



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK (iTouch)
Information Provider (IP):	Not applicable
Service Type:	Subscription
Complainants:	RAJ RAJKUMAR
Complaint Number:	6112
Code Version:	6.2 / 7.0
Advertising Rules Version:	N/A

Complaint

The Complainant stated the following:

“As a Vodacom customer I noticed on statement charged by iTouch since Jan 2009 for Fun Club to which I did not subscribe to. When I contacted Yandiswa @ iTouch (021 4152100) she claims that I had subscribed to this on 8/01/09. I am almost 60years old and I do not have the time & patience to subscribe to procure ring tones. I have been debited daily for something I haven’t even used. Today I was showed how to unsubscribe and have refused point blank to refund the money debited to my account for the last three months. I only noticed it yesterday after I received my statement of account from Vodacom. It seems to me that this company is doing it to the public -having access to cell phone numbers - by some means they create a response to their sms,s - internet/emails etc. The carryon charging the service provider account until it is discovered. When contacted they tell how to unsubscribe by then they have taken enough funds of you. When you contact the service provider (VODACOM) they claim it has nothing to do with them. This is a big scam. I asked to speak to the director of iTouch who is Greg Brophy without any success. THIS I THINK IS A BIG SCAM TO SECURE SALES. They need to be shut down.

iTouch claims that I authorised them by giving them my cell number.”

Service provider’s response

The SP wrote the following:

“Thank you for making this users complaint known to us. The user was subscribed via our fun club brain age advertisement, which is how we obtained the users mobile number. The user was informed via sms that they have joined a subscription service and also notified on how to stop the fun club service.

Attached you will find messages sent to the user, when he subscribed to the fun club service, as well as the pin he or she, would have needed to insert in order to have the subscription initiated.

Below is the entire processes on how the user was introduced to the fun club service.

This is a web based subscription that was initiated by the user on the day of subscribing to the fun club service. In no way was the advert misleading in any way to the public. This is in essence a subscription based service and the user was informed of this when accessing the webpage on the day the subscription was started. The pin which was sent to the user needed to be entered on the webpage in order for the subscription to be initiated.

Below is the entire processes the user would have had to follow to start the Fun Club subscription at R10/day.

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 user 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

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

1. The banners that the user sees.
2. They enter their age and the number of hours that they sleep.

3. 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 web splash page.

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.

1. After the user 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 user 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 user has to enter the pin number that is sent from his / her phone before he / she can be subscribed to the service.

2. We give the user 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 user is subscribed and received his welcome message, the brain age game and the link to the website.

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 website with the call center number is if he | 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 insures 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 web link to download content where it states in the terms and conditions and frequently asked questions on the web 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 31194 to end)

Should you require any further information, please do not hesitate to contact us. In this regard we do not deem a refund possible, as all pages display that he or she was in fact interacting with a subscription based service.”

Sections of the Code considered

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

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.

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

11.2.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

11.2.2. Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'.

11.2.3. The 'STOP' request described above must be charged at the lowest tariffed rate available (with the exception of reverse billed rates).

11.2.4. Members must ensure that the termination mechanism is functional and accessible at all times.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent response.

The SP has provided proof of the fact that the Complainant in this matter has indeed subscribed to its services through a website. A pin was subsequently issued and the Complainant, after allegedly entering the pin, became subscribed.

As can be seen on the logs and the SP's database, this was logged and subsequent services started.

Although the Adjudicator is not implying that the Complainant in this matter is not providing facts true to the best of his knowledge and hence his subsequent recollection of events, it has to be stated that in the absence of any evidence on behalf of the Complainant proving otherwise as to what was logged by the SP, it is difficult for the Adjudicator to make a finding, based on the words of the Complainant alone.

However, should there be some overriding factor(s) which might alter the opinion of the Adjudicator, mention thereof must be made, and this is indeed what is unfolding here.

It has come to the attention of the Adjudicator that there have been several complaints in the same month pertaining to the same services.

These were all lodged as formal complaints against the SP in this matter.

All complaints have its origins based on the same allegations alleged by the Complainant in this matter, uttering their frustrations with the "brain-age" service, stating that they either did not receive a pin, or when receiving the pin, did not enter the pin and therefore did not consent to a subscription service. In this specific matter the Complainant denied ever subscribing to the service.

In light of these circumstances and the occurrence of similar events, manifesting itself over the same time period, having regard to evidence supplied by the SP, the Adjudicator has to ask him / herself whether such evidence can be relied upon?

Without having sufficient access to the said systems generating these logs, and therefore any mechanism to guarantee the fail-save operation of the SP's operational system, the Adjudicator can also not merely imply that the SP is in breach of any section of the Code of Conduct.

The Adjudicator is however of the opinion, taking all the relevant circumstances into consideration, based on circumstantial evidence alone, that there must be an instance of malfunction on behalf of the SP, or at the very least, something to that extend.

This read together with the decision provided in Adjudication 5921, leaves the Adjudicator with no alternative but to find the SP in breach of sections 4.1.2, 11.1.2, 11.1.4 of version 6.2 of the Code and 11.1.5 of version 7.4 of the Code.

The Complaint is upheld.

Sanctions

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct;

The SP is instructed to refund the Complainant in full;

In addition, the sanctions provided in Adjudication 5921 refer.
