



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Lessa / Smartcall Technology Solutions
Information Provider (IP):	Not applicable
Service Type:	Subscription Service
Source of Complaints:	Public
Complaint Number:	10802
Code of Conduct version:	9.0
Advertising Rules version:	Not applicable

Complaint

Complaint #10802 is the escalation of unsubscribe request #405346. The Complainant's initial request dated 16 August 2010 states as follows:

"Sent me a WAP link "http://chat.mob.vc/images/sex_chat_contacts.gif" without being asked to or subscribed to their services. I Want to know how they got my number and the contact details of who gave my private number to them. I have been in contact with Ch. [redacted] (...[redacted]@lessa-mobile.com) who refused to release the person who subscribed me to their sex services. My cellular number is [redacted]."

On the same day, the Complainant again wrote to WASPA, stating: ***"I want to know who subscribed me in the first place and their contact details please."*** In reply, WASPA sent the following contact details for the SP to the Complainant on 18 August 2010:

***"The details of the company are below
WASP Display Name: Lessa
Web site: http://www.lessa-mobile.com/
Customer support phone number: 27110835382
Customer support phone number (2): 27110835375
Customer support email: support@lessa-mobile.com."***

It appears from the correspondence furnished to me that the Complainant attempted to make contact with the SP on numerous occasions, with little success. The Complainant accordingly wrote to WASPA on 1 October 2010, as follows:

"As I expected I did not receive a reply as to who "subscribed" me to the services of Lessa Mobile, as promised by ... [redacted] of that company. Is anyone going to answer me on this? Or are the ethics of your industry as I suspect?"

On the same day, WASPA wrote to the SP asking for a response to the complaint, noting that it had been 4 weeks since the SP had last emailed the Complainant. On 11 October, whilst still awaiting a response from the SP, the Complainant wrote as follows: ***"I understand under the Electronic Communications and Transactions Act, 2002 Unsolicited goods, services or communications that I should be supplied with the identifying particulars of the source from which that person obtained the consumer's personal information, on request of the consumer. I have asked for this on several occasions now and it has not been forthcoming. I want that information"***.

Due to the fact that no reply from the SP was forthcoming, the request was escalated to a formal complaint, sent by WASPA to the SP on 14 October 2010. In the notification of this formal complaint by WASPA to the SP, WASPA stated, *inter alia*, as follows:

"It is recommended that your response should include as much as possible of the following information that is relevant to this complaint:

- Logs as stipulated in clause 11.9.2. of the Code of Conduct***
- Information on how this service was or is advertised e.g.: TV, WAP, Internet, SMS, radio***
- A copy of the advertisement/marketing material***
- In the case of a TV advert please provide flight times and codes***
- Statistics on the number of entries/users of this service"***

On 19 October, WASPA also sent notification of this complaint to Smartcall Technologies Solutions (referred to hereafter as "Smartcall"), a WASPA member, due to the fact that the SP was an Affiliate member and appeared to have been making use of Smartcall's infrastructure in order to provide the service complained of. WASPA accordingly made Smartcall aware of the complaint and all its details, and stated the following:

"You may:

- 1. Choose to allow the relevant Affiliate member to respond to this complaint, and not provide any response of your own; or***
- 2. Provide a written response to the complaint, which will be considered by the adjudicator in addition to any response provided by the relevant Affiliate member.***

It is recommended that your response should include as much as possible of the following information that is relevant to this complaint:

- Logs as stipulated in clause 11.9.2. of the Code of Conduct***
- Information on how this service was or is advertised e.g.: TV, WAP, Internet, SMS, radio***
- A copy of the advertisement/marketing material***
- In the case of a TV advert please provide flight times and codes***
- Statistics on the number of entries/users of this service***

Depending on the severity of the alleged breach, you may also wish to take additional steps regarding the service that is the subject of the complaint. If you do choose to take such steps in response to this notification, please notify the WASPA Secretariat of the steps taken.

Please note that this message constitutes formal notification of this complaint in terms of clause 14.3.3 of the WASPA Code of Conduct. This means that whether or not you choose to respond, it is possible that the independent adjudicator will treat you as a respondent for this complaint, and sanctions could be imposed on your company. The adjudicator may also hold you liable for the actions of the Affiliate member in the event that that member does not comply with any sanctions imposed on that member by the adjudicator.

It appears from the correspondence furnished to me that there has been no response at all from Smartcall.

SP Response and Complainant's Feedback to Response

On 18 October 2010, Mr ... [redacted] of the SP replied as follows:

"Once again I want to thank you for giving this important information and the opportunity for a statement. We always try our very best to satisfy our customers wishes and to fulfil the inquiry's send by WASPA.

Together with STS we investigated in this over the last month as Mr [redacted] already mention and as you can see in the communication listed below.

Unfortunately we had not been able to receive a proper answer to our questions.

Nevertheless the following was investigated:

1. Regarding how Mr [redacted] entered our service / SPAM:

We found out that Mr [redacted] (or somebody else who has access to his phone) has clicked on a WAP banner which we use for advertising on several Wap portals. Our system was not able to recognize the MSISDN, so the user was redirected to a page where he had to enter the MSIDN manually. We assume that Mr [redacted] or somebody else has entered the site via the WiFi enabled phone through a wireless Internet connection. This might be also the reason for not getting the phone number at the first time plus it might be the reason why we couldn't give Mr [redacted] a proper answer to his question regarding who has given us his personal details.

2. No possibility to unsubscribe

After Mr [redacted] has received an SMS from us containing a link to our Wap portal landing page he had to confirm the T&C which he did. The T&C are displayed right under the confirmation button with only one line break in between.

At this page there are several ways of unsubscribing the service offered, eg.:

- 1) Send stop to shortcode (Displayd on opt-in page, Disclaimer page, Welcome SMS).***
- 2) Call center number (Displayd on opt-in page, Disclaimer page, Welcome SMS).***
- 3) Send e-mail to support@lessa-mobile.com (Displayd on opt-in page, Disclaimer page, Welcome SMS).***
- 4) Go to my profile then "unsubscribe" link;***

Please also find attached a proof of subscription including date and IP which documents that the customer gave us the permission to contact him.

The point is that after Mr [redacted] send us his wish to be unsubscribed it took a view eMails more from our side until he gave us the number. After we received the number we unsubscribed him at once at 16-Aug-2010 Mon 09:17.

We also refunded him in full just to make sure that no damage will be caused on his side. As we currently see no mistakes on our side we would like to ask you to close the file. If we could provide you with any further information we'll do our very best to deliver this as soon as possible.

If you also do have any further question please let me know.

Yours sincerely,

... [redacted]"

The attachment sent by the SP as proof of subscription is a log entitled "***WAP Opt-in Information for MSISDN [redacted number]***" containing the following information:

6 August 2010 23:04; Type – WAP Menu; Menu – WAP Chat; Downloads – 2, followed by the identifying handset details.

This response from the SP was sent to the Complainant on 19 October 2010, asking him if the complaint had been resolved to his satisfaction. The Complainant responded on the same day that it had not been resolved to his satisfaction, noting as follows:

"(1) I have disabled WAP and Data connections on my mobile phone a few years ago, not only in the settings on my phone but also with my service provider (MTN). Should it become necessary I am sure that MTN can verify my statement. To imply that "someone who had access to his phone" is also nullified by this fact. It is way too easy for companies represented by your organisation to spam people and then place the burden of proof on them to display that they did not subscribe, which is what Mr [redacted] is attempting to do here.

(2) I never unsubscribed to anything, and certainly did not acknowledge Terms and Conditions at any time, no matter what Mr [redacted] says. I challenge him to provide irrefutable proof that I did.

I also did not reply on my cellular phone, I never do to cellular spam, as your industry is notorious for billing people for services that were never asked for in the first place. I wrote down the message that I received and then attempted to trace him via my PC based internet connection from simple Google searches, which eventually bought me to WASPA as well.

"Please also find attached a proof of subscription including date and IP which documents that the customer gave us the permission to contact him."

Please provide me with this proof. I am eager to see it.

(3) Clearly from my initial emails to Mr [redacted] he had no intention of ever releasing the "subscription" details to me, it was only after I threatened him with WASPA's involvement did he promise to release said details, which he

then never did, and simply stopped replying to my queries in the hope that I would give up. It is not that he failed to deliver a "prompt answer" as he so euphemistically writes, but that he did not reply at all.

(4) That he refunded me is utter nonsense. There was never an amount to refund in the first place. The incompetence of this statement amazes me.

I am astounded that Mr [redacted] does not see any mistakes from his side; it is full of inaccuracies to say the least, but hope that WASPA does.

I look forward to individual answers to each of my four comments above. Thank you for your actions on this matter, it is much appreciated. WASPA is a valuable organisation to the public."

Also on 19 October 2010, the Complainant responded in a separate email that the IP address that the SP had identified was his Vodacom data connection that he used to track the SP down – in other words, it was not the IP address of the cellular device on which the alleged spam was received. The Complainant states that he performed a Google search for the wording of the spam message (and in this manner managed to track the SP down) and that the IP address that he used for this purpose was the IP address that the SP has identified. He enclosed a copy of the "trace" he ran on the IP address. He also stated that he reconfirmed with MTN that it is impossible for him to connect to data services with his cell phone.

The Complainant also sent correspondence to the chairperson of WASPA on 20 October 2010, asking for his involvement in the resolution of the complaint. In this correspondence, the Complainant stated that he has since been spammed via SMS with "***yet more porn sites***". He identified three. He stated that he phoned these SP's and that they claimed that they got his number from his cellular phone, and that one of them identified the handset as a Nokia, which he said was incorrect, as his phone is a Samsung. He reiterated that the WAP and data services on his phone had been disabled by MTN a while back at his request, before receiving any spam, and he enclosed a copy of the MTN data services records as proof. Finally, he stated as follows:

"Also, I was also told by WASPA on 2010/08/16 that I was unsubscribed from all of your spam on the WASPA unsubscribe system, your reference number #405346. So why then am I still being harassed by your members telling me that I must cancel a subscription that I never made in the first place or I will be charged R(X) per day? Why can you as the industry self-regulating body not protect me against this harassment? And stop me getting pornographic spam texts sent to my cellular phone?"

Having regard to the WASPA unsubscribe log, it does appear that Mira, Switchfire and Sprint Media were all asked during the course of October to unsubscribe and remove the Complainant's MSISDN from their mailing lists, which they each confirmed they had done. It was only Sprint Media who commented that no refund had been offered, as the Complainant had subscribed from a WAP site and all sign up and welcome messages had been delivered (although these have neither been requested nor presented).

This complaint, however, is a complaint made directly against Lessa, a WASPA affiliate member and, indirectly, against Smartcall Technologies, a WASPA member. The complaint relates to a particular subscription service and this adjudication is limited only to that service.

Subsequent to considering all the documentation furnished to me, particularly the SP's initial response and log purporting to be proof of subscription, I directed WASPA during January 2011 to again ask the SP to deliver, within 5 business days of the request (which was sent on 19 January 2011), a copy of the advertisement for their service that they allege the Complainant clicked on, as well as copies of all logs showing all messages sent between the SP and the Complainant from the date of subscription to the date of unsubscription. They were also asked to deliver a statement showing all charges billed against the Complainant and the date of each charge.

In response, the SP sent what purports to be a more detailed message log, and a copy of the relevant advertisement. The log contains the same information as the first log sent by the SP, noting that there were 2 WAP downloads from a certain MSISDN with particular handset details, and then goes on to show a further record of the SP having unsubscribed and "stopped" this user on 16 August 2010, with confirmation of a free unsubscribed message having been delivered. The SP also confirms in covering correspondence that no charges were billed to the Complainant (which is contrary to Mr [redacted]'s initial email which states that all charges were refunded in full).

Decision

Section 11 of the Code deals with subscription services. Various sub-sections are relevant to the complaint at hand. Section 11.2 introduces the basic requirements of a valid subscription process as follows:

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 quiz.

The Complainant alleges that he was automatically subscribed to a subscription service without specifically opting in to that service, in contravention of section 11.2.1 and 11.2.2. The two log documents furnished by the SP described above (as purported proof of subscription) do not provide any conclusive evidence that the Complainant in fact specifically subscribed to a service. As discussed above, the Complainant states that the "download history" provided by the SP shows an IP address which he alleges is actually the Complainant's Vodacom data connection that he used to track the SP down, and it is not the IP number of his cellular phone, nor was it the cell number to which the SP had sent their spam. This dispute is a difficult one for an independent adjudicator to resolve, however I do not think it is necessary to resolve it in this instance for reasons that I proceed to set out below.

The fact of the matter is that a valid subscription process can only be said to have occurred when all of the relevant requirements of the Code have been complied with. In this regard, it is poignant to note that the SP alleges that:

“We found out that Mr [redacted] (or somebody else who has access to his phone) has clicked on a WAP banner which we use for advertising on several Wap portals. Our system was not able to recognize the MSISDN, so the user was redirected to a page where he had to enter the MSIDN manually.”

It is therefore relevant to note the content of section 11.2.4 of the Code which provides as follows:

“If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must be sent to the customer's mobile handset in order to prove that the number entered matches the customer's mobile handset number. This message may either:

(a) contain a PIN number which is then confirmed or validated on the web page, or

(b) contain a URL with a unique identifier, which, when clicked, validates the handset number.”

It is clear that where a subscription service is initiated by the entering of a customer's mobile number on a web page or WAP site, an obligation arises on an SP to send a message to that mobile number requesting confirmation of the subscription through a further validation process.

Section 11.2.6 also provides that:

“For any subscription services that are initiated via WAP, and which are not confirmed by the customer using the validation process set out in 11.2.4, it is a requirement for the service provider who has a direct contract with the network operator to display a WAP confirmation page to the potential subscriber. This confirmation page must be displayed after the subscriber has first indicated an interest in the subscription service by clicking on a “join” or similar link.”

The words ***“validation process set out in 11.2.4”*** as used in section 11.2.6 refer clearly to the act of a consumer confirming their subscription and validating their handset by means of a pin or unique identifier as expressly provided for in 11.2.4 (a) and (b). It is not entirely clear from the wording of section 11.2.6 whether the section:

- (i) exempts an SP from sending a message requesting confirmation as provided for in 11.2.4 where a subscription service is initiated after entering a consumer's mobile number of a web page if the SP has already produced a WAP confirmation page that must be displayed after the subscriber has indicated his or her interest in the service by clicking on a “join” or similar link; or
- (ii) enables an SP to confirm a subscription using the WAP confirmation page method envisaged by 11.2.6 in all cases except for cases where the subscription was initiated by entering a mobile number on a web page or WAP site.

My interpretation of the interplay between 11.2.4 and 11.2.6 is that 11.2.6 caters for situations where a subscription service is initiated via WAP without entering a mobile number on a web page or WAP site. The explanation given by the SP that ***“our system was not able to recognize the MSISDN, so the user was redirected to a page where he had to enter the MSIDN manually”*** suggests that if the SP's system

had been able to recognise the MSISDN, the consumer would not have been required to enter his mobile number on a web page and the obligations of 11.2.4 would not have arisen. If the system had been able to recognise the MSISDN, the subscription could have been confirmed using the method detailed in 11.2.6. But in this case, the SP's system could not recognise the MSISDN, so the obligations of 11.2.4 would have to have been complied with for a valid subscription to have been concluded.

There can be no debate that section 11.4 of the Code provides further as follows:







11.4. Welcome message

11.4.1. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

- (a) The name of the subscription service;**
- (b) The cost of the subscription service and the frequency of the charges;**
- (c) Clear and concise instructions for unsubscribing from the service;**
- (d) The service provider's telephone number.**

In order to conclude that legitimate subscription had actually occurred, all of the compulsory confirmation, validation and welcome messages that an SP is required to send must have actually been sent.

The SP was expressly requested to furnish copies of its message logs. The logs produced are pictured below with mobile numbers and IP addresses redacted:

MSISDN  is in the following Club(s):									
Opt-in Date	Last BCST Date	Stop Date	Club ID	Billing Gateway	Info	Credits	Status	Tools	
(chat) 6-Aug-2010 Fri 23:04	6-Aug-2010 Fri 23:04	16-Aug-2010 Mon 08:41	52	GW:34 AppId:12846	None	100	Stopped	[STOP] [BLOCK] [SEND STOP SMS]	
MT history for MSISDN: 									
Date	Gateway	MSISDN	Network	Country	Type	SMS Message			Status
16-Aug-2010 Mon 09:17	GW:292 AppID:42361 SC:42361		MTN	South Africa	Free Text	FREE SMS: You have been unsubscribed from all services, come back and see us again soon!!			DELIVERED
MO history for MSISDN: 									
Date	MSISDN	Network	Country	Gateway	MO SMS				
There are no MO SMS for this MSISDN!									
WAP Opt-in information for MSISDN: 									
Date	MSISDN	Type	Menu/Prd. No.	Download(s)	Handset Details				
6-Aug-2010 Fri 23:04		WAP Menu	WAP Chat	2	Mezilla/5.0 (Windows; U; Windows NT 6.1; en-GB; rv:1.9.2.8) Gecko/20100722 Firefox/3.6.8				
Date	Product	Type			Session ID				

The logs produced by the SP have no evidence that any confirmation, validation and/or welcome messages were sent. This can only mean one of two things, either none of these messages were sent or no records of the messages were kept.

Section 11.9.2 of the Code contemplates the retention of subscription service logs and provides specifically as follows:

“11.9.2. When requested to do so by WASPA, a member must provide clear logs for any subscription service customer which include the following information:

- (a) proof that the customer has opted in to a service or services;**
- (b) proof that all required reminder messages have been sent to that customer;**
- (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and**
- (d) any record of successful or unsuccessful unsubscribe requests.”**

Given that one of the central purposes of the Code is to foster confidence amongst consumers that the industry is well regulated, and that issues such as auto subscription can be policed - the importance of proper record keeping and production as contemplated by section 11.9.2 cannot be underestimated. It is only by showing a complete and accurate log that one can establish compliance by the SP with the steps required of an SP during the subscription process.

The SP has made no claim that any portion of its messages logs have been lost or destroyed so on the evidence before me it appears as though required confirmation and welcome messages were not sent.

It should be mentioned here that although this complaint primarily takes the form of an "auto-subscription" complaint, there is also the question of spam. Complaints of this nature have arisen and been upheld against the SP before (see reports 9792 and 10152) for very similar factual situations to the one at hand – i.e. receiving a "WAP push" message for subscription to adult content. In the present case it is impossible to determine on the available evidence whether an advertisement was in fact clicked on by the consumer (as alleged by the SP) or whether unsolicited spam was received by the consumer (as alleged by the consumer). In such disputes, the matter can sometimes be adequately resolved by having reference to the SP's own version. On its own version, it has breached the code through its failure to comply with the subscription processes provided for in section 11, in particular by failing to send any subscription confirmation and/or welcome messages as required by the Code.

Sanction

In determining the sanctions to be imposed on the SP, both the seriousness of the offence and its prior conduct should be taken into account. It also bears mentioning that where adult content is concerned, any breaches of the Code are viewed as particularly serious. Claims of involuntary subscription to services are undermining confidence in the wireless application services industry as a whole and the breaches evident in this matter run contrary to the very purpose and ambition of the Code.

An extract from the adjudication report in complaint 9792 is illustrative. The complainant in that matter complained, inter alia, that:

My wife was spammed with a WAP push as explained in my complaint. Clicking on the link in this WAP push takes one to sign up page. NOT a WAP Banner ad. They have not dealt with the spam component of the complaint.

The response of the SP stated, inter alia, as follows:

"Our system was not able to recognize the MSISDN, so the user has been redirected to a page where he had to enter his MSIDN manually."

"We assume that the customer has entered the site via his WiFi enabled phone (Nokia N78) through a wireless Internet connection. This might be also the reason for not getting his phone number at the first time. After the user has received an SMS from us containing a link to our Wap portal landing page he had to confirm the T&C which he did. The T&C are displayed right under the confirmation button with only one line break in between (pls see the attached screenshot on that)."

Various breaches of the code were upheld against the SP in this complaint and fines totalling R80 000 were imposed.

In complaint 10152 the adjudicator summarised the facts of the complaint as follows:

The complainant complained of receiving a WAP push message as SPAM. She stated that when she clicked on the link to the website she noticed that the website was sex related and wanted to exit. She states that it was not possible to click on anything as she could not move the cursor and as such she had to exit the site.

On complaining, she was provided with the details of her apparently having entered her MSISDN details into the website whereafter she was sent the message she complained of. Her complaint ultimately rests not on the process of the messages sent and the subsequent notifications but the fact that she never entered her details on the website and as such the WAP Push message confirmation itself was SPAM.

The response of the SP to complaint 10152 was as follows:

“Regarding SPAM:

a. The customer has clicked on a Wap banner which is used for advertising our Wap portal;

b. Their system was not able to recognize the MSISDN, so the user was redirected to a page where she had to enter his MSIDN manually;

c. We assumed that the customer entered the site via a WiFi enabled phone (Nokia N75) through a wireless Internet connection. This might be also the reason for not getting her phone number at the first time.

2. Regarding the issue of no possibility to unsubscribe:

a. After the user received an SMS from us containing a link to our Wap portal landing page she had to confirm the T&C which she did;

b. The T&C are displayed right under the confirmation button with only one line break in between (pls see the attached screenshot on that)”

Fines totalling R80 000 were again imposed on the SP in the above matter.

The repeated breaches of the Code by the SP are very serious and the similarities between the previous complaints upheld and the responses given by the SP are striking.

I am obliged in terms of section 14.3.15 of the Code, when determining appropriate sanctions, to take into consideration any previous successful complaints made against the member and any previous successful complaints of a similar nature. I have outlined above the previous breaches of a similar nature and the sanctions imposed to which I have had regard.

In light of the seriousness of the breaches and the previous complaints upheld against the member, I am accordingly of the view that greater sanctions are now required than those previously imposed on the SP in complaints 9792 and 10152.

It is worth noting that the SP also falls within the definition of an “information provider” in terms of the Code and that the SP makes use of the services of another member (described sometimes as “Smartcall Technologies” and/or “Smartcall Technology Solutions”, I will refer to either or both entities, should there be more than one, as “Smartcall”).

The following sanctions are now imposed:

1. Smartcall is required to terminate all services to the SP for a period of not less than 90 days.
2. A fine of R100 000.00 is imposed on the SP, to be paid to the Secretariat within 5 working days of the date of delivery of this report failing which the SP shall be expelled from WASPA.
3. In the event that the SP is expelled from WASPA, the Secretariat is directed to notify all network operators and other members accordingly.