

REPORT OF THE APPEALS PANEL

Date: 5 May 2013
Appellant (IP): TIMWE
SP: MIRA NETWORKS
Complaint Number: 11035
Code of Conduct Versions: 9.0

1. INTRODUCTION TO THIS APPEAL

- 1.1 This appeal concerns the adjudication of complaint 11035.
- 1.2 The complaint was lodged against the IP's 'Games Club' service by a complainant who was subscribed to the IP's service. The complaint was lodged on 4 November 2010 and this appeal considers the escalation of an unsubscribe request filed on 8 October 2010.
- 1.3 The crux of the complaint was that the complainant denied that she subscribed to the IP's service. The complainant was unsubscribed from the IP's service but decided to escalate the complaint to the formal system for adjudication because the complainant was "*not happy with the outcome of the refund request*".
- 1.4 In response to the complainant's request for confirmation of the sign-up to the IP's service, the IP provided a summary or spreadsheet on 11 November 2010 of all the messages sent to the complainant. (The IP and the adjudicator make use of various terms, such as spreadsheet, logs and records to refer to exactly the same document in which these messages are reflected. For the sake of consistency and to avoid confusion the panel will refer to the spreadsheet when referring to this document as well as the corresponding information provided by the SP.)
- 1.5 Despite a reminder from WASPA that the complaint had been escalated to the formal system of adjudication on 19 November 2010, the IP made no further submissions before the dispute was assigned to the adjudicator on 24 November 2010.
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2. THE ADJUDICATOR'S DECISION

- 2.1 The adjudicator's report starts off by identifying the relevant clauses of the WASPA Code of Conduct, which in the adjudicator's opinion, are alleged to have been breached by the IP. In this regard the adjudicator identifies clause 11 generally (dealing with subscription services_ without reference to any specific sub-clauses of clause 11) and clause 3.1 (dealing with professional

and lawful conduct on the part of service providers) as being the relevant clauses of the Code.

- 2.2 The adjudicator continues by stating “*in as much as the spreadsheet can be relied on*” that the spreadsheet does not list a single instance of the complainant initiating a download of the content items offered by the IP’s service (at a total cost of more than R3000 over the entire period of subscription).
- 2.3 In the same manner the adjudicator was unable to identify a single instance of an attempted unsubscribe action (request) in the spreadsheet provided by the IP, as was alleged by the complainant. An explanation by the IP of the nature of the information captured on the said “*spreadsheet*” would, according to the adjudicator, have added clarity to whether this was a meaningful omission in the spreadsheet, or not.
- 2.4 After specifically mentioning that it is “*a further noteworthy aspect of the information provider’s log*”, the adjudicator notes that the complainant received messages from the IP on a daily basis and that this had not been denied by the complainant. Working on the assumption that most people would have been frustrated by the regular receipt of these “*un-requested*” or unsolicited messages, the adjudicator states that it is “*peculiar*” that the complainant failed to take decisive action for a period of almost 2 years.
- 2.5 Because of the fact that the “*spreadsheet is not accompanied by an explanation of what the information it purports to convey*”, the adjudicator states that “*the same document may variously be understood to represent either a log solely of SMS messages by the Information provider to the Complainant in the larger framework of all communications between the parties*” (option 1); or according to the adjudicator “*it might reflect the sum total of all communications.*” (option 2).
- 2.5.1 Option 1, the adjudicator explains, would imply that the IP’s contention that the complainant did in fact sign up for its services is “*logically plausible*” while option 2, according to the adjudicator, “*would leave one no option other than to conclude that the complainant never signed up*”.
- 2.5.2 The adjudicator then points to the fact that the IP had an opportunity to present further evidence in support of its contention that the complainant signed up for its services after being invited by WASPA to do so, but that the IP did not do so before the commencement of the adjudication.
- 2.6 The adjudicator then makes mention of “*the time lapse of 31 seconds between the originating SMS to the Complainant conveying the password ‘asquac’, and the Information Provider’s confirmation SMS to the complainant welcoming her as a subscriber*”. After specifying all the steps between the originating SMS and the IP confirmation message (welcoming message), the adjudicator notes, that even though it is not “*conceptually impossible*”, that the fact that all of this could happen in only 31 seconds “*stretch[es] credulity*”.
- 2.7 The adjudicator lastly refers to the IP’s complaint history in the context of the IP’s subscription services. According to the adjudicator 26 formal complaints have been lodged against the IP in the 22 months prior to the complaint before the adjudicator, 20 of which were upheld, 2 were partially upheld, and 12 were appealed by the IP.

- 2.8 The adjudicator concludes by finding on the basis of all the evidence and information before the adjudicator that the IP was in breach of clause 11.2.1 (customers may not be automatically subscribed to a subscription service without specifically opting in to that service) and clause 3.1.2 (members are committed to lawful conduct at all times) and imposed the following sanctions on the IP:
- 2.8.1 the IP must refund the complainant all amounts debited as per the IP's spreadsheet; and
- 2.8.2 the IP must make payment of a fine in the amount of R25 000.
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3. IP's GROUNDS OF APPEAL

- 3.1 The IP explains by way of introduction to its appeal, the fact that it uses "Club NATTA" - a service that offers entertainment content, such as music, games and images 'downloadable to mobile devices'. In order to receive the content a customer needs to register (subscribe) to the service and pay a subscription fee.
- 3.2 The IP continues its appeal by referring to "records" (logs) kept by both the IP, and its SP, Mira Networks, as proof that: "*the complainant subscribed [to] the Natta services on November 17th 2008 through a webspot that is no longer online (but is equal to the one in EXHIBIT A).*"
- 3.3 The IP further states that information provided to potential subscribers on the "webspot" explains that "*from the time the user puts his phone number in and confirm your (sic) request by inserting a PIN Code is entered into a subscription, as is written in the webspot.*" This is then followed by a quote of the wording provided on the "webspot" (as substantiated by the Annexure) which includes screenshots of the "webspot" of a campaign similar to the campaign which forms the subject of the complaint.
- 3.4. According to the IP the "*subscription is only possible through a voluntary request of the user, once you enter your mobile number in the webspot. Later due to its application, the user receives a message with a PIN Code or password on your phone.*"
- 3.5 The IP goes on to explain in rather unclear language, that access to the service is offered in one of two ways, namely; (1) "*introducing the mobile number and password in a web page*"; (2) "*sending an SMS to 31606 to request and confirm the service*". According to the IP the complainant voluntarily subscribed to its service through "way 1" by inserting a PIN code which "*is essential for the service to be activated.*"
- 3.6 The IP then avers that the subscriber had access to "*all the information of the terms and conditions*" displayed on the webspot as well as to the information necessary to "*terminate and cancel the subscription*" by stating:
- 3.6.1 "*In this sense, the user had access to all information of the terms and conditions of the contract directly on your mobile voluntary after inserting the password in the webspot.*"

Is thus abundantly clear to the client from the moment you entered the PIN Code, was doing (sic) a subscription service with downloadable content, which had a cost of R4,99 per day, and also has at its disposal all information necessary to terminate and cancel the subscription.”

- 3.7 In summary, 3.1 – 3.6 above amount to the IP’s confirming its compliance with clauses 11.3 of the Code.
- 3.8 The IP asserts also, that the complainant had all the information necessary to unsubscribe as evidenced in the confirmation message sent to the complainant and further, that the complainant never made use of the option to unsubscribe. Therefore, according to the IP, it was not aware that the complainant wanted to unsubscribe until the time when the complaint was lodged.
- 3.9 After reiterating that the “users” of the IP’s services are subscribed voluntarily, the IP claims that weekly “warning messages” (which we take to mean reminder messages) are sent to subscribers stating that the “user” will be able to cancel their subscriptions. The IP then points to its “EXHIBITS B AND C” in claiming that the complainant subscribed through its “webspot”, which is proved by the spreadsheets provided.
- 3.10 Finally, the IP explains that the short period of time “*between the message sent with the password and the message confirming the subscription is perfectly normal since the users are in front of their computer waiting to receive the password which is a short word that they immediately insert in the webspot and submit, therefore 31 seconds is deemed to be more than enough.*”
- 3.11 After summarising its arguments as stated above as to why the IP is of the opinion that it “*respected all its obligations*”, the IP states that it is of the opinion that the decision reached by the adjudicator is “*excessive*” and that the IP therefore asks that the IP be “*acquitted of any and all sanctions*” or “*that the values of the sanctions be reduced.*”
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4. FINDINGS OF THE APPEALS PANEL

- 4.1 The panel finds it necessary to encourage service providers not only to keep proper and detailed records such as spreadsheets and screenshots of all the services they provide, but also to supply as much relevant information as early as possible in the complaint process. This complaint is a good example of an adjudication that most probably would have had a totally different outcome had the adjudicator been provided with all the relevant information and documentation from the outset. If the adjudicator had been provided with the screenshots and the spreadsheets provided to the panel in support of the IP’s appeal, (we refer to EXHIBITS A, B and C), the adjudicator would not have needed to speculate on the nature of the service and would have had all the information necessary to make an informed decision.
- 4.2 We also encourage adjudicators to ask for additional information (for which the process allows) if enough information is not supplied by service providers when considering a complaint. This will certainly lead complaints to be resolved at an earlier stage and will allow adjudicators to reach informed, consistent and objective decisions.

- 4.3 We are not entirely sure what the adjudicator means with the remark *“In as much as the spreadsheet can be relied on”*. The choice of words may indicate that the adjudicator is not convinced of the authenticity or factual correctness of the spreadsheet or summary provided by the IP. In the absence of evidence or circumstances indicative of the fact that the documents provided by an IP are not what they purport to be, or are not trustworthy it is our view that they should be accepted. We presume that the fact that the adjudicator was unaware that the first interaction between the complainant and the IP was through a “webspot” may have resulted in the adjudicator not being able to place the information provided in the spreadsheet in the proper context.
- 4.4 This panel has no reason for doubting the authenticity or the factual correctness of the spreadsheets provided by the IP which according to the IP’s appeal document correspond with those of its SP, Mira Networks. The SP’s spreadsheets were provided to the panel but it seems, were not provided to the adjudicator. We choose to take these spreadsheets at face value. We do question, however, why it was that the IP did not provide this important information when being advised of the complaint and when being advised of the appointment of an adjudicator.
- 4.5 According to the spreadsheets provided to the panel the complainant did in fact subscribe to the IP’s subscription service and in a manner not inconsistent with, or in breach of the Code. We can on the evidence before us not find that the complainant was unaware that she was subscribed to the subscription service of the IP and that the IP’s service was therefore in terms of its subscription method, in breach of the Code. The ‘double opt-in’ process which includes the insertion of a pin code, as was employed by the IP, is consistent with the subscription provisions of the Code.
- 4.6 We believe that the adjudicator, in context of the lack of information provided to the adjudicator by the IP, believed that the spreadsheets reflected *“the sum total of all communications.”* as stated in option 2 (as explained in paragraph 2.5 above) of the two possible scenarios that the adjudicator considered. Option 2 according to the adjudicator *“would leave one no option other than to conclude that the complainant never signed up”*. It turns out that option 1 in terms of which the adjudicator explains the spreadsheet *“to represent a log solely of SMS messages by the Information provider to the Complainant in the larger framework of all communications between the parties”* was the true reflection of the communications between the parties because the complainant accessed the service of the IP through what the IP states was its *“webspot”*. The adjudicator states in the adjudication report that this would imply that the IP’s contention that the complainant did in fact sign up for its services is *“logically plausible”*.
- 4.7 With the benefit of more detailed information before us in the form of the screen shots of the IP’s service and the spreadsheets of its SP we are confident that the complainant in fact did sign up for the service of the IP.
- 4.8 We further agree with the IP that the time lapse of 31 seconds between the originating SMS conveying the password and the confirmation SMS welcoming the complainant as a subscriber, is nothing out of the ordinary and we can draw no negative inferences in this regard.
- 4.9 We also agree with the adjudicator, although the adjudicator did not seem to have taken this aspect into consideration in reaching the decision, that it is *“peculiar”* that the complainant failed to take decisive action for a period of almost 2 years. This *“peculiarity”*, however, did not inform our decision in any way, other than to agree that no refund need be made by the IP.

- 4.10 We would in conclusion like to mention that it is within the ambit of the Code (clauses 14.6.7, 14.6.9 and 14.6.11) and within the powers of this panel to consider the facts before it and find breaches apart from those possible breaches for which the complaint was lodged or those found by the adjudicator. On the evidence before us, including the logs and the screenshots attached as annexures to the IP's appeal, it is our opinion that it is entirely possible that the adjudicator could have considered other clauses of the Code to have been breached if the adjudicator had requested or been provided with all the relevant information, documents and screenshots from the outset.
- 4.11 The IP, however, did not have the opportunity to respond to or present grounds of appeal in defence of any other possible breaches of the Code associated with the service of the IP which forms the subject of this appeal. For this reason coupled with the rather substantial lapse of time since the complaint was lodged we have not taken any other possible breaches into consideration.
- 4.12 The IP's grounds of appeal which disputes the fact that the complainant was subscribed to the IP's service without her knowledge, and therefore that the IP was in contravention of clause 11.2.1 of the Code, is upheld. It flows from the fact that we did not find a breach of clause 11.2.1 of the Code that the IP could not have been in breach of clause 3.1.2 of the Code.
- 4.13 As a result of the IP's appeal being upheld the sanctions as instituted by the adjudicator are therefore no longer applicable.
- 4.14 The appeal fee is not be refunded to the IP. We believe that the IP did not provide the adjudicator with the necessary information and documentation needed for the adjudicator to reach an informed decision. If the IP had done so the adjudicator would most likely have reached a decision similar to the one reached by this panel and would an appeal not have been necessary.