



REPORT OF THE ADJUDICATOR

WASPA Members: Mobimex

Service Type: Automatic subscription / spam

Complaint Number: 5816

Adjudicator: Kerron
Edmunson
Kerron Edmunson

Code and Ad Rules: v6.2 read with v2.3 of the Ad Rules

Introduction

This is a complaint regarding the ease with which customers can be subscribed to services they do not want, and then billed for them, and funds actually deducted from their bank accounts. The facts are similar to those set out in complaint 5602, and both complaints are against the same SP. This has been taken into account in the decision and sanction.

Complaint

The complainant is an MTN customer and after a period of some months, was liable for hundreds of rand for a service he claimed not to have subscribed to, which money was deducted from his account by MTN.

Specifically the complainant writes that he was billed for a “content charge”. He had clicked on a link to download “free” ringtones from the MTN menu after enabling WAP on his phone, but had not downloaded anything. He then received other SMS’s inviting him to unsubscribe, but he ignored them as he does not reply to unsolicited messages. When he complained, he was provided with a log indicating that he had hit the SP site. He also submitted an SMS with his complaint which reads “Free SMS: thank you for using our service! This is R100 spending notification. Txt stop to unsubscribe. Problem? Mail to: help@mob.vc.”

As the complainant points out, there is no indication of how much a reply to this SMS will cost or whether a reply is possible – the only possible response is to email the address given.

SP Response

Mobimex unsubscribed the subscriber but refused a refund in the circumstances, claiming that the complainant subscribed and unsubscribed in the usual way. They submitted a short log with their response confirming that messages were sent to the complainant, but did not attempt to explain their service or defend the complaint.

The adjudicator requested further information including a copy of the initial text sent to subscribe the complainant to the content service and the text of the free music download link referred to by the complainant, but the response from the SP was

simply that “there was no message sent out to the complainant in order to subscribe him. We are not sending marketing messages out. He has clicked on an advertising banner for our WAP service in a third party site and landed on our terms and conditions page, where all the conditions are clearly described as by WASPA regulations. As he is writing there were a number of notification SMS has been sent explaining also how to unsubscribe.”

Consideration of the WASPA Code

As set out in the other complaint referred to, there are several sections that apply and I have repeated them in full here.

The first set refer to the type of message and service by definition:

- **Section 2.8:** a “**commercial message**” is defined as is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.
- **Section 2.11:** a “**content subscription service**” is any subscription service providing or offering access to content including, by way of example only and not limitation: sound clips, ring tones, wallpapers, images, videos, games, text or MMS content or information. This includes any subscription service which describes itself as a “club” or which otherwise allows access to content to subscribers, at a cost which includes both a subscription element and a per content item element. Services which are not considered to be content subscription services include: dating services, chat services, location-based services, GSM terminal device services, corporate application services, reminder services, synchronisation applications, corporate communications applications, VOIP, etc.
- **Section 2.23:** a “**subscription service**” is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

The relevant sections within section 5 (sending of commercial communications) are as follows:

- **Section 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.
- **Section 5.1.3:** where feasible, customers should be able to unsubscribe from any subscription service using no more than two words, one of which must be ‘STOP’.
- **Section 5.2:** this section deals with the identification of spam, and states at 5.2.1 that “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”.

Section 11 is particularly relevant, and provides that in relation to subscription services:

- **Section 11.1.1:** Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”.
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- **Section 11.1.2:** 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.
- **Section 11.1.3:** Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.
- **Section 11.1.4:** Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.
- **Section 11.1.7:** Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a 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.
- **Section 11.1.8:** A monthly reminder SMS must be sent to all subscription service customers containing the following information:
 - (a) The name of the subscription service;
 - (b) The cost of the subscription service and the frequency of the charges;
 - (c) The service provider’s telephone number.
- **Section 11.1.9:** The monthly reminder SMS must adhere to the following format:
 - (a) The monthly reminder must begin with either “Reminder: You are a member of NAME OF SERVICE” or “You are subscribed to NAME OF SERVICE”.
 - (b) Any marketing for a new service must appear after the cost and frequency of the existing service and the service provider’s telephone number.

It is also relevant to consider the introduction to the Code which sets it in context.

- **Section 1.2** states that “the primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. The Code aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made.”

From the limited information provided we can determine that:

1. the complainant attempted to access a content service described as “free”, which does not appear to have been described as a subscription service from the facts, although he was nonetheless then subscribed to a service for which he was also billed repeatedly;
 2. it is not clear whether the SP complied with sections 11.1.7, 11.1.8 or 11.1.9 and so we must assume they did not but from the facts it would appear that the SP failed to comply with any of sections 11.1.1, 11.1.2 or 11.1.4;
 3. the complainant did not, in the message quoted by the complainant, offer an unsubscribe service via SMS; and
 4. the SP accepted that the customer wanted to unsubscribe but carried out this instruction in the normal way and not as a result of the complaint, and a refund has been refused.
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Decision

The SP has not responded to the allegation in any detail and so assumptions regarding the service offered by the SP, manner of contacting the complainant and complainant's desire to subscribe must all be judged on the complainant's version.

This being the case, I find that the SP was in breach of all of sections 4.2, 5.2, and 11.1. The SP's response is, as in complaint 5602, quite inadequate to limit or avoid liability for this repeated breach of the Code, which on the facts before me appears to be even more material, even more serious.

I consider it unacceptable that a customer can somehow be directed through a link describing a free service which is apparently of the nature of a content service or a non-subscription service, to a website that creates a commercial relationship of subscription with that customer, and that the customer can then be billed in a repeated fashion, at a high level, for a number of months without relief.

Sanction

The SP is directed to pay a fine to WASPA in relation to the breaches of each of sections 5.2 and 11.1 of R20,000 for the breach of section 5.2 and R20,000 in respect of the breach of section 11.1 (R40,000 in aggregate), within 10 days of the date of publication of this adjudication.

The SP is also directed to refund all of the complainant's payments from the date of “subscription” in the same period and confirm to WASPA that this has been done.

I might add that it is worth a few minutes of the SP's time to provide more detailed and comprehensible responses when requested to do so by WASPA, as it is quite impossible to determine – even after further enquiry – the full facts on the SP version.