



ADJUDICATOR'S REPORT

WASPA Member (SP):	Sybase 365
Information Provider (IP):	aVericomm
Service Type:	Subscription Service
Source of Complaints:	WASPA Monitor
Complaint Number:	6219
Code of Conduct version:	7.0

Complaint

A complaint was submitted by the WASPA Monitor following a test of the Name Analyser service operated by the IP in conjunction with the SP. A copy of the report compiled by the Monitor regarding the test performed on 8 April 2009 is set out below:

Name analyser

Service Provider: Mobile 365
Shortcode: 31936
Phone number: 0728926523
Starting balance R122.86

Purpose of test:

The purpose of this test is to ensure that I do not get automatically subscribed to a subscription service when doing the Name analyser test on a wap site.

NAME ANALYSER

What does your name really mean? It o personality.

Enter your first name:

[Calculate](#)

[Partner Tracker, Xray Scanner](#)

[Hot sexy vids](#)

Current page:
Web address:
http://www.loveport.mobi/analyse.wml?ref=buzzanalyseimage
Connection:
Normal

0 kB 10:38

Test:

I went to the wap link: <http://www.loveport.mobi/analyse.wml?ref=buzzanalyseimage> and entered in a name and clicked on **calculate**.

I got prompted to enter my cell number which I did, and under the **send** button it said: "You will receive a text message with link to view your result. Agree to receive promotional messages."

It did not display any costs or subscription service information.

Then it said:

"Thank you a message was sent to 0728926523 just open the link."

And I received a message in my service inbox and I clicked on **receive result**. It took me to a link where my result was shown.

I then exited the link to check my balance and it was **R92.80**

So R30 was deducted.

Then I received a message in my cellphone inbox:

Freemsg:

"Welcome to the LoveME Analyse Club! Get ur name analyser results for R20/wk + R10/calculation until you send stopanalyse to 31936. Help? 0114613273"

I also received three other service message links:

- **Track your partner**
- **Real fun sounds**
- **Top music charts**

Conclusion:

All you are told by entering your number is that you will receive a text message link with your result. No where does it tell you that it is a subscription service. You have to scroll right down a extremely long page of different headings in order to see that it is in fact a subscription service. Also not once did it give me a chance to click on or confirm that I would like to join a service. I was automatically subscribed.

Breaches of the code of conduct:

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "Subscription services"

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

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:

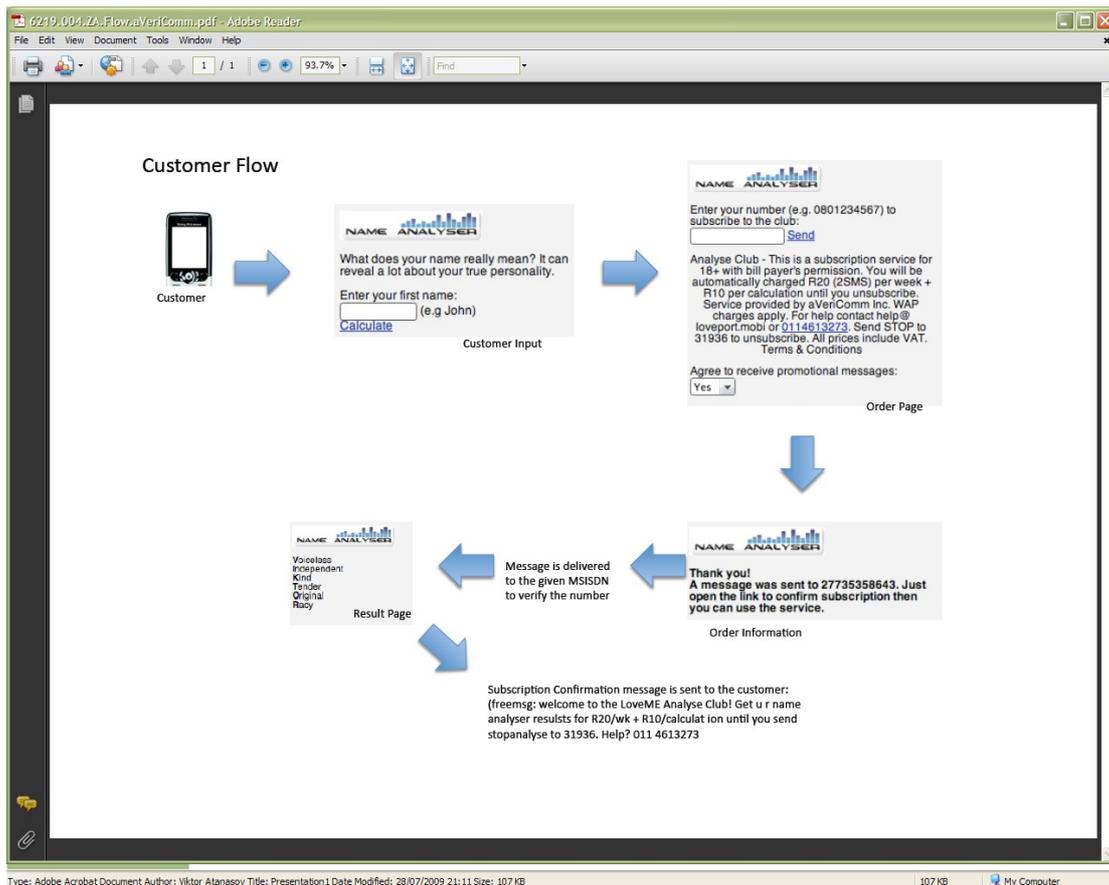
[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing]. Help? Call [call centre number + "(VAS)" if applicable]. To unsubscribe, [unsubscribe instructions].

Response of SP

The complaint was responded to by the IP.

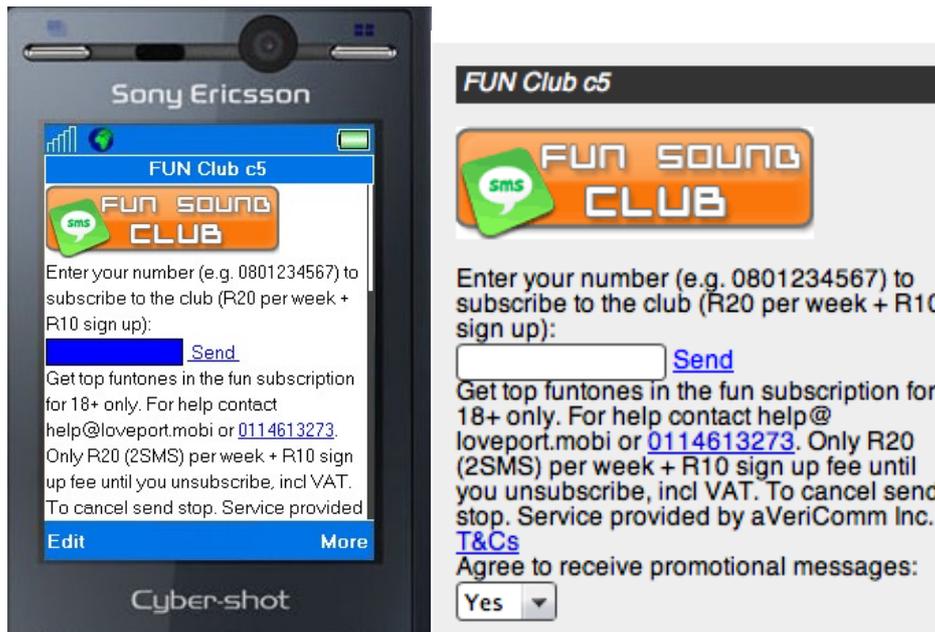
In its response, the IP did not dispute that the Code had been breached in the manners alleged by the Monitor.

The IP undertook to implement certain changes to the manner in which the service was advertised and activated. It submitted a document describing a proposed new subscription process with corresponding information that would be displayed at each step in the process. A copy of the document submitted by the IP is set out below:



The Monitor responded and expressed the view that the proposed revisions still did not adequately display pricing information for the service at the stage when a consumer was being invited to subscribe to the club. The Monitor suggested that the IP insert pricing information into the process at the stage at which a consumer is invited to enter their number so as to subscribe to the club. The Monitor also requested the IP to resubmit copies of further revisions to its process design to enable the Monitor to see how the IP intended to make pricing information clear.

The IP thereafter submitted two further screenshots of new pages being used for the second stage of the subscription sign-up process. These further screenshots are set out below:



Decision

Section 2.11 of version 7.0 of the WASPA Code defines a “content subscription service” as including “any subscription service providing or offering access to content including, by way of example only and not limitation: sound clips, ring tones, wallpapers, images, videos, games, text or MMS content or information. This includes any subscription service which describes itself as a “club” or which otherwise allows access to content to subscribers, at a cost which includes both a subscription element and a per content item element. Services which are not considered to be content subscription services include: dating services, chat services, location based services, GSM terminal device services, corporate application services, reminder services, synchronisation applications, corporate communications applications, VOIP, etc.”

The Name Analyser club charges consumer’s R20 per week plus R10 per name analysis requested. The name analysis is provided by a text message containing a link to be accessed in order to view the name analysis result.

The Name Analyser club constitutes a “content subscription service” for purposes of the Code.

Pricing information

The IP did not dispute the Monitor’s claim (as outlined in the initial complaint) that the advertising for the service did not display the cost thereof nor the fact that the service was a subscription service. Having considered all the information submitted, the service is found to have been advertised and provided in breach of sections 4.1.1, 6.2.5 and 6.1.12(c) which state as follows:

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.

6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price must appear with all instances of the premium number display.

6.2.12. For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application:

(a)...

(b)...

(c) If the transaction is to initiate a subscription service, then the price and frequency of the service must be included directly in the text of the WAP link or immediately adjacent to it and must be visible on the same screen as the link.

Subscription mechanism

Prior to the amendments to the subscription process mechanism being proposed and implemented by the IP, the consumer received no information about the subscription nature of the service. This was clearly in breach of sections 4.1.1, 6.2.5 and 6.2.12 of the Code as outlined above. After the amendments, the transaction method by which a consumer is subscribed to the services can be summarised as follows:

1. The consumer enters his or her name into a form and clicks on a link saying "Calculate".
2. The consumer is then requested to enter their cell phone number to subscribe to the Name Analyser Club.
3. A message is sent to the consumer enabling them to confirm their subscription so as to enable them to thereafter access the results of the name analysis request.

The subscription service mechanism being employed by this service (taking the process amendments that were introduced into account) interweaves a request for a name analysis to be performed with a request to join a subscription service.

11.1.2 of version 7.0 of the WASPA Code of Conduct states as follows:

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.

The word "*independent*" in section 11.1.2 has a clear and unambiguous meaning as the opposite of the word "*dependent*", which in turn means to be reliant upon something else. It follows that if a request to join a subscription service is dependent on any other request, it would not be an "*independent*" request. In the present matter, the subscription transaction is dependent on a consumer initiating a name analysis request in order to be subscribed, i.e. the subscription request is not an independent transaction request but is wholly dependent on the consumer requesting a name analysis. The service accordingly breaches section 11.1.2 of the Code.

The further screenshots submitted by the IP do not rectify this breach of the Code.

Summary

In summary, I find that sections 4.1.1, 6.2.5, 6.2.12(c) and 11.1.2 of the Code have been breached and that section 11.1.2 continues to be breached.

Sanction

The method of subscribing a consumer to a service (i.e. the initial method detected and reported by the Monitor, not the revised method proposed by the IP) constitutes an extremely serious breach of the Code. The Monitor reported having been subscribed to a subscription service and having had R30 debited as a result of following a process which made no mention of any subscription service or of any pricing.

The IP appears to be based outside of South Africa and it is especially important that the SP educate foreign based IP's who may not have prior exposure to the Code other than through the SP.

The breaches which exist in this complaint are of a type that cause harm to both consumers and the Wireless Application Services industry as a whole. The primary objective of the Code is described in section 1.2 as being *"to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services"*.

In considering appropriate sanctions to be applied in this matter, I have had reference to other complaints that have been upheld against the SP and its customers previously, including the following complaints:

- #4335 and 4336 in which the SP was formally reprimanded and required to amend its advertising for a subscription service; and
- #5165 in which the SP was ordered to refund subscribers and suspend the provision of subscription services to an IP for a period of six months.

In light of the severity of the breaches in the present matter, I do not regard light sanction as being appropriate. I also consider that certain sanctions ought not to be capable of being suspended pending any appeal that may be lodged in this matter in light of the fact that certain breaches of the Code have not been disputed and in light also of the fact that the Name Analyser service ("the service") appears to continue to operate in a manner that breaches the Code.

In the circumstances, the following sanctions are imposed:

1. The SP is directed to:
 - 1.1 immediately suspend the service and all billing for the service;
 - 1.2 pay over to WASPA a fine of R100 000 within 5 days of the delivery of this report failing which the SP's membership of WASPA shall be suspended for a period of 30 days or until such time as this fine has been paid in full, whichever period is the longer; and
 - 1.3 pending full compliance by the SP with the sanctions contained in paragraph 3 below:

- (a) withhold payment of all amounts due by it to the IP as contemplated by the provisions of section 13.4.1(i) of the Code;
- (b) preserve and retain all revenue paid to it by any cellular network operator in respect of the any service offered by the IP and to refrain from dissipating such revenue in any way other than in fulfilment of the fines provided for in paragraph 3 below; and
- (c) send an SMS message to all subscribers to the service advising them as follows:

“The [name of service] has been suspended due 2 breach of WASPA Code of Conduct. Further communications will follow. For help contact [telephone number of SP]”.

2. In terms of section 13.4.2 of the Code, the sanctions contained in paragraph 1 above may not be suspended pending any appeal that may be instituted in this matter but shall become effective immediately on the publication of this report. In the event that any appeal lodged is substantially successful, then the fine paid by the SP in terms of paragraph 1.2 shall be refunded to the SP subject to any remaining sanctions or revised fine that the Appeals Panel may determine appropriate.
3. The SP is further directed:
 - 3.1 to furnish WASPA with monthly statements of account (“the statements”) detailing all revenue either already received by the SP or that is to be paid over to the SP by any cellular network operator in respect of any services offered by the IP from the commencement date of any such services;
 - 3.2 to deliver a written consent to WASPA within 7 days of the delivery of this adjudication report irrevocably authorizing WASPA to verify and audit the accuracy of the statements with the relevant network operators concerned and indemnifying WASPA against any and all claims for loss, costs and expenses that may be made against it by the IP, a network operator or any other person in this regard;
 - 3.3 to send an SMS message to all subscribers advising them that the service has been suspended due to breach of WASPA Code of Conduct and advising subscribers of their right to claim a refund of all subscription fees paid by contacting the SP’s help desk by 5pm on a date falling 5 days after the sending of such message or the first business day thereafter if that date falls on a weekend or public holiday;
 - 3.4 as contemplated by the provisions of section 13.4.3(g) of the Code, to issue a blanket refund to all subscribers claiming a refund within the period mentioned in paragraph 3.3 above within 10 days of the expiry of such period provided that any amounts to be refunded shall be paid:
 - 3.4.1 firstly from any IP revenue share held by the SP in terms of paragraphs 1.2(a) and (b);

- 3.4.2 on exhaustion of the IP revenue share, from the SP revenue share; and
- 3.4.3 on exhaustion of the SP revenue share, the SP and IP shall be jointly and severally liable for payment of the balance of all refunds due;
- failing which the WASPA Secretariat shall direct all members to suspend all services to the IP or any related entity;
- 3.5 within 30 days of the expiry of the 10 day refund period provided for in paragraph 3.4 above, to
- 3.5.1 pay over to WASPA a fine equal to the greater of:
- (a) 100% of the revenue share earned or received by or accruing or allocated to the SP in respect of the service less the total amount of blanket refunds paid out from the SP revenue share or SP's own funds as evidenced by the SP's original bank statements or certified copies thereof; or
 - (b) R50 000;
- failing which the SP's membership of WASPA shall be suspended for a period of 30 days or until such time as the fine has been paid in full, whichever period is the longer; and
- 3.5.2 pay over to WASPA a fine equal to the greater of:
- (a) 100% of the revenue share earned or received by or accruing or allocated to the IP less the total amount of any blanket refunds paid out from the IP revenue share or IP's own funds as evidenced by the IP's original bank statements or certified copies thereof; or
 - (b) R100 000 to be collected from the IP;
- failing which the WASPA Secretariat shall direct all members to suspend the provision of all services to the IP and to refrain from the commencement of any new services to the IP for 30 days or until such time as the fine has been paid in full, whichever period is the longer.
4. For the purposes of paragraphs 3.4 and 3.5 above, a related entity shall be any entity in which 25% or more of the beneficial ownership of such entity is held by any one or more of the shareholders in the IP or which has any directors in common with the IP.
5. The suspension of the service shall continue until such time as all sanctions have been fully complied with and until the WASPA Secretariat and Monitor have received and approved of a detailed description of all revisions to the service designed to ensure full compliance with the Code and Advertising Rules.

