



REPORT OF THE ADJUDICATOR

Complaint reference number:	14352
WASPA member(s):	Smartcall Technology Solutions (SP) (0090) JP Consulting (IP) (1192)
Membership number(s):	See above
Complainant:	Public
Type of complaint:	Subscription Service
Date complaint was lodged:	2011-08-11
Date of the alleged offence:	2011-07-21
Relevant version of the Code:	11.0
Clauses considered:	Clauses 4.1.2, 4.3.3, 5.2.1, 5.3.1, 11.2, and 11.3.1. 14.3.2
Relevant version of the Ad. Rules:	N/A

Related cases considered: 13243 and
13244 and appeal ruling of case 10152.

Complaint

Complaint summary:

Complaint number 14352 is the escalation of unsubscribe request number 1842088 regarding a subscription service.

The formal complaint was sent to the WASP (IP) and SP on 2011-08-12.

The WASP (IP) responded on 2011-08-19 and this was sent to the complainant.

The complainant refused resolution on 2011-08-22 and the matter was assigned to the adjudication queue.

On 2011-08-23 the SP indicated they would reply by 24 August 2011, however no further reply was forthcoming.

Complaint:

Complaint number 14352 was logged by a complainant regarding an unsolicited wap push message he received and subscription to a service to which he claims he did not subscribe.

His concern is further that the WASP is able to debit his account through a payment arrangement he has with Vodacom and not through a direct arrangement with himself which means it is easier for the WASP to deduct monies without any direct contractual arrangement with an individual.

He further requested details of how the WASP came to be in possession of his contact details.

In summary the complaint sets out the following having been breached:

- Messages unsolicited;
- Subscription process flawed; and
- Automatic subscription.

Service provider's response

The WASP (IP) responded as follows to explain why the message was sent and how the contact details were obtained and the complainant subscribed:

When a member visits our landing page and enters his phone number soon after this action the customer receives an SMS including a special code link for his phone. When the customer opens the link he goes through double opt-in and then becomes our member.

We do not do autosubscribing and there is no possible way our customers to stay unaware of their subscription to the service.

The phone number 27824114415 has been entered on our landing page on 22-Jun-2011 Wed 20:11 min. After that the customer has received an SMS to confirm the subscription and then he got subscribed to our service.

It is possible that the customer misunderstood our subscribe conditions and therefore he maybe assumed he would not be charged for the service.

We would like to inform you that we have refunded the customer in result of this misunderstanding. Please find proof of subscription attached.

Complainant's Further Reply

The Complainant responded to the WASP (IP)'s response to state that they never entered any details on any of the WASP's (IP's) web pages, and that there is no actual proof that the number was entered by the complainant himself.

In response to statements that a message was sent to the Complainant, he states that due to the fact that he never subscribed to anything, he viewed the message as spam and unsolicited and as such it was deleted. The WAP push message received opened automatically and was stopped and deleted. Furthermore, details were received to a link to a web page which he refused to open as he didn't know what was there.

Finally, the WASP(IP) indicated that a full refund was given but the Complainant has not received it.

Sections of the Code considered

4.1 Provision of Information to 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.

4.3. Refunds

4.3.3 Refunds must not be unreasonably delayed.

5.2. Identification of spam

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.3 Prevention of spam

5.3.1 Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

11.2. Subscription process

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.

11.3. Subscription initiated via web or WAP

11.3.1. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must be sent to the customer's

mobile handset in order to prove that the number entered matches the customer's mobile handset number. This message may either:

- (a) contain a PIN which is then confirmed or validated on the web page, or
- (b) contain a URL with a unique identifier, which, when clicked, validates the handset number.

14.3. Formal complaint procedure

14.3.12. Where a complaint involves any interaction with a customer, when requested to do so, a member must, within five working days, provide clear copies of all relevant logs of that interaction.

Decision

I have a general issue with the practical problems of determining when a WAP push message initiating a subscription process is unsolicited or not. All too often, a WASP alleges that the Complainant entered their cell phone number into the WAP or website to initiate the process and the Complainant denies doing any such thing. Due to the fact that it is possible for anyone to enter any cell phone number into a website, it is very hard to demonstrate whether or not the Complainant actually did the inputting themselves.

In this case I have regard to the appeal report of case 10152. The appeals panel in this matter made the following ruling regarding spam which I feel is applicable to the facts of this case.

In the appeal report of case 10152, the appeals panel on the issue of spam found that the WASP (IP) provided logs which merely showed an interaction of some kind with the WAP site and did not prove that the complainant had either subscribed or been sent a confirmation message.

The panel was of the view that the messages that were the cause of complaint in complaints 10512 were sent to the respective complainants before the complainants accessed the IP's WAP site, or indeed had any commercial contact with the IP. The IP can thus not rely on any alleged visit to its WAP site to establish a "prior commercial relationship". Consequently the messages complained of were unsolicited commercial messages and the IP infringed section 5.3.1.

Decision in respect of IP

In this case it appears from the IP's response that the Complainant accessed the site at 20:11 on 22 June 2011 but the logs show the time as 21:39.

I have to find that the WASP (IP) did breach section 5.3.1 by sending the WAP push message.

Further, although the WASP (IP) alleges that there was a double opt in process that was followed, they failed to provide logs to substantiate compliance with this double opt in or with the process mandated by 11.2 and 11.3.1, notwithstanding a request by the adjudicator

that they do so. On request by the adjudicator in this regard they merely provided the same logs as previously provided.

I am also of the view that in this regard the WASP (IP) has intentionally misled WASPA and the Complainant, and accordingly the WASP (IP) is found to have infringed section 4.1.2.

The WASP (IP) further failed to provide all relevant logs as required by section 14.3.12 and is accordingly in breach of that section, in particular by failing to provide the logs relating to the message as required by section 11.3.1.

Finally, the WASP (IP) clearly breached the Code section 4.3.3 due to the fact that they stated that a refund would be paid but failed to do so timeously or at all.

Decision in respect of SP

The SP alleges that there was a double opt in process that was followed, they failed to provide logs to substantiate compliance with this double opt in or with the process mandated by 11.2 and 11.3.1, notwithstanding a request by the adjudicator that they do so. On request by the adjudicator in this regard they merely provided the same logs as previously provided by the IP.

The SP further failed to provide all relevant logs as required by section 14.3.12 and is accordingly in breach of that section, in particular by failing to provide the logs relating to the message as required by section 11.3.1.

Sanctions

SP:

Confirm suspension of the IP until compliance by the IP with all reports in respect of the services.

In respect of their breaches of the Code in terms of section 11.3.1 and 14.3.2 a fine of R10 000 which is suspended provided that they do not breach the same sections of the Code within 6 months of the publication of this report.

IP:

In respect of the IP's infringement of section 5.3.1 in complaints a formal reprimand;

In respect of 11.3.1 a fine of R30 000, of which R15 000 is suspended on condition that the IP does not infringe section 11.3.1 for a period of six months from the date of publication of this report.

In respect of the IP's infringement of section 4.1.2 and 14.3.2 a fine of R50 000, of which R30 000 is suspended on condition that the IP does not infringe section 4.1.2 for a period of six months from the date of publication of this report.