



REPORT OF THE ADJUDICATOR

WASPA SP (SP):	iTouch
Information Provider (IP):	Not identified
Service Type:	Subscription service
Complainant:	Members of the public
Complaint Number:	5921 and 5937
Code Version:	6.2 (consideration also given to version 7.0)
Advertising Rules Version:	2.3

Introduction

This report concerns two complaints lodged with WASPA regarding virtually the same service provided by the same SP. I have accordingly dealt with both complaints in this report.

Complaints

Complaint 5921

The complainant was subscribed to a Fun Club service known as the “Brain Age” game (“the service”) on the Web. The complainant stated the following:

I saw an advert on the Site ["moneyweb.co.za"](http://moneyweb.co.za) saying ["Find out your true brain age"](#). I thought this was a bit of fun and clicked on the link. A new screen appeared asking for various details including my cellphone number. I completed the details and submitted them. A screen appeared saying that I would be notified of the result by cellphone. Nowhere did it say that I was subscribing to anything or that my cellphone account would be charged with R10 per day. I then received the SMS message as per the attachment. I thought the SMS was spam as a result of my completing the previous mentioned questionnaire and I treated it as I do with any other spam-I hit the

delete button. Even this SMS did not say that I had subscribed to anything or that I would be charged with R10 per day.

The complainant requested to be unsubscribed, notified of the unsubscription by SMS, provided with proof of the initial subscription and refunded the amounts charged and deducted from the complainant's account.

The complainant was unsubscribed on 19 February 2009 when the member sent a "STOP" request to the SP, notified of this fact and proof of subscription was made available by the SP. The logs are a little unclear as to the specific time the complainant was subscribed but there does not appear to be any doubt that the complainant was unsubscribed on that day.

Complaint 5937

The essential details of this complaint are as follows:

Code_Breached: 11.1.2. 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

11.1.3. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

Not sure what part of the Code was breached - but did not enter pin number to confirm subscription but was billed nonetheless

Detailed_Description_Complaint: Brain Teaser - give cellphone number - within next couple of second will receive a pin number - received the pin, but never entered it - deleted the message - now finds that he has been billed R8.77 per day - contacted Mr Julius Orbit at Moneyweb where the Brainteaser quiz was advertised- complained to him - sent an email to Henning at iTouch - they stated that they will not bill the client unless the pin was activated - [The complainant] is adamant that he did not sms the pin number and the shortcode is not reflected on this itemised bill - Moneyweb has received numerous complaints in this regard. Not interested in

downloads etc. These quizzes Mislead the public via the website - Moneyweb now apparently refuse to allow iTouch advertising in the future - no shortcode regstered on the itemised bill. Has unsubscribed to 31194 number given to him by iTouch.

Service provider's response

The SP contended that the service is clearly marked as a subscription service and it is not misleading in any way. The SP furnished WASPA with descriptions of two versions of the service and its views on whether the service is in breach of the Code. This descriptions are annexed to this report and marked Annexures "A" and "B".

Sections of the Code considered

This complaint was filed prior to an update to the Code. I have accordingly considered versions 6.2 and 7.0 for the purposes of this report in order to determine compliance with the Code (referencing version 6.2) and the remedy for non-compliance (referencing version 7.0). I have considered the following sections of the Code:

Version 6.2	Version 7.0
4.1.2: Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.	4.1.2: Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.
11.1.2: 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.	11.1.2: 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.
11.1.3: Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.	11.1.4: Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.
11.1.4: Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.	11.1.5: Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

Version 6.2	Version 7.0
	<p>11.1.10. 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:</p> <p>[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing]. Help? Call [call centre number + "(VAS)" if applicable]. To unsubscribe, [unsubscribe instructions].</p>

Sections of the Advertising Rules considered

Rule 9.2 generally.

Decision

The service is somewhat misleading. The visitor who proceeds through the steps described in Annexures "A" and "B" will then receive a welcome message reading: *"welcome to the Fun Club! U get unlimited game, tones, vids & more!Start Downloading now! Help: 0214178001 (R10/day subscription service. Sms STOP FUN to 31191 to end)"*. In response to complaint 5937, the SP stated the following:

As mentioned previously the customer would have to enter his / her cellphone number into the advertised page in order to get the "unique pin" number. Only by entering the cellphone number is it possible to get this pin as we have no means of obtaining the cellphone number otherwise.

It is very important to note that the subscription was initiated AFTER the pin number was INSERTED into the advertising page and NOT on receiving the pin number to the cellphone.

This mechanism does not change the point at which the subscriber discovers what he or she actually subscribes to. On the face of it the purpose of the service is to test a site visitor's intelligence but there are a number of other indicators on the site that reveal that the service is, in fact, a subscription service through which a subscriber receives "*unlimited game, tones, vids & more*". It is only on arriving at the splash page 3 steps into the process is there a mention that the service is a subscription service. After the splash page the visitor is sent a PIN or access number which he or she must enter on a further page before being subscribed to the service.

Based on the screen-shots, visitors to the splash page ought to be aware that the service is a subscription service however there is no mention of the "*unlimited game, tones, vids & more*" until the subscriber receives a welcome message, after the subscriber has submitted a mobile phone number and subscribed to the service. The visitor/subscriber remains under the misapprehension that he/she is participating in a "brain age" game until that point. In other words, a subscriber's overwhelming impression is that he or she is playing the "brain age" game which, despite the notices that the service is a subscription service, appears to be a single item service. I accordingly find that the SP is in breach of 4.1.2 of the Code.

A visitor would be excused for believing he or she is playing the "brain age" game and not that he or she is subscribing to a content service. In contrast the SP clearly intends using the "brain age" game as a means to securing a subscription for a very different service. I am therefore of the view that the service is a violation of 11.1.2 of both versions of the Code and appears to be an example of bundling is not permitted.

Flowing from my findings regarding 11.1.2, I believe that the SP is further in breach of 11.1.4 of the old Code and 11.1.5 of the current Code.

Complaint 5937 includes an allegation that the service does not comply with 11.1.3 of the old Code. I disagree. The screen-shots provided clearly indicate that the service is a subscription service at the points at which the prospective subscriber has an opportunity to subscribe to the service (that is, from the splash page onwards).

Furthermore the text of the terms of use, such as they are, does not appear to be compliant with the provisions of Rule 9.2 of the Advertising Rules which address the formatting of terms of use on a website. The font size, for one thing, is understated and not nearly prominent enough.

Sanctions

1. The SP is required to suspend the service and access to the site it is hosted on until such time as it complies with the orders set out below. The SP may not initiate any new or existing billing transactions for the service during such period of suspension, however it may process any unsubscription requests;
2. The SP shall send an sms notification to all existing subscribers of the service in the format prescribed in 11.4 of the current Code (the SP shall furnish the WASPA Secretariat with confirmation that it has notified its subscribers);
3. The SP shall ensure that welcome messages sent to the service's subscribers comply with the requirements of 11.1.10 of the current Code.
4. The SP shall clearly indicate at the first point of contact with the service and all subsequent pages and sites that the service is a subscription service and further precisely what the subscription entails. These indications must be clearly visible and unambiguous.
5. The SP shall ensure that any reference to or implication of the availability of single items is removed from the service's site such that the site only makes reference to its subscription content in clear and unequivocal terms;
6. The SP shall ensure that its terms of use are amended in accordance with Rule 9.2 of the Advertising Rules;
7. The SP is fined:
 - 7.1. R20 000 for its breach of 4.1.2 on the basis set out above; and
 - 7.2. R30 000 for its non-compliance with 11.1.2 and 11.1.4 in that it bundled a single item with a subscription service and its failure to adequately differentiate between single items and subscription services.

Annexure "A"

Background to the Brain Age web based game:

This is a Fun Club page that is created by our online advertising agency and is served on a variety of South African websites.

As a full member of WASPA we pride ourselves in remaining above board without misleading our customers.

As can be seen in the WASPA code of conduct, clause 3.1.1:

- 3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.

On all our pages we have included the text "subscription service R10/day" and the full terms and conditions. In the terms on conditions it instructs the visitor how to unsubscribe to the service.

Below it can be seen (blocked in red) that it is mentioned 3 times on the advertising landing page that it is a subscription service and that it is billed at R10/day. It is Arial font as to ensure clarity on a website. This information is also on every page in the process of the subscription

Top banner on the landing page

THE BEST MOBILE CONTENTS FOR YOUR MOBILE R10/DAY THIS IS A SUBSCRIPTION SERVICE ONLY ORIGINAL MUSIC AND COOLEST GAMES

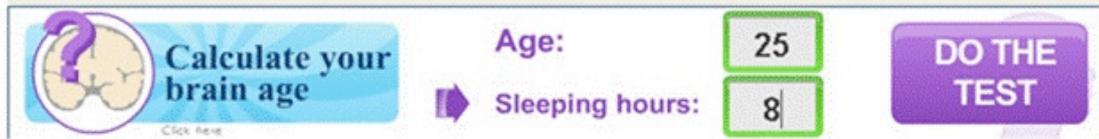
Terms and Conditions:

Available to all networks. WAP needed. Plus WAP charges/downloads. Bearer costs. Permission from the bill payer needs to be obtained before joining the subscription. SUBSCRIPTION SERVICE, R10/day. All prices incl. VAT. To unsubscribe, sms STOP FUN to 31194. Premium rates apply. Free SMSs do not apply. Errors billed. Available to compatible handsets only. Help 021 417 8001. Full Terms and conditions available at www.clubmovielisto.co.za, wap.36060.co.za.
* Free items may vary from what is advertised. Subject to bearer costs and WAP charges

Below are screenshots of the entire process that the visitor would have take part in, before being subscribed.

1. The banners that the visitor sees.
 1. They enter their age and the number of hours that they sleep
 2. They get a banner that says, the result is on your mobileThe visitor is not subscribed at this stage and is sent to our wap splash page.

STEP 1: THE USER INSERT HIS REALY AGE AND THE SLEEPINGHOUR



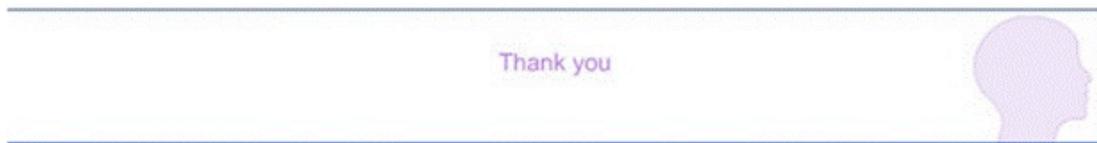
The screenshot shows a form for calculating brain age. On the left, there is a button with a brain icon and a question mark, labeled "Calculate your brain age" with a "Click here" link below it. To the right, there are two input fields: "Age:" with the value "25" and "Sleeping hours:" with the value "8". A purple arrow points from the "Age:" field to the "Sleeping hours:" field. On the far right, there is a purple button labeled "DO THE TEST".

STEP 2: THE USER SELECT HIS OPERATOR



The screenshot shows a screen titled "THE RESULT ON YOUR MOBILE" on the left. On the right, there is a section titled "SELECT YOUR OPERATOR" with two buttons: "VODACOM" (highlighted with a green border) and "MTN" (highlighted with a red border). A faint silhouette of a head is visible on the right side of the screen.

STEP 3: THE USER GO TO THE SPLASH



The screenshot shows a splash page with the text "Thank you" in the center. A faint silhouette of a head is visible on the right side of the screen.

2. On the splash page we have that it is a subscription service with terms and conditions. We are now trying to make the advertising space smaller so that all visitors don't have to scroll. Currently some visitors, depending on their screen will have to scroll to see the full T&C's
Still at this point the customer isn't subscribed

THE BEST MOBILE CONTENTS FOR YOUR MOBILE R10/DAY THIS IS A SUBSCRIPTION SERVICE ONLY ORIGINAL MUSIC AND COOLEST GAMES



**NOW FOR YOU
YOUR BRAIN AGE**

Age:
25
Sleeping hours:
8

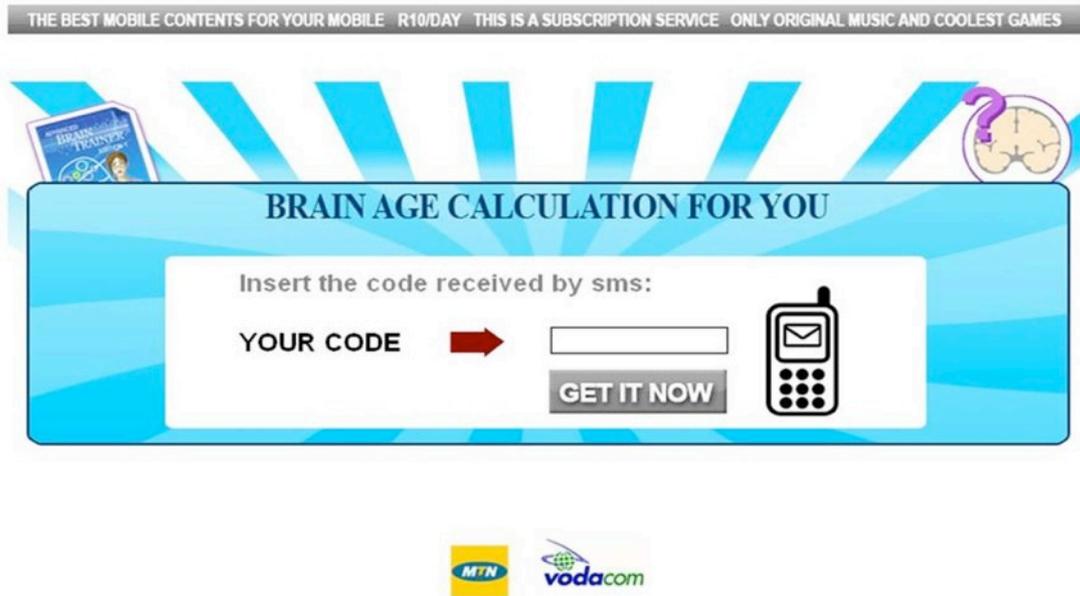
BRAIN AGE CALCULATION WITH BRAIN TRAINER
Your mobile number

GET IT NOW

MTN vodacom

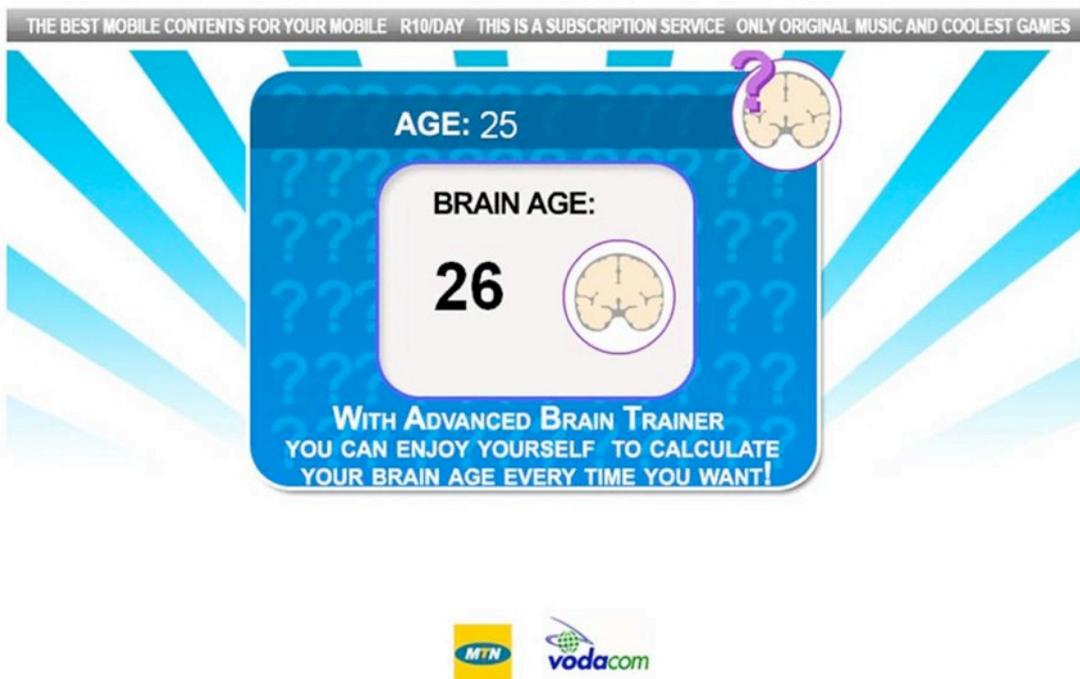
Available to all networks. WAP needed. Plus WAP charges/downloads. Bearer costs. Permission from the bill payer needs to be obtained before joining the subscription. SUBSCRIPTION SERVICE. R10/day. All prices incl. VAT. To unsubscribe, sms STOP FUN to 31104. Premium rates apply. Free SMS; do not apply. Errors billed. Available to compatible handsets only. Help 021 417 9001. Full Terms and conditions available at www.clubmovielite.co.za/wap/36060.co.za.
* Free items may vary from what is advertised. Subject to bearer costs and WAP charges

1. After the visitor has entered in his phone number he is sent a pin number to his phone. Still on screen is the subscription service caption and the terms and conditions.
At this stage the visitor has still not been subscribed to the service
On this screen the game can be seen in the corner. The game comes to the front of the page and is enlarged
The visitor has to enter the pin number that is sent from his / her phone before he / she can be subscribed to the service.



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2. We give the visitor his / her brain age results and then notify them that with the brain trainer they can calculate their own brain age. This page is being modified to say “WELCOME TO FUN CLUB At this point the visitor is subscribed and receives his welcome message, the brain age game and the link to the wap site.



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Based on the above mention we do not feel that we are in breach of any clauses of the code of conduct. We have no intention on misleading the public in any way and therefore give the customer all necessary details on the subscription, including a website where full terms and conditions are available (as seen in the terms and conditions outlined below). Full terms and conditions are available on both the website and wapsite with the call center number is if he l she wishes to unsubscribe or find out more information.

The banner on the top of the advert as well as the terms and conditions are included on every page of the subscription as can be seen below. This ensures that the customer is aware through the entire process on any information that they may require.

Upon subscription the customer is sent a welcome message stating that they are part of the FUN CLUB and how to unsubscribe, what the billing is as well as the call center number.

After the welcome message they are sent the wap link to download content where it states in the terms and conditions and frequently asked questions on the wap site what the billing is and that it is a subscription service and how to unsubscribe.

This welcome message is as below:

"welcome to the Fun Club! U get unlimited game, tones, vids & more!Start Downloading now! Help: 0214178001 (R10/day subscription service. Sms STOP FUN to 31191 to end)

Annexure “B”

This is a Fun Club page that is created by our online advertising agency and is served on a variety of South African websites.

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Top banner on the landing page

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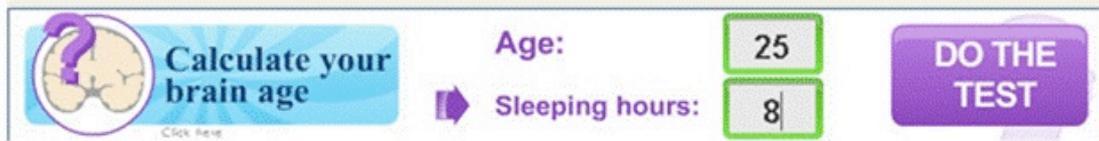
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 1. They enter their age and the number of hours that they sleep
 2. They get a banner that says, the result is on your mobile
- The user is not subscribed at this stage and is sent to our wap splash page.

STEP 1: THE USER INSERT HIS REALY AGE AND THE SLEEPINGHOUR



Calculate your brain age Click here

Age: 25

Sleeping hours: 8

DO THE TEST

STEP 2: THE USER SELECT HIS OPERATOR

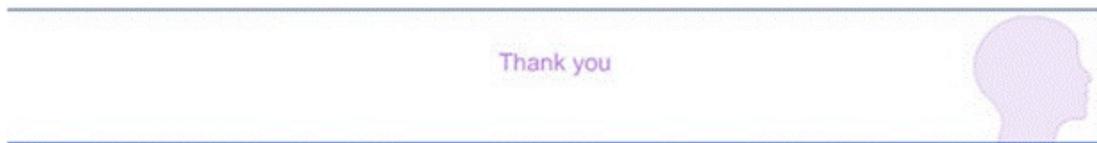


THE RESULT ON YOUR MOBILE

SELECT YOUR OPERATOR

VODACOM MTN

STEP 3: THE USER GO TO THE SPLASH



Thank you

2. On the splash page we have that it is a subscription service with terms and conditions. We are now trying to make the advertising space smaller so that all users don't have to scroll. Currently some users, depending on their screen will have to scroll to see the full T&C's
Still at this point the customer isn't subscribed

The campaign was removed from market and was adjusted as can be seen below:

1. We have included an image of the game that user will be getting when he / she subscribes
2. We have included the copy that says "GET THIS GAME ON YOUR MOBILE NOW"

Before change:

THE BEST MOBILE CONTENTS FOR YOUR MOBILE R10/DAY THIS IS A SUBSCRIPTION SERVICE ONLY ORIGINAL MUSIC AND COOLEST GAMES

**NOW FOR YOU
YOUR BRAIN AGE**

Age: 25
Sleeping hours: 8

BRAIN AGE CALCULATION WITH BRAIN TRAINER
Your mobile number

GET IT NOW

MTN vodacom

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After Change:

GET THE GAME ON YOUR PHONE NOW R10 PER DAY THIS IS A SUBSCRIPTION SERVICE ONLY ORIGINAL AND COOLEST GAMES

GET THIS GAME ON YOUR MOBILE NOW!

MOBILE GAME
BRAIN TRAINER

AGE:

TIME:

BRAIN AGE CALCULATION WITH BRAIN TRAINER
Your mobile number :

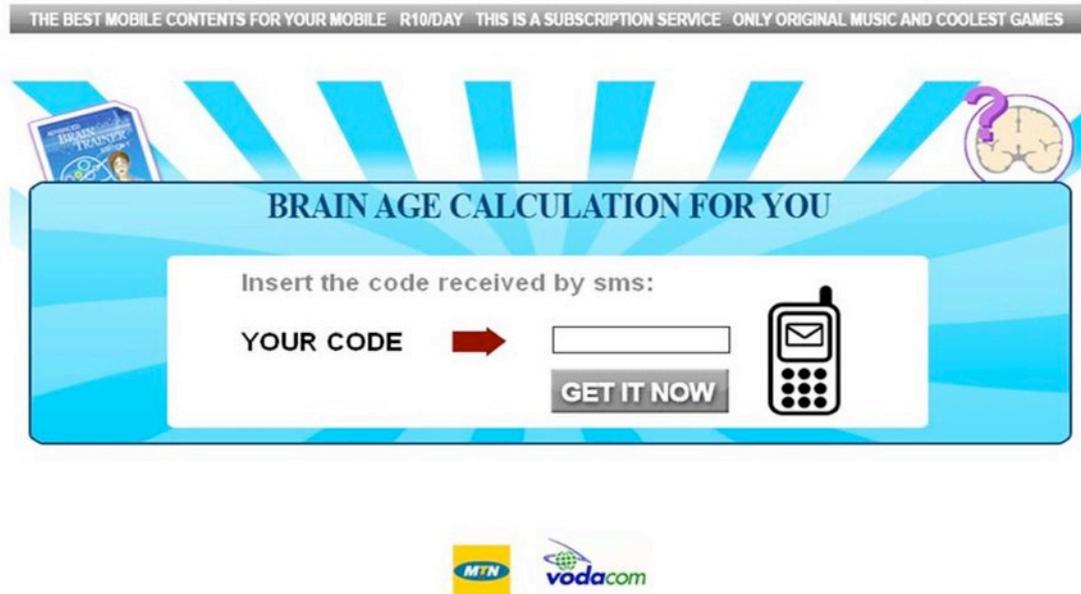
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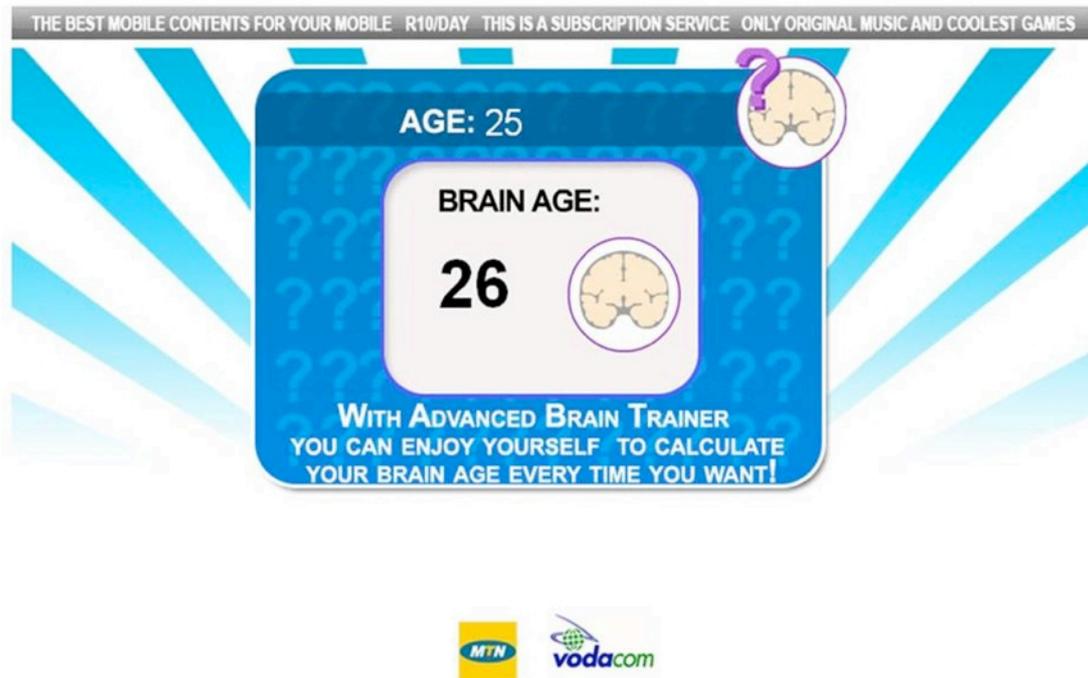
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Based on the above mention we do not feel that we are in breach of any clauses of the code of conduct. We have no intention on misleading the public in any way and therefore give the customer all necessary details on the subscription, including a website where full terms and conditions are available (as seen in the terms and conditions outlined below). Full terms and conditions are available on both the website and wapsite with the call center number is if he I she wishes to unsubscribe or find out more information.

The banner on the top of the advert as well as the terms and conditions are included on every page of the subscription as can be seen below. This ensures that the customer is aware through the entire process on any information that they may require.

Upon subscription the customer is sent a welcome message stating that they are part of the FUN CLUB and how to unsubscribe, what the billing is as well as the call center number.

After the welcome message they are sent the wap link to download content where it states in the terms and conditions and frequently asked questions on the wap site what the billing is and that it is a subscription service and how to unsubscribe.

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