



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Integrat
Information Provider (IP):	Teljoss CC
Service Type:	Subscription/Content
Source of Complaints:	Competitor
Complaint Number:	5888
Code Version (CoC and AR):	Code of Conduct 6.2
Date of Request:	23 June 2009
Date of Adjudication:	05 August 2009

Complaint and Responses

1. On the 25th February 2009 the complainant indicated that he had received an SMS for an adult service which was unsolicited and further required that a message be sent to a premium rated number which would cost R30.00.
2. The Complainant – who is a competitor to the IP – then indicated that he was unable to establish who the Service Provider (SP) for this service was.
3. Thereafter it was established that the SP in this matter was Integrat and the IP was Teljoss CC.
4. The IP responded by indicating that the Complainant had in fact opted into the marketing database within three months of the date of the message and as a result the message was not spam.
5. The IP further indicated that the Complainant did not opt out by texting “No” to the required number, and that it was only the reply of “YES” to the number that would have triggered a charge of R30. Put differently the IP contended that the ability to stop messages was not a premium rated service, while the ability to continue with the messages was premium rated.

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6. The IP further contended that the complaint was a vindictive attack by a competitor and that the IP would seek legal counsel to ascertain its rights.
 7. The Complainant then replied by indicating that while he was on a Marketel database, the message he received did not indicate the sender of the message and as such he could not know whom to interact with. He further disputed that the opt out message would cost R0.50 as it was clearly a premium rated number which would cost R30.00.
 8. The IP then responded by repeating that the Complainant has not opted out of this service that the Complainant was using a similar service (for which he had also not opted out). However the IP did concede that 200 messages were sent from the incorrect number which would have resulted in an opt-out message costing the consumer R30.00. The IP further indicated that they had immediately stopped this practice when they discovered the error and had refunded the three people who did opt out using the R30.00 premium message number.
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Portions of the Code of Conduct (version 6.2) considered:

9. **3.1.1.** Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.
 10. **5.1.1.** All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.
 11. **5.1.5.** Once a recipient has opted out from a service, a message confirming the opt-out should be sent to that recipient. This message must reference the specific service that the recipient has opted-out from, and may not be a premium rated message.
 12. **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.
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Decision

13. Before beginning it should be noted that the grammar and spelling used by both the complainant and the IP were so poor as to make it unwise to reproduce the

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communications between the parties. As both parties are WASPA members the adjudicator takes a dim view of the degree of professionalism used by both parties when taking this matter further. In addition the failure by the Complainant to provide the exact and original text was unhelpful especially for a member of the industry.

14. As this matter occurred during the period when version 6.2 of the WASPA Code of Conduct ("CoC") was operative, that version of the CoC will be referred to.
15. There are three issues to consider when dealing with this complaint:
 - 15.1. Did the IP provide sufficient information about the identity of the sender?
(Failing which it would have breached clause **5.1.1** of the CoC)
 - 15.2. Was the opt out message a premium rated message? (and thus a breach of clause **5.1.5** of the CoC)
 - 15.3. Did the IP spam the Complainant? (and thus breach clause **5.3.1** of the CoC)

IDENTIFICATION OF SENDER

16. The Complainant contends that the message he received did not indicate who the sender of the message was. This allegation is borne out by his need to contact WASPA in order to ascertain the identity of the sender of the message. Once again the lack of the original message text from the IP hinders the ability of the adjudicator to ascertain the true position by reference to independent evidence. However the IP in his communications with WASPA never actually refuted that the message that was sent did not contain the identity of the sender. In the circumstances the IP is found to have breached clause 5.1.1 of the CoC.

PREMIUM RATED OPT-OUT MESSAGES

17. Initially the IP strenuously objected to the allegation that the opt-out message was a premium rated message. Thereafter the IP did admit that it did send out a message where the opt-out message would have gone to a premium rated service. By its own admission then the IP has conceded that clause 5.1.5 of the CoC was contravened by the IP.

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18. The only question that remains is whether the Complainant received a message which would have caused him to pay R30.00 to opt out of the service.
19. In the circumstances it is common cause that the Complainant did not in fact send a message to the premium rated number and as a result did not incur the R30.00 message termination cost, if indeed that would have been the cost of sending the termination message.
20. While the IP's actions in correcting the error of sending a premium rated opt-out message are commendable, this does not excuse the fact that it did in fact make this mistake and as a result breached clause 5.1.5 of the CoC. Rather these actions would be mitigating factors to consider when considering the sanction to impose.
21. Moreover it should be noted that the only evidence available to the adjudicator that the necessary actions were taken by the IP to prevent this error and rectify the situation is the bald assertion by the IP itself.

SPAM

22. The question of whether this message was unsolicited is mired by a clear dispute of fact between the parties. The IP contends that the Complainant was on a database and had agreed to receive messages while the Complainant argues that he was on an unrelated database and did not agree to receive messages.
23. Clearly the onus in this case rests on the IP as failing positive proof from the IP the message can reasonably be classed as spam. This aspect should be stressed as the IP contended that the Complainant must provide the original message. While the Complainant is positively encouraged to provide the original message text to WASPA, the approach of the IP is misconstrued as once the IP admits that a message was sent to the Complainant the onus rests on the IP to produce the message, rather than the Complainant.
24. Cognisance must also be had of the fact that the Complainant is a member of the industry and further appears to have had dealings with the IP in the past.
25. While it may be true that the Complainant did opt into the service no message with a time a date indicating this election by the Complainant was provided to the adjudicator.

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In the absence of any proof from either side supporting the two positions, the only conclusion that is possible is that the message is unsolicited as the IP in this case had the duty to discharge the onus and not the Complainant.

26. In the circumstances the IP is found to have breached clause 5.3.1 of the CoC.

Mitigation/Aggravation

27. In aggravation of the circumstances:

- 27.1. the IP did not provide the original message to the adjudicator;
- 27.2. the IP was found guilty of breaching clause 5.1.5 of the CoC version 6.2 in Complaint 5273, and was found guilty of “very serious” breaches of the CoC in this matter which occasioned a significant fine. This in turn strongly contradicts the IP’s assertion that it has “an impeccable track record” although this adjudication was admittedly delivered after the IP contended that its track record was “impeccable”.

28. In mitigation of the circumstances:

- 28.1. the IP apparently took several steps to rectify the error of sending a premium rated opt-out number to the 200 consumers.

Sanction Imposed

29. The following sanctions are imposed:

- 29.1. The IP is fined the amount of R2000.00 for failing to indicate the identity of the sender and is further directed to ensure that all communications indicate the identity of the sender as required by clause 5.1.1 of the CoC.
- 29.2. The IP is fined an amount of R10 000.00 for breaching clause 5.1.5 of the CoC which is wholly suspended for the period of 6 months, provided that if this clause is breached within six months of the date of this adjudication.
- 29.3. The IP directed to ensure that the Complaint is removed from all its databases.

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In the event that the Complainant wishes to receive marketing messages from the IP he will need to opt-in to the service again.

29.4. The IP is further fined an amount of R10 000.00 which is wholly suspended provided that the IP is not found guilty of sending unsolicited messages (spam) within 6 months after the date of this adjudication.

29.5. The IP is directed to provide the names and numbers of the three people where it refunded the cost of the premium-rated message to WASPA in order for the WASPA monitor to verify the accuracy of this statement.

Appeal

Please note that should the SP or complainant wish to appeal this decision it must inform the secretariat of this within five working days of this decision in terms of section 13.6 of the Code of Conduct version 7.4.
