

REPORT OF THE ADJUDICATOR

Complaint reference number:	10963
WASPA member(s):	2Comm (the Information Provider or "IP") and Mira Networks (the Service Provider or "SP")
Membership number(s):	1019 and 0011
Complainant:	Public
Type of complaint:	Subscription service
Date complaint was lodged:	2010-10-11
Date of the alleged offence:	06-06-2010 until 13-10-2010
Relevant version of the Code:	9.0
Clauses considered:	11.5.1, 11.5.2, 11.5.5
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	Not applicable
Related cases considered:	Not applicable

Complaint

Complaint #10963 is the escalation of unsubscribe request #590946, logged on the WASPA unsubscribe system on 11 October 2010. The request was escalated to a formal complaint due to the fact that the Complainant was not satisfied with the IP merely unsubscribing him and he accordingly requested WASPA to investigate, *inter alia*, how he was subscribed to a content service and how this service could have been activated without his consent.

The Complainant wrote to WASPA on 11 October 2010 as follows:

"Unsolicited MMS received accompanied by an opt-out [option]. Did not respond because (a) never opted in, in the first place (b) have no desire to use the product / service (c) the opt out response number looks like one of those costly sms numbers. A month later the cell phone provider (in my case Cell C) levies a series of charges at an astronomical R13.15 per instance of alleged 'content service' – all associated with something called Mira Online. This is fraud. Cell phone company then denies any responsibility despite the fact that they are the conduit of funds to Mira and quite possibly provided personal contact details to Mira (contra 4.2.1.)"

It appears from the unsubscribe request document generated by WASPA that the SP unsubscribed and blocked the Complainant's number on 13 October 2010, following which the Complainant again wrote to WASPA on 14 October 2010 as follows:

“To be quite honest I think your response is totally unsatisfactory. You have limited your action to the issuing [of] an “unsubscribe” request for something that was never legitimately subscribed for – hence this is fraud pure and simple. So what action will you be taking on this – the real issue? It is astounding how widespread and prevalent this form of fraud and deception is amongst certain of your members. In my view it is WASPA’s failure to enforce its own rules and standards that amounts to condonation of the behaviour that you allegedly seek to regulate. Your piecemeal response to individual complaints (such as issuing “stop” requests) is clearly not addressing the root of the problem and leads to suspicion of some level of organisational complicity with the perpetrators. Please urgently advise on the following: 1. How was my cellular number in South Africa obtained by the organisation involved (MIRA ONLINE)? 2. Was my service provider (Cell C) financially advantaged by virtue of the transaction? 3. I note through my own investigation that there is some link to a UK based organisation (2Comm) as a content provider with further involvement of yet another service provider. Who is this underlying provider and what premium number are / were they using? 4. What services was I allegedly subscribed to and how was the activation accomplished without my consent? 5. In connection with (4) above, please detail the activation mechanism that was used as this was not a normal SMS but rather some form of live banner (WAP?) popup. Looking forward to your prompt response.”

WASPA sent the formal complaint notification to the IP on 29 October 2010 and to the SP on the same date. The IP as Affiliate Member is bound by the Code, but the SP's infrastructure was being made use of to provide the service complained of, and the SP may accordingly also be treated as a respondent for the purposes of this complaint.

Information provider's response

As mentioned above, the SP unsubscribed and blocked the Complainant's number on 13 October 2010, shortly after the complaint was logged. The matter was handed over by the SP to the IP on 15 October 2010. The IP wrote to WASPA on 21 October 2010 to advise WASPA that it had contacted the Complainant and informed him that it would issue him with a refund as a goodwill gesture, but that the Complainant had refused to provide his banking details for the purposes of the refund. The IP confirmed that the service had been stopped and that the Complainant had been informed of this.

An undated log provided by the IP shows the following:

Sheet1

When Hit	Device Information
06/06/10 08:19	Remote IP: 41.157.70.12 Nokia6500

This log seems to suggest that a Nokia6500 handset accessed a site from a particular IP address on 6 June 2010 at 08h19.

The IP's written response dated 2 November 2010 addresses each of the Complainant's questions set out above in the quoted communication to WASPA dated 14 October 2010. The IP quotes each question and then answers with a response, below. I quote therefrom for ease of reference:

"1. How was my cellular number in South Africa obtained by the organisation involved (MIRA ONLINE)?

IP response: This user's number was obtained by browsing and entering one of our services on 17th May 2010 using a Nokia 6500 from IP Address: 41.157.70.12, the user did not subscribe to our service at this time.

2. Was my service provider (Cell C) financially advantaged by virtue of the transaction?

IP response: The consumer must ask Cell C about this as we receive a revenue share from the aggregator we contract with after these deductions have taken place.

3. I note through my own investigation that there is some link to a UK based organisation (2Comm) as a content provider with further involvement of yet another service provider. Who is this underlying provider and what premium number are / were they using?

IP response: As you can see from the below logs there were no investigations needed as we have our company name within the reminder messages along with our Customer Service number. The consumer was given MIRA Networks details by Cell C as the short code used is attached to their network but we utilise this code for our traffic.

4. What services was I allegedly subscribed to and how was the activation accomplished without my consent?

IP response: We then sent them a Free 2 User message on 5th June 2010 @ 15:06 for the World Cup Predictor Service of which the user clicked on the promotion and then proceeded to subscribe on 6th June 2010 at 08:18 using the same handset and IP address as above to the service after reading our terms and conditions. We then sent the consumer a welcome message as per below at 08:19am, please see below logs of all regulatory messages. As you can see from the below the user was sent all the relevant FREE messages that the regulation[s] stipulate."

The following logs appear at this point in the IP's response:

Shortcode	Mobile Number	Status	Message
FreeMsg	27846644994	SENT	http://mobilepredictor.com/?c=addb1f6dc
FreeMsg	27846644994	SENT	WELCOME TO PREDICTOR. Make cup final and win the 1s R14.99 per 3 days. Send STOP to unsub Help:0114643394
FreeMsg	27846644994	SENT	FreeMsg: U r a member of 2Comm's World Cup Predictor to cancel. Subscription 14.99R every 3 days.
FreeMsg	27846644994	SENT	FreeMsg: U r a member of 2Comm's World Cup Predictor to cancel. Subscription 14.99R every 3 days.
FreeMsg	27846644994	SENT	FreeMsg: U r a member of 2Comm's World Cup Predictor to cancel. Subscription 14.99R every 3 days.
FreeMsg	27846644994	SENT	FreeMsg: U r a member of 2Comm's World Cup Predictor to cancel. Subscription 14.99R every 3 days.

The IP's response continues answering the Complainant's questions:

"5. In connection with (4) above, please detail the activation mechanism that was used as this was not a normal SMS but rather some form of live banner (WAP?) popup.

IP response: Please refer to point 4.

The IP's reply then continues, explaining that the Complainant had refused a full refund (of R69.96) as he did not wish to make personal banking details available – and that the IP is fully prepared to refund him R100.00 as a gesture of goodwill, and for any inconvenience caused. It also restates that the Complainant received all the correct messages and if he really didn't want to take part in the service, he had ***"the full option to respond with STOP as stipulated in the Welcome messages."***

The Complainant replied to the IP's response in a lengthy email to WASPA dated 18 December 2010. He disputes the IP's case. An extract from his reply is quoted below:

"In sum [redacted name]'s scenario is that I was identified for a "service" opportunity by means of his company employing some form of data gathering technique that managed to capture my cell number whilst I was allegedly browsing the internet including apparently his company's website and service offering – all this occurring on the 19th May. Rather odd therefore that this handset's billing for May shows precisely zero internet expenditure that would support this ridiculous claim. In any event there is no doubt that Mr [redacted name] did indeed obtain my handset number and I have no doubt that the means employed are illegal. Having obtained the handset number his company was then induced to send an unsolicited email on the 5th June that we are to believe so enamoured me as to avail myself of an opportunity to participate in some sort of online gambling. Again I have absolutely no record of these "messages" in my personal call or SMS history as they have all conveniently disappeared within seconds of receipt leaving the consumer without any evidence or response mechanism. Rather clever technology that Mr [redacted name] prefers to avoid discussing preferring rather to produce a 'supporting log' that will have one believe that I interfaced with his service...[...] I do however continue to seek recompense and await a constructive solution as to my compensation."

Following the assignment of this complaint for formal adjudication, on 21 June 2011 I requested that WASPA obtain the following further information from the IP and the SP within 5 working days of the request:

1. A copy of the online marketing campaign materials (i.e. web pages, advertisements, banners, etc.) that 2Comm alleges the Complainant responded to in June 2010.
2. A copy of the WAP mobile internet landing page (in the form that it would have appeared to the Complainant at the relevant time in June 2010).
3. A copy of any WAP confirmation page displayed to the Complainant.
4. A detailed description of the subscription activation and subscription confirmation processes and mechanisms.
5. Copies of any and all welcome messages, subscription confirmation messages and monthly reminder messages sent to the Complainant in log format showing MO/MT numbers, date and time of sending, delivery status and detailed message content.

WASPA sent this request to the IP on 21 June 2011, and it responded on 1 July 2011, repeating the earlier response but also attaching a document that sets out the “customer experience” step by step. The following is accordingly what the IP alleges would have been displayed to the Complainant:

A typical client will subscribe through a wap push or banner advert



And reaches our landing page as per this:



When users click “SUBSCRIBE AND ENTER” button it gives us our first opt in. They are now taken to a confirmation page.



Predict your way to R1000 for
only 14.99 every 3 days
SUBSCRIPTION 18+. Helpline
0861106472. To Unsubscribe
send STOP to 37916

Confirm and Enter

[Terms and Conditions](#)

Users click "CONFIRM AND ENTER" This is our second opt in.

Once the user has clicked on this button they are subscribed and a welcome message is sent:

They now have access to the site and predict scores.

The user is now on our billing cycle at R14 per 3 days.

Users receive a subscription reminder message once per month Please see below for the F2U logs:

The IP then includes the following log of welcome and reminder messages sent to the Complainant:

Shortcode	Mobile Number	Status	Message	When Sent
FreeMsg	27846644994	SENT	http://mobilepredictor.com/?c=addb1f6dc	05/06/10 15:06
FreeMsg	27846644994	SENT	WELCOME TO PREDICTOR. Make cup final and win the 1st prize in Football. This is a subscription service at R14.99 per 3 days. Send STOP to unsub Help:0114643394	06/06/10 08:19
FreeMsg	27846644994	SENT	FreeMsg: U r a member of 2Comm's World Cup Predictor Service. Probs 0114643394 SMS stop to 37916 to cancel. Subscription 14.99R every 3 days.	30/06/10 19:37
FreeMsg	27846644994	SENT	FreeMsg: U r a member of 2Comm's World Cup Predictor Service. Probs 0861106472 SMS stop to 37916 to cancel. Subscription 14.99R every 3 days.	31/07/10 16:43
FreeMsg	27846644994	SENT	FreeMsg: U r a member of 2Comm's World Cup Predictor Service. Probs 0861106472 SMS stop to 37916 to cancel. Subscription 14.99R every 3 days.	31/08/10 20:37
FreeMsg	27846644994	SENT	FreeMsg: U r a member of 2Comm's World Cup Predictor Service. Probs 0861106472 SMS stop to 37916 to cancel. Subscription 14.99R every 3 days.	30/09/10 16:58

Sections of the Code considered

“11.5.1. A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter.

11.5.2. The reminder messages specified in 11.5.1 must adhere exactly to the following format, flow, wording and spacing:

You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

Or

You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code]."

"11.5.5 The cost of service and frequency of billing must use the format "RX/day", "RX/week" or "RX/month" (or RX.XX if the price includes cents). No abbreviations of "day", "week" or "month" may be used."

Decision

There are matters where it is difficult for an adjudicator to determine the veracity of one party's allegations over another's. This matter is such a matter. I am not in a position to determine whether or not the Complainant actually did follow the specific steps to subscribe to the service that the IP alleges the Complainant did. However, when adjudicating on any alleged breach of the Code of Conduct that entails a disputed set of facts, where the disputed facts are not capable of clear resolution on the evidence placed before the adjudicator, the adjudicator is entitled, in appropriate circumstances, to determine whether any breach of the Code has occurred on the evidence that is put up by the respondent.

With this principle in mind, I have considered the content of the message logs adduced by the IP in this complaint. In this regard, I have noted that the monthly reminder messages sent by the IP read as follows:

"FreeMsg: U r a member of 2Comm's World Cup Predictor Service. Probs0114643394 SMS stop to 37916 to cancel. Subscription 14.99R every 3 days."

Section 11.5 of the Code deals with reminder messages. Section 11.5.1 and 11.5.2 state as follows:

"11.5.1. A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter.

11.5.2. The reminder messages specified in 11.5.1 must adhere exactly to the following format, flow, wording and spacing:

You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

Or

You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code]."

Notably, the reminder messages sent by the IP do not begin with "**You are subscribed to...**", but rather confirm that you are a "member" of a service. The use of the word "Free" also denotes something is being provided to you without any charge. Membership could easily be misconstrued as being free and the words "Subscription 14.99R" could easily be taken as advertising some other form of premium or paid-for membership. Being a member of something does not necessarily imply that you are paying at intervals for an ongoing service. The prescribed format of the reminder message in section 11.5.2 also sets out that the words "**You are subscribed to...**" should be directly followed by the cost and frequency of billing, which is not the case in the IP's messages, which put this information at the end. Furthermore, in the context of the unsubscribe instruction, the IP uses upper case lettering for "SMS" but lower case lettering for "stop". Section 11.5.2 of the Code requires the opposite.

The IP is in breach of section 11.5.2 of the Code in several respects.

Furthermore, in terms of section 11.5.5 of the Code, reminder messages must display pricing information in the format "RX.XX" per day, week or month. The reminder message used by the IP in this service displays the price of the service as "14.99R" which is a breach of section 11.5.5 of the Code.

While the complaint of involuntary subscription to the IP's service is not upheld, breaches of section 11.5.2 and 11.5.5 of the Code have been established on the IP's own version.

Sanctions

Given the purpose behind the Code here, which is to make it clear to the consumer that they have been and are *subscribed to a service* which is being *billed for* at a certain rate and at regular intervals – the non-compliance with section 11.5.2 is significant. Even on the IP's own version of events, it is possible that had the first reminder message been sent to the Complainant in the appropriate and specific format required by the Code of Conduct, the Complainant may have simply availed himself of the un-subscription mechanism at the first opportunity and the complaint may have been avoided.

The following sanctions are now imposed:

1. The IP shall refund the Complainant all sums debited against his account plus interest thereon at the rate of 15,5% per annum calculated daily and compounded monthly in arrears from date of debit until date of refund.
2. The IP shall further compensate the Complainant in the amount of R500.
3. At the Complainant's election, the amounts referred to in paragraphs 1 and 2 must be paid by the IP by means of direct deposit into an account nominated by the Complainant, alternatively by means of a non-transferable bank guar-

anted check payable to the Complainant and delivered to the Complainant's nominated address.

4. A fine of R20 000.00 is imposed on the IP.
5. All amounts to be paid by the IP shall be paid within 10 working days of the date of delivery of this report failing which:

5.1 the IP shall be suspended from WASPA; and

5.2 the SP, Mira Networks, and all other members shall be directed by WASPA to suspend the provision of any services to the IP,

and the suspensions contemplated in paragraphs 5.1 and 5.2 shall remain in force until such time as all amounts have been paid in full.
