Response as to why the attempt to unsubscribe was not successful and it is accordingly difficult to avoid coming to the conclusion that the facility was not properly operational.

Furthermore it appears from the Complaint and the Response that no information regarding the manner in which recipients could opt-out of such SMS communications was included in the SMS received by the Complainant. In other words there was no opt-out facility included in the SMS communication.

Section 5.1.2 of the Code requires that there be a facility that allows a recipient to unsubscribe. Has there been a breach of this section where the existence of the facility is not communicated to a recipient? On the one hand and on the strength of the IP’s Response (and leaving aside the question as to whether it was properly operational in this case), it appears that the IP did have such a facility – one which it had taken pains to develop. On the other hand, surely the meaning to be ascribed to “facility” should perforce include communication to recipients of the existence of the facility and the means to access it?

I am inclined towards the latter view. Although Section 11.11 of Version 1.6 of the WASPA Advertising Rules only came into force some four days after lodging of the Complaint and accordingly cannot be directly applied to this matter, there is clear support for a requirement that the existence and details of access to an opt-out facility must be communicated to recipients for there to be compliance with Section 5.1.2 of the Code.

It has been established in a number of previous adjudications<sup>1</sup> that SPs, as members of WASPA, are obliged to take reasonable steps to ensure that their customers, and the customers of their customers, comply with applicable provisions of the Code. The responsibility of compliance ultimately falls to the WASPA member. There is no indication from the SP of what reasonable measures have been taken and I am of the opinion that the nature of the breach is such that, had reasonable measures been taken, a breach of this nature should not have occurred.

Accordingly I find that Section 5.1.2 has been breached, both through the apparent failure to provide a working facility and the failure to communicate the existence of the opt-out facility to the Complainant.

In considering an appropriate sanction to be applied in the matter I have taken into account the fact that

- the matter would appear to have been resolved between the parties;
- the fact that the IP would appear to have established a certain level of good faith compliance through the provision of its dynamic opt-out facility; and
- the absence of any previous breaches of this nature on the part of the SP.

The following sanctions are imposed:

- A formal reprimand is issued and the SP is requested to clearly and urgently communicate the requirements of the Code insofar as it has been breached in this matter to all of its customers and ensure that they, in turn, so communicate with their customers and so on.
- The SP is further issued with a fine of R5 000.00, which fine is suspended for a period of twelve (12) months from date of this Report; provided that no further breaches of the Code of Conduct in the specific respects detailed in this Report are identified in such twelve (12) month period.

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<sup>1</sup> See for example <http://www.waspa.org.za/code/download/0045.pdf>