



REPORT OF THE ADJUDICATOR

WASPA Member	Tanla Mobile Limited
Information Provider (IP) (if any)	MobileNOBO
Service Type	Subscription
Source of Complaints	Competitor
Complaint Number	12756
Date lodged	28 April 2011
Code of Conduct version	10.0

Complaint

1. This is an anonymous competitor complaint. The adjudicator has been requested to process the complaint on an urgent basis.
2. The complaint related to an allegedly unsolicited SMS received by the complainant after 20h00:

"I was sent, what I believe to be a spam SMS (contravention) after 8pm at night (contravention), it told me I'd won an Ipod 4 and should reply OK to claim my prize. There was no pricing or indication at all of a service or cost. There was no information on how to opt out (contravention). I replied OK and was Automatically subscribed (contravention) to a games service. I replied 'End' and have not recieved a notification that I've either opted out (contravention) or my 'subscription' has been stopped (contravention).

The details of the sms are as follows. I've attached photos of the SMS as proof as previously an adjudicator asked for proof months later and of course the messages had long been deleted. Should the Adjudicator need more proof they should let me know urgently before the SMSs are deleted from my phone.

First Message.

Long Code: +2782007206139826

Content: Congratulations for winning the prize. Reply Ok to claim your brand new iPhone 4.

Time received: 21:18:25

Date received: 27-04-2011

Message in response to my "OK".

Long Code: +2782007206139826

Content: Welcome to MobileNobo.download up to 10 games/week @ R44,97/week.
Unsubscribe? SMS 'stop games' to 39826. Help: 0800982166
Time received: 21:41:11
Date received: 27-04-2011"

3. Screenshots of all messages received were supplied.
4. The complainant expressed the view that the conduct detailed in the complaint was in breach of sections 3.1.1, 3.3.1, 4.1.1, 4.1.2, 5.1.2, 5.1.3, 5.1.6, 5.1.8, 5.2.1, 6.2.2, 6.2.3, 6.2.4, 9.1.1, 9.1.3, 9.1.4, 9.1.6, 11.1.1, 11.2.2 and 11.2.3.
5. The SP was notified of the complaint against the IP on 4 May 2011 and on the same date notified WASPA that it had "suspended with immediate effect all services that MobileNOBO has with us. Re-instatement of services will be done as soon as the issues related to this case are cleared and advised by WASPA."
6. The IP filed the following response:

"The customer states that he was deliberately being misled into using our service. We strongly insist that this has not been the case.

The customer received the first message as part of an online WEB-subscription game, after he specifically placed his phone number into the webpage. The Terms & Conditions of the page clearly indicated that this game is part of a subscription service. In addition to this the customer has a chance to win a prize, in this case an iPhone. The customer confirmed the subscription by sending an SMS to our short code starting the game subscription service and receiving a welcome message that indicated the price, subscription interval and most importantly, how to stop the service.

We must indicate that prizes are allowed to be given away anywhere in the world and we saw no issues with providing this to the end user, as an extra reward for subscribing to the game service.

Moreover, a further check on this indicates that according to clause 9.3.6, competition services are allowed in South Africa:

<http://www.waspa.org.za/code/advert-rules.shtml>

http://www.waspa.org.za/code/advert-rules/009_waspa.ad.rules_v2.3_chapter09.pdf

Customer satisfaction is held to the highest possible standards by Mobilenobo – for any complaint that comes to our attention we do the upmost efforts to contact the client, explain the service, how the customer got subscribed and apologize for any misunderstanding.

In this particular case, the client assured us that his complaint was answered to his satisfaction. Furthermore stopped the service and proceeded to refund the customer.

In the meanwhile, Mobilenobo has completely removed the two campaigns until further notice. In addition all our media campaigns were closed upon Tanla's request.

Kindly note that this suspension is damaging the user experience of thousands of other subscribers who compliantly shook our hands months or years ago, by sending an SMS to start the service, and can no longer download games until we enable billing again.

We would appreciate it, if you can at the very least; give us a go to resume the other game services currently running in South Africa."

7. The complaint was not satisfied with this response:

"The response is unacceptable.

I did NOT submit my number via a webpage for months prior to receiving the sms. Their statement that I did is therefore a lie.

Furthermore, even if I had, which I didn't, the subsequent SMS sent is still in contravention to the vast majority of clauses I raised in my complaint.

I request this goes for formal adjudication and that the service remain suspended at this time as the contraventions discovered are of a VERY serious nature."

8. The complainant advised further that he/she had tested the service again on 7 May 2011 and found that – after sending "OK" to the relevant short code - he/she was once again sent a welcome message and links to games, i.e. it appeared that the service had not been suspended at all.
9. From later correspondence it appears that the SP had suspended the IP from 05h26 on 5 May 2011 until 03h01 on 6 May 2011. The Monitor enquired of the complainant whether he or she had been billed during this time and noted that "[E]ven if you weren't they should not have continued billing you though once a complaint was filed".
10. It appeared at this time that the Monitor had already been in contact with the IP and SP in respect of the web-based campaign conducted by the IP. The Monitor recorded that she had sent an email to the SP on 26 April noting that the web campaign undertaken by the IP was in breach of the Code and "would also be in breach of the [National Lotteries

Board] Act” due to the use of a competition to promote a subscription service. The Monitor requested the SP to deactivate the campaign so that she would not be forced to lodge a further complaint.

11. The Monitor provided correspondence entered into with the SP which indicates that the SP had, in the opinion of the adjudicator, acted in good faith in interacting with the Monitor regarding the suspension of the IP’s service.
 - 11.1. On 5 May the SP advised the IP that it should provide its services to the Monitor for testing purposes and would only be unsuspended once cleared by the Monitor. The SP also referred to two services against which there were complaints and advised that these should either be resubmitted for testing or removed (but would not be unsuspended until cleared by the Monitor).
 - 11.2. On 6 May the IP clarified to the Monitor that it had suspended new subscriptions to the IP services but that “regular billing” was still operational in respect of users who had subscribed to services prior to the suspension thereof. The IP noted that these subscribers remained able to access content and services through their subscriptions. The Monitor indicated in a return mail that this was acceptable (or at least did not raise any issue with the IP’s assertion regarding regular billing).
 - 11.3. On 9 May the Monitor advised the SP and IP that further testing had revealed problems with all three links provided and attached a test report. The SP responded to offer its assistance if required. The Monitor further advised that the IP was still billing the complainant.
12. The complainant provided his/her billing indicating the following:

Date	Item	Charge
27 April	Content Services	R13.15
28 April	Content Services	R13.15
29 April	Content Services	R13.15
2 May	Content Services	R13.15
4 May	Content Services	R13.15
4 May	Content Services	R13.15
6 May	Content Services	R13.15
7 May	Content Services	R13.15
7 May	Content Services	R13.15

13. On 13 May the complaint repeated his or her view that users were being tricked into responding and subscribing to the service and that those people were currently still being billed.

Sections of the Code considered

The following sections of version 10.0 of the WASPA Code of Conduct were considered:

3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.

3.3.1. Members will not offer or promise services that they are unable to provide.

4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

5.1.3. For SMS and MMS communications, a recipient should be able to stop receiving messages from any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply 'STOP' procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

5.1.6. Where the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the service provider must honour the opt-out request as if the word 'STOP' had been used.

5.1.8. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the upfront description of the service.

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:
(a) the recipient has requested the message; (b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or

(c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

6.2.2. All advertisements for services must include the full retail price of that service.

6.2.3. Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.

6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.

9.1.1. Any promotional material for a competition service must clearly display the full cost to enter the competition and any cost to the user to obtain the prize.

9.1.3. Interactive competition services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.

9.1.4. Promotional material must clearly state any information which is likely to affect a decision to participate, including:

(a) the closing date; (b) any significant terms and conditions, including any restriction on the number of entries or prizes which may be won; (c) an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes; (d) any significant age, geographic or other eligibility restrictions; (e) any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item; (f) the entry mechanism and workings of the competition.

9.1.5. The following additional information must also be made readily available on request, if not contained in the original promotional material:

(a) how and when prize-winners will be informed; (b) the manner in which the prizes will be awarded; (c) when the prizes will be awarded; (d) how prize-winner information may be obtained; (e) any criteria for judging entries; (f) any alternative prize that is available; (g) the details of any intended post-event publicity; (h) any supplementary rules which may apply; (i) the identity of the party running the competition and responsible for the prizes.

9.1.6. Competition services and promotional material must not:

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- (a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;
 - (b) exaggerate the chance of winning a prize;
 - (c) suggest that winning a prize is a certainty;
 - (d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

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.

11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.

11.2.5. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].

Decision

- 14. There is a long line of adjudications indicating that competitor complaints should be treated with a degree of caution due to the need to avoid the WASPA complaints process from being used by one member to gain a competitive advantage over another. This is even more so the case when faced with an anonymous competitor complaint.
- 15. The complaint is based on the evidence provided of the SMS received, and this evidence is accepted strictly for the purposes of showing that the complainant received it.

16. The fact of the receipt of the SMS does not however establish that the IP's version - that the SMS received by the complainant was not unsolicited but that it was received pursuant to interaction by the complainant with a web campaign for the subscription service in question – is untrue. The complainant denies any such interaction. No evidence was provided by the IP in support of its version.
17. Notwithstanding this lack of evidence, the adjudicator finds it improbable that the complainant received the SMS complained of “out of the blue” and not pursuant to some form of interaction with the IP's web campaign which was running at the time. On a balance of probabilities and given the anonymous competitor nature of the complainant the version advanced by the IP is to be preferred in this regard. In this regard:
 - 17.1. It is noted that the IP has been forthcoming with regard to admitting other problems with its service in its correspondence with the Monitor.
 - 17.2. There is no evidence of a pattern of complaints against the IP in respect of unsolicited messages.
 - 17.3. In considering the conflicting versions of the parties the adjudicator is mindful of the probability of a harsh sanction being imposed on the IP should a contravention of this nature be confirmed and the paucity of evidence on which to base such a confirmation and sanction.
18. The complaint, insofar as it relates to the unsolicited nature of the SMS and the timing of the sending thereof, is dismissed. This equates to dismissing the elements of the complaint relating to sections 5.2.1, 5.3.1 and 5.1.8.
19. No assertions have been raised by the IP as regards the allegation that the unsubscribe function was not operating in the manner required by the Code, i.e. in response to the complainant's statement that SMSing “End” in response to the welcome message. In the circumstances the IP is found to have breached sections 5.1.2 and 5.1.6. The complainant has also cited section 5.1.3 but that is not relevant to this complaint.
20. Implicit in the finding made above regarding the nature of the SMS received is the further finding that such SMS was part of a web-based sign-up to a subscription service.
21. The complaint being considered does not relate to the web-based promotion of the subscription service and no evidence relating to such promotion was placed before the adjudicator. The WASPA Media Monitor has in any event taken proactive steps to address shortcomings with such web campaign as evidenced by the suspensions affected. All that the complainant has provided is the SMS and the alleged breaches of the following sections of the Code cited by the complainant cannot be sustained on the

basis of this evidence as opposed to evidence showing the web promotion: 6.2.2, 6.2.3, 6.2.4, 11.2.2 and 11.2.3.

22. The evidence before the adjudicator consists of the confirmation SMS and the welcome SMS. Neither of these can be regarded as promotional material for the purposes of sections 9.1.1 and 9.1.4 or 11.1.1 of the Code. Sections 9.1.3 and 9.1.5 are not relevant to this complaint. The aspects of the complaint relating to these sections are dismissed.
 23. The wording of the confirmatory SMS – “Congratulations for winning the prize” – suggests a breach of section 9.1.6 and the adjudicator accepts that this SMS was promoting a competition for the purpose of said section 9.1.6.
 24. There is insufficient evidence and the nature of the breaches found is not such as to justify finding a further breach of sections 3.1.1, 3.3.1, 4.1.1 and/or 4.1.2.
 25. In determining an appropriate sanction for the confirmed breaches of sections 5.1.2 read with 5.1.6 and 9.1.6, the adjudicator has considered:
 - 25.1. The good faith engagement of the IP (and the SP) with the Monitor;
 - 25.2. The refunding of the complainant;
 - 25.3. Previous adjudications relating to the IP’s subscription services.
 26. The member is:
 - 26.1. Fined the sum of R5 000 in respect of the breach of section 5.1.6 and ordered to ensure that it has an unsubscribe facility which complies with this section; and
 - 26.2. Fined the sum of R10 000 in respect of the breach of section 9.1.6.
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