

REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Venista
Information Provider (IP):	Not applicable
Service Type:	Subscription service
Source of Complaint:	Public
Complainant:	David Lombaard
Complaint Number:	8278
Date Received:	08 December 2009
Code Version:	8.0
Advertising Rules Version:	Not applicable

Complaint

The formal complaint is the escalation of the unsubscribe request logged by the complainant on the 27th of November 2009 via the WASPA unsubscribe facility in respect of the SP's subscription service. The complainant denied ever subscribing to this service and requested the SP to:

- (i) *unsubscribe the complainant;*

- (ii) *send an SMS confirming the unsubscribe;*
- (iii) *provide proof of subscription; and*
- (iv) *contact the complainant regarding a refund.*

Service provider's response

The SP, in response, on or about the 28th of November 2009:

- (i) *unsubscribed and blocked the complainant from the subscription service;*
- (ii) *sent an SMS to the complainant confirming the unsubscribe activation;*
- (iii) *provided WASPA with the relevant logs pertaining to the complainant's number and service; and*
- (iv) *contacted the complainant and offered a full refund of fees paid over to the SP by the complainant.*

In respect of the proof of subscription: the SP's written response (and supporting logs) as received by WASPA stated that a "wappush invitation" was sent to the complainant from the SP. The SP further stated that the subscription service had not commenced on the SP's website but that the "user" had to get through the opt-in process on the wap-site in order to subscribe to the service.

Notwithstanding the above, the SP reported that the complainant was pleased with the manner in which the unsubscribe request was resolved and the level of support received from the SP (and WASPA).

In respect of the refund, the SP indicated that a cheque posted on the 30th of November 2009 had not reached the complainant but that arrangements were made to courier a cheque via overnight delivery to the complainant's work address and further follow up with the complainant to ensure safe receipt of the cheque.

Complainant's Reply:

The complainant responded on 14 December 2009 to WASPA's query on the satisfactory resolution of the unsubscribe request by providing as follows:

- (i) *more generally that the complainant's request was not resolved;*
- (ii) *the submission by the SP that an anonymous party had erroneously subscribed the cellphone number of the complainant to the service was "a little far-fetched" considering that such a "transaction would require confirmation from the subscriber that he or she willingly [accepts] the conditions relating to the service content."*
- (iii) *notwithstanding the initial **offer of a refund to the complainant, the complainant has not to date received the refund offered; and***
- (iv) ***that the complainant has queries regarding the basis on which, "a German company" has provided the "unsolicited sms's" to the complainant and subsequently billed the complainant in relation to such "content".***

Sections of the Code considered

2. Definitions

2.8. A "commercial message" is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.

2.11 A "content subscription service" includes any subscription service providing or offering access to content including by way of example only and not limitation: sound clips, ring tones, wallpapers, images, videos, games, text or MMS content or information. This includes any subscription service which describes itself as a "club" or which otherwise allows access to content to subscribers, at a cost which includes both a subscription element and a per content item element. Services which are not considered to be content subscription services include: dating services, chat services, location based services, GSM terminal device services, corporate application services, reminder services, synchronisation applications, corporate communications applications, VOIP, etc.

2.22 "Spam" means unsolicited commercial communications, including commercial messages as referred to in section 5.2.1.

2.23 A “subscription service” is a service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

4.1 Provision of information to customers

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

4.1.6 Members must have a complaints procedure allowing their customers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.

4.3 Refunds

4.3.3 Refunds must not be unreasonably delayed.

5.1. Sending of commercial communications

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator’s database, so as not to receive any further messages from that message originator.

5.1.5. Once a recipient has opted out from a service, a message confirming the opt-out should be sent to that recipient. This message must reference the specific service that the recipient has opted-out from, and may not be a premium rated message.

5.1.7. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient’s personal information was obtained.

5.2. Identification of spam

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

- a. the recipient has requested the message;**
- b. 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**
- c. the organisation supplying the originator with the recipient’s contact information has the recipient’s explicit consent to do so.**

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.

11.1. Manner of subscription

11.1.8. 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.**

11.1.10. 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]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing].

11.1.11. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation must be obtained from that customer's mobile handset before any billing may take place for that service.

11.5. Termination of a service

11.5.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

11.5.8. Members must ensure that the termination mechanism is functional and accessible at all times.

11.5.12. If a consumer lodges a request with WASPA to be unsubscribed from a subscription service, the WASPA member concerned must honour that request within two working days (48 hours) of that request being passed on by WASPA.

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 (iv) the sections of the Code considered:

It appears from the information contained in the SP's log that an opt-in request to subscribe for the service was received via WAP from the complainant's mobile number and a confirmation message was sent to the complainant's number by the SP regarding his subscription to the service. On the basis of such information and in the absence of any contradictory evidence or the contents of the communications, I am inclined to give the SP the benefit of the doubt regarding the manner of subscription. .

Further, I am satisfied that the SP has dealt with the unsubscribe request and that the complainant has been validly unsubscribed from the service.

I do however take issue with the explanation provided by the SP in respect of the source of the complainant's mobile number for the purposes of the original WAP push invitation sent by the SP to the complainant. On the basis of the information presented, it cannot be established that **the complainant had requested the message; had a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or that the organisation supplying the originator with the complainant's contact information has the recipient's explicit consent to do so.** The information presented, both in the vagueness of the source of the information from the SP and the complainant's subsequent reply regarding an anonymous party further substantiate the questionable nature of the source of the complainant's mobile number and a violation of 5.3.1 and 5.1.7 of the Code.

I further believe that the complainant and SP had duly reached agreement on resolution of the matter. Notwithstanding that the SP has unsubscribed the complainant from the relevant service; the agreement further included the payment of a refund which has been unreasonably delayed in violation of 5.3.2 of the Code.

In addition I am not satisfied with the complaints procedure of the SP more specifically in relation to whether this complaint and the manner of resolution agreed to was dealt with in a reasonable amount of time. In this regard I find the SP in violation of 4.1.6 of the Code.

The remaining aspect of the complainant's reply being a call for clarification regarding the ***basis on which, "a German company" has provided the "unsolicited sms's" to the complainant and subsequently billed the complainant in relation to such "content"*** is not considered in this adjudication as it is believed that this is directed at the WASPA Secretariat.

Sanctions

The SP is:

- (i) ***Ordered to take immediate steps to ensure that the complainant is refunded and in any event confirm in writing to the WASPA Secretariat that it has done so within five (5) days of date of notification of this Adjudication;***
- (ii) ***Required to verify in writing to the Secretariat within ten (10) days of notification of this Adjudication: the names and contact details of the persons responsible for dealing with unsubscribe and refund requests and the name of a senior member of management of the SP that is responsible for oversight in respect of dealing with complaints; and***
- (iii) ***Fined the sum of R20 000, of which R10 000,00 is suspended for a period of six (6) months subject to the SP complying with (i) and (ii) above; and the balance payable to WASPA Secretariat within five (5) days of notification of this Adjudication.***