



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	HR Computek
Service Type:	Subscription Service
Information Provider:	Conti-Mobile
Source of Complaint:	Competitor
Complainant:	Cindy Scheepers
Complaint Number:	10550
Date Received:	09 December 2010
Code Version:	9.0
Advertising Rules Version:	Not applicable

Complaint

The initial complaint pertains to the automatic subscription of a customer of the complainant (message recipient) to a subscription service offered by the SP's client, the Information Provider.

The salient aspects of the complaint are as follows:

- (i) The complainant avers that the SP is in violation of clause 11.2.1 of the WASPA Code of Conduct (*version 9*):

Customers of the SP 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.

- (ii) The complainant avers that the SP is in violation of clause 11.2.2 of the WASPA Code of Conduct (*version 9*):

Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or a quiz.

- (iii) The Complainant had prior to the initial complaint, contacted the SP at the SP's call centre requesting proof of the message recipient's initiation of subscription to the relevant service and was not provided with a valid explanation for the subscription.

Service provider's response

The SP, in response, on or about the 17th of September 2010 stated that:

- (i) The SP contacted the message recipient personally and explained the nature of the "erroneous" subscription to the end of resolution of the issue; and
- (ii) The message recipient's number has been "removed from any notifications".

The message recipient accepted the explanation by the SP, being that an employee of the SP had used a cell phone number from his own personal contact list to "test" a subscription service offering and that the number had in the interim been removed from the subscription list of the SP.

At this stage the complaint was considered settled by the parties.

Complaint reopened

On 29 October 2010, the Complainant requested that complaint #10550 be reopened by WASPA as new details about the complaint had come to light:

- (i) The complainant alleged that a certain second person had also been automatically subscribed to the same service by the SP, again without the necessary consent to do so. The SP failed to provide a satisfactory explanation of the source of the information. Further that the explanation provided by the SP has altered substantially from the first instance: in the first instance, the SP claimed that the message recipient's auto-subscription to the service was attributable to the SP's internal testing whereas the SP in the second instance claimed that the auto-subscription of the message recipients was attributable to the SP's client, a certain Information Provider's practices;
 - (ii) The complainant further noted that the SP's primary contact person in this dispute was employed by the Complainant's company but was uncertain of the implication of this fact;
 - (iii) The complainant submitted that the issue of suspension of the Information Provider in question by the SP, warranted further inquiry; and
 - (iv) The complainant alleged that the SP did not practice due diligence.
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Service provider's response

WASPA contacted the SP to inform them that the complaint against them had been reopened. The SP responded by stating that:

- (i) The 2 relevant incidents of automatic subscription were attributable to their client, the Information Provider;

- (ii) The SP was not aware of the contents of the Information Provider's database or the source of the contents and cannot provide answers in this regard;
- (iii) The Information Provider's engagement with the SP was under a "test account";
- (iv) The SP had no agreement with the Information Provider at that stage;
- (v) The Information Provider's account with the SP had been terminated;

The SP stated that they had tried to contact the Information Provider, via email to establish where they had obtained their database from but had not received a response.

Complainant's Reply:

The Complainant responded on 29 October 2010 to WASPA's query on the satisfactory resolution of the complaint by the SP by providing as follows:

- (i) *more generally that the matter was not resolved; and*
 - (ii) *that the conduct of the SP was unacceptable as they had not done due diligence on an international company before doing business with them in the South African market;*
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Sections of the Code considered

Reference has been made to sections of the Code of Conduct

2. Definitions

- 2.13. An "**information provider**" is any person on whose behalf a wireless application service provider may provide a service, and includes message originators.

2.24 “**subscription service**” is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

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.

3.9.2. Where any information provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider.

3.9.3. A WASPA member shall, by obtaining the information provider's signature on the WASPA template agreement, be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and this shall be considered as a mitigating factor for the WASPA member when determining the extent of any possible liability for the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider.

3.9.4. The member may suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

3.9.5. The member must act in accordance with the WASPA complaints and appeal process and if appropriate, suspend or terminate the services of any information provider.

5.1. Sending of commercial communications

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 Subscription process

- 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.
- 11.2.2 Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or a quiz.
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Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her.

With reference to (i) the complaint, (ii) the SP's response(s) to the complaint, (iii) the complainant's responses and (v) the sections of the Code considered:

Turning to the SP's response to the re-opening of the complaint including the SP's correspondence with its client, the Information Provider, the SP did not take issue with the fact that the first and second message recipients were auto-subscribed to the service in question. The SP's response deals primarily with:

- (i) the issue of the inability to be answerable for the automatic subscription due to the automatic subscription being entirely attributable to the SP's client; and
- (ii) further, that the SP's ability to deal with this matter was further compounded by the fact that the SP has no formal agreement with the Information Provider.

On review of the Code of Conduct, specifically section 3.9, I tend to agree with the complainant regarding the necessity for diligent practices on the part of the SP vis-à-vis its relationship with the Information Provider.

The SP's submission pertaining to a "test account" does not, in my view detract from the SP's responsibilities in respect of its relationships with Information Providers as set out in 3.9 of the Code of Conduct or excuse a violation of the Code of Conduct. The SP is required to: (i) 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; and (ii) where any information provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information provider is made fully aware of all relevant provisions of the Code.

Further the SP, as per 3.9.2 of the Code of Conduct remains responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider

Whilst I note that the Information Provider's engagement with the SP was duly suspended, the SP, by his own admission did not enter into a WASPA template agreement, a measure which would have considered a "diligent measure" and contrary to the complainant's contention otherwise.

Largely, by the SP's own admission, I find the SP in violation of 3.9.1, 5.1.7 and 11.2.1 of the Code of Conduct.

Sanctions

The SP is fined an amount of R 30 000.00 payable to the WASPA Secretariat within ten (10) days of receipt of this report;