



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Grapevine Interactive
Information Provider (IP) (if any)	Avis Car Hire
Service Type	Commercial SMS
Source of Complaints	Public
Complaint Number	3663
Date received	19 March 2008
Code of Conduct version	5.7

Complaint

The Complaint relates, in essence, to unsolicited commercial SMSs received by the Complainant.

The Complainant provided an itemised bill which reflected a number of R6.58 per SMS debits. The Complainant indicated that the SIM associated with the number in question was not in use in a mobile phone but rather constituted a monitoring system positioned in a computer box and incapable of subscribing to the service in question. When contacted this SIM responded with a message indicating an attempt at illegal access.

The Complainant requested that the SP refund the total amount debited by it.

SP Response

The SP contacted the Complainant in order to obtain certain information which the Complainant duly provided. After an internal investigation the SP indicated that

1. An SMS had been sent by one of their clients to the monitoring number (i.e. the number associated with the SIM as set out above).

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2. The response from the monitoring system SIM was regarded as a new SMS coming onto the SP's platform.
 3. The SP's system reacted by replying to the monitoring system, creating a messaging loop.

The SP indicated that it had taken the following remedial action:

- "1. I contacted our client who sent the initial sms through to [the Complainant] and let them know that no messages are to be sent to this number as it is not a personal cell phone but a monitoring system (possibly a typo on their side for a legitimate client).
2. Contacted [the Complainant] and explained the course of events to her.
3. Ensured that all "loops" had stopped and were prevented in future."

The matter was escalated to the formal dispute resolution procedure due to the Complainant's request for a refund being denied by the SP who indicated that it did not believe it was at fault regarding the Complaint.

Further Investigation

The Adjudicator requested that the SP specify the name of the IP and the manner in which consent was obtained. The SP duly indicated the IP's identity and that it was investigating how consent was obtained in this case. No further details had been provided two weeks after this communication.

The Adjudicator further requested information relating to the nature of the service and the composition of the R6.58 charge levied. The following reply was received:

"The charge related to the 'truncated number' the clients automated system sent the SMS to.

Original Email 2 SMS (083642xxxx) Details:

2008-02-02 09:50:03 submitted message to SMSC: ToSMS:2783642xxxx
Content: XXXXX XXXXX,MR thank you for renting with AVIS.

Investigation Details:

[The Complainant's] number/system replied to this message but changed the reply number, her system removed the last three digits replying to 2783411471100 instead of 2783411471100034. Because her reply message came back to this number and not to the originating number our system marked this as a new sms, and not a reply message.

Our system then processed this as a new sms into our information service.

Background on this service: clients are able to associate keywords with particular information. This information is sent out via sms/email when an sms with corresponding keyword is sent through.

When a keyword is not recognized a default error message is sent back to the originating number - the number that sends this message changes to the premium number: 27839200170.

Content Sent in by [the Complainant's] number: Access Denied: Password Invalid
Response to her reply: The keyword you have entered is incorrect. To get today's World Top Poly from Dodo Mobile send POLY to 36773 Price R5.

This loop stopped at 10:29 on the 2nd February 2008 and was stopped on [the Complainant's] side (no reply message sent)."

Sections of the Code considered

The following sections of the WASPA Code of Conduct were considered by the Adjudicator:

3.9. Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

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.

5.3. Prevention of spam

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

Decision

The IP is in breach of the Code as regards the initial message which was commercial and unsolicited as per section 5.2.1 of the Code. While the SP may not have breached section 5.3.1 of the Code *per se* there is ample precedent that it retains responsibility under the Code for the acts of its contracted IPs.

The Adjudicator believes that the Complainant should be refunded. The SP has refused to do this on the basis that it is not at fault.

This ignores the fact that it is quite patently not the Complainant who was at fault.

In the view of the Adjudicator both the SP and the IP share a degree of responsibility for the billing of a SIM functioning within a monitoring system. The IP because it initiated the messaging loop, whether through error or otherwise. The SP is also at fault in that its systems were configured to allow such a messaging loop to occur in the first place. This much is evident from the SP's statement that it had taken steps to ensure such a loop would not occur again in future and the relative ease with which this appears to have been achieved.

The Adjudicator accepts that this was an error but reiterates that such error was not on the side of the Complainant.

No punitive sanction is imposed but the SP is ordered to refund the Complainant in respect of the charges levied by it for the relevant period. If it is in compliance with section 3.9.1 it should be able to negotiate the apportionment of this refund with the IP.