

REPORT OF THE ADJUDICATOR

Complaint Reference Number:	25719
WASPA member(s):	Tristar Trading LTD (1452) (IP) (“Tristar”) / Infobip Africa (0143) (SP) (“Infobip”) / Opera Telecom Pty Ltd (0068) (SP) (“Oxygen8”)
Source of Complaint:	Monitor
Type of complaint:	Misleading Marketing, Subscription Services
Date complaint was lodged:	2015—1-12
Date of the alleged breach:	2015-1-12
Relevant version of the Code:	13.1
Clauses considered:	4.2; 4.8; 5.4; 5.5; 16.9; 16.10; 16.11; 16.13;

Complaint

The complaint is the formal complaint concerning a direct message received by a WhatsApp user. The source of the complaint is the Media Monitor:

The Media Monitoring team were alerted to a Direct SMS campaign being sent out to WhatsApp users with the following message:

“Your WhatsApp wall for [082REDACTED] needs an UPGRADE! Open [www.i3y.us/u/a.php?m=\[082REDACTED\]](http://www.i3y.us/u/a.php?m=[082REDACTED]) <<http://www.i3y.us/u/a.php?m=082REDACTED>> and Click SUBSCRIBE (FREE MSG) 44617 2optout smsStop Upon investigation, we understand that the SMS campaign could be in breach of the WASPA Code of Conduct and request this complaint is forwarded to an adjudicator.”

According the Monitor, the cellphone subscriber had no prior relationship with the relevant Information Provider (IP).

- 1.** The first concern raised by the Monitor pertained to the consent of the user for receipt of the direct marketing message. The Monitor forwarded that whilst the IP avers use of a WhatsApp user database, this is not permitted. The general public use WhatsApp; and have not specifically opted into a mobile content service before. The assumption of interest in mobile content services is problematic. The direct SMS campaign, according to the Monitor is supposed to be marketed

to a database that has specifically opted into a mobile content service, and given consent to be marketed to in the future. The Monitor requested that specific consumer consent of such marketing be provided and provided the user's cell-phone number for the purposes of investigation of such consent.

2. The second issue of the Monitor pertained to potential misleading marketing. In the view of the Monitor, the subscription service should be marketed on the merits of a beneficial subscription service and not a *misleading marketing hook*. According to the Monitor, the phrase "UPGRADE YOUR WA WALL" (in this context) implies that the consumer's WA service will expire; or that *WA service problems will be experienced if the "upgrade" is not performed*.

The Monitor avers that the effect of such "misleading message" could force a consumer into "upgrading" and ultimately purchasing a subscription service that they did not intend to buy. The Monitor forwarded that where the IP is selling WA mobile wallpapers service for the WhatsApp service, this should be marketing as such and the consumer (user) should not erroneously be led to believe that there is problem with the current WA (Wall).

3. Thirdly, the Monitor was of the opinion that the opt-out format in the marketing message is problematic due to 44172 2 being difficult to read (in the actual message) which has the effect of not allowing the consumer (user) to stop the service. The Monitor believes that the word "to" is to be utilised.
4. The fourth aspect of the Monitor's complaint was that the "(FREE MSG)" directly follows the word "SUBSCRIBE" which may mislead the consumer into thinking that if they did subscribe, the subscription would be free.

The formal complaint was sent to the WASP on 2015-1-13 for a formal response.

The formal complaint was sent to the SP that owns the 5 digit short code (Opera/ Oxygen) used for the sms communication; and the SP that that sent the sms communication (Infobip) on the 2015-01-13 for formal responses.

Service Providers Response's

OXYGEN 8

Opera/Oxygen8 responded as follows:

On 2015-01-15 the SP's brief email correspondence noted that:

Where a third party erroneously or fraudulently puts their shortcode in the marketing message, there is no way we can be held responsible and that a formal response was forthcoming nonetheless.

On 2015-01-15, we also note a brief email correspondence on 15 January 2015 from Infobip to Oxygen 8:

Confirming Infobip's receipt of the formal complaint and requesting resolution from Oxygen 8. A return correspondence from Oxygen 8 to Infobip notes that a response was forthcoming from Oxygen 8.

On 2015-01-15: the formal response in summary provides:

Upon receipt of Formal Complaint #25719, the SP immediately replied to the WASPA Secretariat stating that Oxygen8 has been cited as SP in error (again). The Secretariat later advised that, because Oxygen8's shortcode is being used in the marketing message, the SP is implicated in the abovementioned Complaint. The SP confirms as per an extract from an email to Tristar in OCTOBER 2014, the SP had previously notified Tristar that Tristar are using the SP's shortcode in error and must immediately halt to do so.

The SP claims no control over the content of Tristar's message content, and placed on record that if the SP's shortcode was erroneously used in a message it has no visibility of, and had no knowledge of, then this was being done fraudulently, maliciously or in bad faith and the SP cannot, by any stretch of the WASPA Code of Conduct, applicable regulations or the Law, be held responsible.

The SP's plea was for:

- The Complaint against Oxygen8 be withdrawn, or that Oxygen8 be removed as a party to the complaint;

- Alternatively, the complaint against Oxygen8 be dismissed;
- The Adjudicator, as part of his/her findings, reprimand WASPA and its Media Monitor for the manner in which Oxygen8 has been repeatedly called to account for complaints in which it never should have been a party to in the first place.

Oxygen8 was of the opinion that WASPA was negligent and/or malicious in its repeated citing of Oxygen8 as SP to complaints pertaining to Tristar's bulk messages, in consideration of an explanation being sent to WASPA on multiple occasions.

Of further relevance is that during/about September 2014, Oxygen8 was approached by TriStar Trading to act as an aggregator, facilitating billing for their content services. It was specifically agreed between Oxygen8 and TriStar that Tristar would not be using Oxygen8 for the sending of their bulk marketing messages. In support:

- An email to the relevant representatives of TriStar Trading, dated 1 October 2014, was attached to the Formal Response. The email was sent to Tristar subsequent to a previous WASPA complaint pertaining to Tristar's bulk SMS's, in which Oxygen8 was also cited as the SP / aggregator. The writer noted that on various occasions, Oxygen8 has
"made it clear to WASPA that Oxygen8 does not, nor have we ever: seen the content or proposed content of ANY bulk messages for the company involved prior to it being sent; or sent ANY single or bulk marketing message promoting ANY service of Tristar Trading."
- An email dated 19 December 2014 from our Oxygen 8 to the Media Monitor in the context of the Heads Up (HU315) which resulted in this Complaint, was included in the Formal Response. The following extract is of relevance:
"I also, again, wanted to stress that O8 did not send the message in question and a) shouldn't have even been copied in the correspondence, but b) we are assisting our client regardless because it's part and parcel of our responsibilities / pledge to our clients."

Infobip responded as follows:

On 2015-01-15, Infobip responded to WASPA:

Confirming an attached communique sent to their client and an acknowledged of receipt of the complaint.

On 2015-01-21 Infobip responded:

Noting that they (Infobip) had investigated the matter with Oxygenate and Tri-Star was not sending the problematic communication through Oxygenate. Furthermore, that additional information (correct information) would be forthcoming on completion of Infobip's investigation.

TRISTAR:

On 2015/01/13 the WASP responded:

That as per the previous complaints, and according to (WASPA's) suggestions, the WASP has ceased all SMS campaigns "a weeks ago". The WASP agreed to provide the response and any information deemed relevant to the complaint within the time frame.

Additionally, on 2015-01-15, the WASP undertook:

To provide the logs within determined time frame.

The WASP responded formally on 2015—01-30:

According to the WASP:

- An SMS was sent to Identified Consumer* (user) at Identified MSISDN"* offering their services. The user did not respond and was never billed by the WASP. Permission (consent) was received from the user when he clicked on one of our internet banners in the past and provided information such as his address and South African identity number. *(Logs supporting this activity were not included).*

- The user has a WhatsApp service installed on his mobile device (*a screenshot of the user account was included in the response*):
- The marketing should not imply that there will be any issues relating to the users WhatsApp service should they not take advantage of our offer as suggested by the Monitor. This was believed to be “pure conjecture on the part of the WASPA monitor team in regard to their opinion of the users intelligence and general knowledge in regard to the WhatsApp service”.
- The WASPA monitoring team should not be able to dictate their marketing methods as Monitors are not specialists in this field. The WASPA monitor was again casting doubt on the intelligence of the end users that Tristar was marketing to.
- The Tristar messages use syntax familiar to anyone who has used SMS as a form of communication and is an accepted industry norm.
- “Free MSG” is at the end of the instructions and short service description and is merely intended to inform the recipient that they have not been billed for this message.
- Tristar did follow the instructions of the monitoring team and included the short code and placed a comma and space between the short code and the “2”, in the message content. This formal complaint was received on the same date (13 Jan 2015) and, according to Tristar has effectively been dealt with.

Sections of the WASPA Code of Conduct Considered

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

4.8. Members must not provide any services or promotional material that:

(c) induces an unacceptable sense of fear or anxiety;

5.4. Members must have honest and fair dealings with their customers.

5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

16.9. A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who has given his or her consent.

16.10. A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who:(a) has provided the party responsible for sending the direct marketing communication with his or her contact details in the context of the sale of a product or services, and the responsible party's own similar products or services are being marketed

16.11. A member may not engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing other than as provided for above.

16.13. Upon request of the recipient of a direct marketing message, the member must, within a reasonable period of time, identify the source from which the recipient's contact details were obtained. The member must also provide proof that the recipient has given consent to receive that message, or alternatively provide proof that the recipient has provided his or her contact details in the context of the sale of a product or service the same as that being marketed.

Decision

1. Deliberating on the content of the message (SMS communication) in question, I find the content suggests that the (i) service to be provided is an upgrade to a WhatsApp feature, the WhatsApp Wall; and that this service is needed by the user. Both of which are inaccurate and misleading in that the service to be provided by the WASP (Tristar) is a content subscription service (further specifics of which are unknown) and there is no real necessity for a WhatsApp Wall upgrade on the part of the user.
2. Whilst a contention that the user has consented to receive direct marketing through a web based platform is forwarded, there are no logs to support the receipt of consent by the WASP (Tristar). Furthermore no evidence of a commercial client relationship between Tristar and the client has been provided.

- 3.** Oxygen8’s short code is included in the message for the purpose of opting out of the service. The compliance of the opt-out facility with the Code of Conduct is a separate issue and has not been raised by the Monitor for deliberation. Relying on Oxygen8’s explanation of their relationship with Tristar, the content of the communication does not relate to Oxygen8 and Oxygen8 cannot be responsible or accountable in this regard. Oxygen8 is also distanced from the dissemination of the communication which removes responsibility in this regard.
- 4.** Returning to the issue of misleading content and consent to communicate with the client, to what extent is Infobip responsible? Considering the nature of Infobip’s part in the dissemination of the communication, Infobip has permitted their facilities to be used in a manner that does not conform with the Code of Conduct.
- 5.** An ambiguous submission that SMS campaigns have been terminated presents a certain lack of clarity.
- 6.** Consequently and in summary, I find the following breaches of the Code of Conduct:

4.2	Breach by the WASP (Tristar)
4.8	-
5.4	Breach by the WASP (Tristar)
5.5	Breach by the WASP (Tristar)
16.9	-
16.10	-
16.11	Breach by the WASP (Tristar), Breach by (SP) Infobip
16.13	Breach by the WASP (Tristar)

- 7.** Additionally, I am concerned by the responses provided by Infobip which is neither forthcoming nor co-operative and suggests a level of disconnect from the complaint or the alleged violation of the Code of Conduct albeit called upon for a Formal Response.

8. An important albeit aside matter is the inclusion of Oxygen 8 in the complaint:

I have duly considered the response submitted by Oxygen 8. By their own admission, Tristar was using their shortcode for receipt of opt-out messages (albeit without authorisation). Whilst I accept that this is not the originating short code and does not establish a dissemination service by Oxygen8, I must place the source of the issue as one between Tristar and Oxygen8.

The WASPA Secretariat is following due process by including Oxygen8 in the complaint. It would be remiss for the Secretariat to exclude Oxygen8 on the assumption of unauthorised use in each instance. At the point of adjudication, a missing piece resulting would be the owner of the named source code, albeit not the originating details.

Despite the frustrations of Oxygen8 to be called upon for formal responses, this matter needs to be resolved with Tristar. Moreover, the commercial relationship between Oxygen 8 and Tristar provides Oxygen 8 adequate legal and commercial opportunity to resolve the unauthorised use of short code.

Sanctions

In the circumstances, Tristar is fined R25, 000.00. Tristar is required to confirm termination of the service that forms the basis of this complaint within two(2) working days of receipt of this adjudication report.

In the circumstances, Infobip is fined R25, 000.00.