



REPORT OF THE ADJUDICATOR

WASPA Member (Member):	Mobimex Group
Service Provider (SP):	SmartCall
Service Type:	Subscription
Source of Complaints:	Consumer
Complaint Number:	6719
Code of Conduct version:	6.2
Advertising Rules version:	

Complaint

Complaint #6719 is the escalation of unsubscribe request #13652 regarding a subscription service.

On 9 December 2008 WASPA received a written communication from a consumer who stated as follows:

I have a contract for my daughter through Vodacom. Starting at about the beginning of October, (we do not have itemised billing so can't say for sure exactly when) all of a sudden she started receiving sms's that is billing her R30 everytime she receives one which is about 4 times a month (while there is money available) and a further 2 to 3 even though there is no more money available to be billed. In other words she has no airtime to use her phone. We have tried all sorts of things to stop these sms's (such as resetting the phone) but of course that doesn't help. I have now contacted Vodacom to find out what we can do about this and they informed us that we are being billed by ViaMedia and Smartcall IT. They also informed us that they do not take responsibility for these WASP's and that we have to 'please' them to stop the service. I would appreciate it if this could be sorted out so that they stop sending the sms's and to refund all monies that they have (in my mind) stolen. Please unsubscribe, provide proof of subscription and/or refund."

This communication was forwarded to the Member who replied on 12 December 2008 as follows:

"There was no stop received. We stopped the service now. He downloaded some videos (6-Sep-2008 Sat 11:35)".

An unsubscribe request was logged on the WASPA website on 9 January 2008 however several months later the consumer was still trying to establish how the service had come to be subscribed to, which WASPA member had provided the service and who the subscription charges had been paid to. Communications

24 February

between the consumer, WASPA and the Member took place over a number of months and do not bear repetition in this report suffice it to say that the unsubscribe request was ultimately escalated into a formal complaint against the Member on 5 June 2009.

Response to Complaint

On 11 June 2009 the Member responded to the formal complaint as follows:

"We checked again our logs and as seen on the proof attached the mobile number did opt-in on 2008-09-06. It was stopped immediately after request on 2008-12-12. There are downloads from this number as seen in the attached log. All actions and responses by Mobimex were on time and in accordance with the Code of Conduct. Should you need further information please don't not hesitate to contact me."

The Member also furnished WASPA with tables showing the date (i.e. 6 September 2008) and time at which it alleged the consumer had subscribed to its services as well as the specific handset (a Samsung SGH E340) and IP address used to subscribe.

On 6 July 2009 the consumer replied as follows:

"I have looked at the attached logs and all that it shows is the one date of the 'so called' subscription. Further there is nothing."

What often happens (I have spoken to loads of people that are having problems) is that just going to a website subscribes you without warning plus there is no warning sms to say that this a subscription service and to confirm. Furthermore there was no way of opting out.

As soon as the sms was received on the phone, R30.00 was taken and there was plenty of these.

So as far as I am concerned, I am not happy with their explanation and would like a full refund."

The matter was then referred for formal adjudication.

On 26 October 2009 an adjudicator's request for additional information was delivered to the Member by WASPA in the following terms:

"Please can the SP and/or IP to kindly provide their full message and transaction logs in respect of complaint #6719 within 5 days of receipt of this request, including:

- (a) proof of all required reminder messages having been sent to the customer;*
- (b) detailed transaction histories indicating all charges levied and the service or content item applicable for each charge; and*
- (c) any record of successful or unsuccessful unsubscribe requests.*

If neither the SP nor the IP are able to provide all of this detail, I would like them to explain within 5 days what message and transactional logs they do keep for these consumers and why."

On 4 November 2009 the Member furnished WASPA with the requested information which will be discussed in greater detail below.

The Member also alleged in its reply that the consumer had "clicked on banner ad published in a third-party WAP site. The user has come on the Landing Page with the subscription terms and conditions and accepted them when accessed the WAP portal. A free welcome message was sent to the user. After that the below content downloads were made."

On 9 November 2009 a further request for additional information by the adjudicator was sent to the Member by WASPA stating as follows:

"Please request the SP/IP in this complaint to provide me with copies of all advertisements for the service that were clicked on by any consumers who have complained in this matter, including the various banner ads published in third party WAP sites that the SP/IP alleges were clicked on and which resulted in the consumer arriving on the landing page for each service containing the subscription terms and conditions."

On 16 November 2009 the Member replied as follows:

"The user has clicked on the following advertisement published in a third-party WAP site, which has lead to the terms and conditions page:

ENJOY COOL VIDS - WATCH NOW!

Should any further information be needed, please do not hesitate to contact me directly."

On 17 November 2009 a further request for additional information by the adjudicator was sent to the Member by WASPA stating as follows:

"Can I now also please request the SP/IP in these complaints to provide me with copies of the "landing page" that consumers would have accessed after clicking on the banner ads and the terms and conditions for the service?"

I would request that these pages and terms and conditions be provided to me in the size and format that a consumer would have seen and accessed them.

If I could have this information in the requested format within 5 working days from the SP/IP please, alternatively the most suitable size or format in which they can provide them together with an explanation why they cannot furnish the information in the original size and format."

Please could you provide the requested information to the WASPA Secretariat at your earliest convenience, but in no later than five working days."

On 24 November 2009, the member replied as follows:

"Kindly find attached the requested "Landing Page" and "Terms and Conditions" page. Since we do not have in place the mobile phone used by the visitor, namely Samsung SGH E340, the pages are being displayed using WML browser.

Should you have any questions, please don't hesitate to contact me directly."

The following images of the "Landing" and "Terms and Conditions" pages were attached:

Welcome



SA JUKEBOX
TOP TEN Update Every Week.

[Enter here](#)

We provide pics, videos and games for members. For HELP write to help@gsm.vc, Wallpapers and Screensavers cost just R5 each, Videos R10, Mobile Games R45. 150 credits equals R15. Subscription services at R15 per week. Additional bearer charges may apply. SMS STOP to 39215 to unsubscribe or send mail to help@gsm.vc
Service provided by Mobimex

Wap Menu

Terms and Conditions

The bill payers permission is required before using the services advertised on this wapsite (the services). The services are charged at value added services rates (free minutes do not apply). Wallpapers and Screensavers cost just R5 each, Videos R10, Mobile Games R45. 150 credits equals R15. Subscription services at R15 every 3 days. All costs are VAT including. Additional bearer charges may apply. WAP enabled phones are required to play. Incorrect entries/requests will be billed in full. By utilising the services, you agree that Mobimex may contact you via SMS with promotional information/offers from time to time. Mobimex is not liable for any loss, damage or expense arising from the use by you of the services, and the services are used at your own risk. If you enter a competition then the judges decision is final, winners will be notified telephonically. All information and pricing of the services are correct at the date it is published on the web site but may be subject to changes. Participation in and/or use by you of the services constitutes acceptance by you of the Terms and Conditions; services brought to you by Mobimex. e-mail: help@gsm.vc. Call Centre: 079 144 4615 8am to 5pm Monday to Friday. SMS STOP to 39215 to unsubscribe.

[Back](#)

Decision

The Member has alleged that the consumer subscribed to its subscription services on 6 September 2008. Although the consumer denies this, I have applied version 6.2 of the Code of Conduct (which was in force on 6 September 2008) to the facts of this dispute.

Although the Member alleges the consumer subscribed on 6 September 2008, the Member's message logs show that the subscription confirmation message was only sent to the consumer on 25 September 2009. The Member has therefore breached section 11.1.7 of the Code of Conduct which states that "*once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer*" (own emphasis).

Section 11.1.2 of the Code of Conduct deals with requests by consumers to become subscribed to a subscription service. This section reads as follows:

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.

The Code is clear: for a consumer to become subscribed to a service the consumer must have the specific intention of subscribing to a service and must not be intending to do anything else other than subscribe to a service at the time he or she is so subscribed.

In response to the complaint by a consumer that he had not subscribed to the Member's services, the Member furnished a reply stating that the consumer had *"clicked on the following advertisement published in a third-party WAP site, which has lead to the terms and conditions page"*. This sentence can be reduced to the following steps that the Member alleges the consumer to have taken:

1. the consumer clicked on an advertisement in a third-party site; and
2. the consumer arrived at a terms and conditions page.

Having reviewed the subscription process described by the member, it is difficult to establish where in the above process the consumer would have expressly transacted to become a subscriber to the services.

The advertisement produced for the services by the Member does not have the appearance of a transaction page. The only button available to the consumer is a button headed *"Enter here"*. Unless there are other indications of an intention to transact, an invitation to enter a site is considerably different from an invitation to transact on a site. Furthermore, it appears from the process description and the evidence put up by the Member that the subscription transaction mechanism must have been activated by clicking on a button that appears to be a navigation button rather than a transaction button. A reasonable consumer would not be intending to transact by clicking on that button and the method by which consumers were subscribed to the Member's service breaches section 11.1.2 of the Code of Conduct.

Section 3.1.1 of the Code requires members to *"at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA"*.

Furthermore, sections 4.1.1. and 4.1.2 of the Code state as follows:

"4.1.1 Members are committed to 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."

In light of my finding regarding the nature of the subscription activation process, I find the member to also have breached sections 3.1.1, 4.1.1 and 4.1.2 of the Code of Conduct.

The SP in this matter, being a member itself, is also obliged in terms of section 3.9.1 to bind information providers with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct. In terms of section

2.13 an “*information provider*” is “*any person on whose behalf a wireless application service provider may provide a service, and includes message originators.*”

I have had regard for the findings of the Appeals Panel in complaint 411 in which the Panel found (in paragraphs 24 and 25 of its decision) that an SP was responsible for an IP’s adherence to the Code of Conduct. I have also had regard for the finding of the adjudicator in complaint 5981 that this should remain the case even where the information provider in question is also a member of WASPA.

As the service in question has been shown to have been operated in breach of the Code, the SP should also not be in a position to benefit commercially from the service. Benefitting as the SP has in this matter from a service provided in breach of the Code amounts to a breach of sections 3.1.1 (referenced above) and, in the circumstances of this matter - where no binding contract appears to have been concluded between the complainant and the Member - section 3.1.2 of the Code which requires members to be committed to lawful conduct at all times.

I have accordingly imposed sanctions against both the Member and the SP as set forth below.

Sanction

The breaches of the Code committed by the member in this matter are of a very serious nature. The primary purpose of the WASPA Code of Conduct is stated in section 1.2 thereof as follows:

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 breaches by the member go to the heart of the Code and undermine the reputation of the wireless application services industry as a whole. In considering an appropriate sanction to be applied in this matter I have also had regard for previous breaches of the Code upheld against the Member including in complaints 6303, 6678, 6759, 6928, 7081 and 6671 where identical or near-identical breaches were upheld against the Member. I have noted that the date on which the adjudication reports in the aforementioned matters was delivered is after the date on which the present complaint arose, however the facts of those complaints indicate that the member has repeatedly breached the Code in a very serious manner.

For the purposes of paragraphs 1.3 and 2 below, a “related entity” shall be any entity in which any of the beneficial ownership of such entity is held directly or indirectly by any of the owners of the member or which has one or more directors, members or senior executives in common with the member.

1. The Member is directed to:

- 1.1 immediately suspend all of its subscription services offered in South Africa and all billing for any such services;
- 1.2 pay over to WASPA a fine of R350 000 within 5 days of the delivery of this report; and

- 1.3 pay to the consumer compensation in the amount of R30 per week for each of the 12 weeks the consumer was apparently subscribed to the service between 6 September and 12 December 2008 (totalling R420) plus interest on the total refund amount at the rate of 15,5% per annum calculated daily and compounded monthly in arrears from 12 December 2008 until date of payment, such payment to be made into a bank account within 5 days of the consumer furnishing the Member with details of its nominated bank account;

failing which the Member's and any related entity's memberships of WASPA shall be suspended and all relevant cellular network operators shall be requested to bar the Member's and any related entity's access to its billing platforms and services as contemplated by the provisions of section 13.4.3(d) of the Code for a period of 180 days or until such time as the fines imposed in paragraphs 1.2 and 1.3 above have been paid in full, whichever period is the longer.

2. The SP, SmartCall, is directed that in the event that the Member does not pay the fines and compensation provided for in paragraphs 1.2 and 1.3 above within 5 days, or cause such fines and compensation to be paid, then the SP shall:
 - 2.1 immediately compensate the consumer as provided for in paragraph 1.3 above and make all necessary arrangements with the consumer to comply with the provisions of this sub-paragraph;
 - 2.2 within 10 days furnish WASPA with a historical statement of account detailing all revenue received by it in respect of all subscription services provided to Mobimex prior to 12 December 2008 and specifying the SP's service fees in respect of such services and the SP's share of any revenue generated by such services;
 - 2.3 permit WASPA to appoint an independent person to audit the accuracy of the statements to be furnished in terms of paragraph 2.2 above including by having reference to the SP's message records, transaction records and bank statements;
 - 2.4 provide WASPA and the auditor with all requested written consents that may be required to facilitate the conduct of the audit referred to in paragraph 2.3, including a consent to permit any network operator to furnish WASPA and the auditor with copies of all relevant records reasonably required for the purposes of such audit including relevant message and transaction records held by any such network operator;
 - 2.5 withhold any payments currently or at any time becoming due by it to Mobimex or any related entity as contemplated by the provisions of section 13.4.1(i) of the Code;
 - 2.6 pay over to WASPA the SP's service fees and the SP's revenue share paid to it by any cellular network operator in respect of all subscription services provided to Mobimex prior to 12 December 2008 until such time as WASPA has received payment in full of the penalty specified in paragraph 1.2.

3. In terms of section 13.4.2 of the Code, the sanctions contained in paragraphs 1.1, 1.2 and 2.2 to 2.6 above may not be suspended pending any appeal that may be instituted in this matter but shall become effective immediately on the publication of this report.
4. In the event that any appeal is lodged is then interest on the compensation to be paid to the consumer in terms of paragraph 1.3 and 2.1 shall not be interrupted pending such appeal but shall continue to run.
5. In the event that any appeal is substantially successful, then any fine paid by the Member in terms of paragraph 1.2 or by the SP in terms of paragraph 2.6 shall be refunded to the relevant party concerned subject to any remaining sanctions or revised fine that the Appeals Panel may determine appropriate.