



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	MobileGate
Information Provider (IP):	Not applicable
Service Type:	Subscription contact/dating service
Complainant:	Member of the public
Complaint Number:	#7137
Code Version:	7.4
Advertising Rules Version:	2.3

Complaint

The complainant, a member of the public, lodged a complaint with WASPA against the member's service, a "flirt" service which appears to be a combination of a subscription service and a contact or dating service. The complainant confirms he made use of the service but claims that "there was no pricing associated to the smses received".

Service provider's response

WASPA requested logs on more than one occasion. The member's response to WASPA's requests for logs was the following:

Hi Joe, RACHEL from GTREE wants to chat at maybemeet.me! TXT YES TO CONNECT NOW! MAYBEMEET>ME for help 0800981229 R10msg + R60sub 2end txt stop

Aside from a terse email to WASPA asking WASPA to stop requesting logs given that it had already furnished the above "log", the member does not appear to have submitted any further information to WASPA.

Sections of the Code considered

This complaint was filed prior to the most recent update to the Code to version 8.0. I have accordingly considered versions 7.4 and 8.0 for the purposes of this report in order to determine compliance with the Code (referencing version 7.4) and the remedy for non-compliance (referencing version 8.0). Having regard to the issues raised in this complaint, I have also considered other sections of the Code, which are pertinent.

I have therefore considered the following sections of the Code:

Code version 7.4	Code version 8.0
<p>2.10: A “contact and dating” service is any service intended to enable people previously unacquainted with each other to make initial contact and arrange to meet in person.</p>	<p>2.10: A “contact and dating” service is any service intended to enable people previously unacquainted with each other to make initial contact and arrange to meet in person.</p>
<p>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.</p>	<p>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.</p>
<p>3.1.1: Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.</p>	<p>3.1.1: Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.</p>
<p>3.1.2: Members are committed to lawful conduct at all times.</p>	<p>3.1.2: Members are committed to lawful conduct at all times.</p>
<p>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.</p>	<p>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.</p>

Code version 7.4	Code version 8.0
<p>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.</p>	<p>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.</p>
<p>6.2.9. During any calendar month, if the total cost of any service exceeds R200 for that month:</p> <p>(a) Where the WASP is in control of the billing (e.g. an OBS), an additional communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.</p> <p>(b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), the member must send a notification to the customer once they have reached this limit.</p>	<p>6.2.9. During any calendar month, if the total cost of any service exceeds R200 for that month:</p> <p>(a) Where the WASP is in control of the billing (e.g. an OBS), an additional communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.</p> <p>(b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), the member must send a notification to the customer once they have reached this limit.</p>
<p>6.2.10. During any calendar month, when the total cost of any service reaches R400, and when it reaches any multiple of R200 thereafter, an additional notification must be sent to the customer notifying them of the total cost incurred for that service so far.</p>	<p>6.2.10. During any calendar month, when the total cost of any service reaches R400, and when it reaches any multiple of R200 thereafter, an additional notification must be sent to the customer notifying them of the total cost incurred for that service so far.</p>
<p>6.2.11. The member providing the service must keep a record of the confirmation provided by the customer (for 6.2.9 (a)) or the notification sent to the customer (for 6.2.9</p>	<p>6.2.11. The member providing the service must keep a record of the confirmation provided by the customer (for 6.2.9 (a)) or the notification sent to the customer (for 6.2.9</p>

Code version 7.4	Code version 8.0
(b)).	(b)).
<p>10.1.1. Contact and dating services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.</p>	<p>10.1.1. Contact and dating services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.</p>
<p>10.1.2. Providers of contact and dating services must warn users of the service of the risks involved when contact information is given out to other individuals and must give clear advice on sensible precautions to take when meeting people through such services.</p>	<p>10.1.2. Providers of contact and dating services must warn users of the service of the risks involved when contact information is given out to other individuals and must give clear advice on sensible precautions to take when meeting people through such services.</p>
<p>10.1.3. Providers of contact and dating services must ensure that customers' contact information is duly protected and not publicly available.</p>	<p>10.1.3. Providers of contact and dating services must ensure that customers' contact information is duly protected and not publicly available.</p>
<p>10.3.1. When so requested by a customer, the provider of a contact and dating service must ensure that the customer's details are removed from the service at the earliest opportunity and in all cases within 24 hours.</p>	<p>10.3.1. When so requested by a customer, the provider of a contact and dating service must ensure that the customer's details are removed from the service at the earliest opportunity and in all cases within 24 hours.</p>
<p>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.</p>	<p>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.</p>
<p>11.1.2. Any request from a customer to join a</p>	<p>11.1.2. Any request from a customer to join a</p>

Code version 7.4	Code version 8.0
<p>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.</p>	<p>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.</p>
<p>11.1.4. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.</p>	<p>11.1.4. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.</p>
<p>11.1.5. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.</p>	<p>11.1.5. 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.</p>
<p>11.1.8. 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:</p> <ul style="list-style-type: none"> (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; 	<p>11.1.8. 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:</p> <ul style="list-style-type: none"> (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;

Code version 7.4	Code version 8.0
<p>(d) The service provider's telephone number.</p>	<p>(d) The service provider's telephone number.</p>
<p>11.1.10. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:</p> <p>[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing].</p>	<p>11.1.10. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:</p> <p>[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing].</p>
<p>11.1.11. If a subscription service can be initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation must be obtained from that customer's mobile handset before any billing may take place for that service.</p>	<p>11.1.11. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation must be obtained from that customer's mobile handset before any billing may take place for that service.</p>
<p>11.2.5. The cost of service and frequency of billing must use the format "RX/day", "RX/week" or "RX/ month" (or RX.XX if the price includes cents). No abbreviations of "day", "week" or "month" may be used.</p>	<p>11.2.5. The cost of service and frequency of billing must use the format "RX/day", "RX/week" or "RX/ month" (or RX.XX if the price includes cents). No abbreviations of "day", "week" or "month" may be used.</p>
<p>11.5.1. Instructions on terminating a</p>	<p>11.5.1. Instructions on terminating a</p>

Code version 7.4	Code version 8.0
subscription service must be clear, easy to understand, and readily available.	subscription service must be clear, easy to understand, and readily available.
<p>11.5.2. Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.</p>	<p>11.5.2. Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.</p>
<p>12.3.2. Prohibited services:</p> <p>(a) Chat services where a customer is billed for receiving a message rather than being billed for sending a message. "Chat services" includes any service where facilities are provided for any form of conversation or dialogue between the customer and other customers of the service, between the customer and a software application, or between the customer and staff of the chat service provider.</p>	<p>12.4.2. Prohibited services:</p> <p>(a) Chat services where a customer is billed for receiving a message rather than being billed for sending a message. "Chat services" includes any service where facilities are provided for any form of conversation or dialogue between the customer and other customers of the service, between the customer and a software application, or between the customer and staff of the chat service provider.</p>

Sections of the Advertising Rules considered [if applicable]

Not considered.

Decision

There are a number of difficulties with the member's service. The service itself is, to a degree, misleading from the outset. It has the appearance of a sms chat service whereas it is, in fact, a subscription service alongside a premium sms service. The

member has contended that the complainant was notified of the service's pricing on its website, located at flirtsms.co.za. This website does display pricing information but at R2,00 per sms with a R12 registration cost. This pricing does not correspond with the pricing charged to the complainant and it therefore appears that the website itself has changed since the complaint was first lodged in 2008. I am therefore unable to make a determination as to whether the complainant was presented with pricing information when he visited the website initially.

Celerity Systems furnished WASPA with the following information:

The user had a registration on Flirtsms, this registration was done on the website(www.flirtsms.co.za)(he is not subscribed on any subscriptions)Also note that messages sent to FlirtSMS are charged at R2/sms (not R10 as stated)In addition each page of the website (including the registration pages) state "Each SMS charged at R2 "

This does accord with the current pricing on the website although it doesn't explain the R10 per sms the complainant was quoted or the fact that he was actually charged R10 per sms.

Going further, the messages the member allegedly sent to the complainant don't mention the Flirtsms website at all and instead refer to the domain maybemeet.me. I outlined my brief investigation into this domain in my report on complaint 6875. Briefly, this domain currently points to a placeholder website with links associated with pharmaceutical drugs.

I don't have any information which would explain how the Flirtsms and the member's service at maybemeet.me are connected or how the complainant's Flirtsms usage could give rise to or be linked to the member's service and charged at R10 per sms. There is clearly some confusion, at best, or deception, at worst.

Pricing information

The Code specifies the format of any pricing information for mobile services. I am unable to comment on whether pricing information for the reasons I stated above. On the other hand the member has disclosed the pricing format in its messages, which I quoted above.

In the first message the member alleges was sent to the complainant, the price is in the format Rx although it is unclear what the billing frequency is. In other words, the quoted price, "R10 msg + R60sub" doesn't reveal whether the prices quoted are charged per message, once off, daily, weekly, monthly or otherwise. This pricing format is misleading and doesn't comply with the Code formatting requirement in rule 6.2.8 or in Rule 11.2.5.

Billing reminders

The Code requires members to notify users when charges incurred reach certain thresholds (R400 total charge or increments of R200). This service has tended to result in charges in excess of the R200 and R400 thresholds although I was not presented with any information about the complainant's aggregate charges incurred.

There is no indication that any notifications regarding these thresholds were sent (I therefore can't make a finding on compliance with this requirement) and the member also appears to have failed to maintain proper records of the complainant's confirmation of the charges applicable to the service, or his election to opt-out of such requirement, as required by Rule 6.2.12 (a) or 6.2.13 (respectively). The member certainly didn't furnish WASPA with such records when it responded to the complaint.

In addition, the member failed to ensure that a message including the prescribed format specified in Rule 11.1.10 was sent to the complainant when the complainant apparently became a subscriber to the service. Such a notification would have clarified the nature of the service to the complainant and given him an opportunity to limit his costs.

Bundling

As I mentioned above, the service is somewhat misleading. It has the appearance of an sms based chat service but it is also a subscription service. There is no indication that the complainant entered into an independent transaction with a view to subscribing to the service as a subscription service. For this reason I believe that the service falls foul of the Code's "anti-bundling" provisions, specifically Rules 11.1.2 and 11.1.5.

The member's conduct

I have a number of concerns about the member's conduct towards the complainant and WASPA.

There is some confusion about the charges payable for the service the complainant made use of. He appears to have been using the Flirtsms service but the charges for that service are not in line with the R10 per sms the complainant was actually charged. The complainant certainly doesn't confirm having made use of the Flirtsms and another service so it is unclear precisely how the complainant came to be charged R10 per sms for a service which is priced at R2 per sms.

While there is no clear evidence before me, the service appears to be somewhat misleading and calculated to disguise the various charges associated with the service, along with their billing frequency. One reasonable conclusion to draw from this is that the service is designed to induce subscribers to use it frequently without being kept apprised of the associated costs, much to their dismay when they, like the complainant, find themselves having to pay excessive costs they perhaps did not anticipate initially. This conclusion is reinforced by the availability of clear guidelines in the Code that specify the format and frequency of various notifications and how such services may be conducted. The service is potentially fraudulent and the member in breach of its obligation to act lawfully in its dealings with the complainant and WASPA.

Going further, the member's dealings with the complainant do not appear to have been fair and honest, based on the apparently deceptive nature of the service. Pricing information is not clearly communicated to subscribers at all.

The short history of this matter further indicates that the member has not responded to WASPA's communications with a reasonable diligence and with information it is required to collate and have available on request. The member failed to furnish WASPA with adequate logs (or any real logs for that matter). In addition, the member was particularly discourteous in its dealings with WASPA when WASPA repeatedly requested logs the member is obliged to prepare and supply on request.

Historical context

As I pointed out in my findings on complaint 6875, this is not the first time a complaint about the member's service has been lodged and adjudicated. This is one of several complaints that have been referred to me for review and there have been at least previous reports filed by my colleagues in 2009 expressing similar reservations about the service and its non-compliance with the Code.

The member does not appear to have taken note of the 2009 reports and it has continued to make its service available in substantially the same form to members of the public, often with severe financial implications for subscribers.

Sanctions

The member has clearly failed to take notice of previous findings against it. I take further notice of the member's further and blatant disregard for the Code's provisions and the member's continued failure to heed WASPA's rulings regarding the service and its variations. I therefore impose the following sanctions, which will similarly not be suspended pending any appeal process:

1. The member is fined an amount of R150 000, payable to WASPA within 10 business days of receiving notice of this report;
2. The member is ordered to refund amounts calculated in excess of R2 per sms and charged to the complainant for his use of the service from 17 July 2008 to date of termination of his subscription. The refund must also include any subscription charges paid by the complainant. Such refund must be paid within 10 business days of receiving notice of this report;
3. The member is ordered to cease all instances of the service for so long as the service (and its variations) continue to be in violation of the Code;
4. The member is ordered to send all the service's (and its variations) current subscribers a notification in the format prescribed by Rule 11.2.2 of version 8.0 of the Code, being the current version of the Code.