



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	TMobileSA
Information Provider (IP): (if applicable)	N/A
Service Type:	Subscription
Complainant:	Competitors
Complaint Number:	10549 & 10822
Code version:	Code v 9.0 and Ad Rules v 2.3
Date of Report:	30 Nov 2010

1. Complaints 10549 & 10822 arise from the same set of facts, and consequently they will be dealt with together.

Background

2. These complaints both result from what the Member claims was a technical fault. The Member's version is set out below.
3. During late August 2010, the Member was configuring a connection to services at MTN using what is referred to in the documentation as the "IS infoconnect link."
4. At the same time, the Member was busy migrating certain personal information from databases in respect of "Vodacom Service Provider" to "Vodacom Group".
5. On the 31st of August 2010, as the Member explains it:

...when MTN migrated using the Info-connect link, the Apache application went down, thus causing corruption of the script we were running on the other services. This resulted in the erroneous (sic) billing of the 32 000 sitting within our [removed] data base.
6. This erroneous billing took place on the Vodacom network.
7. It subsequently emerged that the affected parties were both subscribed to services **and** billed in consequence. In other words, it was an erroneous subscription that caused the billing.
8. The Adjudicator was at first not quite clear as to the technical details of the events that caused the erroneous billing, and requested that the Member should clarify.

The exact technicalities are not important in themselves, but clarification was intended to confirm the credibility of the Member's version. The Adjudicator confesses that he is none the wiser either as to the technical details or as to the Member's credibility as a result of the clarification.

9. It is possible to draw the following from the Member's account however:
 - 9.1. A technical fault caused approximately 32 000 people to be erroneously subscribed and billed for services they did not request;
 - 9.2. The Member probably did not take adequate steps to ensure that a technical error would cause this result. In other words, the erroneous subscription was the Member's fault.
10. As can be imagined, several consumers were somewhat annoyed at the unexpected billing, and the Member was rapidly made aware of the problem by Vodacom.
11. The Member undertook to refund all those who had been affected by the error and also initiated preventative measures to ensure that such an event never recurs. Again, the Adjudicator is in no position to form an opinion on the effectiveness of these technical measures.

Facts of Complaint 10549

12. On the 15th of September 2010 a competitor of the Member lodged the following complaint against the Member:

Code_Breached: Illegal content billing

Detailed_Description_Complaint: Three content billing items processed against my phone account. I received messages on the day which I did not request. I have addressed the issue with TMobileSA and they have assured me that I will be unsubscribed and refunded. They say (as appears in various Google search results for other suspects) that a technical glitch caused this. They could not say where they got my number from and I left it at that. It is worth noting that the contact numbers on their website (www.tmobilesa.co.za) do not exist. The 087 number does work. I do not personally require any further action but the industry as a whole could ill afford this type of business practice.

13. The Complainant subsequently received a refund voucher for the erroneous billing, and the WASPA Secretariat also passed on the Member's explanation for the error to him.
14. Despite the fact that the Complainant said that he was personally satisfied with the Member's reaction to the complaint, he felt that he was obliged to pursue the matter in the interests of the WASP industry, and consequently the matter was escalated to a formal complaint.
15. The Complainant subsequently indicated that he wanted to know where the Member had got his MSISDN, as he had never interacted with the Member.

16. On the 5th of October 2010 the WASPA Secretariat sent the formal complaint to the Member per email.
17. The Member had not responded to the complaint by the 14th of October, and as a result the Secretariat sent a reminder to the Member. When the Secretariat notified the Member on the 15th that as no response had been received the matter would be referred to adjudication without benefit of its response, the Member replied that it was awaiting a response from the Complainant.
18. The Complainant advised on the 18th that he had sent a response to the Member, but did not specify what that response was.
19. Finally, on the 29th, the Secretariat asked the Member to respond by close of business on the first of November 2010. No response having been received by the deadline, the matter was referred to adjudication.
20. As an aside, the Adjudicator checked the telephone numbers listed on the Member's website on the 30th of November 2010, and found that they are all valid numbers.

Facts of Complaint 10822

21. On the 2nd of September 2010 the Complainant, a competitor, made the following unsubscribe request through the WASPA website at www.waspa.org.za:

Competitor writes: Dear WASPA received an SMS spam message from +27820048440 on 30/8/2010, to my phone [removed]. The content was: Welcome 2 Mobbee. U can view unlimited content! To opt out in the promotion SMS STOP to 37459 help call 0878204085. T & C apply I have never had any commercial relationship with this company. [removed]

22. And further on the 14th of October:

Escalation reason: Complainant writes: The client admitted to billing 4000 people, and provided a very suspect explanation. It is now publicised on Mybroadband, and is causing great damage to the industry. It probably originates from another complainant (an MTN subscriber - I am on Vodacom). I have not been refunded for the fraudulent billing regarding #453528 I have not been informed where they obtained my number for both #10747 and #453528.

23. The WASPA Secretariat emailed the formal notice of complaint to the Member on the 14th of October, and sent a reminder to respond on the 25th. As no response was forthcoming, the matter was referred to adjudication on the 28th.

Portion of the Code Considered

24. As the conduct complained of in both complaints took place in August and September 2010, version 9.0 of the WASPA Code of Conduct applies to both of them.

25. The following provisions of the Code of Conduct are applicable:

5.1.7. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.

...

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

Decision

26. Both complaints relate to infringements of the same provisions of the Code of Conduct arising from the same set of facts. The Adjudicator will consequently treat them together and impose sanctions for both together.

Unauthorised Subscriptions

27. The Member admits that the technical fault discussed above caused the Complainants and some few thousand others to be erroneously subscribed to a subscription service. The second sentence of section 11.2.1 states that "Customers may not automatically be subscribed to a subscription service without specifically opting in to that service." It is the Adjudicator's view that the Member has infringed section 11.2.1 of the Code of Conduct.
28. Some may interpret section 11.2.1 so as to exclude the instant scenario. "Customer" is defined in the Code of Conduct as "...a user of a mobile cellular telecommunications service that has indicated a willingness to access or utilise a service provided by a wireless application service provider." It could thus be argued that given the fact that neither of the Complainants had any relationship with the Member at all, they had not "...indicated a willingness to access or utilise a service provided by a wireless application service provider." Hence, the argument might be made that this section does not apply where random consumers are automatically subscribed.
29. The Adjudicator does not agree with this interpretation. It is clear that the drafters of the Code of Conduct intended to prevent just such scenarios as this one; a purposive approach to interpretation is appropriate when dealing with the WASPA Code of Conduct.

Failure to Identify Source of Personal Information

30. In both complaints the WASPA Secretariat asked the Member to indicate from where the Complainants' MSISDNs were obtained. In neither case did the Member provide this information. The Adjudicator managed to obtain this information, but feels it is inappropriate to disclose it here. Notwithstanding, it is clear that this information was not disclosed to the WASPA Secretariat, despite reminders, between the dates when the complaints were sent to the Member (the 15th of

September and 14th of October respectively), and the dates of escalation to adjudication (2nd November and 28th October respectively). These periods are both reasonable as contemplated in section 5.1.7 of the Code of Conduct, and given that the required information was not received by the time the matters were referred to adjudication, the Member has infringed section 5.1.7.

Sanction

Unauthorised Subscriptions

31. In mitigation, the Adjudicator is satisfied that the Member has taken appropriate remedial steps in refunding those affected by the error. The Adjudicator cannot take a view on the technical steps taken. While the Complainant in complaint 10822 had not been refunded at the date of his complaint, it is reasonable to suppose that refunding some 32 000 people is a significant undertaking that is not accomplished overnight. Having said that, the refund must of course be completed sooner rather than later.
32. The Member's record in respect of complaints is a good one – there have been only three formal complaints made against the Member, of which only one was upheld.
33. In aggravation, in complaint 9553 the Member admitted to subscribing consumers to its subscription services as a result of a database error. However the error had been resolved to the satisfaction of all parties by the time the matter reached adjudication, and the adjudication itself related to the Member's failure to respond to the formal complaint. The complaint was not upheld.
34. Complaint 9564, which **was** upheld, also resulted from a disputed subscription. The matter was adjudicated at the same time as complaint 9553, and the Adjudicator did not address the question of the actual erroneous subscription for the same reason. The issue in complaint 9564 was that according to the Member's records the Complainant had been subscribed, but never billed. The network operator's logs however told a different story and the Member was found to have infringed section 3.1.1 in that its poor record keeping was deemed unprofessional.
35. In complaint 9564 the Adjudicator issued the Member with a formal reprimand for the shoddy state of its backend systems, and made the following request to the WASPA Monitor:

The WASPA Monitor is requested to test the Member's systems to ensure that billing is accurately reflected thereon, unless this issue has already been dealt with between the Member and WASPA, as I suspect it may have been.
36. Complaints 9553 and 9564 were both lodged on the 19th of May 2010, and the technical glitch(s) involved were seen as being an isolated problem. It now appears however that the Member suffers from chronic problems with its computer systems.

37. The Adjudicator does not believe that the Member's infringement of section 11.2.1 is intentional, but substantial chaos and prejudice to consumers can result from the Member's conduct in this regard. Accordingly, the following sanctions are imposed in respect of the Member's infringement of section 11.2.1 of the Code of Conduct:
- 37.1. The Member may not subscribe anyone to any of its subscription services until such time as it can demonstrate to the reasonable satisfaction of the WASPA Secretariat that it has taken reasonable steps to ensure that unauthorised subscriptions to its services do not occur.
 - 37.2. The WASPA Secretariat may at its sole instance appoint an independent technical expert to review the Member's systems to satisfy itself of compliance with the condition imposed in paragraph 37.1. This expert should be acceptable to both parties, but should no expert acceptable to the Member be found, the Secretariat may appoint an expert of its choosing, with the proviso that the expert should not be a competitor of the Member or work for one, and that the expert signs such reasonable non-disclosure agreement as the Member may require.
 - 37.3. The network operators are to block to all new subscriptions to the Member's subscription services for the period set out in paragraph 37.1, as contemplated in section 14.4.3 of the Code of Conduct. This order shall stand only if it is technically feasible in the view of the WASPA Secretariat.
 - 37.4. The Member is fined the amount of R100 000, wholly suspended for the period of six (6) months, on the condition that it does not make itself guilty of an infringement of section 11.2.1 during that period.
 - 37.5. To the extent that the Member has not done so immediately, it must refund all those subscribed to its services without their consent.
38. Given the potential for prejudice that exists in having a backend system that is as problematic as the Member's has been shown to be, the sanctions set out in paragraphs 37.1 and 37.3 will not be suspended pending appeal.

Failure to Identify Source of Personal Information

39. In view of the Member's relatively clean record with the WASPA, the Adjudicator imposes the following sanctions in respect of the Member's infringement of section 5.1.7 of the Code of Conduct:
- 39.1. the Member is given a formal reprimand
 - 39.2. the Member is fined the amount of R 2 000 in respect of each complaint, for a total of R4 000.
40. As a postscript, the Adjudicator recommends that the Member examine the provisions of the Protection of Personal Information Bill, which will have a profound impact on the Member's duty in respect of personal information when it is enacted.

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