



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	iTouch
Information Provider (IP) (if any)	n/a
Service Type	Commercial SMS
Source of Complaints	Competitor
Complaint Number	#1680
Date received	6 July 2007
Code of Conduct version	5.2

Complaint

The Complainant alleged breaches of sections 5.1.1, 5.1.2, 5.1.3, .5.1.4, 5.2.1, 6.2.6 and 11.1.7 (b) flowing from the following sequence of events:

"I received an unsolicited SMS from an unknown source +278200350113 - this is an invalid phone number - sent to my phone 076 892 11940. Following is a copy of the sms and this SMS is also available for your perusal:

"Want inspiration & guidance? Ponder the future with a personalized TeaLeavesReading for you. S\ms TEA to 35050. The 35050 team. R5/sms\".

There is also an attempt made to hide the charge in that the cost does not directly the instructions. I look forward to your urgent response."

The SP tried to resolve the matter telephonically but this appears to have been somewhat less than fruitful and the matter was duly escalated. The Complainant also advised the SP that he required payment of R20 000 in compensation for his time in researching and lodging the Complaint.

This Complaint is almost identical to that lodged by the same Complainant against the same SP under Complaint 1655.

SP Response

The SP made the following formal Response:

“A R20,000 claim for compensation is outrageous and cannot be supported. Terms and conditions for the use of our services clearly state that by making use of our services users are automatically subscribed to receive marketing messages from us. The complainant made use of our services, and was therefore opted-in to receive marketing messages.

The same terms and conditions clearly indicated how users can unsubscribe from receiving such messages. The complainant chose NOT to opt-out via the channels made available to him. He chose, rather, to spend an hour putting together an unsupported claim of unsolicited marketing messages, and then to add on a compensation claim for R20,000.

It was the complainant's choice to spend so much time putting together an unsupported claim. The sms he received was not unsolicited, he has been unsubscribed from ALL services. We therefore consider the matter closed and will not offer any compensation.”

Sections of the Code considered

The following sections of the WASPA Code of Conduct were raised and considered:

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

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. Any mechanism for allowing a recipient to remove him or herself from a database must not cost more than one rand.

5.1.4. Notwithstanding 5.1.3, for SMS and MMS communications:

- (a) A recipient should be able to stop receiving messages from any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply 'STOP' procedure must be included at the start of any messaging service, for example: "reply STOP to opt out".
- (b) Recipients of premium rate or non-replyable messages must have the option to opt out at a cost of R1 or less. This opt-out instruction must be included in every commercial premium rate or non-replyable message, for example. "sms STOP to 32xxx to opt out".

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

6.2.6. Unless otherwise specified in the advertising guidelines, the name of the WASP or the information provider providing the service must appear in all advertisements for premium rated services.

11.1.7. Once a customer has subscribed to a subscription service, a notification message must be sent to the customer containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number.

Decision

At the outset the Adjudicator wishes to highlight the following:

- complaints referred to the formal procedure are adjudicated with reference to the provisions of the WASPA Code of Conduct and not with reference to the personal feelings of the complainant, no matter how strongly these may be expressed;
- where a complainant is a competitor there is a strong line of precedent in WASPA Adjudications that Adjudicators in such complaints should adopt a strict interpretation of the Complaint and are not required to give the same degree of latitude as may be provided to a consumer complainant who is unaware of the workings of the industry and who is not expected to having knowledge of the existence and provisions of the WASPA Code of Conduct and Advertising Rules;
- an Adjudicator is not empowered to make any awards for “compensation for wasted time and inconvenience” and it is noted that it is doubtful whether any South African forum would entertain a claim of this nature.

The Adjudicator in this matter takes particular exception to the “shotgun” approach taken by the competitor complainant. No less than 7 breaches of the Code of Conduct are alleged with a bare minimum of substantiation and, as will be seen below, there is precious little merit in any of these

The following findings are made on the versions presented by the Complainant and SP:

1. The statement by the SP that the Complainant had opted in to the receipt of marketing correspondence through the use of related brand services is accepted. It follows that the Complainant had a “direct and recent prior commercial relationship with the SP and would reasonably expect to receive marketing communications from the SP” [see section 5.2.1.(b) of the Code]. In simple terms consent has been given through agreement with a set of terms and conditions and the message received by the Complainant was not unsolicited as alleged. The aspect of the Complaint dealing with section 5.2.1 is dismissed.
2. No substantiation is included in the Complaint for the allegations relating to a breach of sections 5.1.2, 5.1.3 and 5.1.4 of the Code and these aspects of

the Complaint are dismissed. The Complainant makes no allegations in this Complaint about trying to unsubscribe or the cost thereof.

3. Likewise no substantiation is provided in respect of the alleged breach of section 11.1.7 of the Code of Conduct. The Complainant does not even state that he subscribed to the service in question let alone aver that no confirmatory message was received as required by section 11.1.7. This aspect of the Complaint is also dismissed.
4. The allegation that the SP has not provided its name in the SMS advertisement is not dealt with by the SP in its reply. Under section 5.1.1 of the Code the SP is required to provide a valid originating number AND/OR the name or identifier of the message originator. In other words the SP can provide a valid originating number on its own and this will be sufficient for the purposes of the section. An "originating number" is defined in the Code as the "number allocated to the WASP by the network operator from which a commercial message is sent". This is evidently present and this aspect of the Complaint is dismissed. The Complainant's observation that it is not a valid telephone number is irrelevant.
5. The allegation that the SMS advertisement, which is for a premium service, does not contain the name of the message originator is not dealt with by the SP in its reply. There is nothing in the Advertising Rules to absolve the SP from this requirement in respect of SMS marketing and, notwithstanding the fact that the 35050 brand is well-known, the failure to display the name of the SP constitutes a breach of the Code of Conduct.

The Adjudicator furthermore cannot find a basis for make a finding that the SP has attempted to hide the access cost.

The SP is accordingly found to have breached section 6.2.6 of Version 5.2 of the WASPA Code of Conduct. Other than in the accompanying Adjudication under Complaint 1655 (written contemporaneously with this one), the SP has not been found to be in breach of this section to date and is hereby issued with a formal reprimand and a fine of R2 500.

The balance of the Complaint is dismissed.