



REPORT OF THE ADJUDICATOR

WASPA Member (SP) Mobimex GmbH

Information Provider (IP)
(if any)

Service Type Subscription

Source of Complaints Mr R Kushlick

Complaint Number 7424

Date received 25 August 2009

Code of Conduct version 7.4

Complaint

The complainant logged an unsubscribe request via the WASPA unsubscribe system on 3 June 2009. However, the complainant was not satisfied with the SP's response and the complaint has been escalated to formal adjudication.

The complainant's reasons for escalating the complaint were stated as follows:

1. The complainant had been receiving WAP sms's for a period of time (at all hours), informing him of his subscription to the African Music Portal and to certain dating services.
2. The complainant called the unsubscribe number and was informed that he couldn't be unsubscribed as there was no record of his cell number on the system. No further explanation was offered. The complainant then logged an unsubscribe request with WASPA.

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3. In July 2009, the complainant found a series of content charges: “(R15.00) – Mobimex – on his itemized cell account for that month. The complainant then checked previous months and found further debits to his account.
 4. He then logged a second unsubscribe complaint with WASPA. After speaking to the consultant, he was informed that he should obtain records from his network operator to establish when this subscription started as neither WASPA nor the SP could provide a record of his subscription.
 5. The complainant also tried to get hold of the SP by email, without any response. The SP didn’t answer the phone (voice mail to unsubscribe). After much effort, the complainant managed to retrieve his itemised bill from his network operator to find that the subscriptions to the SP’s service had started in late October 2008.
 6. It was then discovered that neither the complainant’s cell number nor the twin card number were associated with the subscription.
 7. In July 2009, the complainant received a WAP SMS which he forwarded to the SP at their request for tracing. The complainant was then advised that a different number was subscribed to the service in question. The SP stated that they were not responsible and suggested that he request a refund from his network service provider.
 8. The complainant found this unacceptable and requested an immediate refund with interest and an explanation. WASPA and the network provider’s customer care department continued to liaise to establish how this number came to be associated with the complainant’s cell number.
 9. After certain threats were made by the complainant to take the matter to the media, he received an email from the SP requesting his bank details and the refund amount. The complainant submitted an account for the amount deducted from his account with interest and received an electronic refund a few days later.
 10. Since then, WASPA had managed to establish that the third “ghost” number was indeed related to the complainant’s number and was the data / fax number associated with his account. This number was unknown to the complainant and any person outside of the network provider’s data services.

11. The complainant received a statement from the SP showing details of the transactions from October 2008 to July 2009. However no proof of subscription was evident nor was any written explanation of how this number came to be in the SP's possession was given.
12. Recently WASPA was researching the initial subscription and asked the complainant to verify what handset he was using in late October 2008. His records clearly show that he was using a HTC Tytn during that period and only upgraded in April 2009 to a HTC Touch Diamond P3700. The reason for the request was that WASPA had information that the handset used to subscribe in October 2008 was the model the complainant was currently using, which is totally incorrect.

The complainant concluded by raising the following issues:

- a) How can the SP make multiple subscription debits to a number without proof of subscription?
 - b) How can the SP deduct subscription in multiples of R15.00 without complying with the WASPA regulations on subscriptions of R10.00 and more?
 - c) How did the SP manage to obtain a number which is unknown to most people and then use it for subscription purposes?
 - d) It is impossible to unsubscribe from the primary cell number so how many of these numbers is the SP illegally utilising at present?
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SP's response

The SP initially stated that it had checked its system and there were no subscriptions and charges for either of the complainant's numbers. The only entries that were found were 3 "STOP" messages not related to any subscription service.

After clarification from WASPA on the correct number billed (which was the fax number slave to the complainant's main sim), the SP stopped the subscription with effect from 1 August 2009 and the number was currently blocked in its system.

The SP requested clarification from the network service provider on how it was

possible for two numbers to be completely mixed. The SP indicated that it has proof of subscription and download activity from the correct number from 2008. However the charges were being levied on a different number.

The SP states that it is unable to provide a refund as it does not know how to proceed in such a case where someone is billed for another person's use of the service.

The SP advises that it cannot interfere with customers' settings connected to their mobile accounts, as well as slave accounts.

Proof of subscription was sent to the complainant with a possible explanation of why this had happened and also explaining that the SP cannot interfere with the settings of the mobile numbers in his possession. The SP referred the complainant to the network service provider to resolve.

The SP has attached proof of subscription on 15 October 2008. The logs show two further opt-in requests on 24 December 2008 and 22 March 2009. These logs show information about the model of the mobile phone, the IP from which its WAP site was accessed and the relevant date and time.

Sections of the Code considered

11. Subscription services

11.1. Manner of subscription

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.

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 and may not be an entry into a competition or quiz.

11.1.3. An advert for a content subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed.

11.1.4. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

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.

11.1.6. Subscription services with different billing frequencies should not have a subscription mechanism likely to cause a customer to accidentally subscribe to a more frequent service.

11.1.7. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

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:

- (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.

11.1.9. Once a customer has subscribed to a subscription service, neither the amount and frequency of the charges nor the frequency of the service may be increased without the customer's explicit permission.

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:

[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].

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.

11.2. Reminder messages

11.2.1. A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter.

11.2.2. The reminder messages specified in 11.2.1 must adhere exactly to the following format, flow, wording and spacing:

U r subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].

or

U r 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 unsubscribe, sms STOP [service keyword] to [short code].

11.2.3. The entire reminder message must be sent in a single SMS, may not contain any line breaks or carriage returns and may not include any additional characters other than those specified in 11.2.2.

11.2.4. The content/service description must be text describing the content, promotion or service (e.g. “tones” or “poems”). This text must not be worded in a way that attempts to deceive or mislead the customer from the purpose of the reminder which is to inform the user that they are subscribed to a service.

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.

11.2.6. The text “(VAS)” must be included after any VAS-rated phone number. It does not need to be included after phone numbers which are not VAS-rated.

11.2.7. Members must test reminder messages on a range of phones to ensure that all characters and lines are displayed identically.

11.6. Subscription service directory and logs

11.6.2. When requested to do so by WASPA, a member must provide clear logs for any subscription service customer which include the following information:

- (a) proof that the customer has opted in to a service or services;
- (b) proof that all required reminder messages have been sent to that customer;
- (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and
- (d) any record of successful or unsuccessful unsubscribe requests.

Decision

The correct number which has been used to subscribe to the SP’s service was eventually identified after much effort on the part of the complainant, his network provider and WASPA.

Once the correct number was identified, the SP was then under an obligation, pursuant to the unsubscribe request, to provide clear logs in terms of section 11.6.2 of the WASPA Code.

I am not satisfied that the SP has done so. In terms of section 11.6.2, such logs must include the following information:

- (a) proof that the customer has opted in to a service or services;
- (b) proof that all required reminder messages have been sent to that customer;
- (c) a detailed transaction history indicating all charges levied and the service or content item applicable for each charge; and
- (d) any record of successful or unsuccessful unsubscribe requests.

The SP has not provided adequate proof that the complainant opted-in for the services in question. The SP faces the following problems in this regard:

1. The handset used by the complainant at the date of subscription differs from the handset details identified in the SP's print-out.
2. The number used to subscribe is a slave fax number connected to the complainant's sim. The complainant was not even aware that he had this number at the time when he allegedly subscribed to the SP's service.

These issues were raised in the complaint but have not been answered by the SP. An adverse inference must therefore be drawn against the SP and the conclusion reached that the complainant did not validly opt-in for the service in October 2008.

The records of the SP do indicate that the alleged opt-in request came via its WAP site. The SP would then be obliged to comply with section 11.1.11 of the Code by obtaining a separate confirmation from the complainant's mobile handset before any billing takes place for that service. The SP failed to do so.

I am therefore of the view that the SP has contravened sections 11.6.2 and 11.1.11 of the WASPA Code. This complaint is accordingly upheld.

Sanction

This complaint is one of a number of complaints brought against the SP on the same or similar grounds. There appears to be a pattern developing whereby members of the public are being subscribed to the SP's services without their knowledge or consent. Such conduct must be viewed in a very serious light.

The SP in this complaint has denied its obligations under the Code and has attempted to shift blame onto the shoulders of the complainant's network operator. However, despite denying any culpability on its part, the SP has made a full refund to the complainant, together with interest.

Taking these factors into account, the following sanctions are given:

1. The SP is ordered to suspend all its subscription services accessible from its WAP sites until such time as it has verified all subscribers on its database and provided the WASPA Secretariat with confirmation that it has done so.
2. The SP is fined R150 000.00.

These sanctions may not be suspended pending any appeal being lodged against this decision by the SP.