



REPORT OF THE ADJUDICATOR

Complaint reference number:	11296
WASPA member(s):	TMobileSA
Membership number(s):	0116
Complainant:	Public
Type of complaint:	Subscription Service
Date complaint was lodged:	2010-12-01
Date of the alleged offence:	Late August 2010
Relevant version of the Code:	9.0
Clauses considered:	5.1.7; 11.2.1; 11.9.9
Relevant version of the Ad. Rules:	Not Applicable
Clauses considered:	Not Applicable
Related cases considered:	10511 & 10822; 10511 & 10927

Complaint and Response

1. In this matter the complainant is a member of the public, and received unsolicited SMSes from the member as a result of being subscribed to a subscription service allegedly without his consent.
2. The complaint was made on 31 August 2010 through the unsubscribe service offered on WASPA's website in the following terms:

I received two unsolicited SMS "welcoming" me to edu-Mobi and Mobbee respectively. I have never given consent to any organisation to provide my contact details to any organisation for whatever purpose. I opted out by sending STOP to 37459, but did not receive confirmation, as required.

I need to know where TMobileSA obtained my contact details.

3. And on the 2nd of September:

I INSIST on receiving proof of subscription as I have NEVER heard of this service and I have NEVER subscribed to it. In addition, if any subscriptions funds were debited I want it refunded.

4. According to the unsubscribe system logs, the member noted on 1 September that the complainant had been unsubscribed, and made the same note on 6 September. However on 3 November the complainant advised that he had not received any feedback from the member, nor had he received any indication of what action would be taken against the member.
5. As a result of the lack of response, the matter was escalated to a formal complaint on 2 December 2010 and the formal notice of complaint sent to the member. Despite a reminder that the WASPA Secretariat sent to the member on 14 December, no response was ever received.

Sections of the Code considered

6. The conduct complained of took place in late August 2010. Consequently version 9.0 of the WASPA Code of Conduct applies to this complaint.
7. 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.

11.9.9. When a customer has requested that they be unsubscribed from a service, an unsubscribe notification must be sent to that customer, and must use the following text format, flow and wording:

You've been unsubscribed from [service name].

or

You've been unsubscribed from [service name]. To resubscribe [service activation instructions]. You'll then be resubscribed at [cost of service and frequency of billing].

Decision

8. 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.
9. It subsequently emerged that this problem was one with broad effects, and that many consumers had been affected.

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10. 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.
11. 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.
12. 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.
13. Other relevant complaints are numbers 10511 and 10927, which follow one from the other. In these complaints, the adjudicator found that the member had fraudulently contrived logs in order to mislead the WASPA Secretariat. He imposed a suspension of 30 days with a concomitant block on network services as a sanction. According to the WASPA Secretariat, the member's membership had not yet been suspended as of 29 March 2011, as it is not

quite clear what a suspension would entail, an issue that is receiving attention.

14. 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.
15. Consequently, the adjudicator finds that the member has infringed section 11.2.1 of the WASPA Code of Conduct.
16. Further, in failing to disclose the source of the complainant's personal information, the member infringed section 5.1.7 of the Code of Conduct.
17. Finally, the allegation was made that the member sent no unsubscribe notification to the complainant as required by section 11.9.9. The member had the opportunity to rebut this allegation, but made no response; consequently the adjudicator has little choice but to accept, in the circumstance of the matter, that no unsubscribe notification was sent and that the member has infringed section 11.9.9 of the Code of Conduct.

Sanctions

18. 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
19. 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.
20. Similarly, the member's failure to comply with clause 11.9.9 was as a result of non-functional systems. As this has already been addressed, there is little point in imposing a specific sanction for this infringement.
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.