



REPORT OF THE ADJUDICATOR

WASPA Member (SP): Opera Interactive

Information Provider (IP): Sprint media

Service Type: Subscription services

Complainant: Public

Complaint Number: 17927

Code Version: 11.6

Advertising Rules Version: Not applicable

Complaint

In essence, the complainant complained that:

- ☒ He had been subscribed to the service in question without his knowledge
- ☒ He was overcharged

The complainant did not consider a full refund sufficient resolution of the matter. He reiterated that he was not aware of subscribing, and that he did not have access to the internet during that time.

He believes that the overcharging was a calculated “error” and that perhaps many people are being taken advantage of in this manner.

Service provider’s response

The IP responded in this matter, and firstly raised that it had made the refund to the complainant in ‘full and final settlement of the matter’, and that the complainant accepted this offer. The matter should therefore be closed.

The IP did, however, provide detailed logs of the double opt in process and all reminder messages. It submitted that the over charging was a genuine error, and that it had not only refunded the overcharge, but the justifiable charges too.

The IP explained that the internet access was done via the mobile device (handset).

Sections of the Code considered

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

11.1.2. An advert for a content subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed, except as provided for in 11.1.3.

11.2.5. If a subscription service is initiated by a customer sending an SMS to the service provider, then a separate confirmation message must then be sent to the customer's mobile handset. Only once the customer has followed the activation instructions in the confirmation message can they be subscribed to the subscription service.

11.2.6. The confirmation message described in 11.2.5 must 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].

11.2.7. If the network is already undertaking any of the verification steps required in this chapter of the Code, then it is not necessary for members to repeat those particular steps again.

11.4. Subscription initiated via USSD

11.4.1. After selecting the required service, the customer must be presented with a confirmation step.

The subscription service may not begin until the customer follows the confirmation instructions. The following information must be presented as part of the confirmation step:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Instructions to follow to confirm the subscription (e.g. "1 - Confirm, 2 - Cancel")

11.5.1. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message should not be mistaken for an advert or marketing message. The customer may not be charged for this message.

11.5.2. The welcome message must start with the text "Welcome: " and must also be a clear notification of the following information, in the following order:

- (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.

11.6. Reminder messages

11.6.1. 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. The customer may not be charged for these reminder messages.

11.6.2. The reminder messages specified in 11.6.1 must adhere exactly to the following format, flow, wording and spacing:

Reminder: You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. SMS HELP [optional keyword] to [short code]/call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].

or

Reminder: 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 unsub, sms STOP [service keyword] to [short code].

11.6.3. 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.

11.6.4. 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.

11.6.5. 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.

Decision

Full and final offer

The IP has initiated its response by stating that it paid the refund in "full and final settlement". It is true that in law, when an offer made in "full and final" settlement is accepted, the person accepting the offer has no further claim against the offeror.

However, the complainant in this matter is not making a further claim against the IP. He is alerting WASPA to what he perceives is non-compliance with industry rules by an industry member. I do not believe that this is in breach of the contract created by the "full and final" offer. I am, in any event, not convinced that such a communication between parties in any way prevents WASPA from taking action against the member.

Subscription

I turn my attention to the complaint that the complainant does not believe that he subscribed to the relevant services.

The IP has clarified that the subscription and web browsing happened from the cell phone in question, and therefore the complainant's allegation that he did not have access to the internet at the relevant time because he was moving house does not hold water – his cell phone would still have been working.

In this context it is noted that the IP has provided full records of the transactions, and I am satisfied that the complainant's cell phone was indeed used – whether by the complainant or someone else, I cannot know.

At my request, the IP has provided a copy of the type of banner advertisement that triggered this matter. I have no choice but to regard this as a material representation of what the complainant responded to:



Clause 11.1.1. requires that "Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material."

I am not satisfied that the above advertisement portrays the "subscription service" disclaimer boldly enough. In the first place, it is in small print, in the corner of the advertisement. One is distracted by the visual, and by the bold invitation to "CLICK

HERE". I would have like to see the subscription service disclaimer appear in the same clear manner as the invitation to "CLICK HERE", so that anyone clicking would immediately have their attention drawn to this important piece of information.

I am particularly concerned about this in the context of mobile browsing, where the entire image would have been much smaller. Even if it were full screen, which is doubtful, it would have looked something like this:



I do not believe that the advertisement is compliant with Clause 11.1.1.

This having been said, the landing page to which the user is led clearly identifies that service as a "Subscription service" both at the top of the page, and below the decidedly adult image.

The records show that the cell phone user clicked on "continue" and received the following SMS:

"CLICK <http://ems.cx/r/D660A8EC> TO VIEW VIDEO."

Clause 11.4.1. says:

After selecting the required service, the customer must be presented with a confirmation step.

The subscription service may not begin until the customer follows the confirmation instructions. The following information must be presented as part of the confirmation step:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Instructions to follow to confirm the subscription (e.g. "1 - Confirm, 2 - Cancel")

The SMS in this regard is decidedly not compliant with Clause 11.4.1. However, on clicking this link, the user was directed to a confirmation page, which

appears to be compliant with Clause 11.1.4. I am further satisfied that the welcome message and reminder messages are compliant with the Code.

Therefore, while I do not believe that the user initially knew that he/she was clicking into a subscription process, I do believe that the landing page and confirmation page sufficiently clear up the initial misleading impression, and that the double opt-in process occurred.

The IP has also owned the fact that the complainant was overbilled, and immediately refunded him not only on the overbilling but on the entire subscription.

In the circumstances I believe that this addresses the issue. I do not believe that the overbilling is indicative of a calculated strategy on the part of the IP, and there is nothing before me to indicate that this is the case.

Sanctions

The IP and/or SP are required to amend the initial banner advertisements with immediate effect to better indicate that the service is a subscription service.

I am satisfied that in the circumstances the full refund of the subscription, which has already occurred, is a fair resolution of this matter.