



REPORT OF THE ADJUDICATOR

Complaint reference number:	19918
WASPA member(s):	Sprint Media SL (IP) (1168) / Mira Networks (SP) (0011)
Membership number(s):	See above
Complainant:	Competitor
Type of complaint:	Breach of Code of Conduct
Date complaint was lodged:	2013-03-14
Date of the alleged offence:	2013-03-08
Relevant version of the Code:	12.1
Clauses considered:	5.1.2; 5.2.1, 5.2.2 and 5.2.3.
Relevant version of the Ad. Rules:	N/A
Related cases considered:	16319, 16333, 16668, 16735 and 19852.

Complaint

Complaint 19918 is the escalation of unsubscribe request 4214828 regarding unsolicited sms's.

- The formal complaint was sent to the WASP on 2013-03-19.
- The WASP replied on 2013-03-20 advising that they are cited incorrectly.
- Correct SP is emailed by secretariat on the 2013-04-16.
- SP requests for complaint to be redirected to IP on the 2013-04-17.
- WASP replies on the 2013-04-24.
- The complainant refused resolution on 2013-04-26 and provides additional information on the 2013-05-06.
- The WASP provided additional information on 2013-05-07

The Complainant wrote:

"I received the following spam on my number 0833247290 on 8 Mar 2013: You have 1 new video preview. Click to view <http://bzm.tv/w/?m=27833247290> ...(16 Only) 31923 subscription service R7/day Opt Out dial 0110621412.NB: Please do not click on the link

above, as it could result in my being billed! 0833247290 is a CellC number, ported from MTN.

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

- Spam
-

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 22 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.

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

On the 27th of December 2013 and on the 8th of March 2013, the complainant was sent a promotional message. When we received a "stop" message on 8 March the MSISDN of the Complainant was blacklisted on our systems.

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

Complainant's Further Response

The Complainant refused resolution on the basis that it disputes the validity of the logs. The WASP then disputed the honesty of the Complainant's response. I will not go into detail as the documents in which such issues were raised are available to all parties.

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.

5.2. 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.

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.

I uphold the complaint.

Sanctions

The IP is fined R5000.