



REPORT OF THE ADJUDICATOR

Complaint reference number:	13605
WASPA member(s):	SMSNET-SA
Membership number(s):	0084
Complainant:	Public
Type of complaint:	Subscription service
Date complaint was lodged:	2011-06-29
Date of the alleged offence:	2010-07-14 until 2011-06-15
Relevant version of the Code:	9.0
Clauses considered:	11.1.8, 11.4.1, 11.5.1, 11.5.2; 11.9
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	Not applicable
Related cases considered:	#8060, #8725, #8737, #10467, #11210, #13605, #14721

Complaint

The Complainant is, or rather was, an MTN prepaid customer. During the course of 2010 she noticed that quite some time her airtime was running out faster than expected. She eventually noticed that when she recharge, some charges came off her airtime almost right away. This was extremely frustrating, as she received no SMS to inform her what those charges were for. MTN informed her that she was being billed for a subscription service, and was later referred to WASPA. She did not know which company was billing her as she received no telephone bills, being a prepaid customer. She denies that she had ever opted into the service or that she had received any welcome SMS or monthly. She never made use of any of the services for which she was subscribed. She was unable to opt out of the service because she did not receive any SMS providing her with the option of opting out. Out of pure frustration the Complainant switched service providers in order to avoid the unauthorised charges. She concludes:

This matter caused me great frustration and inconvenience. Often I had no airtime to make phonecalls - which might have been very important – because they kept on deducting airtime from my account. I had to go as far as buying a

new SIM card with another network and start to migrate over just to get out of the billing

She requested a refund, and although it was refused initially, an amount of R400 was later on credited to her account.

Service provider's response

In its initial response to the Complainant the SP apologised for any poor service that may have been rendered. On the issue of how the subscription took place, the SP provided only general information on how WAP opt-in work without providing any specific proof of the Complainant's opt-in. It then provided a description of how the service works and is billed. The SP correctly identified the make but not the model of Complainant's phone as the phone used to initiate the service.

On the question of why she received no reminder SMS's the SP responded:

We do send reminder SMS as in the snapshot attached here. We have double checked our system and from our side there doesn't seem to be any fault in this regard. What we know is that most client delete SMS from unknown number, especial adverts or SMS from long numbers without reading fully the contents. I also do the same most of the time. Like I said I have attached a screen shot of the reminder SMS sent to our clients.

There was however no specific logs to confirm that the reminder messages had been sent other than these generic statements. On my request the SP did provide a log showing the subscription on 14/7/201 and the unsubscribe on 15/6/2011 and the following list purporting to be the reminder notices:

Reminder Notices

Tue Jun 14 10:34:08 27783051213 27839206955 OK, Seq=41499 : "U r subscribed to Hugemob.1game&unlimited contents:R5/3day. Hlp: 0123428001.Unsub sms STOP to 33912"

Sat May 14 10:10:00 27783051213 27839206955 OK, Seq=232844: "U r subscribed to Hugemob.1game&unlimited contents:R5/3day. Hlp: 0123428001.Unsub sms STOP to 33912"

Thu Apr 14 10:22:49 27783051213 27839206955 OK, Seq=15653: "U r subscribed to Hugemob.1game&unlimited contents:R5/3day. Hlp: 0123428001.Unsub sms STOP to 33912"

Mon Mar 14 10:17:54 27783051213 27839206955 OK, Seq=16645: "U r subscribed to Hugemob.1game&unlimited contents:R5/3day. Hlp: 0123428001.Unsub sms STOP to 33912"

Presumably these notices stem from 2011, but there is no indication that such notices were sent in 2010 or the early part of 2011.

The SP confirmed that the Complainant did not download any content during the entire year of subscription.

I additionally requested information from the SP on whether their subscription service was registered with WASPA as required by section 11.9 of the Code of Conduct. It replied as follows:

- *Hugemob.com is in compliant with all waspa media regulations.*
- *The page can easily be accessed by simply entering hugemob.com on your mobile set.*

Sections of the Code considered

"11.1.8. It is acceptable to use the "@" sign in place of "at" in any activation message, welcome message or similar communication. Similarly, "u" may be Page 3 WASPA Adjudicator's report [#11210] used in place of "you", "b" may be used in place of "be", and "r" may be used in place of "are"."

"11.4.1. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be clear notification of the following information, and should not be mistaken for an advert or marketing message:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number."

"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]."

11.9. Subscription service directory and logs

11.9.1. Members must register all subscription services with WASPA, by providing the following information:

- (a) the name of the service;
- (b) the short code or access method (e.g. WAP) the service uses;
- (c) the price and frequency of billing for that service;
- (d) the customer support number associated with the service; and
- (e) unsubscribe instructions for the service.

11.9.2. When requested to do so by WASPA, a member must provide clear logs for any subscription service customer which include the following information:

- (a) proof that the customer has opted in to a service or services;
 - (b) proof that all required reminder messages have been sent to that customer;
 - (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and
 - (d) any record of successful or unsuccessful unsubscribe requests.
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Sections of the Advertising Rules considered

Not applicable.

Decision

In WASPA case number 11210 the adjudicator dealt with a situation that was very similar to the complaint in this case. The alleged infringing conduct of the WASPA in that case stems from the same period and relates to the same sections of the Code of Conduct. In that matter the adjudicator remarked:

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 followed the specific subscription activation steps that the SP alleges the Complainant did. There is clearly a dispute of facts in this matter that cannot be resolved on the face of the information put up by the parties to this complaint. The screens provided by the SP are illustrative of its subscription activation process but cannot amount to proof that the screens were viewed by the complainant in this matter. 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.

However, the similarity in the facts and the indignation of both the Complainants in these cases starts to lend credence to the versions provided by the Complainants. Nevertheless I intend to resolve this case in a similar manner to decision taken in Case 11210.

I have considered the content of the message logs adduced by the SP in this complaint. In this regard, it is convenient to repeat that the welcome message sent by the SP reads as follows:

"Welcome to Hugemob. Enter hugemob.com to start the experience. R5/3days. To unsubscribe send STOP to 33912. (SP:0123428001)"

Section 11.4.1 states that the welcome message must be a clear notification of certain prescribed information. Whilst all the categories of information listed in section 11.4.1 do appear in this welcome message, section 11.4.1 also states that the welcome message "should not be mistaken for an advert or marketing message", i.e. in addition to covering the prescribed categories of information, that information must be given to a consumer in such a way that the subscription notification and welcome message is a clear and unambiguous notification to the consumer that he or she has in fact subscribed to a named subscription service. Having studied the wording of the SP's notification message, I am of the opinion that it could well be interpreted by a reasonable consumer to imply that the recipient has not yet subscribed to any service (i.e. the service has not yet "started"). The message could be interpreted as being an invitation to subscribe to a new service by visiting hugemob.com. In other words, the message could feasibly be mistaken for an advert or marketing message inviting for the subscription service, rather than a welcome message to an existing subscription service. I realise that the words "start the experience" can be interpreted to mean "start using the service you are already subscribed to and paying for" but this is not the only interpretation that the wording of the message permits. It is therefore not an unambiguous and clear notification that the reader is already subscribed to a service

called Hugemob and already liable to pay R5 every 3 days for that service. Given that the welcome message is not unambiguous, the wording of the monthly reminder messages is even more important. Sections 11.5.1 and 11.5.2 deal with reminder messages in detail, and 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].”

The reminder messages sent by the SP read as follows:

“U r subscribed to Hugemob.1game&unlimited contents:R5/3day. Hlp: 0123428001.Unsub sms STOP to 33912”

In relation to permitted abbreviations, section 11.1.8 of the Code allows “u” in place of “you” and “r” in place of “are”, but there is no similar permission for “Hlp” to be used in place of “Help” or “Unsub” to be used in place of “Unsubscribe” in the monthly reminder messages. The SP has used both of these abbreviations in its reminder messages. It has also not used the word “Cost” as prescribed before listing the cost of the service and frequency of billing. In addition, the last sentence of the prescribed format of the reminder message should be “To unsubscribe, sms STOP to...”. The SP has left out the word “To” and simply used the prohibited abbreviation “Unsub sms STOP to 33912”, which does not read as clearly as the expressly prescribed format for a reminder message.

It is notable that the wording of the Code in section 11.5.2 states that “[t]he reminder messages specified in 11.5.1 must adhere exactly to the following format, flow, wording and spacing” (emphasis added). Accordingly, the differences pointed out above are not insignificant. Furthermore, section 11.5.2 demands that the spacing of reminder messages must conform exactly to the prescribed format. The spacing used in the SP’s reminder message appears to be non-compliant. Given that one SMS permits 144 characters, and given that the number of characters in the reminder message as quoted by the SP totals significantly less than 144, there does not appear to be any compelling reason for the SP to not have observed the required spacing. Using helpful spaces contributes to the clear meaning of a reminder message. As pointed out above, the welcome message is itself ambiguous and could be construed as a marketing message or advert, which makes the noncompliance of the reminder messages even more problematic because it increases the probability that a user may remain inadvertently subscribed to a service for a longer period of time than would otherwise be the case if the reminder messages complied with the prescribed format.

The SP is therefore in breach of section 11.5.2 of the Code in several respects. While the complaint of involuntary subscription to the SP's service cannot be upheld on the evidence, a breach of section 11.5.2 of the Code has been established on the SP's own version.

The SP's response to my inquiry whether the subscription service was registered with WASPA was evasive at best. It leads me to the conclusion that it was in breach of section 11.9.1 which requires subscription services to be registered with WASPA. There was also not proper compliance with section 11.9.2 which requires the SP to provide proof that "all required reminder messages have been sent to the customer".

Sanctions

The primary purpose of the WASPA Code of Conduct is to ensure that consumers can use wireless application services with confidence. Given that claims of inadvertent subscription are frequent, non-compliance with section 11.5.2 is significant. The provisions of 11.5.2 are very clear. There can be no justification for non-compliance.

I have noted from adjudication report #10467 that, as at December 2010, 9 of the 21 complaints brought against the SP by that date concerned billing for unsolicited subscription services (6 of these 9 complaints were upheld). Non-compliance by the SP with provision of the Code dealing with subscription services on a repetitive basis cannot be ignored as their repeated non-compliance impacts negatively on the reputation and standing of the wireless application services industry as a whole.

However, due to the fact the conduct and infringements were part of a systemic problem within the SP and that it has already been severely fined for this conduct during this same period, I deem it appropriate not to increase the penalties exacted for similar transgressions. The SP also claims that it has corrected the infringing notices in the mean time. I therefore lay down the following sanctions:

1. In addition to the refund already made by the SP, the SP shall further compensate the Complainant in the amount of R2,000 for the inconvenience and expenses caused to the Complainant.
2. A fine of R50,000 payable to WASPA is imposed on the SP, suspended for six months provided that the SP pays the compensation within 14 days of delivery of this report.