



## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	19852
<b>WASPA member(s):</b>	Sprint Media SL (IP) (1168) / Opera Telecom t/a Opera Interactive (SP) (0068)
<b>Membership number(s):</b>	See above
<b>Complainant:</b>	WASPA Secretariat
<b>Type of complaint:</b>	Breach of Code of Conduct
<b>Date complaint was lodged:</b>	2013-03-08
<b>Date of the alleged offence:</b>	2012-12-24
<b>Relevant version of the Code:</b>	12.1
<b>Clauses considered:</b>	5.1.2; 5.1.3; 5.1.4, 5.1.5 and 5.2.1, 5.2.2 and 5.2.3.
<b>Relevant version of the Ad. Rules:</b>	N/A
<b>Related cases considered:</b>	16319, 16333, 16668 and 16735

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### Complaint

Complaint 19852 is formal complaint lodged concerning unsolicited sms's. The formal complaint was sent to the WASP on 2013-03-12 and they responded on 2013-03-19.

The complainant refused resolution on 2013-03-20.

The Complainant wrote:

“Unsolicited sms, with no STOP instructions for unsubscribe (they want you to call a number to opt-out).”

In summary the complaint sets out the following having been breached:

- Spam
  - No opt out link.
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**WASP response**

The WASP disputed the Complainant's view of events and stated that:

"The complainant was not sent an unsolicited SMS. In fact, the complainant, or someone with access responded to one of our adverts on 11th December 2012 and completed the MSISDN entry field within the first landing page, which upon clicking the 'Call to Action' button, triggered an SMS to the MSISDN in question and agreed to the Terms & Conditions set out within the service, that the user was happy to receive promotional SMS. (As shown in the above log)

The complainant did not respond to the SMS message received to the handset following inputting the MSISDN into the landing page.

On the 24th December 2012, the complainant was sent a promotional message. This message contained the shortcode the service operates on, the fact that it was a related to a subscription service, the cost and billing frequency and the opt-out; which is in fact a telephone number. (As shown in the above log)

The telephone number used for the Opt-out is in line with CPA guidelines, whereby service providers must offer users the ability to opt out of their services at no cost. If we were promote opt-out via SMS, as it currently stands the user would be charged R50c for this service, therefore contravening the CPA."

Accordingly the WASP feels that they have demonstrated compliance with the Code.

**Complainant's Further Response**

"I am not satisfied with the resolution of this complaint.

According to Sprintmedia's response, a blackberry user at 93.186.16.236 entered in my cellphone number on 2012-12-11 11:01:55.

During this time I was in the Eastern Cape, my cellphone with me. I do not own a blackberry, nor have I ever owned one.

I still have unsolicited messages from December on my phone. None include the message in the provided logs for 2012-12-11 11:02:09.

I do however have a copy of the message delivered on 24th December, I was on leave at the time and unfortunately did not lodge a complaint then.

The subsequent message on 8th March 2013 10:10am led to this complaint being lodged. The logs provided do not include this message of 8 March.

If I accept Sprintmedia's explanation that a blackberry user completed the MSISDN on some landing page, then it was most likely a 3rd party.

Quite why some random blackberry user would enter my cellphone number in response to an advert is pure speculation.

I am not a member of WASPA, I am part of the secretariat.

The shortcode 31923 does not reflect any WASPs on the internal lookup I have available. Nor does the longcode +278392100753889 for the message sent on 8 March 2013.

The message sent on 24th December had the long code +27839200240923, which

reflects Opera. However please refer to my point above regarding being on leave at the time.”

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## Sections of the Code 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 direct marketing database, so as not to receive any further direct marketing messages from that message originator.

5.1.3. For commercial messages, 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 should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

5.1.4. For commercial messages, a message recipient must be able to opt out at the lowest tariffed rate available (with the exception of reverse billed rates). If replying 'STOP' as set out in 5.1.3 will result in a charge greater than the lowest tariffed rate available, then instructions for the lowest tariffed rate opt-out must be included in every message sent to the customer.

5.1.5. The reply "STOP" or alternative opt-out procedure must be included in all direct marketing communications. A "STOP" reply in this instance will refer to all direct marketing communications from the message originator.

## 5.2. Identification of spam

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

- the recipient has requested the message;
- 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;
- at the time when the information was collected; and
- on the occasion of each communication with the recipient; or
- the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.2.2. Any commercial message is considered unsolicited after a valid opt-out request.

5.2.3. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

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## Decision

Once again this case finds me in a he said she said situation. And once again without alleging fraud on the part of the WASP in generating logs I can find no basis upon which to dispute the validity of the logs.

However, when taking into consideration the findings of the appeal panel ruling on the issue of spam and specific consent in case 16319 to receive promotional messages and they state that:

“An important concern raised in many of the complaints was that complainants started receiving promotional SMS messages despite not completing the subscription process after clicking “Next”. Sprint Media’s submissions in various appeals currently under review made reference to the consumers having consented to receive “free promotional SMS relating to this

and other services ...” in the terms and conditions. Sprint Media confirmed that unless a consumer clicked through the various pages and actually confirmed their subscription, they would not be charged the subscription charge for the service but clicking on “Next” would constitute their consent to receive these free promotional messages and, in some cases, even

free credit for free content forming part of the same service.

Sprint Media relied on legal principles which bind parties to terms and conditions which they are referred to or which are made available to them in this manner as the basis for its assertion

that the various complainants agreed to these particular terms and conditions, including the consent to receive the promotional messages. This assumption is what concerns us about this

mechanism and which speaks to the adjudicators’ findings regarding spam and misleading conduct in breach of clause 4.1.2 of the Code.

The operative term in this context is “consent”. The Code (version 11) considers a “direct marketing message” to be “unsolicited (and hence spam) unless the “recipient has requested

the message”; where the recipient has a “prior commercial relationship with the message originator” (subject to certain conditions) or where the “organisation supplying the originator

with the recipient’s contact information has the recipient’s explicit consent to do so”.

And later:

“Returning to consent, our concern is that, while the terms and conditions provide for consent

and that consent is imputed to the consumer using accepted legal principles such as the doctrine of quasi mutual assent, the form of consent obtained is flawed. Given the emphasis that concerns us, we find that the consent Sprint Media seeks through its terms and conditions

in use in these campaigns was, in all probability, not specific or informed. This is borne out in the complainants’ assertions that they did not wish to receive promotional messages from

Sprint Media and mistook the messages they received as invitations to view content items and not as part of a specific and informed opt-in to receive promotional messages where they declined the opportunity to subscribe to the appellant's subscription service."

Accordingly I find the IP in breach of clause 5.2.1 of the Code.

With regards to the breach of 5.1.3, on review, clause 5.1.4 modifies 5.1.3 to the extent that in my view, should there be an opt out mechanism which is clear (which there was) and should there be a cheaper opt out option than responding "stop" to the sms, the IP is entitled and in fact in terms of the Code (never mind the Consumer Protection Act which I do not feel is relevant in this forum) to provide an alternative but cheaper option. In this case they offered a cheaper telephonic option.

I accordingly do not find the IP to be in breach of clause 5.1.3 of the Code.

I partially uphold the complaint.

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### **Sanctions**

The IP is fined R5000.

In addition the IP is fined an additional R5000 to be suspended pending their demonstration to the WASPA Secretariat that consent to send promotional messages is properly construed in terms of the Code and the general law.