REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	"Not applicable"
Service Type:	Subscription Service
Complainant:	Ms S Mills
Complaint Number:	10019
Code Version:	9.0
Advertising Rules Version:	"Not applicable"

Complaint

Complaint 10019 is the escalation of unsubscribe request 237851 regarding automatic subscription.

The formal complaint was sent to the WASP on 2010-07-22 and they replied on 2010-08-02.

The complainant refused resolution on 2010-08-02 and provided her itemised billing.

The complainant's response was sent back to the WASP and they replied on 2010-08-03.

The complainant refused further resolution on 2010-08-06.

Complainant complained of subscription process in respect of a subscription service.

Following on her sending of an unsubscribe message to the WASPA member, the complainant was unsubscribed from the service however all monies deducted were not offered to be repaid as a refund.

The complainant held that her complaint had not been resolved to her satisfaction due to the fact that no refund was offered.

Service provider's response

The service provider responded with details of how and when the subscription had occurred as well as details of how and when billing had occurred and details of removal from subscription to the service.

Sections of the Code considered

The service complained of falls within the ambit of the definition of a subscription service as set out in the Code of Conduct. The sections of the Code of Conduct applicable to this issue are sections 11 dealing with Subscriptions Services (in particular 11.2 which deals with the process for subscription, 11.4 which deals with the welcome message after subscription, 11.5 which deals with reminder messages relating to subscription services and 11.9 which deals with subscription logs.

The requirements of section 11.2, 11.4, 11.5 and 11.9 are set out below:

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.

11.2.2. 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.

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

11.2.4. 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 number 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.

11.2.5. 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]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].

11.2.6. For any subscription services that are initiated via WAP, and which are not confirmed by the customer using the validation process set out in 11.2.4, it is a requirement for the service provider who has a direct contract with the network operator to display a WAP confirmation page to the potential subscriber. This confirmation page must be displayed after the subscriber has first indicated an interest in the subscription service by clicking on a "join" or similar link.

11.4. Welcome message

11.4.1. 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.

11.5. Reminder messages

11.5.1. 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.

11.5.2. The reminder messages specified in 11.5.1 must adhere exactly to the following format, flow, wording and spacing:

You are 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
You are 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].

11.5.3. 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 11.5.2.

11.5.4. 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.

11.5.5. 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.

11.5.6. 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.

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

11.9. Subscription service directory and logs

11.9.1. Members must register all subscription services with WASPA, by providing the following information:

   a.   the name of the service;

   b.   the short code or access method (e.g. WAP) the service uses;

   c.   the price and frequency of billing for that service;

   d.   the customer support number associated with the service; and

   e.   unsubscribe instructions for the service.

11.9.2. 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.

The SP provided primae facie proof as required in 11.9 that they had complied with the requirements of 11.2, 11.4 and 11.5.

In return, the Complainant produced proof from her Mobile Network Operator (MNO) that no SMS had been sent to the SP subscribing to the service.

The Complainant therefore requests a full refund of all monies deducted.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her.

With reference to (i) the SP's response to the complaint, (ii) the complainant's reply, (iii) the logs accompanying the SP's response to the complaint, and (ii) the sections of the Code considered. It appears from the information contained in the SP's log that the mobile number in question did subscribe to the service in compliance with the Code. However, it appears in the MNO's records that no such subscription message was sent from the Complainant's mobile number as per the SP's logs.

I find myself in a difficult position in determining where the evidentiary burden of proof should lie in this matter. Both parties have provided so-called proof in support of their arguments. The Code doesn't offer clear guidance as to with which party such burden should lie. Accordingly I have determined that the matter should be resolved as fairly towards both parties' as possible.

It is therefore my decision after careful consideration that I cannot without further proof and auditing of the systems which provided the documents given in support of each of the parties claims rule on whether or not the SP has or has not breached the

Code. They have submitted primae facie proof in support of their full compliance with the requirements of the Code as set out above. I am loathe without knowledge thereof to suggest that this information has been irregularly supplied or obtained. Similarly, the Complainant has provided prima facie proof that no SMS's were sent to the SP subscribing to the service by presentation of an itemised invoice from her MNO.

Notwithstanding the aforegoing, I feel the Complainant should not be out of pocket for a service to which she can provide proof that she did not subscribe. Similarly, the SP should not be sanctioned unfairly when they have to provided the requisite proof of subscription and adherence to the Code.

Due to the fact that several claims of not having subscribed to a service have been levied against the SP however, I feel that complaints against the SP of this nature should be carefully monitored to rule out any irregularities.

Claim partly upheld.

Sanctions

Refund all monies deducted to the Complainant within 5 (five) days of this adjudication.