



## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	15505
<b>WASPA member(s):</b>	Buongiorno (SP)
<b>Membership number(s):</b>	0002
<b>Complainant:</b>	Public
<b>Type of complaint:</b>	Subscription Services
<b>Date complaint was lodged:</b>	2011-11-09
<b>Date of the alleged offence:</b>	2011-03-04
<b>Relevant version of the Code:</b>	10.0
<b>Clauses considered:</b>	2.9, 9.1.6, 11.1.1, 11.2.2, 11.2.3, 11.2.5
<b>Relevant version of the Ad. Rules:</b>	N/A
<b>Clauses considered:</b>	N/A
<b>Related cases considered:</b>	N/A

---

### Complaint

The Complainant in this matter alleged that the SP subscribed her to a service without her consent or willingness to be subscribed. After receiving some proof of logs from the SP in this matter the Complainant acknowledged that she indeed did enter her cell number but refuse to acknowledge that she entered a password. The Complainant requested a refund.

---

### Service provider's response

Below is a verbatim copy of the SP's response, apart from its paragraphs 1-3:

"4. The subscription definitely occurred via the use of a PC, however content download could only have occurred through WAP – i.e. via the subscribers' mobile phone.

### SUBSCRIPTION PROCESS:

5. Due to our double-opt in system, which is even more stringent than that prescribed by the Code, it is highly improbable – if not impossible – to become subscribed to our service without being aware that one was subscribing to a Buongiorno service.

5.1. 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.

6. 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:

6.1. The top of left hand side of both pages ("**B1**" & "**B2**") – "*Subscription service R3/per day*"; and

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

7. In addition the complainant is on both pages ("**B1**"&"**B2**") referred to our terms and conditions before subscribing - this is not a requirement of either the Code and/or the Advertising Rules (the "Rules").

8. On 4th March 2011 the complainant entered their mobile number on the landing page and must have clicked "Send", where after he/she was sent, from ourselves, a text message containing the required pin code (0749) (the "pin code") from Buon-giorno. As already stated above, this text message also confirms that the service offered is a subscription service, charged at R5 per day".

>> Your CODE is 0749 << enter it in the web confirmation page and you'll 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, as the subscriber.

9. At the point of receiving the pin code the complainant was still not subscribed to the service.

Once he/she received the pin code the complainant still had a choice, before becoming subscribed, to enter the pin code on the landing page.

10. Only on entering the pin code correctly on the second landing page ("**B2**") and pressing the "confirm" button would he/she have become a subscription member of the service and received the requisite "welcome" message – which he did (see MT logs).

11. The above process is in line with the Code and the Rules.

12. 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 in-*

*attention 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).*

13. 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 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# 2 unsub (R3/day subscription)

See attached logs.

On the 27th September 2011 the complainant requested to be unsubscribed via our call centre.

#### UNSUBSCRIBE PROCEDURE:

14. Once subscribed the complainant was at all times – through the welcome message – 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 13 above.

15. The complainant obviously understood this unsubscribe procedure as it was this procedure which the complainant utilised to unsubscribe from our 35050 service, having been it via our 24x7 contact number or, utilizing the instruction within the welcome and reminder message.

See attached logs.

#### ADDITIONAL OBSERVATIONS:

16. 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:

17. 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, as noted the user has been unsubscribed from the 35050 Vip service as having been notified of the relevant information in the welcome message...

18. For the reasons stated above we do not believe that the complainant is entitled to a refund nor complain. The complaint is currently no longer subscribed to our mobile subscription service, as having unsubscribed as of his/her own accord by utilizing the unsubscribe instruction within the received messages as, was informative of both the subscription and unsubscribe information, inclusive of our contact centre telephone number, should the complainant have experienced any issues with the service."

#### Sections of the Code considered

2.9. A "**competition service**" is any competition or game with prizes or entry mechanism into a draw. Where an auction or a reverse auction has the characteristics of a competition service, it is considered to be a competition service.

9.1.6. Competition services and promotional material must not:

- (a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;
- (b) exaggerate the chance of winning a prize;
- (c) suggest that winning a prize is a certainty;
- (d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.

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.

11.2.2. 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.

11.2.5. 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]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].

---

## 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 reply.

It is unfortunate that the Adjudicator in this matter did not have access to the banner ad which lured the subscriber / Complainant into subscribing to the SP's service.

This however does not preclude the Adjudicator from agreeing with the defense offered by the SP in its paragraph 12, although not in its entirety. As far as the Adjudicator in this matter is concerned, the SP must ensure that all of its banner ads conform to section 11.1 and its sub paragraphs. The Code cannot be manipulated to allow discrepancies. Consumers / users / subscribers must not be misled at any stage of the subscription process and SPs and / or IPs are advised to correct banner ads to reflect same. As stated however, the Adjudicator was only provided access to the landing pages and can therefore not rule on the banner ad.

The Adjudicator is however of the opinion that the Complainant in this matter has had ample opportunity to unsubscribe, after having received an initial notice of subscription, subsequent monthly reminders and sufficient information on how to unsubscribe. The 6 month delay in requesting a un-subscription casts a negative light on the validity of complaint.

The landing pages provided by the SP also seem to be compliant with the WASPA Code.

The Complainant in the second instance did not deny entering her cell number, but rejected entering the password received. From the SP's response and the subsequent logs received, this allegation would seem to be unfounded, or at least unsubstantiated by any evidence on behalf of the Complainant. The Adjudicator can only request the WASPA Secretariat to instruct the WASPA Monitor, which it hereby does, to test the opt-in mechanism of the SP for this service, and if found to be faulty, to institute a new complaint which might justify a refund to the Complainant in this matter.

The Adjudicator therefore has no hesitation in concurring with the SPs response.

The Complaint is dismissed.

---