

REPORT OF THE ADJUDICATOR

Complaint reference number:	#15578
WASPA member(s):	Buongiorno SA (the Service Provider or "SP")
Information Provider(s):	Not applicable
Membership number(s):	0002
Complainant:	Public
Type of complaint:	Subscription
Date complaint was lodged:	2011-11-15
Date of the alleged offence:	2011-07-17
Relevant version of the Code:	11.0
Clauses considered:	11.6.1, 11.6.2, 11.6.3, 11.6.4, 11.6.5
Relevant version of the Ad. Rules:	2.3
Clauses considered:	12.1, 12.2
Related cases considered:	Not applicable

Complaint

Complaint #15578 is the escalation of unsubscribe request #2213251.

On 17 October 2011, the Complainant wrote:

"Hi, I have sent in a request via Vodacom and they have given me a reference number of #2213251 on the cell phone number [redacted number]. Recently I received an SMS from 35050 (SP) reminding me of a R3/day subscription that I supposedly had. I have not ever subscribed to any SMS service in my life time, nor do I intend to. My cell phone records can back this up more than adequately. Vodacom have said that they have unsubscribed me but there are still 2 issues outstanding regarding this. The first is that I require a refund for the 2 to 3 months (as the Vodacom customer care man informed me) that I have been "subscribed" to this service. As I have never agreed to such a subscription, the "service" that they have subscribed me to is illegal. The second is that they could easily re-subscribe me (and any other cell phone user) if they like without permission. This is clearly an illegal practice and needs to be dealt with under the consumer act. If you do a simple Hello Peter or Google search there are quite a lot of these

complaints and Vodacom themselves say that 35050 has a big problem with subscribing people that neither know about the service nor have agreed to subscribe to them. My question is that since some of these enquiries date back to 2008, why hasn't this organisation been shut down already? They might be provided a "service" to some but a significant portion of their operation is acting under illegal premise[s]. If this cannot be resolved and refunded within the next few days then I will be going to the consumer rights commission as well as the police. It might only be R100/month or whatever but by the looks of things I am one of thousands (I'm sure) that they are doing this to. If this is true then they are committing fraud and should be punished under the full extent of the law. Please help in sorting this out in a speedy manner. Thanks."

On the same day, the WASPA unsubscribe system reflects that the SP responded as follows:

"Thank you for contacting [SP] Customer Care. The services on the number were already cancelled on 2011-06-08."

The Complainant was not satisfied with the SP's response and requested formal escalation of the complaint. On 15 November 2011, the SP was formally notified of the escalated complaint.

Service Provider's response

On 22 November 2011, the SP sent a written formal response to WASPA, which referred to the following attachments: 1) screenshots of the campaign landing pages with which the Complainant allegedly interacted; 2) copies of messages sent to the Complainant by the SP; and 3) billing history.

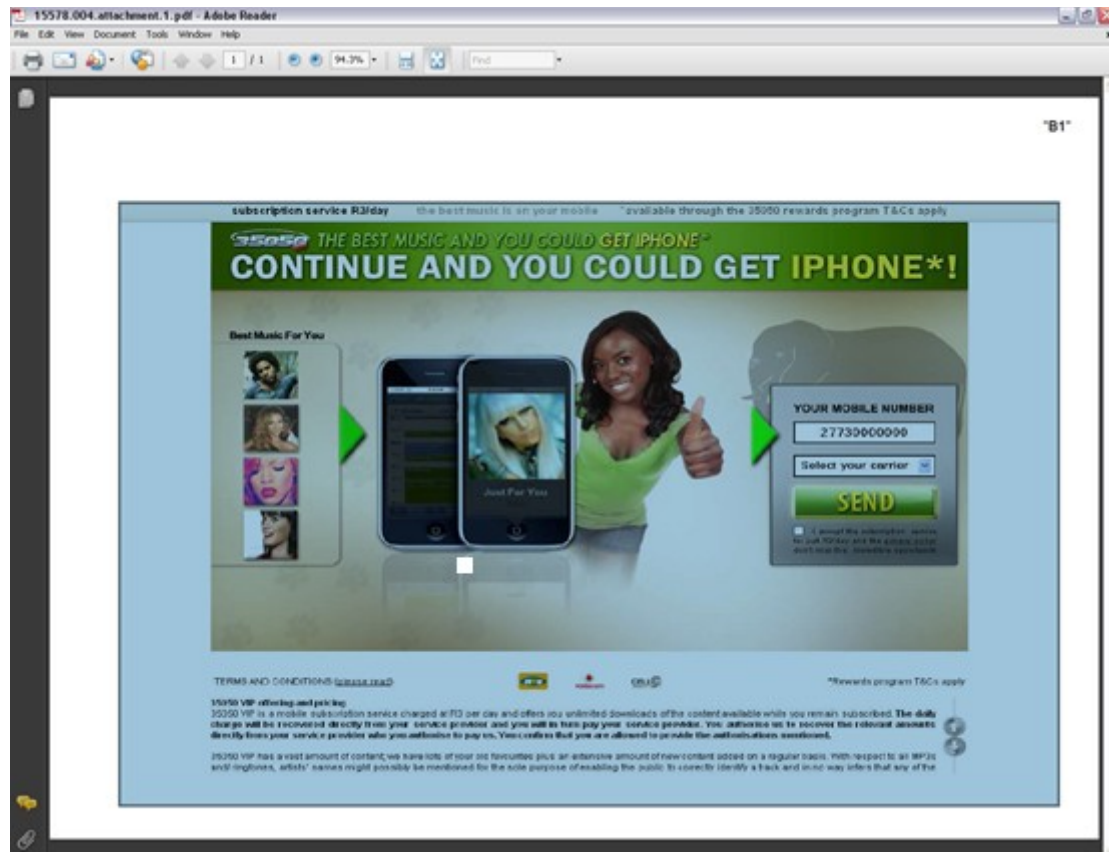
In its formal response the SP states that the subscription allegedly occurred on 17 July 2011. It identified the service in question as its "35050 VIP" subscription service. The copies of the advertising/web pages submitted by the SP also clearly refer to the service as the "35050 VIP" service at an advertised cost of R3/day. The SP goes on to state that the subscription definitely occurred via the use of a PC, however content downloads could only have occurred through WAP i.e. via the Complainant's mobile phone. The SP explained its subscription process, stating as follows:

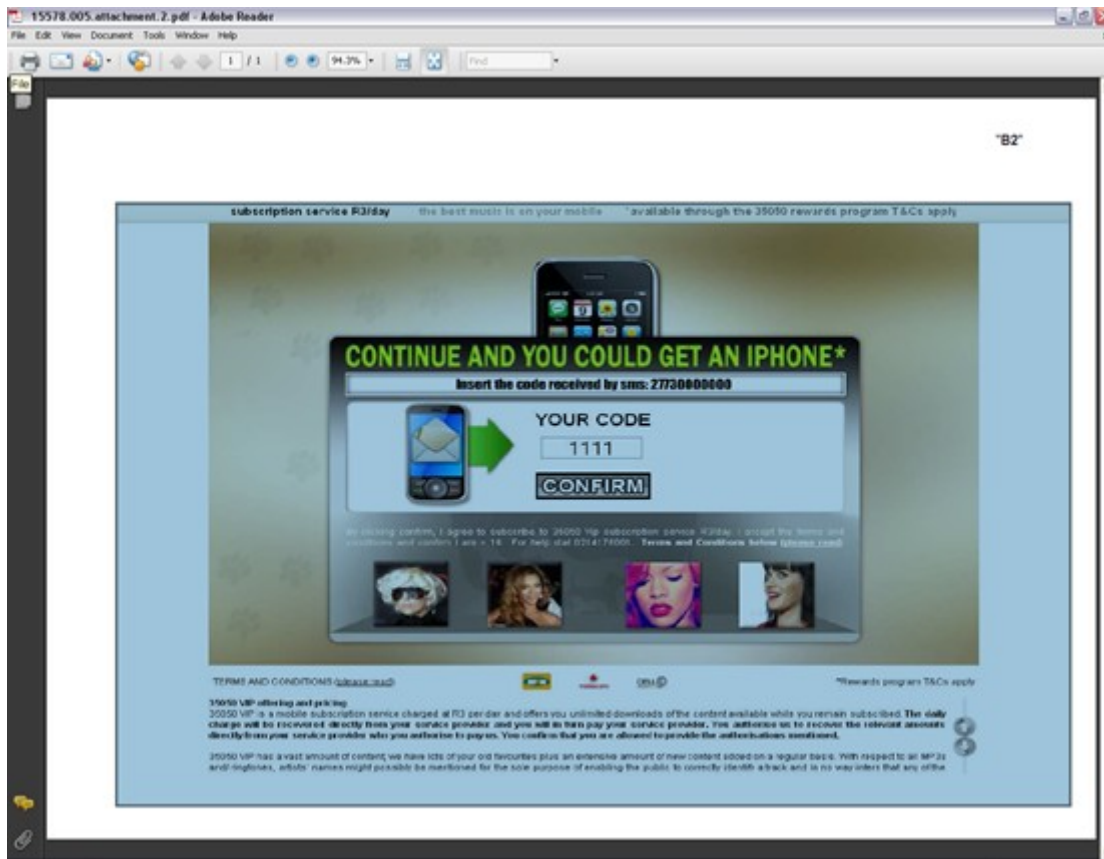
"Due to our double-opt in system, which is even more stringent than that prescribed by the Code, it is highly improbable – if not impossible – to become subscribed to our service without being aware that one was subscribing to a [SP] service. In addition to the requisite subscription text being visible 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. 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."

The SP drew attention to the top left hand side of both landing pages of the campaign allegedly viewed by the Complainant, which pages include the text

"Subscription service R3/per day" (see screenshots labelled "B1" and "B2" below) and also points out that beneath the "Confirm" button on "B2", it states that, "By clicking confirm, I agree to subscribe to 35050 VIP subscription service R3/per day...".

The screenshots of the landing pages of the campaign in question as provided by the SP, marked "B1" and "B2" respectively, are set out below:





The SP went on to state that the Complainant was also referred to the SP's terms and conditions on both pages "B1" and "B2" before subscribing.

The SP alleged in its response that the Complainant entered his mobile number on the landing page on 17 July 2011. It explains that the Complainant:

"...must have clicked "Send", whereafter he/she was sent, from ourselves, a text message containing the required pin code (9858) from [the SP]. As already stated above, this text message also confirms that the service offered is a subscription service, charged at R3 per day [stating] " >> Your CODE is 9858 << 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. 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. Only on entering the pin code correctly on the second landing page and pressing the "confirm button" would he/she have become a subscription member of the service and received the requisite "welcome" message – which he/she did (see MT logs)."

The SP continues that it is of the view that the process as outlined above is in line with the Code and the Advertising Rules, and refers the Secretariat to the Adjudication in complaint number #11863, where the adjudicator found (at paragraph 20 of his/her report) as regards the SP's subscription process, as follows:

"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" (SP's underlining).

The SP then referred to the billing and MT logs which it provided as attachments, which it stated confirmed that the Complainant received all the required welcome and reminder messages. It pointed out that such messages again confirmed the subscription element of the service, the cost thereof, as well as instructions on the unsubscribe process. The welcome message reads:

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)

In relation to the unsubscribe procedure, the SP stated that once subscribed, the Complainant was at all times, by means of the welcome message, provided with detailed instructions on how to unsubscribe, as well as its help line number if the Complainant experienced any problems. The SP also stated that the Complainant obviously understood the unsubscribe procedure, as it was this procedure which the Complainant utilised in order to unsubscribe from the 35050 service – whether this was by using the 24x7 contact number or by utilizing the instruction within the welcome and reminder message. The monthly reminder messages provided by the SP all stated as follows:

"Reminder: Ur subscribed to Buongiorno SA 35050 VIP 4 Daily GIVEAWAYS. Cost R3/day. For help call 0214178001. To unsub, sms Stop Vip to 35050 or DIAL *120*5133#"

Although the SP did not draw specific attention to this fact, it was noted that each monthly reminder message sent out for the months of August, September and October 2011 was preceded, by some 10 seconds according to the message logs provided by the SP, by another message opening with the word "Reminder". This message read as follows:

Reminder: as a valued VIP member u could drive away in a brand new Polo! Plus Unlimited Downloads 4 hot MP3s, cool games & Fabulous Daily GIVEAWAYS!

Finally, the SP concluded as follows:

"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. The information provided illustrates 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 had been unsubscribed from the 35050 vip service as having received the relevant information supplied in the welcome message, as well as reminder messages during the subscription period. It is rather unfortunate that the Complainant had a negative experience with our

service and we apologise to the Complainant respectively. However, for reasons stipulated above the user undoubtedly engaged with the service. In this regard we do not deem a refund justified, as all evidence proves the user subscribed through our stringent subscription process as stipulated and enforced by the WASPA code of conduct. Please be advised that the Complainant's subscription has been cancelled as/was requested."

The SP's response as set out above was forwarded to the Complainant on 23 November 2011, and he was asked whether he considered the matter resolved. The Complainant replied on the same day, stating as follows:

"It isn't satisfactorily resolved, no. My request was for a refund because I never once subscribed to the [SP] or their 35050 service. Last I heard from you guys you were pushing them to prove my subscription. I have had no such proof and I don't see how they would prove it anyway, since I've never subscribed with them so I still require a refund on the 3 months worth of fees which they deducted from my Vodacom cell phone account without my permission."

The Secretariat forwarded this response to the SP on 23 November 2011, asking whether the SP wished to add any further information prior to the matter being referred to adjudication. The SP responded on the same day that there was no further forthcoming information in the matter.

Sections of the Code considered

Sections 11.6.1 to 11.6.6 of the Code provide as follows:

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.

11.6.6. For services that are not billed on a daily, weekly or monthly basis, the pricing should be of the format "RX every [time period]".

Furthermore, sections 12.1 and 12.2 of the Advertising Rules state as follows:

12.1 As is specified in the WASPA Code of Conduct (www.waspa.org.za), a monthly reminder SMS must be sent to all subscription service customers. The reminder must contain the following information only:

- (a) The name of the subscription service.
- (b) The name of the service provider supplying the content or service to the subscriber
- (c) The inclusive cost of the subscription service and the frequency of the charges;
- (d) Explicit instructions on how the subscriber may stop their subscription to a service using an SMS MO.
- (e) The service provider's telephone number. If VAS rates are applicable, this must be indicated next to that telephone number.
- (f) The information in (a) - (e) above must be presented in the reminder message in the order of first (g), then (b), then (c), then (d), then last (e), inclusively. **[Note: Adjudication 5646 determined that reference to (g) in this list is an obvious error that ought to be read as (a)].**
- (g) No other characters other than those prescribed in this section may be inserted before the information contained in (a) and after (e).

12.2 The information specified in s12.1 must, without exception, take the following design and have the following content, capitalisation, and spacing and must be provided exclusively in

ENGLISH only:

You'r<space>subscribed<space>to<space><SERVICE NAME><space><inclusive cost of service & the frequency of billing><space>from<name of content provider><period>To<space>stop<space>service,sms<space>STOP<space><insert service name><space> to<space><insert number><space><open bracket><cost of MO><close bracket><period>Help?Call <space>0xy1234567<open bracket>VAS<close bracket>

- where <period> indicates the full stop character, "."
- where <open bracket> indicates the "(" character
- where <close bracket> indicates the ")" character
- where the word "VAS" is inserted only if required by the type of helpline number being utilised.

Decision

Factual disputes of the nature raised in this complaint are exceptionally difficult to adjudicate on. Generally, a person making an allegation should substantiate and prove their allegation unless the facts capable of substantiating the allegation are solely with the other party's knowledge. In the present matter, the Complaint has alleged that he did not subscribe to the 35050 VIP service. The SP has responded

by giving information as to when it alleges that the Complainant did in fact subscribe, including the specific PIN code issued to the Complainant.

Based on all of the information before me, I am unable to uphold the complaint of an alleged involuntary subscription.

However, I do find that the subscription reminder messages sent to the Complainant breached the strict requirements of the Code and Advertising Rules.

Section 11.6.2 of the Code is clear in its requirement that reminder messages adhere "exactly" to the format, flow, wording and spacing prescribed by the Code. The reminder messages sent each month by the SP do not adhere exactly to the prescribed format, wording and spacing of the Code and Advertising Rules in the following respects:

1. The word "Ur" has been used instead of "You are" or "U r".
2. The words "Daily GIVEAWAYS" have been inserted between the name of the service and the cost of the service. This breaches section 12.1(g) quite clearly as "Daily GIVEAWAYS" is not the name of the service.
3. The word "Stop" has not been written in uppercase which clearly breaches the capitalisation requirements of section 12.2 of the Advertising Rules.

The effect of these transgressions should be considered as a whole and in light of all relevant circumstances. In this regard, it is also relevant to note that, approximately 10 seconds before the sending of each monthly reminder message, the SP also routinely sent another message also headed "Reminder" which stated as follows:

Reminder: as a valued VIP member u could drive away in a brand new Polo! Plus Unlimited Downloads 4 hot MP3s, cool games & Fabulous Daily GIVEAWAYS!

The scheduled sending of an additional marketing message also headed "Reminder" immediately before the actual reminder message would have the effect of undermining the nature and importance of the second communication also headed "Reminder" and would have increased the likelihood of a consumer ignoring or deleting the second message without studying its contents. Even if opened, the repetition of the marketing phrase "Daily GIVEAWAYS" in the actual reminder message before the confirmation of the cost of the service would further detract from and undermine the nature and importance of the second message.

Sanctions

The SP has breached the provisions of the Code and Advertising Rules relating to subscription services on several previous occasions. Its breaches are wide ranging (see for example complaints 10756; 11278; 11863; 13038 and 13039). A number of other complaints relating to the SP's subscription services have also been upheld but are currently on appeal.

Given that the SP joined WASPA in 2004 and the relatively high number of complaints previously lodged against it, the SP would by now be well versed in the provi-

sions of the Code and the Advertising Rules. Sections 12.1(g) and 12.2 of the Advertising Rules are clear and objective compliance therewith is not difficult. Non-compliance in this matter is the result of the deliberate wording and design of the reminder message and the effect of the non-compliance is, in my opinion, compounded by the deliberate timing of a almost simultaneous marketing message also headed "Reminder".

The experience of the SP, the relatively high number of previous complaints upheld against it for non-compliant subscription services and the relative ease of compliance with the particular provisions of the Advertising Rules breached in this particular matter must be considered against the importance of these specific provisions in safeguarding the interests of consumers and in upholding the reputation of the WASP industry as a whole.

In the light of all relevant circumstances, the following sanctions are imposed:

1. A refund of R3 per day for each day that the Complainant was subscribed to the service between 17 July 2011 to 16 October 2011 is ordered to be paid to the Complainant by the SP.
2. For breach of sections 12.1(g) and 12.2 of the Advertising Rules and 11.6.2 of the Code the SP is fined an amount of R40 000.
