



REPORT OF THE ADJUDICATOR

WASPA Member (Member):	Mobimex Group
Service Provider (SP):	SmartCall Technology Solutions
Service Type:	Subscription
Source of Complaints:	Public
Complaint Number:	6928
Code of Conduct version:	7.0
Advertising Rules version:	2.3

Complaint

This complaint is an escalation of an unsubscribe request and initial complaint filed by a consumer on 29 June 2009 stating as follows:

“Good day, I have been noticing several strange debits on my cell phone account since December 2008. These have now been happening at regular intervals now and I have to state the facts. I never applied for any services from Smartcall Technologies. I never gave permission to Smartcall Technologies or Autopage Cellular to debit my cell phone account with charges to any service. As you can see from the attached file, the total of these charges is a whopping R189.34 over a period of six months. After much phoning around, Smartcall Technologies has been identified by Autopage cellular as being the party who initiated these charges. I tried to phone to Smartcall number, where I only got a pre-recorded message instructing me to send an SMS to number 36628 to stop them from charging me. This has been done. I now request that either Autopage Cellular or Smartcall technologies refund this amount to me before the end of this coming week (03 July 2009). Failure to do so will force me to lay a formal complaint at WASPA, who has also been included in this e-mail.”

On 30 June 2009 Mobimex responded as follows:

“Customer subscribed properly on 15-May-2009 (proof attached) Subscription terminated by customer through \“Stop\” SMS. No refund offered because have properly used our content services. We are contacting the customer directly regarding refund request.”

The response of Mobimex did not satisfy the complainant who then escalated the complaint to a formal complaint on 1 July 2010 and stated as follows:

“Hi there, My problem still is that I never subscribed to any premium service in the first place, and I would like WASPA to help me get a refund from the parties listed

10 February

below. I have not heard anything from them up to today on the matter of the refund. The case is thus not resolved as yet."

The complainant continued to email Smartcall Technologies seeking a refund.

Response to Complaint

On 7 July 2009, the SP (Smartcall Technologies) wrote to the complainant and stated that:

"There was a content subscription on your phone for content services. It has been cancelled."

On 8 July 2009, the member (Mobimex) advised WASPA in writing that:

"The customer did a regular opt-in with one of our content sites on May-15 (proof attached). By doing that he has passed through the terms and conditions page, which explains that this is a subscription service and also gives the billing conditions. He has accepted it in order to enter the site and start a subscription. Mr. Rodney de Bruin did unsubscribe himself via STOP SMS sent to the short code.

The customer is complaining about charges since December 2008, which are definitely not for any of our services. He has become a member with us on May-15, 2009."

The member also included a table showing the date and time on which the complainant's MSISDN had subscribed to the member's service and showing the model of telephone used to subscribe.

On 10 July 2009, the complainant addressed the following further response to WASPA:

"I need [t]o share the following facts:

- 1. My cell phone account has been debited from December 2008, as the attached extract is taken from my itemised billing at Autopage. If not Mobimex, than who has been debiting my account since then?*
- 2. Mobimex does not say what is the service I subscribed to, and I insist that I NEVER subscribed to any premium rated service. I am a heavy WAP user for a few years now, and I need more than fabricated logs of my WAP sessions. What is the WAP PAGE, what is the service, what is the value received?*
- 3. I opted out after I became aware of the debits to my account.*

This complaint has NOT resolved to my satisfaction and I await the service provider's feedback on the issues raised above."

On 14 July 2009, WASPA received written confirmation from AutoPage (the complainant's cellular service provider) that the persons responsible for debiting the consumer's account in December 2008 were Starfish Mobile and SmartCall Technology Solutions.

On 16 July, the Member then replied further to WASPA as follows:

The service to which the number did subscribe is our WAP Erotic Portal, which provides wide variety of adult content - wallpapers, videos, games, etc. for download.

It was accessed by following clicking on an advertising banner of ours which brings to the following URL <http://5ja.in/?dst=366917> The user did opt-in after accepting our Terms and Conditions page (the very first one) and received a Welcome SMS. The free welcome SMS is sent Only after subscription has started and gives all the information about tariff and opt-out options.

The opt-out was done properly on Jun-21st via STOP SMS.

Should you need any further information please do not hesitate to contact me.

In response, the complainant stated on 16 July as follows:

This is not proof enough and Mobimex are fully aware of this. I tried to access this link supplied by them, and all it does is asking me for a telephone number. I will not be foolish enough by entering my telephone number just to test their allegations.

I NEVER downloaded any of the content being referred to in their e-mail....and I'm looking for more substantial proof from their side.

Can we please just go to the next step in the process as it appears that we will not resolve anything this way as:

- 1. I insist that I never subscribed - and have not been supplied with any acceptable proof to the contrary*
- 2. Mobimex appears unwilling to refund my money*

The matter was thereafter referred for formal adjudication.

On 26 October 2009, the adjudicator requested the following further information:

Please can the SP and/or IP to kindly provide their full message and transaction logs in respect of complaint #6928 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.

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

On 4 November 2009 the member provided tabulated logs showing the message history on the complainant's MSISDN number. These logs showed messages sent and received and charges debited during May and June 2009 before being finally unsubscribed from all of the member's services on 28 June 2009.

On 9 November 2009 the adjudicator then made a further request for additional information 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 to the request for additional information made by the adjudicator 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:

New EROTIC FANTASY Videos Here!

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

On 17 November 2009, the adjudicator then requested as follows:

The adjudicator reviewing complaint #6928 has made the following request:

"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 Nokia 6670, 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



**GET ALL THE ADULT
CONTENT YOU WANT
RIGHT HERE! 18+
ONLY!**

[Enter here](#)

We provide pics, videos and games for members.

Subscription services at only R15 per 3 days. Text STOP to 39215 to unsubscribe or send mail to help@gsm.vc.

For HELP write to help@gsm.vc. Wallpapers and Screensavers cost just R5 each, Videos R10, Mobile Games R45. 150 credits equals R15.

Additional bearer charges may apply.

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.

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Decision

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 SP's services, the SP stated 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 SP 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.

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 for the services 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 SP 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 SP'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, 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 5696 and 5954 where similar breaches of the Code were upheld against the SP and complaints 6303, 6678 and 6759 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 R1 000 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 Technology Solutions, 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 27 October 2009 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 27 October 2009 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 and 2 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. In the event that any appeal lodged 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.