



REPORT OF THE ADJUDICATOR

Complaint reference number:	12622
WASPA member(s):	Buongiorno SA
Membership number(s):	0002
Complainant:	Public
Type of complaint:	Subscription Service
Date complaint was lodged:	2011-04-11
Date of the alleged offence:	Not ascertainable
Relevant version of the Code:	10.0
Clauses considered:	Clauses 4.1.1, 5.2, 5.3, 11.3
Relevant version of the Ad. Rules:	Not applicable

Related cases considered:

Complaint

Complaint 12622 is the escalation of unsubscribe request 1256015. The Complainant alleges that they never subscribed to the subscription service and requests that they be unsubscribed and a full refund be paid to them for all monies deducted in respect of such service.

Service provider's response

The SP explained that in their view there had been no breach of the Code and the allegations were denied in full.

The SP claims that the complainant entered their number on a wap page and was then sent the required messages as part of the subscription process. There is no proof available as to the actual entering of this number which triggered the subscription process.

The SP states further that as soon as the unsubscribe request was received they auctioned it and the complainant has been unsubscribed from the service.

Sections of the Code considered

4.1. Provision of information to customers

4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

5.2. Identification of spam

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

- the recipient has requested the message;
- 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
- the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.2.2. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

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.

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

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:

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

11.3.2. For any subscription services that are initiated via WAP, 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.

11.3.3. The WAP confirmation page must display the following information in a clear and easy to read manner:

- The name of the service and an indication that it is a subscription service
- The price and frequency of billing
- A phone number for customer support

11.3.4. Where it is necessary for a consumer to confirm that their MSISDN may be made available to an application, this may be done by including the following wording on the WAP confirmation page:

[Application name] has requested that your mobile number be made available.

11.3.5. The information listed 11.3.3 and 11.3.4 must be presented as text and not as an image.

11.3.6. The WAP confirmation page described above must also present a confirmation button. It must be clearly communicated to the customer on the confirmation page that clicking the confirmation button will initiate a subscription service.

11.3.7. The WAP confirmation page may not contain any marketing messages or other content that is likely to distract the customer from the required confirmation information and process.

11.3.8. The WAP confirmation page must offer all languages used in the promotional material for that service.

Decision

I considered the Code, the complaint, the abundance of previous cases in respect of the SP and the response of the SP in determining how to rule on this case. Whilst the SP has clearly alleged that they comply fully with the Code the evidence that they adduce tells a different story. I will now set out below the sections I feel have been breached, what has been done by the SP that they feel is sufficient to comply with the Code and how I feel such steps have fallen short of the Code.

Section 4.1.1 Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

Although an argument could be posed that the SP was not honest with their customers I do not feel that this particular section needs to be dealt with in any great detail save to say that I feel an ordinary consumer of the type to which this service would apply could be misled by the service offering.

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I feel it is pertinent at this point to raise the issue that arises in many cases with regards to wap push messages and subscription processes. Unlike sending a normal SMS where the SP must show that the message is not unsolicited, in these cases the SP merely alleges that the complainant themselves entered their details onto the wap page of the SP. No logs are ever provided in this regard and I am not certain whether this is technically possible. The fact is, I feel that it is an easy way around having to demonstrate that the message was not spam in that without having to prove anything the SP can merely state that the contact was initiated by the complainant via a wap page. Similarly, the reverse would also hold true in that it would seemingly be easy for a complainant to allege they didn't do this with the knowledge it would be hard for the SP to demonstrate that they did.

In this regard I make this point merely to have it noted and not to rule on the issue of spam.

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Notwithstanding the issue of whether or not the complainant themselves initiated the subscription process the SP in my view has failed to comply strictly with the requirements of section 11.3 which details the proscriptive process for SP's to follow when subscribing customers via wap message.

Although they followed the processes require by 11.1 including inter alia the sending of the welcome and reminder messages they fell short of the specific wap sign up requirements.

I therefore find that the SP has breached the sections of the Code as set out above.

Sanctions

Due to the fact that part of the requirements of the Code were complied with I have been lenient in my sanctioning of their behaviour.

I fine the SP R2 500 payable immediately to WASPA. I furthermore order the SP to refund the complainant in full within 5 (five) days of receiving this ruling.