



REPORT OF THE ADJUDICATOR

Complaint reference number:	16269
WASPA member(s):	Sprint Media (IP) / Opera Interactive (SP)
Membership number(s):	1168 / 0068
Complainant:	Competitor
Type of complaint:	Website advertising
Date complaint was lodged:	2012-01-31
Date of the alleged offence:	2011-11-01
Relevant version of the Code:	11.0, 11.6
Clauses considered:	4.1.1, 4.1.2, 11.1.1, 11.1.9, 11.2.1, 11.2.2, 11.2.5, 11.2.6, 11.6.1, 11.6.2, 12
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	Not applicable
Related cases considered:	16319, 16333, 16668, 16735

Complaint

1. This complaint was lodged by an employee of a WASPA member who alleged that his wife's MSISDN had been subscribed to the Mobmatic service offered by the IP without her consent and in breach of the WASPA Code. The complaint was lodged on 13 February 2012 and the complainant specified 1 November 2011 as being the date on which the unauthorised subscription took place.
2. The complainant stated that no notification or reminder messages had been received by his wife and that she had become aware of the subscription through her Vodacom bill. The complainant's wife had unsubscribed from the service through Vodacom and contacted the SP.
3. The complainant noted that numerous complaints regarding the IP's service were to be found on social media channels and consumer complaints websites.
4. The relief sought was a refund of R534.18 as well as "compensation for costs and for being fraudulently billed, a suggested amount of R10 000 as well as that the service provider be fined accordingly by WASPA".

5. In the initial complaint the complainant referred to several breaches of the Code. It appears, however, that these references are to version 11.6 of the Code (in force at the time the complaint was lodged) and not version 11.0 (in force at the time that the unauthorised subscription was alleged to have taken place and therefore the applicable version). This is an understandable error and the complainant has nevertheless communicated the essence of the breaches he believed occurred, viz:

5.1. Since his wife had not subscribed to the service, no subscription service notification or separate confirmation message was received.

5.2. No reminder messages had been received.

6. The complainant later filed an augmented complaint in the following terms:

"In addition to my complaint I also want to make the following issues known:

The provider breached the following clauses of the WASPA Code.

1. The following message was delivered to the handset. At no point was this requested though the provider claims it was and have provided IP logs which cannot be verified. 1 new message on your account: 'Your account 0824506614 has 500 cr...' Click to read full message <http://ems.cx/w/?m=27824506614/2optout/click/r7/d/subscr> The above is however undeniably, not compliant. Firstly all subscription services should clearly be identified as subscription services. Subscr - is not sufficient as clear identification. The provider is in breach of clause 11.1.1 of the WASPA Code - 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.

2. The pricing in the message above is also in breach of the WASPA Code -

11.1.9. For services that are not billed on a daily, weekly or monthly basis, the pricing should be of the format "RX every [time period]".

3. The provider claims that the number has received 550 credits which – I assume only becomes available once the users subscribes to the service. The advert does not make this clear at all which is in breach of the following clauses of the WASPA Code.

With regards to 11.2.1 the provider lures the subscriber into the service with a single content item/prize - 500 credits.

In relation to 11.2.2 the provider does not make it clear that the user is entering into a subscription service, but disguises the subscription as credits that have been received, the fact that the pricing is so unclear and in breach of the code leads to further confusion.

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.

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.

4. The provider is also in breach of the following clauses due to the deceptive and misleading nature of the promotional SMS. Their refusal to refund in this instance whilst knowing that the service is not compliant does not presume fair or honest dealings: 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. The reminder message of the provider is not complaint: Reminder: Redeem ur coins 4 products or they'll expire.u r subscribed to Sprint Media MOBMATIC.Help 0213002334 cost R7/day to unsub, dial stop 31923 free msg 11.6.2. The reminder messages specified in 11.6.1 must adhere exactly to the following format, flow, wording and spacing: Reminder: You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. SMS HELP [optional keyword] to [short code]/call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code]. or Reminder: 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 unsub, sms STOP [service keyword] to [short code]."

7. At a later stage the complainant raises a further allegation that the logs provided by the IP and which purported to constitute proof of subscription and subsequent messaging had been falsified:

"The complainant believes she was defrauded by Opera by unlawfully subscribing her to a subscription service that she most definitely did not subscribe to, even if the records shows otherwise, it simply means those records are fraudulent as well."

Service provider's response

8. During the informal resolution process, the IP indicated in an email to the WASPA Secretariat, sent on 21 February 2012, that it had contacted the complainant directly and offered him a refund. An offer to refund R609 – made without any admission of liability - was then recorded in writing pursuant to a telephone conversation between the IP and the complainant.
9. The complainant responded six days later with what essentially amounted to a counter-offer: that the complaint would be withdrawn and the matter put to rest on payment of the sum of R1 609 by a specified date. Presumably the complainant sought to recover an additional amount representing a form of compensation for related costs and inconvenience.
10. The IP provided written indication to the WASPA Secretariat that it would only pay a refund representing the amount actually debited and would not entertain the payment of compensation over and above this:

"As you can see from the email below, the complainant is still seeking compensation and our stance has always been not to issue the compensation request as this figure was initially R1000, then R10000 through WASPA then back to R1000.

I have liaised with Lorraine at WASPA on this, and she is dealing with the complainant directly. We are aware that this may go to adjudication, however the fact that we are being extorted by an employee of another WASP member is extremely concerning."

11. The complainant indicated that the matter should proceed to formal adjudication.
12. The IP provided its formal response on 20 March 2012. This was supported by log excerpts and screenshots showing the subscription process in general and as it was specifically applied to the complainant's wife.
13. The SP also provided a response, on 26 March 2012.

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- 13.1. It had undertaken its own internal investigation into the complaint and wished to draw the attention of the adjudicator to the facts as it understood them. Logs were provided to substantiate this understanding.
- 13.2. The allegations raised in the complaint were not raised by the affected consumer but by a third party. Such "statements, allegations and accusations do not fall within his personal knowledge and has not been confirmed by the actual consumer".
- 13.3. On 2 July 2011 at 17:17:27 a SMS push marketing message was sent to the mobile number 082 xxx 6614 and the message delivered successfully. However, no further action was taken by the consumer at this time.
- 13.4. On 31 October 2011 at 12:50:35 a SMS push marketing message was sent to the mobile number 082 450 6614 and the message delivered successfully. Refer to row 4 of Annexure A.
- 13.5. "On or about" 1 November 2011 the consumer clicked on the link provided in the SMS push marketing message and was then redirected to the Mobmatic Subscription Service WAP landing page. This is set out in Annexure A to this adjudication.
- 13.6. The consumer then clicked on the "NEXT>" button thereby completing the first step of the double opt-in procedure.
- 13.7. The IP's system had captured the make and details of the consumer's handset.
- 13.8. "On or about" 1 November 2011 the consumer was sent and received a confirmation message reading "CLICK <http://ems.cx/r/3E5D7503> TO CONTINUE."
- 13.9. The consumer clicked on this link and was redirected to the Mobmatic subscription service WAP confirmation page. This is set out in Annexure B to this adjudication.
- 13.10. The consumer clicked on the "COMPLETE" button, thereby completing the second leg of the double opt-in process.
- 13.11. The consumer was sent and received a further confirmation message: "You are now signed up to mobmatic, your password will be sent to you by sms. Click here to login."
- 13.12. On 1 November 2011 at 21h20 a welcome message was sent to the consumer as follows:
- "WELCOME: COLLECT COINS 4 PRODUCTS 24/7 Visit mobmatic.com
Password: 40523742. help@mobmatic.com subscriptionR7/day 16plus 2 unsub
sms stop 31923. 0213002334".
- 13.13. A reminder message in the prescribed form was sent to the consumer as required by the Code.
- 13.14. An unsubscribe request was received on 31 January 2012 and this was actioned and confirmed to the consumer within 10 seconds.
- 13.15. The consumer has been charged the R7 daily fee for the period 1 November 2011 to 31 January 2012. This fee was for access to the service and it was irrelevant that the service was not used.
- 13.16. As regards the allegation that the communications to the consumer were unsolicited the SP asserted that "on or about" 24 June 2011 the consumer had

clicked on a mobile banner advertisement and redirected to the Mobmatic WAP landing page. This page "clearly states" in the terms and conditions set out thereon:

"“Mobmatic has requested that your mobile number be made available. Clicking on “next” you are declaring to be 18+ and are accepting both the terms and conditions and to receive free promotional SMS relating to this and other services operated by Sprint Media S.L. To opt-out from promotions, sms STOP to 39325 or contact Support@mobmatic.com or call 0213002334.”"

- 13.17. On the same date at 12:02:48 the consumer entered the MSISDN in the space provided and clicked on the "NEXT>" button and was sent and received a confirmation message. The consumer did not however take any further action and the opt-in process was not completed.
- 13.18. Marketing messages were then sent to the consumer on 2 July 2011 and 31 October 2011
- 13.19. Logs and screenshots were provided in support of the above.
14. The SP confirmed that a "goodwill gesture refund" of R609 had been offered – this amount representing total billings for the subscription period,
15. The SP further provided a rebuttal to the specific Code clauses raised by the Complainant which largely echoes and corresponds with the version placed before the adjudicator by the IP.

Decision

16. This complaint forms part of a series of related complaints lodged against the SP and IP during the first three months of 2012 in respect of the Mobmatic service. In particular complaints 16319, 16333, 16668 and 16735 were lodged with WASPA during this period. These four complaints have subsequently been adjudicated and appealed as a batch by the IP. A WASPA Appeals Panel delivered its decision on 13 December 2012 - this can be accessed at http://www.waspa.org.za/code/download/16319_appeal.pdf.
17. In the circumstances – especially the refund effected by the IP – the decision in this matter must follow the guidelines set out in the Appeal judgement:
 - 17.1. The member is found to have breached clauses 4.1.2 and 5.3.1 of the Code. This flows from what the Appeal Panel found to be "somewhat misleading and/or deceptive" mechanism to obtain consent to receipt of marketing messages. These messages are therefore to be regarded as unsolicited.
 - 17.2. The member is found to have breached clauses 11.1.1 and 11.6.2 for the reasons set out in the Appeal decision.
18. There is no provision in the WASPA Code empowering an adjudicator to make a compensatory award of the type claimed even if he or she was inclined to do so.

Sanctions

19. No specific sanction is applied (other than an order to refund which is no longer relevant) as it is equitable to subsume sanctions in respect of the breaches identified within those set out in the Appeal decision.

Annexure A – Landing Page

SUBSCRIPTION
SERVICE R7/DAY

Mobmatic's
Premium
Wallpapers for
your Cell. Click
next to join:

NEXT >

Support:
help@ems.cx

Mobmatic is a
subscription service for
mobile content at rand
seven per day.
Mobmatic has
requested that your
mobile number be made
available. Clicking on
'next' you're declaring
to be 18+ and are
accepting both the
[terms and conditions](#)
and to receive free
promotional SMS
relating to this and
other services
operated by Sprint
Media S.L. To opt-out
from promotions, sms
STOP to 31923 or
contact
Support@mobmatic.com
or call 0213002334.
[Privacy Policy](#).

Annexure B – Mobmatic subscription service WAP confirmation page

Confirmation
complete. Thank
you, now click
complete to finish
the signup
process.

COMPLETE

Subscription
Service R7/Day

Support:
help@ems.cx

Mobmatic is a points oriented subscription service for mobile content at rand seven per day. Mobmatic has requested that your mobile number be made available. Clicking on 'complete' you're declaring to be 18+ and are accepting both the [terms and conditions](#) and to receive free promotional SMS relating to this and other services operated by Sprint Media S.L. To opt-out from promotions, sms STOP to 39328 or contact Support@mobmatic.com or call 0213002334. [Privacy Policy](#).