



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe request
Complainants:	Patricia Lerm
Complaint Number:	7789
Code Version:	7
Advertising Rules Version:	N/A

Complaint

The Complainant stated the following:

“I do not know which conduct to choose but I have never activated a pin and need help in order to get my monies back that they have debited to my MTN account. After calling and chatting to them on Friday 4th Sept 2009 after which they told me to sms STOP. I did this again as they requested it on the strength of my telephone call. I have never ever activated any PIN. This must be a scam. They sent me spreadsheets today but still they cannot tell me when I in fact physically activated it ...solid proof from which banner etc....I need your help as I am being scammed.”

The Complainant was not satisfied with the SP’s response and provided the following reason for escalation:

“Thank you for your email. I however am not happy because I never subscribed to the product and have sent an original sms to them that I was not interested. They went ahead and started debiting my cell phone account. I want them to refund me in full. Please assist.”

The Complainant provided the following response to the SP’s reply:

“Thank you for all the information. As mentioned previously. I NEVER activated any pin. I in fact sent a sms informing the sender to stop sending me sms's. This was returned as an error. I NEVER activated any pins. As explained to you and them in length my mobile account is paid by dt order and only after cancelling my 3G facilities did I in fact notice that there was still an amount dt to my account. On contacting MTN they informed me that it was

some or other company and that I should contact WASPA. This I did. I emphasize that I am not responsible for any of the billed amounts to me and I demand a full refund!!!!!!”

Service provider's response

In its initial response to the informal complaint the SP wrote:

“We'll investigate to determine if a refund is due. Thanks.
Attached is proof of sub member will be contacted to inform that no refund is due. Thanks.”

The SP provided the following response to the formal complaint:

“Attached you will find the users original request to stop the Fun Club subscription in the message 2 report, the first time the user subscribed to the fun club service. This request was honored by us and processed via our systems.

In addition from the info attached you will find that on the 17th June 2009 at 12:34:56, the user once again subscribed to the Fun Club. Attached you will find subscription history and messages sent to the user upon rejoining the fun club subscription service.

In this regard we do not deem a refund justified as all messages sent to the user informing him or her of the subscription was delivered as per the info sent back from his or her service provider to us. This is the way in which the user acquired the stop commands on both occasions.

On both occasions the complainant entered the 4 digit pin sent to his or her mobile device on the website advertisement. These pin number can be found in the word document attached for your perusal.

All information supplied is proof that the user was aware for the mobile subscription service as was honored by us to inform the user of the subscription to the fun club.”

Sections of the Code considered

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.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”.

11.1.2. 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.

11.1.3. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.1.5. Subscription services with different billing frequencies should not have a subscription mechanism likely to cause a customer to accidentally subscribe to a more frequent service.

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

11.1.7. 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.

11.1.8. A monthly reminder SMS must be sent to all subscription service customers containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) The service provider's telephone number.

11.1.9. The monthly reminder SMS must adhere to the following format:

- (a) The monthly reminder must begin with either "Reminder: You are a member of NAME OF SERVICE" or "You are subscribed to NAME OF SERVICE".
- (b) Any marketing for a new service must appear after the cost and frequency of the existing service and the service provider's telephone number.

11.1.10. Once a customer has subscribed to a subscription service, neither the amount nor frequency of the charges nor the frequency of the service may be increased without the customer's explicit permission.

11.1.11. The format of the both the initial notification message and the monthly reminder should comply with the relevant section of the WASPA Advertising Rules.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent response.

The SP has provided proof of the fact that the Complainant in this matter has indeed subscribed to its services through a website. A pin was subsequently issued and the Complainant, after allegedly entering the pin, became subscribed.

As can be seen on the logs and the SP's database, this was logged and subsequent services started.

The SP has provided proof of the fact that the Complainant in this matter has requested to stop its subscription services. Logs were also provided to indicate the sending of subsequent reminder messages. No other information was provided by the SP.

Although the Adjudicator is not implying that the Complainant in this matter is not providing facts true to the best of his knowledge and hence his subsequent recollection of events, it has to be stated that in the absence of any real evidence on behalf of the Complainant, the facts would under normal circumstances amount to mere speculation.

However, should there be some overriding factor(s) which might alter the opinion of the Adjudicator, mention thereof must be made, and this is indeed what is unfolding here.

It has come to the attention of the Adjudicator that there have been several complaints in the same period pertaining to the same services.

These were all lodged as formal complaints against the SP in this matter.

All complaints have its origins based on the same allegations alleged by the Complainant in this matter, complainants uttering their frustrations with either the "IQ test", "Brain-age" or "Fun Club" service, stating that they either did not receive a pin, or when receiving the pin, did not enter the pin and therefore did not consent to a subscription service.

In light of these circumstances and the occurrence of similar events, manifesting itself over the same time period, having regard to evidence supplied by the SP, the Adjudicator has to ask him / herself whether such evidence can be relied upon and whether there might be a case of bundling and an instance of the SP misleading its customers?

Without having sufficient access to the said systems generating these logs, and therefore any mechanism to guarantee the fail-save operation of the SP's operational system, the Adjudicator can also not merely imply that the SP is in breach of any section of the Code of Conduct.

The Adjudicator is however of the opinion, taking all the relevant circumstances into consideration, based on circumstantial evidence alone, that there must be an instance of malfunction on behalf of the SP, or at the very least, something to that extend.

This read together with the decisions provided in Adjudication 5921, 6039, 6112 and several others, leaves the Adjudicator with no alternative but to find the SP in breach of sections 4.1.2, 11.1.2, 11.1.4 and 11.1.5 of version 7.0 of the Code.

The Complaint is upheld.

Sanctions

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct;

The SP is instructed to refund the Complainant in full;

In addition, the sanctions provided in Adjudication 5921 refer.