

REPORT OF THE ADJUDICATOR

Complaint reference number:	13405
WASPA member(s):	Opera Interactive (SP) / Morvec (IP)
Membership number(s):	0068 / 1137
Complainant:	Consumer
Type of complaint:	Subscription
Date complaint was lodged:	2011-06-10
Date of the alleged offence:	2011-06-05
Relevant version of the Code:	10
Clauses considered:	3.1.2, 3.3.1, 4.1.8, 11.3.1, 11.3.2
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	Not applicable
Related cases considered:	None

Complaint and Responses

On 10 June 2011 the complainant lodged a complaint with WASPA that the IP had debited R14 from his cellular account on 5th June 2011 and again on 7th June 2011. The complainant stated that he had received unsolicited messages on those dates but alleged that he had deleted the messages and that he had not subscribed to any services.

The IP's initial response was that the consumer had clicked on one of their banners *"via the mobile internet"* and then had accepted the terms and conditions on their WAP page. The IP explained further that the consumer's mobile number is *"automatically passed to us"* by the mobile networks *"when you click on our Join button"*.

The complainant disputed the IP's version of events and alleged that section 11.3.1 of the WASPA Code had been breached. Section 11.3.1 of the Code provides that for any subscription service initiated by entering a customer's mobile number on a web page or WAP site, a separate confirmation message must be sent to the customer's mobile handset which must be confirmed or validated in the prescribed manner in order to prove that the number entered on the web page or WAP site matches the customer's own mobile handset number.

The complainant alleged that at no stage had he been asked to confirm that he wished to join anything and alleged further that, if he had been asked, he was emphatic that he would not have provided any such confirmation.

The complainant also provided a link to his personal blog in which he said he had posted additional information about his complaint. A short summary of his complaint (as taken from his blog) is set out verbatim below:

"I have finally figured out how it works, and how they "caught" me before. I remember on the day of the IPL Cricket final going to m.espnricricinfo.com, the mobile site for *CricInfo*, to see what time the match would start. The site was overloaded, and very slow. I vaguely remember clicking on a display ad by mistake. It's an easy enough mistake to make, given how slow the graphics were loading. It was right at the top of the page, and I had scrolled down further already, but the cursor obviously hadn't moved yet. When this advert page appeared, I selected "back" and continued. It turns out that **purely by viewing this page**, R14 was deducted from my phone account *every 3 days* until I noticed. I did not have to click any buttons, or agree to any pricing, or even be aware of what they were selling, if anything. Think of it as the virus of Internet display ads. Last night I decided to retrace my steps, and see what happened. Using the built-in browser on my *Nokia* phone, I loaded up m.cricinfo.com and selected the "Live" cricket match. In this case it was [England vs Sri Lanka](#). At the top and bottom of the page is a banner ad (from [admob.com](#)) that says: "[Fun Mobile Videos Click Here](#)". There is no indication of any cost involved before you click, and once you have clicked on the link the web site gets the [MSISDN](#) (subscriber) number from the phone. I have no idea whether the **privacy geniuses** at *Nokia* or [MTN](#) decided to *give away my identity* online in this fashion, but there you have it: it gets used for fraud without the phone owner's knowledge or explicit permission."

In all, some twenty three items of correspondence passed between the complainant, the SP, the IP and WASPA. The main points that can be extracted from this correspondence are as follows:

1. The IP denied that the subscription confirmation steps required by section 11.3.1 of the Code were relevant in the present matter. The IP alleged that section 11.3.1 only applied to services initiated by the entering of a mobile number on a web page or WAP site and not to services initiated by clicking on a join button on a WAP site. In the present matter, the IP alleged that the service had been initiated by clicking on a "Join" button on a WAP site and that the mobile number of the user to be debited had been "automatically passed" to the IP by the consumer's own mobile network operator rather than manually entered on the site.
2. The complainant alleged that his cellphone was "not configured for WAP". The IP alleged that this was false and that the complainant had definitely visited WAP sites and had in fact depicted screenshots of WAP sites on his blog. The complainant replied that he meant to state that his cellphone was not configured for MMS messages.
3. The complainant alleged that the IP did not send a subscription confirmation message. This would amount to a breach of section 11.5.1 of the Code. The

IP alleged that it did in fact send the required subscription confirmation messages and suggested that the complainant's blog showed these confirmation messages.

4. The complainant alleged that he did not see any subscription confirmation page requesting him to confirm his subscription. The IP alleged that its "landing page" was fully compliant with the requirements of the WASPA code insofar as subscription confirmation pages are concerned.
5. The complainant alleged that "STOP" messages that he sent to end the service were ignored by the IP and that the IP's contact telephone number was inactive. The IP alleged that the complainant did not send STOP messages before the charges were debited against his account and the IP stated that all STOP messages that were received were in fact honoured.
6. The complainant alleged that he had not received any information from the IP as to how or where he could access any of the content of the service that he had allegedly subscribed to. He stated that this amounted to a breach of section 3.3.1 and 3.1.2 which commit a member to only offering services that they can provide and to only engaging in lawful conduct.
7. The complainant alleged that the IP's MSISDN passing software was fallible. He demonstrated this by showing that a URL string entry could be manipulated to include any telephone number in the section of the string that contains the parameter "&msisdn=". This would result in whatever number was manually entered into the URL string becoming subscribed to a service.
8. On 5 July 2011, the IP advised WASPA that it had noted suspicious subscription registration activity and specifically alleged that the complainant lacked good faith and that this was evidenced by the fact that he had, inter alia, involuntarily signed up an MTN account manager whose business card and telephone number he had obtained.
9. On 5 July 2011 the SP advised that the services of the IP had been temporarily suspended in order to do a full investigation and to ensure that there could be no potential future harm to consumers.
10. On 12 July 2011 the IP advised WASPA that the WASPA website did not show the correct contact number for the IP and that the correct information had now been provided to WASPA.
11. The parties agreed that the complainant had already been refunded R100 and that his number had been blocked from further services. The complainant alleged that this refund was unreasonably delayed and was not accepted in full and final settlement of all complaints and requested that WASPA proceed with formal handling of the complaint.

Decision

Before turning to deal with the various disputes between the parties, an initial point to consider is whether section 11.3.1 WASPA Code of Conduct applies to subscription services joined by clicking on a "Join" or similar button on a WAP site.

Section 11.3.1. states 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 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."*

In other words, the crisp question is whether clicking on a "Join" or similar button on a WAP site should require either of the further validation steps set out in 11.3.1 to be complied with in order for a subscription to be validly activated.

In my opinion, the meaning of the words *"entering a customer's mobile number on a web site"* refers to the act of manually entering a mobile number onto a web page and not to automatic MSISDN passing by networks. This interpretation of the words is also consistent with the intended purpose of section 11.3.1 which is explained in the annotated notes to the Code as being *"to avoid any possibility whatsoever of a third-party entering a subscriber's number on a web site or WAP page and causing that subscriber to be subscribed to a service without their consent"*.

As it turns out, the intended purpose has actually not been fulfilled by the insertion of section 11.3.1 of the Code as a practical means of circumventing the protection of 11.3.1 of the Code and involuntarily subscribing a third party has been discovered. However, section 11.3.1 did not appear to contemplate this technical possibility and the intended purpose of the section is what is relevant when considering whether the section has been breached.

Furthermore, section 11.3.2 deals directly with the scenario of clicking on a "join" or similar link. This section provides as follows:

"For any subscription services that are initiated via WAP, 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".

Section 11.3.2 is an overarching requirement of all services initiated via WAP whereas section 11.3.1 applies only to WAP initiated services that depend on the manual entry of the customer's number onto the WAP site. In my opinion, section 11.3.1 does not apply to WAP sites that automatically receive the consumer's number from the relevant mobile network operator in order to initiate a subscription.

I turn now to deal with the balance of disputes raised by the parties:

The complaint that the advert to join the service was not clicked on

Factual disputes of this nature are exceptionally difficult to adjudicate on. Generally, a person making an allegation should substantiate and prove their allegation unless the facts capable of substantiating the allegation are solely with the other party's knowledge. In the present matter, the IP has given precise details as to when it alleges that the complainant subscribed for the service (i.e. 21 May 2011 at 15:01:06 using a Nokia 5130 a specific IP address).

In his email to WASPA of 2 July 2011, the complainant alleged that *"I recall using my phone (the Nokia 5130) on 21/5/2011 to visit the Cricinfo mobile web site, but deny ever seeing the ad supplied, and I certainly would not have clicked to the "Join" button."* He goes on to state that it would have been possible for someone else to have browsed the advert and inadvertently entered his number by mistake. However, in his own blog post of 18 June 2011 he writes that:

I remember on the day of the IPL Cricket final [i.e. 21 May 2011] going to m.espncriinfo.com, the mobile site for *CricInfo*, to see what time the match would start. The site was overloaded, and very slow. I vaguely remember clicking on a display ad by mistake.

Based on all of the information before me on this point, and the complainant's admission on his blog (to which he referred WASPA) that he does "vaguely remember" clicking on an advert, the allegation that he did not click on the advert for the service is not upheld.

The complaint that a subscription confirmation message was not sent

The complainant has alleged that the IP breached section 11.5.1 of the Code by not sending a subscription confirmation message. He alleges that he only received subscription confirmation messages after 10 June 2011 and not after the subscription was first activated. In reply, the IP alleges that it would have sent subscription confirmation messages as part of its standard subscription process. The IP also states that the subscription confirmation messages posted by the consumer to his blog prove this. In this specific regard I cannot agree. The confirmation messages posted by the consumer to his blog relate to the messages received after 10 June 2011, i.e. the messages he admits receiving. No message log or other form of proof of sending of subscription confirmation messages at the time the subscription was first activated has been provided by the IP. In this regard, the onus of rebutting the complainant's allegation that no confirmation messages were sent should fall on the IP and SP. That onus has not been discharged and the complaint of a breach of section 11.5.1 of the Code is accordingly upheld.

The complaint that no subscription confirmation page was displayed to the consumer and that STOP messages were not processed

This again is a difficult point to adjudicate on the evidence before me. In my opinion, there is insufficient evidence before me to uphold this specific aspect of the complaint.

The complaint that the IP's contact telephone number was inactive

Section 4.1.8 and 4.1.9 of the Code provide as follows:

4.1.8 Customer support must be easily available, and must not be limited to a medium that the customer is unlikely to have access to (for example, support should not be limited to email if a significant number of customers do not have access to email).

4.1.9 Any telephonic support must be provided via a South African telephone number and must function effectively. Should the member be unable to provide immediate

support, a customer should be provided with the ability to leave a message. Support numbers may not forward to full voice mailboxes.

Although there is no express requirement in the Code that a valid number be published on the WASPA website, there is a general requirement in section 4.1.2 that member's web sites must link to the WASPA website. Furthermore, sections 4.1.8 and 4.1.9 make it clear that customer support must be easily available and that telephonic support must function effectively.

The IP has admitted that the telephonic contact information provided for it on the WASPA web site was incorrect, however it has claimed that the correct telephone number would have been included in all subscription confirmation / welcome messages. In light of the admission that the number on the WASPA website was incorrect and my finding above that not all of the required subscription confirmation / welcome messages were delivered to the complainant initially, I find that telephonic support was not easily available to the consumer at the time the cause of his complaint first arose.

The complaint of a breach of section 4.1.8 is accordingly upheld.

The complaint of breach of sections 3.3.1 and 3.1.2

The consumer alleged that he had not received any information from the IP about how or where to access any of the content of the service that he had allegedly subscribed to. He stated that this amounted to a breach of section 3.3.1 and 3.1.2 which commit a member to only offering services that they can provide and to only engaging in lawful conduct.

On the information before me I am unable to make a finding that the IP was offering a service that it was not technically capable of providing nor that the service itself was of an unlawful nature. I therefore do not uphold the complaint of breach of sections 3.3.1 and 3.1.2

The refund to the consumer

It is common cause that the consumer was refunded R100. On the information before me, which does not bear exhaustive repetition in this report, I do not regard the refund as having been unreasonably delayed. I also do not regard the refund as prejudicing the consumer's rights to have pursued this complaint with WASPA. On 22 June 2011 at 13:12 the IP emailed the consumer and offered R100 in "full and final settlement". The IP asked the consumer to send an email confirming his happiness with the outcome of the discussions between the IP and the consumer. The consumer replied to this email 17 minutes later advising that he would not accept the payment in full and final settlement and reserved his rights to take further action for "breaking the law and violation of the WASPA code of conduct". It is arguable that the consumer's response indicated his acceptance of the refund as full compensation for the charges debited against his account however, it is clear that the payment of the R100 refund did not prejudice the consumer in making a complaint to WASPA.

Sanctions

For the breaches of sections 11.5.1 (failure to deliver subscription confirmation messages and 4.1.8 (failure to provide easily available telephonic support) the IP is fined R6 000.

No further refund to the consumer is ordered.