



ADJUDICATOR'S REPORT

Complaint reference number: #17480

WASPA member(s): Buongiorno SA

Membership number(s): 0002

Complainant: Public

Type of complaint: Subscription service

Date complaint was lodged: 2012-06-14

Date of the alleged offence: 2012-04-12

Relevant version of the Code: 11.6

Clauses considered: 11.1.1, 11.1.2, 11.2.1, 11.2.2, 11.2.3, 11.3.1, 11.3.6, 11.3.7, 11.5, 11.6, 11.9.11

Relevant version of the Ad. Rules: Not considered

Clauses considered: Not applicable

Related cases considered: 11863

Complaint

This complaint concerns a subscription service operated by the member. Specifically, the complainant has alleged that she did not subscribe to the service and expressed some outrage at the charges which have been deducted flowing from her subscription to the service. The complainant submitted the following as part of her complaint to WASPA on 12 June 2012:

Complainant writes: To whom it may concern It has been brought to my attention that one of

your many Wireless Application Service Providers have been fraudulently billing me a substantial portion of my airtime everytime I load airtime onto my mobile phone. I have never subscribed to any of these willy-nilly services and in fact am unable to determine who the service provider is!! I have been given your contact details by Cell C, my service provider, to unsubscribe from this fraudulent service. Upon numerous calls to your 011-476 7710 number I have decided to mail you instead. I demand for this activity to stop and a FULL REFUND of the money billed to my number - 084 XXX XXX [REDACTED]. I hope that this be resolved IMMEDIATELY and please do not give me the excuse of "an error on our system and have resolved it since." I have researched this kind of activity and will be escalating it to my legal team. There are numerous blogs outlining this kind of scam and acquisition of my number is an infringement of my privacy!! Once again, I reiterate that my above-mentioned number be unsubscribed from the service in question - not in five(5) days like your website stipulates - but ASAP!! Regards [NAME REDACTED] Good afternoon once again Charles. Cell C has advised me that the company/service provider that is billing me fraudulently is iTouch Messaging Services.

The following day, she submitted the following:

PLEASE CAN YOU SPEED THIS PROCESS UP IMMEDIATELY!!!!!! HAVING LOGGED THIS COMPLAINT YESTERDAY Buongiorno South Africa HAS STILL SENT ME AN SMS AND AFTER HAVING R26 AIRTIME LASTNIGHT, I AM NOW LEFT WITH 36c THIS MORNING!!!!....THIS IS FUCKING RIDICULOUS!!!!....I WANT A FULL REFUND OF EVERY CENT THAT WAS BILLED TO THIS NUMBER ASAP !!!!

The complainant was unsubscribed on 13 June 2012 and, on 14 June 2012, the complainant escalated the complaint for the following reason:

Escalation reason: this is not proof that I have subscribed to this service. I have not signed for anything nor have asked for any of these services!!!

The complainant was not offered a refund.

Service provider's response

The member submitted a fairly detailed response to the complaint in which the member described the process the complainant would have gone through in becoming subscribed to its services (the complainant apparently subscribed to two similar services) as well as the subscription process itself, accompanied by screenshots of the various pages the complainant would have seen throughout this process.

The member's submissions, along with the screenshots referenced in the submissions are enclosed with this report. To summarise the campaigns' mechanics, a consumer would arrive at

a website using a desktop computer through an unspecified avenue and would be faced with an initial landing page such as “B1” or “B4”. In the former instance, the consumer would be invited to submit a cell phone number in order to “join and grab your chance right now” to win an iPhone or an iPad 2. In the latter instance, the landing page includes a similar field for the consumer to submit a mobile number under the heading “Top New Hits on Your Mobile” and alongside thumbnail images of various musicians. In fact, both screenshots contain thumbnail images indicating more than one content item or download is, in some way, associated with the offers presented on the landing pages.

When the consumer submits her mobile number on the landing page she receives a message containing a four digit pin code and instructions to –

“enter it on the web confirmation page & Get UR Chance to WIM!!”*

The consumer would be presented with a second page in her web browser containing a box with space to insert the pin code under the invitation to “Insert the CODE received by SMS” in both instances. The button to the right of the text field for the pin code contains the text “Confirm” and, immediately below this submission box is the following wording in respect of the first, 35050 GOLD service:

By clicking confirm, I agreed to subscribe to 35050 GOLD subscription service R5/day. I accept the terms and conditions and confirm I am 18+. For help dial 021 417 8001. Terms and Conditions below (please read)

The wording on the second, ZAP service pin entry page is almost identical:

By clicking confirm, I agreed to subscribe to ZAP subscription service R6/day. I accept the terms and conditions and confirm I am 18+. For help dial 021 417 8001. Terms and Conditions below (please read)

The consumer would then be presented with a further web page welcoming the consumer to the particular service. Each of these webpages include the phrase “Subscription Service R5/day” at the top of the screen and references to the applicable terms and conditions, the service name and an indication that the service is a “rewards program”.

The consumer would also receive a welcome message on her mobile device containing, in the case of these two services, the following text:

*Welcome 2 35050 GOLD 4 UNLIMITED Top Hits, Hot Apps & PRIZES on UR Mobile 4 Just R5/day go 2 <http://35050.mobi> to unsub dial *120*5133# help 0214068686*

and

Welcome to ZAP 4 UNLIMITED Cool Games PLUS WIN Daily Prizes go 2
wap.funfone.co.za 4 Just R6/day on UR mobile to unsub dial *120*5122# help 0214068686*

The logs divided by the member confirm that these welcome messages were sent to the complainant and these messages comply with clause 11.5 of the Code. The member also received reminder messages on 12 May 2012 and 11 June 2012 with the following content:

Reminder: You are subscribed to Buongiorno SA 35050 Gold. Cost R5/day. For help call 0214068686. To unsub, sms STOP gold to 35050.

and

Reminder: You are subscribed to Buongiorno SA ZAP. Cost R6/Day. For help call 0214068686. To unsub, sms STOP fun to 36060.

For the most part, these reminder messages comply with the message format prescribed in clause 11.6.2 of the Code except they do not state the content/service description detail required. Clause 11.6.2 requires exact adherence to the “format, flow, wording and spacing” of the message format and the member’s messages don’t do this.

The transactional history supplied by the member reflects the charges against the complainant’s mobile device, including a number of unsuccessful attempts to charge the device where they were insufficient funds. The complainant’s subscriptions remained in place despite these unsuccessful attempts to charge her although this does not appear to be improper. Clause 11.9.11 requires that a consumer be unsubscribed from a subscription service “if no successful bills have been processed for that service for more than three months, or if there is an indication from one of the mobile networks that the number is no longer in use or has been recycled”. This was not the case in this present matter.

Sections of the Code considered

In adjudicating this dispute, I considered the following clauses:

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 reasonably 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 the name of the service, an explanation of the confirmation process, and a URL with a unique identifier, which, when clicked, validates the handset number.

...

11.3.6. The WAP confirmation page described above must also present a confirmation button. It must be clearly communicated to the customer on the confirmation page that clicking the confirmation button will initiate a subscription service.

11.3.7. The WAP confirmation page may not contain any marketing messages or other content that is likely to distract the customer from the required confirmation information and process.

...

11.5. Welcome message

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, in the following order:*

- (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. Reminder messages

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 11.6.2.*

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]”.*

11.6.7. The text “(VAS)” must be included after any VAS-rated phone number. It does not need to be included after phone numbers which are not VAS-rated.

11.6.8. Members must test reminder messages on a range of phones to ensure that all characters and lines are displayed identically.

...

11.9.11. A user must be removed from a subscription service if no successful bills have been processed for that service for more than three months, or if there is an indication from one of the mobile networks that the number is no longer in use or has been recycled.

Sections of the Advertising Rules considered [if applicable]

Not considered.

Decision

As the member pointed out, the subscription process incorporates and is known as a “double-opt in system” whereby the consumer submits a mobile number as a first opt in, followed by submission of a pin code sent to the consumer’s mobile device by SMS on a subsequent web page confirming the consumer’s subscription to the relevant service.

Clauses 11.2.1 and 11.2.2 essentially require that, in order for a consumer to be subscribed to a subscription service, the consumer’s intention must be specifically to subscribe to a subscription service as an independent transaction and not in some way bundled with a request for a different service. Clause 11.2.3 permits members to include consumers as participants “in a promotional draw competition as an additional benefit to being a subscription service customer”, provided it is “reasonably clear to the customer that the promotional draw 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”.

In the case of both services which form the subject matter of this complaint, I believe it is “reasonably clear” that these campaigns are associated with a subscription service despite the invitation to enter a draw to win a prize, in one case, or download ring tones, in the other. The complainant ought to have been aware that she was opting into a subscription service when she submitted her details online; when she received the welcome messages when she confirmed her subscriptions and then, again, on two subsequent occasions when she received reminder messages pointing out that she was subscribed to these services.

There is no evidence before me (aside from the complainant's assertions that she did not subscribe to the services) which suggests that the member's logs are incorrect and, therefore, that they do not evidence what they purport to be evidence of, namely the complainant's subscriptions.

Even if the complainant did not intentionally subscribe to the services online, she had ample opportunity to terminate her subscription on multiple occasions and to either curtail the cost she incurred or possibly even terminate her subscription on its commencement.

As I mentioned above, the member's reminder messages do not comply with the very specific requirements of clause 11.6.2 in that they do not state the nature of the content or service in the message body as the message format requires. This must obviously be rectified given clause 11.6.2's emphasis on exact compliance.

Accordingly, I see no reason to uphold the complaint that the complainant was subscribed in a manner that contravened the Code. I do find that the reminder message format used by the member is not compliant although the extent of this non-compliance is immaterial in the context of the complaint.

Sanctions

The member is directed to bring its reminder message wording into strict compliance with clause 11.6.2 within seven days of receipt of this report. No further sanctions are necessary.

Dear WASPA

1. The code of conduct Version 11.6 was the applicable version at the time of subscription (12th April 2012).
2. The services in question are our 35050 Gold & ZAP subscription service (the "services").
3. Also attached, for your ease of reference, are:
 - 3.1. screenshots taken of the landing pages of the campaign in question (marked "**B1**", "**B2**" "**B3**", "**B4**" "**B5**" & "**B6**"); and
 - 3.2. The BILLING and MT logs.
4. The subscriptions 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 Subscription 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 this 35050 Gold campaign as a whole, it is clear that before subscribing the complainant was made fully aware, on both the landing pages of the services, that what is being offered was a subscription service at a daily charge of R5/day. See:
 - 6.1. The top left hand side of both pages ("**B1**", "**B2**", "**B3**") – "*Subscription service R5/ day*"; and
 - 6.2. Beneath the "Confirm" button ("**B2**") it also states that, "*By clicking confirm, I agree to subscribe to 35050 GOLD subscription service R5/ day...*".
7. In addition the complainant is on pages ("**B1**", "**B2**" & "**B3**") 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 12th April 2012 the complainant entered his mobile number on the landing page ("**B1**") and must have clicked "Send", whereafter he was sent, from ourselves, a text message containing the required pin code (4400) (the "pin code") from Buongiorno. As already stated above, this text message also confirms that the service offered is a subscription service, charged at R5 per day"

>> ur CODE is 4400 << enter it on the web confirmation page & Get UR Chance to WIN*!!

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 she received the pin code the complainant still had a choice, before becoming subscribed, to enter the pin code on the landing page (“**B2**”)
10. Only on entering the pin code correctly on the second landing page and pressing the "confirm" button would she have become a subscriber of the service and received the requisite "welcome" message – which she did (see MT logs).
11. Only after the user has subscribed to the 35050 Gold service is the user then transferred to a new product offering, which is the ZAP service as illustrated through the ZAP landing page marked (“**B3**”), in this case.
12. The complainant was notified in the pin code message of the ZAP service offering. The message also contained the pin code (4400) for the subscription service. The message read as follows:

>> ur CODE is 4400 << verify it on the web confirmation page & Get UR Chance to WIN*!!

Not only is the Landing page design and product offering of the ZAP service distinctly different from the offering for the 35050 Gold service, but the new service information is also clearly indicated in the pin code message. See Log attached.

Services subscribed also displayed service welcome messages... See “**B3**” & “**B6**”

The service in turn after the complainant had acted positively and clicked the “CONFIRM” button was the complainant sent the ZAP service welcome message: See (“**B4**”) confirm page...

After which the ZAP service sent the complainant the service welcome message: See log attached...

Welcome to ZAP 4 UNLIMITED Cool Games PLUS WIN Daily Prizes* go 2 wap.funfone.co.za 4 Just R6/day on UR mobile to unsub dial *120*5122# help 0214068686 – See log attached.

The above processes are in line 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 pin messages - which messages again confirmed the subscription element of the services, the cost thereof, as well as instructions on the unsubscribe process. The respective messages read:

Welcome 2 35050 GOLD 4 UNLIMITED Top Hits, Hot Apps &PRIZES on UR Mobile 4 Just R5/day go 2 http://35050.mobi to unsub dial *120*5133# help 0214068686

Welcome to ZAP 4 UNLIMITED Cool Games PLUS WIN Daily Prizes* go 2 wap.funfone.co.za 4
Just R6/day on UR mobile to unsub dial *120*5122# help 0214068686

See attached logs.

Please note the complainant received the Wapsa prescribed reminder messages during the subscription period.

Reminder: You are subscribed to Buongiorno SA ZAP. Cost R6/Day. For help call 0214068686. To unsub, sms STOP fun to 36060.

Reminder: You are subscribed to Buongiorno SA 35050 Gold. Cost R5/day. For help call 0214068686. To unsub, sms STOP gold to 35050.

See attached logs

UNSUBSCRIBE PROCEDURE:

15. Once subscribed the complainant was at all times – through the welcome 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.

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 had been unsubscribed from the 35050 gold and ZAP services.
18. For the reasons stated above we do not believe that the complainant is entitled to a refund. The complaint is currently no longer subscribed to our mobile subscription services, 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.

Yours Faithfully

Buongiorno ZA

SUBSCRIPTION SERVICE R5/day

Compatible Handsets only



You could also get a a brand new iPhone* + iPad2*!

Insert Your Cell Phone Number
join and grab your chance right now!

➔ **Continue** ➔

Your operator:



UNLIMITED DOWNLOADS!
Latest APPS, Hot Hits, wallpapers & more!



[Terms and Conditions \(please read\)](#)

*Available through the 35050 Gold Rewards program. T&Cs apply.

[35050 GOLD Terms and Conditions](#)

35050 GOLD offering and pricing

35050 GOLD is a mobile subscription service charged at R5 per day and offers you unlimited downloads of the content available while you remain subscribed



Dont miss ur Chance!

Insert the CODE received by SMS

Your CODE:

Confirm >

By clicking confirm, I agree to subscribe to 35050 GOLD subscription service R5/day. I accept the terms and conditions and confirm I am 18+.
For help dial 0214178001.

Terms and Conditions below ([please read](#))



UNLIMITED DOWNLOADS!

Latest APPs, Hot Hits, wallpapers & more!



[Terms and Conditions \(please read\)](#)


*Available through the 35050 Gold Rewards program. T&Cs apply.

35050 GOLD Terms and Conditions

35050 GOLD offering and pricing

35050 GOLD is a mobile subscription service charged at R5 per day and offers you unlimited downloads of the content available while you remain subscribed

You could also get a
brand new MINI*



Welcome to 35050 GOLD.
35050.mobi

You could be the next lucky owner of
one of our great rewards!



PLUS EVERYDAY SOMEONE WILL RECEIVE
A REWARD*

That's right, just by being a member you could be the next person to receive a reward. Keep checking 35050.mobi out. Rewards change often and they become more and more exciting!



UNLIMITED DOWNLOADS!
Latest APPs, Hot Hits, wallpapers & more!



[Terms and Conditions \(please read\)](#)

*Available through the 35050 Gold Rewards program. T&Cs apply.

[35050 GOLD Terms and Conditions](#)

Top New Hits on Your Mobile

MADCON LEONA LEWIS Katy Perry

Kesha SHAKIRA KYLIE MINOGUE Beyoncé

Rabiosa

Note: Our ringtone database is huge, however we might not have your specific ringtone, otherwise we are sure you'll enjoy all the others

Enter your cell number

Your cell phone number:

Your operator: - Select here -

Continue

[Terms and Conditions \(please read\)](#)

*Available through the ZAP Rewards program. T&Cs apply.

ZAP Terms and Conditions

Zap offering and pricing


Zap is a mobile subscription service charged at R6 per day and offers you unlimited downloads of the content available while you remain subscribed. The daily charge will be recovered directly from your service provider and you will in turn pay your service provider. You authorise us to recover the relevant amounts directly from your service provider who you authorise to pay us. You confirm that you are allowed to provide the authorisations mentioned.


Zap has a vast amount of content; we have lots of your old favourites plus an extensive amount of new content added on a regular basis. We are constantly


[Terms and Conditions](#) [Privacy Policy](#)





Top New Hits on Your Mobile



MADONNA



LEONA LEWIS



Katy Perry




KESHA


SHAKIRA


KYLIE MINOGUE


Beyoncé

2 Enter your PIN code


Insert the CODE received by SMS

Confirm

By clicking confirm, I agree to subscribe to ZAP subscription service R6/day. I accept the terms and conditions and confirm I am 18+. For help dial 0214178001.
[Terms and Conditions below](#) [\(please read\)](#)

Put your Hands UP

Note: Our ringtone database is huge, however we might not have your specific ringtone, otherwise we are sure you'll enjoy all the others



Terms and Conditions (please read)

*Available through the ZAP Rewards program. T&Cs apply.

ZAP Terms and Conditions

Zap offering and pricing

Zap is a mobile subscription service charged at R6 per day and offers you unlimited downloads of the content available while you remain subscribed. The daily charge will be recovered directly from your service provider and you will in turn pay your service provider. You authorise us to recover the relevant amounts directly from your service provider who you authorise to pay us. You confirm that you are allowed to provide the authorisations mentioned.

Zap has a vast amount of content; we have lots of your old favourites plus an extensive amount of new content added on a regular basis. We are constantly

[Terms and Conditions](#) [Privacy Policy](#)



Top New Hits on Your Mobile

MADCON, LEONA LEWIS, Katy Perry, Beyoncé, NSYNC, SHAKIRA, KYLIE MINOGUE, Beyoncé

Welcome to ZAP.
You could be the next lucky owner of one of our great rewards!

Party Rock

Note: Our ringtone database is huge, however we might not have your specific ringtone, otherwise we are sure you'll enjoy all the others

Terms and Conditions (please read)

*Available through the ZAP Rewards program. T&Cs apply.

ZAP Terms and Conditions

Zap offering and pricing

Zap is a mobile subscription service charged at R6 per day and offers you unlimited downloads of the content available while you remain subscribed. The daily charge will be recovered directly from your service provider and you will in turn pay your service provider. You authorise us to recover the relevant amounts directly from your service provider who you authorise to pay us. You confirm that you are allowed to provide the authorisations mentioned. Zap has a vast amount of content; we have lots of your old favourites plus an extensive amount of new content added on a regular basis. We are constantly

[Terms and Conditions](#) [Privacy Policy](#)

