



ADJUDICATOR'S REPORT

Complaint reference number: #17805

WASPA member(s): Buongiorno SA

Membership number(s): 0002

Complainant: Public

Type of complaint: Subscription service

Date complaint was lodged: 2012-07-10

Date of the alleged offence: 2012-03-25

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: 2.3

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 he did not agree to the service's terms and conditions and insisted on proof that he had done so. The complainant submitted the following as part of the complaint to WASPA on 18 June 2012:

Good day Paul Devaney, Thank you for the spreadsheet which you sent Virginmobile

(attached) with regard to a subscription which we do not acknowledge as having agreed to. The spreadsheet lists a number of SMS's which were sent to our number, but does not provide us with proof of our acceptance of the subscription charges. We do not dispute that we received these SMS's, but rather that we ignored them and deleted them as spam/advertising. Please provide us with proof that we accepted the terms of this service, as we would like a refund of all charges, deducted from our cell phone account in error, and for which we have not received anything, nor made use of these services. If this is not the correct address to which we should sent this request, then please advise us of the correct channel of communication.

Regards

The complainant's husband followed up on 19 June 2012 with the following:

Our subscription has already been cancelled by Virgin Mobile on our behalf and we have received a confirmation sms in this regard. We have requested proof that we subscribed from the operator of this subscription service because we do not acknowledge having signed up for it. We have also requested a refund in this regard. To date we have not received a response to our request. Regards

And on 10 July 2012, furnished the following reasons for his decision to escalate the complaint:

The attachment which you kindly forwarded to us as proof of subscription with Buongiorno South Africa, is a spreadsheet listing SMS's sent to my phone in April and May. I fail to see how this could be construed to be proof of subscription. As stated in my complaint # 17586, I ignored all SMS's received from this organisation because as far as I am concerned they were spam. We requested proof of subscription before, from Buongiorno South Africa, through the Virgin Mobile customer service desk , and were provided at that time with another spreadsheet detailing SMSs sent to my phone on 25/03/2012. This is not proof of acceptance of any subscription. Buongiorno South Africa have subsequently ignored all correspondence from myself requesting proof of subscription. Am I not actually entitled to that proof. They cannot tell me which website I was supposed to have initiated the subscription on, without which I do not see how they can have the right to start debiting my cellphone account. I INSIST IN SEEING THE PROOF WHICH HAS NOT BEEN FORTHCOMING !!!!!!! Regards

The complainant was unsubscribed on 20 June 2012 and negotiations to resolve the matter informally were unsuccessful.

Service provider's response

The member submitted a brief response to the complaint in which the member described the process the complainant would have gone through in becoming subscribed to its service 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 campaign's 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". The consumer would be invited to submit a cell phone number, select the appropriate network operator, click on a field resembling a checkbox alongside text confirming "I accept T&Cs. 35050 Gold subscription service R5/day" as well as click on a large button labelled "Continue".

If the consumer does not check the pseudo-checkbox, the consumer would be directed to a page pointing this out with wording to the effect of –

Oops!

You forgot to tick the checkbox!

This reminder is above the same checkbox mechanism on the first page and the same text quoted above.

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

"Insert the CODE received by SMS"

The button below 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 0214178001. 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 and the service name.

The consumer would also receive a welcome message on the third Web page as well as her mobile device containing the following text:

*Welcome 2 35050 GOLD U can get UNLIMITED Top APPs,Games,Mp3s &PRIZES on UR Mobile 4Just R5/day go 2 <http://35050.mobi> to unsub dial *120*5133# help 0214068686*

The logs provided by the member confirm that this welcome message was sent to the complainant and this message complies with clause 11.5 of the Code. The member also received a reminder message on 24 April 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.

For the most part, this reminder message complies with the message format prescribed in clause 11.6.2 of the Code except it does 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 message doesn’t do this.

The transactional history supplied by the member reflects the charges against the complainant’s mobile device for the period 25 March to 18 June 2012.

The member supplemented its response after I requested additional information about the campaign mechanics. This supplemental feedback is annexed to this report and includes the screenshots I referenced above.

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”.

It is somewhat clear that this campaign is associated with a subscription service. The member could further emphasise the subscription nature of the service and the content items available although, that being said, it is apparent from the screenshots that the offer is associated with a subscription service. 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 service) 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 subscription.

Even if the complainant did not intentionally subscribe to the service 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. I also direct that the member take greater care to point out the service's subscription nature in its promotional campaigns.



Dear WASPA,

Complaint #17805

1. The code of conduct / Version 11.6 was the applicable version at the time of subscription (5th September 2011), as was the current version applicable to this complaint.
2. The service in question is our 35050 Gold subscription service R5/day (the "service").
3. Also attached, for your ease of reference, are:

3.1. screenshots taken of the landing pages of the campaign in question (marked "**B1**" to "**B4**"); and

3.2. The BILLING MO / MT logs & User Subscription Log.

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 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 all landing pages of the service, that what is being offered was a subscription service at a daily charge of R5/per day. See:

6.1. The top of left hand side of both pages ("**B1**" to "**B4**") – "*Subscription service R5/per 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/per day...*".



7. In addition the complainant is on all pages ("B1" to "B4") 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 25th March 2012 the complainant entered his mobile number on the landing page ("B1") and must have clicked "Send", where after he or she was prompted to tick the terms and conditions pertaining to the service ("B2"), where after received an sms ourselves, a text message containing the required pin code (4298) (the "pin code") from Buongiorno.

The pin code is unique and directed only to the phone of the complainant, as the subscriber. This has been tried and tested by the waspa media monitor and confirmed compliancy.

9. At the point of receiving the pin code the complainant was still not subscribed to the service. Once he 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 landing page ("B3") 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 MO/MT logs).

Leading on from after having entered the pin code correct, was the user presented with the on-screen service welcome message (See B4 attached).

The user log attached, shows the query used to extract the information as captured on our side when the complainant or someone with access to the complainants msisdn, interacted with our landing pages and subscribed. The media key ie tracking campaign code into which campaign the interacted with, as well as the pin code as recorded as being inserted correctly by the complainant or someone with access to the complainants msisdn can be found within the user log etc. Redacted information is for internal informative information only and not public knowledge due to internal business confidentiality policies.

11. The above process is in line with the Code and the Rules.
12. 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 GOLD U can get UNLIMITED Top APPs, Games, Mp3s & PRIZES on UR Mobile 4 Just R5/day go 2 <http://35050.mobi> to unsub dial *120*5133# help 0214068686
(See attached logs).



On the 24th April 2012 the complainant was through the reminder message reminded of the service as is a standard industry requirement.

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:

13. 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.

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:

14. 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:

15. The information provided illustrates that that the complainant or someone with access to the complainants msisdn 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 gold service as having been notified of the relevant information in both the welcome and reminder message...
16. For the reasons stated above it is evident that the complainant subscribed to the service out of his / her own accord or someone with access to the complainants msisdn. The complaint is currently no longer subscribed to our mobile subscription service as requested.
17. We had agreed prior to this matter being formal that we shall refund the complainant in full as a sign of good faith and are still in this position to offer same without prejudice or as an admission of guilt, as the subscription was processed, as done by the complainant or person with access to the complainants msisdn on the day of subscription.



SUBSCRIPTION SERVICE R5/day

Compatible Handsets only

A chance to get a Brand New Mini*, or a Blackberry* or an iPad*

Is it your Lucky Day?

35050 GOLD

Enter your cell phone number

Your operator: - Select here -

CONTINUE

☐ I accept T&Cs. 35050 Gold subscription service R5/day.

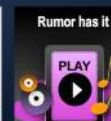


PLUS EVERYDAY SOMEONE WILL RECEIVE
A REWARD*

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!

Games, MP3s, apps + tons more



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

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

35050 GOLD Terms and Conditions

SUBSCRIPTION SERVICE R5/day

Compatible Handsets only

A chance to get a Brand New Mini*, or a Blackberry* or an iPad*

Is it your Lucky Day?

35050 GOLD

Enter your cell phone number

Oops! 778

You forgot to tick the checkbox!

CONTINUE

☐ I accept T&Cs. 35050 Gold subscription service R5/day.



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!
Games, MP3s, apps + tons more



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

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

35050 GOLD Terms and Conditions

SUBSCRIPTION SERVICE R5/day

Compatible Handsets only

A chance to get a Brand New Mini*, or a Blackberry* or an iPad*

Is it your Lucky Day?



Insert the CODE received by SMS

Your CODE:

CONFIRM >



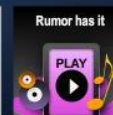
By clicking confirm, I agree to subscribe to 35050 GOLD subscription service R5/day. I accept the terms and conditions and confirm I am >18. For help dial 0214178001.
Terms and Conditions below (please read)



PLUS EVERYDAY SOMEONE WILL RECEIVE
A REWARD*

Thats 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!
Games, MP3s, apps + tons more



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

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

35050 GOLD Terms and Conditions

A chance to get a Brand New Mini*, or a Blackberry* or an iPad*

Is it your Lucky Day?

35050 GOLD

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*

Thats 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!
Games, MP3s, apps + tons more



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

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