



## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	11396
<b>WASPA member(s):</b>	TMobileSA
<b>Membership number(s):</b>	0116
<b>Complainant:</b>	Competitor
<b>Type of complaint:</b>	Subscription Service
<b>Date complaint was lodged:</b>	2010-12-13
<b>Date of the alleged offence:</b>	November 2010
<b>Relevant version of the Code:</b>	10.0
<b>Clauses considered:</b>	11.2.1
<b>Relevant version of the Ad. Rules:</b>	Not Applicable
<b>Clauses considered:</b>	Not Applicable
<b>Related cases considered:</b>	10511 & 10822

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### Complaint and Response

1. In this matter the complainant is a competitor or the employee of a competitor of the member, and the complaint relates to an alleged subscription to a SMS subscription service without the complainant's consent.
2. The complaint was lodged via the WASPA website and is in the following terms:

The subscriber was subscribed without ever requesting the services. He asked for feedback and also how much he was charged - his reference number - TM1771027176. He last spoke them to them on the 21nd of November and is still awaiting feedback.

I managed to reach their call centre and am not satisfied with their response at all. Apparently the agent is unable to tell me to whom the subscriber spoke earlier since they have a new system. She is unable to give me any feedback on what went wrong here at all. I asked her on various occasions if I can give her the reference number, but it seems that this does not mean anything to her.

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3. The WASPA Secretariat sent the formal notice of complaint to the member on 14 December 2010 but, despite a further reminder sent on 5 January 2011, no response was ever received.
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### Sections of the Code considered

4. The conduct complained of took place in November 2010. Consequently version 10.0 of the WASPA Code of Conduct applies to this complaint.
5. The following sections of the WASPA Code of Conduct are relevant to this complaint:

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.

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### Decision

6. Before deciding on the merits of this complaint, it is necessary to give some background. On 30 November 2010 a WASPA adjudicator was called upon to adjudicate on complaints 10549 and 10822 where the member was accused of subscribing an MSISDN to a subscription service and billing for provision of that service without consent. On the member's version, the erroneous subscriptions and billing were caused by a technical fault with its systems.
7. It subsequently emerged that this problem was one with broad effects, and that many consumers had been affected.
8. The adjudicator in that complaint found that the member had infringed section 11.2.1 of version 9.0 of the Code of Conduct, but that it had not done so intentionally. He imposed the following sanction:
  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.
9. The adjudicator enquired as to the status of enforcement of the above sanctions, and the WASPA Secretariat advised him on the 29<sup>th</sup> of March 2011 that Vodacom and MTN had terminated their contracts with the member by the end of January 2010. The Secretariat speculated that the member did not have an agreement with Cell C.
10. The adjudicator in this complaint is in little doubt that the complainant was subscribed without his consent, and also that the reason for this erroneous subscription was the same as that in complaints 10549 and 10822.
11. Consequently, the adjudicator finds that the member has infringed section 11.2.1 of the WASPA Code of Conduct.
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### **Sanctions**

12. The adjudicator believes that to sanction the member again for conduct that has already been sanctioned under complaints 10549 and 10822 and that arose from the same set of facts would amount to double jeopardy. Consequently, no further sanction is imposed in respect of the infringement of section 11.2.1
13. In the event that the member has not refunded the complainant, the member will refund the complainant with all funds debited as a result of the unsolicited subscription.