



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	SMSNet-SA
Information Provider (IP):	Not applicable
Service Type:	Subscription Service
Source of Complaints:	Public
Complaint Number:	10467
Code of Conduct version:	9.0
Advertising Rules version:	Not applicable

Complaint

Complaint #10467 is the escalation of unsubscribe request #430914, in terms of which the Complainant requested that the conduct of the SP be formally investigated.

The Complainant originally logged an unsubscribe request on the WASPA unsubscribe system on 26 August 2010. The nature of the subscription service for which he was billed by the SP is not apparent from the documentation furnished and is, in any event, not in issue here.

The printout generated pursuant to the unsubscribe request captures the history of actions taken by the SP and shows that the Complainant's cell phone number was a "*number not found*" in the SP's records on 31 August 2010. A full refund was offered by the SP on 31 August 2010. In this regard, it appears that the Complainant was billed by the SP on 4 June 2010 and 24 June 2010 respectively in the amount of R15.00 on each occasion. The Complainant was unsubscribed by the SP on 2 September 2010 and the SP also uploaded a document in response to the Secretariat's request to provide proof of the Complainant's subscription on 2 September 2010.

On 8 September 2010, the Complainant indicated his wish to escalate the query to a formal complaint against the SP. He provided the following reason for this escalation request: "*Please formalize my complaint. I do not believe them, as when I called there they were suspect. I have not yet been contacted for a refund.*"

This complaint was sent by the Secretariat to the SP on 9 September 2010. The SP responded per e-mail on the same day that the Complainant had been refunded. This correspondence was forwarded to the Complainant by the Secretariat on 10 September 2010, and the Complainant was asked if the complaint had now been resolved to his satisfaction. On 15 September 2010, the Complainant replied to the Secretariat, refusing resolution of the complaint, and stating as follows:

"My formal complaint was: What is being done to this wasp who has billed me without me subscribing in the first place? I am sure many people are being billed and don't notice until the wasp has stolen many subscription charges. I want to know if they get penalized for this?"

The Secretariat advised the SP of this response on the same day, giving the SP the opportunity to provide a further response.

SP Response

Other than the actions of the SP mentioned above, no further actions were taken and no response was received from the SP pursuant to the formal complaint raised by the Complainant on 15 September 2010. The complaint was accordingly assigned for adjudication on 8 October 2010.

Decision

Section 11.2 deals with the subscription process. More specifically, sections 11.2.1 and 11.2.2 provide as follows:

"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." (Own emphasis added).

"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." (Own emphasis added).

It is clear from section 11.2.1 that customers may not be automatically subscribed to a subscription service without specifically opting in to that service. Further, the act of joining a subscription service must be a specific independent transaction, as appears from section 11.2.2. Having viewed the log document furnished by the SP pursuant to the Secretariat's request for proof of the subscription by the Complainant, it is clear that the SP has been unable to provide any subscription request records, download history or download information connected with the Complainant's mobile number. The log that the SP has provided in this regard has no record as to the subscribing by the Complainant to any subscription service for which the SP has billed him, or indeed as to any relevant information to the complaint at hand, save for the following: *"Could not find any download info for tel: [redacted]"*. There is accordingly no record that the Complainant in fact subscribed to the subscription service offered by the SP, and in the absence of any such record the SP is unable to satisfactorily refute the allegation made by the complainant.

Section 11.9.2 of the Code contemplates the retention of subscription service logs and provides specifically as follows:

"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.”

In the present matter, the WASPA Secretariat expressly requested that proof of subscription be furnished to it. The log provided by the SP in response to WASPA's request for proof of the subscription service is empty. This is presumably because the complainant did not in fact subscribe to the service. It bears mentioning however that, even if the Complainant had subscribed to the service, then the SP would have been in breach of section 11.9.2 for failure to provide proof thereof on request by WASPA.

The complaint is upheld on the grounds of a breach of sections 11.2.1 of the Code.

Sanction

In determining the sanctions to be imposed on the SP, both the seriousness of the offence and its prior conduct would be relevant and should be taken into account. The fact that the SP unsubscribed and refunded the Complainant in full is appropriate, however, this is not sufficient to excuse the SP from further sanction.

Of the 21 complaints against the SP to date, 9 in my view are on point in that they deal with (*inter alia*), erroneous billing for unsolicited subscription services. This is not an insignificant number and the complaints are of a nature that impact on the reputation of the wireless application service industry as a whole.

Of these 9 previous complaints, 6 were upheld and the following sanctions were imposed:

- Adjudication 3548: Refund of subscription charges ordered.
- Adjudication 5558: Fine of R20 000.00 imposed.
- Adjudication 5214: Refund of subscription charges ordered and a fine of R35 000.00 imposed.
- Adjudication 5352: Refund of subscription charges ordered.
- Adjudication 6403: Refund of subscription charges ordered.
- Adjudication 8725: Refund of charges ordered and suspension for 6 months.

It appears that the orders to refund subscription charges and the relatively minor fines of R20 000 and R35 000 imposed on the SP to date in this regard have had little effect in preventing the offensive conduct. I am accordingly of the view that more stringent sanctions are now required and accordingly order the following:

1. A fine of R70 000.00 is imposed, to be paid to the Secretariat within 5 working days of the date of delivery of this report.
2. In the event that the fine provided for in paragraph 1 above is not paid on time, the SP's membership of WASPA shall be suspended until such time as the above fine and any and all other outstanding fines due by it to WASPA have been paid (and proof of such payment delivered to WASPA).
3. In the event that the SP is found to be in breach of section 11.2.1 of the Code again within the next 6 months, or the substantial equivalent of such section in any later version of the Code, a suspension of the SP's membership of WASPA will apply with immediate effect and endure for a period of 3 months.

