



REPORT OF THE ADJUDICATOR

Complaint reference number:	10931
WASPA member(s):	TMobileSA
Membership number(s):	0116
Complainant:	Public
Type of complaint:	Subscription Service
Date complaint was lodged:	2010-10-26
Date of the alleged offence:	October 2010
Relevant version of the Code:	9.0
Clauses considered:	5.1.7; 11.2.1
Relevant version of the Ad. Rules:	Not Applicable
Clauses considered:	Not Applicable
Related cases considered:	10511 & 10822

Complaint and Response

1. On 12 October 2010 the complainant, a member of the public, submitted a unsubscribe request to the unsubscribe facility offered on the WASPA website. According to the records provided by the WASPA Secretariat, the member unsubscribed the complainant on 13 October in response to this request.

2. On 20 October, the complainant submitted the following on the website:

I have called TMobileSA and they assured me that they would arrange to credit my Autopage account with the fraudulently deducted funds. Only the future will tell if this is the truth.

Please, explain to me how it is permitted for one of your members to charge cellphone users for services not rendered and without consent. A look at my account history with Autopage (since 2000) will show not one Premium SMS transaction - until TMobile's recent stunt.

There is only one word to describe this - fraud.

What action will WASPA take against this member?

3. The unsubscribe log provided by the WASPA Secretariat indicates another entry by the member dated 25 October 2010 to the effect that the complainant subscription has been cancelled and that the member would contact the complainant regarding a refund.
4. The complainant however was not satisfied with the member's response, and requested that the matter be escalated to a formal complaint.
5. On 28 October 2010 the WASPA Secretariat sent the formal complaint per e-mail to the member.
6. The member did not respond until 8 November, when it was prodded by the WASPA Secretariat to do so, and advised that it had contacted the complainant on 21 October and was waiting for account details in order to process the refund, and would process the refund later that day.
7. The WASPA Secretariat asked the complainant on 8 November whether his complaint against the member had been satisfactorily resolved. The complainant responded that he had indeed been refunded but it he was "... still in the dark on how T Mobile could debit my Autopage account without my authorisation/use of their services."
8. The WASPA Secretariat forwarded the complainant's request for information to the member, but by 24 November had received no response. On that date it again requested the complainant whether the matter had been resolved to his satisfaction. As far as I can see the secretariat's e-mail to the complainant was resent on 14 December, and the complainant responded to the negative.

Sections of the Code considered

9. The conduct complained of took place during the weeks up until 12 October 2010. Consequently version 9.0 of the WASPA Code of Conduct applies to this complaint.
10. The following sections of the WASPA Code of Conduct are relevant to this complaint:
 - 5.1.7. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.
 - 11.2.1. 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.

Decision

11. Before deciding on the merits of this complaint, it is necessary to give some background. On 30 November 2010 a WASPA adjudicator was called upon to adjudicate on complaints 10549 and 10822 where the member was accused

of subscribing an MSISDN to a subscription service and billing for provision of that service without consent. On the member's version, the erroneous subscriptions and billing were caused by a technical fault with its systems.

12. It subsequently emerged that this problem was one with broad effects, and that many consumers had been affected.
13. The adjudicator in that complaint found that the member had infringed section 11.2.1 of version 9.0 of the Code of Conduct, but that it had not done so intentionally. He imposed the following sanction:
 37. The Adjudicator does not believe that the Member's infringement of section 11.2.1 is intentional, but substantial chaos and prejudice to consumers can result from the Member's conduct in this regard. Accordingly, the following sanctions are imposed in respect of the Member's infringement of section 11.2.1 of the Code of Conduct:
 - 37.1. The Member may not subscribe anyone to any of its subscription services until such time as it can demonstrate to the reasonable satisfaction of the WASPA Secretariat that it has taken reasonable steps to ensure that unauthorised subscriptions to its services do not occur.
 - 37.2. The WASPA Secretariat may at its sole instance appoint an independent technical expert to review the Member's systems to satisfy itself of compliance with the condition imposed in paragraph 37.1. This expert should be acceptable to both parties, but should no expert acceptable to the Member be found, the Secretariat may appoint an expert of its choosing, with the proviso that the expert should not be a competitor of the Member or work for one, and that the expert signs such reasonable non-disclosure agreement as the Member may require.
 - 37.3. The network operators are to block to all new subscriptions to the Member's subscription services for the period set out in paragraph 37.1, as contemplated in section 14.4.3 of the Code of Conduct. This order shall stand only if it is technically feasible in the view of the WASPA Secretariat.
 - 37.4. The Member is fined the amount of R100 000, wholly suspended for the period of six (6) months, on the condition that it does not make itself guilty of an infringement of section 11.2.1 during that period.
 - 37.5. To the extent that the Member has not done so immediately, it must refund all those subscribed to its services without their consent.
 38. Given the potential for prejudice that exists in having a backend system that is as problematic as the Member's has been shown to be, the sanctions set out in paragraphs 37.1 and 37.3 will not be suspended pending appeal.
14. The adjudicator enquired as to the status of enforcement of the above sanctions, and the WASPA Secretariat advised him on the 29th of March 2011 that Vodacom and MTN had terminated their contracts with the member by the end of January 2010. The Secretariat speculated that the member did not have an agreement with Cell C.
15. In complaints 10549 and 10822, the adjudicator also found that the member had infringed section 5.1.7 of the Code of Conduct by failing to disclose the source of the complainant's personal information, and imposed a formal reprimand and a fine of R2000 for each instance, for a total of R4000.

16. The adjudicator in this complaint is in little doubt that the complainant was subscribed without his consent, and also that the reason for this erroneous subscription was the same as that in complaints 10549 and 10822.
 17. Consequently, the adjudicator finds that the member has infringed section 11.2.1 of the WASPA Code of Conduct.
 18. It is also clear from the facts above that the member failed to provide the source of the complainant's personal information when requested to do so by the WASPA Secretariat. Consequently, the member has also infringed section 5.1.7 of the WASPA Code of Conduct.
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Sanctions

19. The adjudicator believes that to sanction the member again for conduct that has already been sanctioned under complaints 10549 and 10822 and that arose from the same set of facts would amount to double jeopardy. Consequently, no further sanction is imposed in respect of the infringement of section 11.2.1
20. The infringement of section 5.1.7 was in the adjudicator's view a result of the failure of the member's systems – the member could not supply the information because it did not exist. However, the member attempted to hide this failure by infringing section 5.1.7 of the code of conduct. In the light of the sanction imposed in complaint numbers 10511 and 10927, this conduct pushes the member's misconduct beyond that which can be allowed for continued membership of WASPA, and the adjudicator consequently recommends the member's expulsion from WASPA.
21. In the event that the member has not refunded the complainant, the member will refund the complainant with all funds debited as a result of the unsolicited subscription.