



ADJUDICATOR'S REPORT

Complaint reference number: #13744

WASPA member(s): Buongiorno SA

Membership number(s): 0002

Complainant: Public

Type of complaint: Subscription

Date complaint was lodged: 2011-07-06

Date of the alleged offence: 2011-04-20

Relevant version of the Code: 10.0

Clauses considered: 11.1.1, 11.1.2, 11.2.1, 11.2.2, 11.2.3, 11.3.1, 11.5.1, 11.5.2, 11.6.1, 11.6.2, 11.6.4 and 11.6.5

Relevant version of the Ad. Rules: Not applicable

Clauses considered: Not applicable

Related cases considered: 11863

Complaint

The complainant lodged a complaint with WASPA regarding a subscription to the member's content subscription service ("the service"), contending that she did not subscribe to the service and insisted that amounts charged to her account be refunded by the member:

I wish to report a fraudulent transaction A 3rd party Gaming Service Provider is

claiming that I subscribed to their service and that a secret pin was sent to my mobile I repudiate this, as I have no record of receiving a pin and did not subscribe to this service Furthermore, I have informed my Mobile Service Provider: MTN that I have never authorised MTN to debit my account with 3rd party charges Both companies have logged calls but cannot take action on my claim that this is fraudulent Buongiorno has provided a mobile traffic report claiming that secret pin was delivered to my phone MTN needs to prove it was indeed received on my HANDSET and that the site was accessed from MY HANDSET before I will accept this ...

The member unsubscribed the complainant on 13 June 2011 but did not offer a refund as the complainant demanded. The complaint proceeded to a formal complaint on 5 July 2011.

Service provider's response

The member's logs (annexed with the complainant's phone number redacted) indicate the following:

- The complainant received a code, apparently from a Web-based campaign, on 20 April 2011 with instructions to enter the code into "a web confirmation page and you'll be subscribed to 35050 VIP at R3/day for mp3s, games and tons more".
- The complainant received two further promotional messages in the next 46 seconds before receiving a confirmation message stating "Welcome 2 35050. Go to Wap.35050.co.za on ur mobile 4 Unlimited games,Mp3's & more! Help: 0214178001 Dial *120*5133# to unsub(R3/day subscription)" less than a minute after the initial PIN message.
- The complainant then received a reminder message on 20 May 2011 stating "U r subscribed to 35050 VIP from Buongiorno. You get unlimited downloads. Cost R3/day. For help call 0214178001. To unsubscribe sms STOP VIP to

35050”.

- Finally, the complainant received a message on 13 June 2011 informing her that she had been unsubscribed from the service: “You have been unsubscribed from 35050 VIP. To re-subscribe sms START to 35050. U'll then b resubscribed @ R3/day”.

The member attempted a further informal resolution in parallel with the formal complaint but this was not successful. The member sent the complainant a document detailing how her number came to be subscribed to the service. This document is annexed to this report although I have redacted the complainant's personal information. This report describes the likely process the complainant (or someone using her phone) followed in order to become a subscriber and includes extracts from the member's logs demonstrating delivery of the various messages sent to the complainant's phone throughout the process.

The member's submissions to WASPA are fairly detailed and are annexed to this report (along with its annexures). A number of statements in the member's submissions stand out:

Subscription Process:

Due to our double-opt in system, which is even more stringent than that prescribed by the Code, it is impossible to become subscribed to our service without being aware that one was subscribing to a Buongiorno service.

Active sign-up requirement:

On 20 April 2011 the complainant entered her mobile number on the landing page and must have clicked "Send", whereafter she was sent from ourselves a text message containing the required pin code (4123) (the "pin code"). As already stated above, this text message also confirms that the service offered is a subscription service, charged at R3 per day"

">> Your CODE is 4123 << enter it in the web confirmation page and youll (sic) be subscribed to 35050 VIP at R3/day for mp3s, games and tons more."

The pin code is unique and directed only to the phone of the complainant, the subscriber in this case.

PIN code requirement for subscription:

Only after entering the pin code on the second landing page and pressing the "confirm" button would she have become a subscription member of the service and received the requisite "welcome" message – which she did (see MT logs).

Logs reflect messages receipt:

The logs confirm that the complainant received all the required welcome and reminder messages - which messages again confirmed the subscription element of the service, the cost thereof, as well as instructions on the unsubscribe process.

The member noted further that the welcome and reminder messages contained unsubscription information and that the complainant made use of this information to unsubscribe from the service when she took action. The member tendered a refund of the R90 the complainant was charged if she agreed to resolve the matter informally. Ordinarily a consumer should not be deterred from exercising his or her rights when those rights have been prejudiced but there is a point at which complaints are lodged unnecessarily and, in this regard, there is merit to the member's final statement:

We also respectfully suggest, whilst WASPA must protect the interests of subscribers, and ensure adherence to the Code, it should also not permit further resources (both its own and the Wasp's) to be wasted dealing with obviously spurious complaints such as the present complaint, by taking them to the level of a formal complaint.

Sections of the Code considered

In reviewing the complaint, I considered the following sections of the Code:

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.

11.2.1. *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.*

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.*

11.2.3. *Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.*

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:*

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

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:*

- (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.*

11.6.1. *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].

11.6.4. 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.

Sections of the Advertising Rules considered [if applicable]

Not considered.

Decision

The member referred to complaint 11863 which was lodged against it for substantially the same service as the one which forms the subject matter of this complaint. The reason the member referred to complaint 11863 was the following statement the adjudicator in that matter made:

The adjudicator is of the view that the reasonable customer would, when clicking on the confirm button on the subscription confirmation webpage, have an understanding of the fact that he or she was joining a subscription service which was charged at R3 per day. The adjudicator accepts that this intention may not be present when

interacting through the banner advert and the initial promotional page, but holds that the intention required by section 11.2.2 would be present at the critical time when the customer takes the last positive step prior to being subscribed. (Member's emphasis)

This quote goes to the heart of the present complaint. The central question in this complaint is whether the complainant subscribed to the service or, when interacting with the service, whether she ought to have been aware that she was subscribing to the service.

Unlike complaint 11863, the complaint in this matter does not address whether the complainant visited the service's campaign website and engaged with the service on a particular basis. In complaint 11863, one basis of the Monitor's complaint was that the service's website was ostensibly a landing page for a competition, not an entry point for a subscription service. Although the same service is involved in this complaint, it is not necessary to consider this issue and even if such a issue were relevant to this complaint, I agree with the adjudicator in complaint 11863 that the impression given by the service's landing page is largely irrelevant.

In this particular complaint the complainant made a number of allegations suggesting the member is engaged in "fraudulent" behaviour. In her email to WASPA dated 28 July 2011, the complainant made the following comments:

I am disputing that I subscribed to the service

I requested that Buongiorno and MTN provide proof i.e. subscribed , from my handset, to the service i.e. provide the internet activity report, proving that I visited the website

Buongiorno could not provide that proof - they furthermore confirmed, in writing, that the service was subscribed by someone visiting their site from a PC. That means that every Tom-Dick-and-Harry can enter competitions, and punch in someone else's mobile number... or Buongiorno themselves can have a database of numbers that they sit and subscribe to themselves...

The member has demonstrated that a series of messages were sent to the complainant's phone including an initial message with a code to activate a subscription initiated on the service's website; a welcome message and a reminder message. Each message points out the service's subscription nature starting with the initial message containing the

code and which was sent as part of an intermediary step before the subscription commenced.

In the absence of a technical fault in the member's subscription system (and there is no indication of this in the documentation before me), the complainant's could not have become a subscriber without taking two active steps: entering her phone number on the website and entering the confirmation code sent to her handset. Furthermore, the subsequent welcome and reminder messages afforded the complainant with opportunities to terminate her subscription, including instructions on how to terminate her subscription in the process.

I agree with my colleague in complaint 11863 that "the intention required by section 11.2.2 would be present at the critical time when the customer takes the last positive step prior to being subscribed". I find that the member's subscription mechanism is substantially compliant with the Code's requirements and the complainant ought to have been aware that her phone was used to subscribe to the service or ought reasonably to have been aware of this.

Sanctions

I dismiss the complaint for the reasons set out above.

MO/M	created	acked	mo proc/mt deliv	service	from	to	message	error
MT	2011-04-20 07:02:17 +0200	2011-04-20 07:02:18 +0200	2011-04-20 07:02:28 +0200	club	27839200278	[REDACTED]	>> Your CODE is 4123 << enter it in the web confirmation page and you'll be subscribed to 35050 VIP at R3/day for mp3s, games and tons more.	
MT	2011-04-20 07:02:33 +0200	2011-04-20 07:02:34 +0200	2011-04-20 07:02:43 +0200	35050_standard	27839200278	[REDACTED]	This summer a lucky VIP member will drive away in a brand new Polo! Plus - EVERY DAY someone will receive an ipod	
MT	2011-04-20 07:03:03 +0200	2011-04-20 07:03:04 +0200	2011-04-20 07:03:14 +0200	35050_standard	27839200278	[REDACTED]	Download The 35050 Vip App To Get Your Content Now.	
MT	2011-04-20 07:03:03 +0200	2011-04-20 07:03:04 +0200	2011-04-20 07:03:19 +0200	35050_standard	27839200278	[REDACTED]	Welcome 2 35050. Go to Wap.35050.co.za on ur mobile 4 Unlimited games,Mp3's & more! Help: 0214178001 Dial *120*5133# to unsub(R3/day subscription)	
MT	2011-05-20 17:20:00 +0200	2011-05-20 19:04:28 +0200	2011-05-20 21:24:18 +0200	35050_stim	27839200278	[REDACTED]	Dont forget, as a valued VIP member u could drive away in a brand new Polo this summer! Plus u could be one of the lucky members to receive an ipod	
MT	2011-05-20 17:20:00 +0200	2011-05-20 19:06:58 +0200	2011-05-20 20:53:30 +0200	35050_stim	27839200278	[REDACTED]	U r subscribed to 35050 VIP from Buongiorno. You get unlimited downloads. Cost R3/day. For help call 0214178001. To unsubscribe sms STOP VIP to 35050.	
MT	2011-06-13 12:36:56 +0200	2011-06-13 12:36:57 +0200	2011-06-13 12:37:06 +0200	35050_standard	27839200278	[REDACTED]	You have been unsubscribed from 35050 VIP. To re-subscribe sms START to 35050. U'll then b resubscribed @ R3/day	

Dear WASPA

1. On the merits of the matter the versions of the WASPA Code of Conduct applicable to this matter are versions 10 (applicable until 8 June 2011) and 11 (applicable from 8 June 2011 and currently still applicable) – the codes applicable at the time of subscription and at the time of the complaint. Version 10 was the applicable version at the time of subscription (20 April 2011), at the time of unsubcription and at the time of the lodging of this formal complaint version 11 was and is applicable.
2. The service in question is our 35050 VIP subscription service (the "service").
3. Herewith the link to the advertised online campaign:

http://www.youmobile-za.com/adv-iphone-gratta-new-1588_118.html

4. Also attached, for your ease of reference, are:
 - 4.1. screenshots taken of the landing pages of the campaign in question (marked "**B1**" and "**B2**"); and
 - 4.2. the service provider's billing and MT logs.
5. The subscription definitely occurred via the use of a PC through the above link. However content download could only have occurred through WAP – i.e. via the subscribers mobile phone.

SUBSCRIPTION PROCESS:

6. Due to our double-opt in system, which is even more stringent than that prescribed by the Code, it is impossible to become subscribed to our service without being aware that one was subscribing to a Buongiorno service.
 - 6.1. In addition to the requisite subscription text being visible on the landing page of the campaign, the fact that the service is a subscription service is recorded in the pin code message, the welcome message, as well as the reminder messages sent to the subscriber.

This will be referred to in more detail below.

7. In consideration of the campaign as a whole, it is clear that before subscribing the complainant was made fully aware, on both landing pages of the service, that what is being offered was a subscription service at a daily charge of R3/per day. See:

7.1. The top of left hand side of both pages ("**B1**") – "*Subscription service R3/per day*"; and

7.2. Beneath the "Confirm" button ("**B2**") it also states that, "*By clicking confirm, I agree to subscribe to 35050 VIP subscription service R3/per day...*".

8. In addition the complainant is on both pages ("**B1**" & "**B2**") referred to our terms and conditions before subscribing - this is an additional precautionary mechanism which goes beyond the already strict requirements of either the Code and/or the Advertising Rules (the "Rules").
9. On 20 April 2011 the complainant entered her mobile number on the landing page and must have clicked "Send", whereafter she was sent from ourselves a text message containing the required pin code (4123) (the "pin code"). As already stated above, this text message also confirms that the service offered is a subscription service, charged at R3 per day"

">> Your CODE is 4123 << enter it in the web confirmation page and youll (sic) be subscribed to 35050 VIP at R3/day for mp3s, games and tons more."

The pin code is unique and directed only to the phone of the complainant, the subscriber in this case.

10. At the point of receiving the pin code the complainant was still not subscribed to the service. Once she received the pin code the complainant still had a choice, before becoming subscribed, to enter the pin code on the landing page.
11. Only after entering the pin code on the second landing page and pressing the "confirm" button would she have become a subscription member of the service and received the requisite "welcome" message – which she did (see MT logs).
12. The above opt –in process complies with the Code and the Rules.
13. We also refer you to the Adjudication in complaint number #11863, where the adjudicator found, at para 20 of his/her report, as regards our subscription process, that:

"The adjudicator is of the view that the reasonable customer would, when clicking on the confirm button on the subscription confirmation webpage, have an understanding of the fact that he or she was joining a subscription service which was charged at R3 per day. The adjudicator accepts that this intention may not be present when interacting through the banner advert and the initial promotional page, but holds that

the intention required by section 11.2.2 would be present at the critical time when the customer takes the last positive step prior to being subscribed" (our underlining).

14. The logs confirm that the complainant received all the required welcome and reminder messages - which messages again confirmed the subscription element of the service, the cost thereof, as well as instructions on the unsubscribe process. By way of amplification the respective messages read:

*"Welcome 2 35050. Go to Wap.35050.co.za on ur mobile 4 Unlimited games,Mp3's & more! Help: 0214178001 Dial *120*5133# to unsub(R3/day subscription)"* – welcome message; and

"U r subscribed to 35050 VIP from Buongiorno. You get unlimited downloads. Cost R3/day. For help call 0214178001. To unsubscribe sms STOP VIP to 35050." – reminder messages.

See attached logs.

UNSUBSCRIBE PROCEDURE:

15. Once subscribed the complainant was at all times – through the welcome and reminder messages - provided with detailed instructions on how to unsubscribe, as well as our help line number if he/she experienced any problems. See logs and paragraph 14 above.
16. The complainant obviously understood this unsubscribe procedure as it was this procedure which she utilised to unsubscribe his/herself from our service. See attached logs.

ADDITIONAL OBSERVATIONS:

17. Please also note that visually it is quite evident on the landing pages that there are additional content items available via the service – as is required by the Code.

CONCLUSION:

18. The information provided illustrates that that the complainant knowingly and deliberately subscribed to the service using a subscription process which is in accordance with the Code.

SETTLEMENT:

19. For commercial reasons (given the refund amount of R90 and the human resources that we have to allocate to these matters) we would like this matter to be concluded without

adjudication even though, for all the reasons set out above, there is no basis for an adverse finding. We have been informed by WASPA that, if the complainant confirms that she does not wish to proceed with the complaint, WASPA will convert the complaint to informal and resolve it on this basis.

20. For the reasons stated above we do not believe that the complainant is entitled to a refund or to complain; however should she agree to withdraw the formal complaint we will agree, for commercial considerations, to refund her in full.
21. We also respectfully suggest, whilst WASPA must protect the interests of subscribers, and ensure adherence to the Code, it should also not permit further resources (both its own and the Wasp's) to be wasted dealing with obviously spurious complaints such as the present complaint, by taking them to the level of a formal complaint.

subscription service R3/day

the best music is on your mobile

*available through the 35050 rewards program T&Cs apply



THE BEST MUSIC AND YOU COULD GET AN IPHONE*

CONTINUE AND YOU COULD GET AN IPHONE*

Best Music For You



YOUR MOBILE NUMBER

Select your carrier



SEND

subscription service R3/day the best music is on your mobile *available through the 35050 rewards program T&Cs apply

iPhone*



CONTINUE AND YOU COULD GET AN IPHONE*

Insert the code received by sms: 27823311778



YOUR CODE

CONFIRM

By clicking confirm, I agree to subscribe to 35050 Vip subscription service R3/day. I accept the terms and conditions and confirm I am > 18. For help dial 0214178001. **Terms and Conditions below** ([please read](#))



[TERMS AND CONDITIONS \(please read\)](#)



*Rewards program T&Cs apply

[Privacy and policy](#)

35050 VIP offering and pricing

35050 VIP is a mobile subscription service charged at R3 per day and offers you unlimited downloads of the content available while you remain subscribed. **The daily**



Monique [REDACTED] – Proof of Subscription

Good day

Thank you for contacting Buongiorno Customer Care

The reason why you where billed R3 per day was for a 35050 subscription which was joined using your number [REDACTED] on the 2011-04-20 at 07:02:33 via the website on a PC,

For playing one of our online web based splash games which we advertise via google ads on various websites. To familiarize yourself with the process once again I have inserted An example screenshot of the splash page (Exact Web campaign id: vpa_tek6885_14327)





Your mobile number was entered into the above mentioned campaign at 2011-04-20 at 07:02:17 instantly your mobile number then received an sms with a unique pin number to confirm subscription , This process was created for security purposes and the subscription only starts once that pin number is entered back into the website. Your Pin code was entered into the website at 2011-04-20at 07:02:33, again almost immediately thereafter you received an sms informing you , the user that he/she is now a member of the club, the subscription costs , how to download content and how to cancel it.

By law reminder text messages need to be sent to your mobile number once per month, to advise you that you're a member, your paying for the service and how to cancel the service.

Below is your sms history with our company for the last 3 months, Kindly note that all delivery reports indicate that all text messages where delivered to your handset.

SMS history:

MOBILE TRAFFIC REPORT						
CREATED	MO/MT	RESPONSE	FROM	TO	TEXT	MORE
2011-04-20 07:02:17 +0200	MT	2011-04-20 07:02:18 +0200 acked	27839200278		>> Your CODE is 4123 << enter it in the web confir....	
	TransID	2011-04-20 07:02:28 +0200 delivered			>> Your CODE is 4123 << enter it in the web confirmation page and you'll be subscribed to 35050 VIP at R3/day for mp3s, games and tons more.	
2011-04-20 07:02:33 +0200	MT	2011-04-20 07:02:34 +0200 acked	27839200278		This summer a lucky VIP	
	TransID	2011-04-20 07:02:43 +0200 delivered				
2011-04-20 07:03:03 +0200	MT	2011-04-20 07:03:04 +0200 acked	27839200278		Download The 35050 Vip App To Get Your Content Now....	
	TransID	2011-04-20 07:03:14 +0200 delivered				
2011-04-20 07:03:03 +0200	MT	2011-04-20 07:03:04 +0200 acked	27839200278		Welcome 2 35050. Go to Wap.35050.co.za on ur mobil....	
	TransID	2011-04-20 07:03:19 +0200 delivered				

Download file XLS

MOBILE TRAFFIC REPORT						
CREATED	MO/MT	RESPONSE	FROM	TO	TEXT	MORE
2011-05-20 17:20:00 +0200	MT	2011-05-20 19:04:28 +0200 acked	27839200278		Dont forget, as a valued VIP member u could drive	template
	TransID	2011-05-20 21:24:18 +0200 delivered				
2011-05-20 17:20:00 +0200	MT	2011-05-20 19:06:58 +0200 acked	27839200278		U r subscribed to 35050 VIP from Buongiorno. You g....	template
	TransID	2011-05-20 20:53:30 +0200 delivered				
Download file XLS						
U r subscribed to 35050 VIP from Buongiorno. You get unlimited downloads. Cost R3/day. For help call 0214178001. To unsubscribe sms STOP VIP to 35050.						

MOBILE TRAFFIC REPORT						
CREATED	MO/MT	RESPONSE	FROM	TO	TEXT	MORE
2011-06-13 12:36:56 +0200	MT	2011-06-13 12:36:57 +0200 acked	27839200278		You have been unsubscribed from 35050 VIP. To re-s...	templa
	TransID	2011-06-13 12:37:06 +0200 delivered				
Download file XLS						
You have been unsubscribed from 35050 VIP. To re-subscribe sms START to 35050. U'll then b resubscribed @ R3/day						

The club was cancelled on 2011-06-13 at 12:36:56 as requested.

Kindly note that because this is a subscription service we do not monitor downloads, instead we charge for the time period the service is made available to you.

If you have any further queries please do not hesitate to contact us.