



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	TIMw.e. New Media Entertainment South Africa
Information Provider (IP):	Not applicable
Service Type:	Subscription service
Complainant:	Member of the public
Complaint Number:	6306
Code Version:	7.0 (consideration also given to version 7.4)
Advertising Rules Version:	2.3

Complaint

The complainant is a member of the public who has complained that he was subscribed to one of the SP's subscription services ("the service") using a subscription mechanism that appears highly problematic. His initial complaint was as follows:

I believe that is is totally unethical practice to try and procure business by sending any person a sms message stating that unless they reply to the message that they will be enrolled for a chargable service. This is the equivalent of spam on the internet. No services should be forced on consumers without their signature of acceptance. - Please remove number from your mailing list. \r\n

It appears the complainant was subscribed to the service in early March 2009 and unsubscribed on 21 April 2009. The complainant was not satisfied with simply being unsubscribed and wrote the following when he escalated his complaint with WASPA:

The fact that I have been unsubscribed is not the total issue. Have I been refunded moneys billed for the month or has my Vodacom bill been revised ?

I would also like to know if this problem has been resolved for all others who have been conned in the same manner or is this just been sorted to make me happy? This type of action is in my opinion highly illegal and should be stopped immediately.

Service provider's response

The SP confirmed that the complainant had been unsubscribed and noted that a refund had been refused. The SP supplied WASPA with subscription logs. These logs are annexed to this report, marked Annexure "A". I have redacted the complainant's phone number in an effort to protect his personal information from improper disclosure.

The SP failed to respond to the complaint despite a reminder being sent to the SP by WASPA in early May 2009. There are therefore no substantive representations by the SP before me.

Sections of the Code considered

This complaint was filed prior to the most recent update to the Code to version 7.4. I have accordingly considered versions 7.0 and 7.4 for the purposes of this report in order to determine compliance with the Code (referencing version 7.0) and the remedy for non-compliance (referencing version 7.4). Having regard to the issues raised in this complaint, I have also considered other sections of the Code which are pertinent.

I have therefore considered the following sections of the Code:

Version 7.0	Version 7.4
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 and may not be an entry into a competition or quiz.

Version 7.0	Version 7.4
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.	11.1.5: 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].	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].
11.2.1: 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	11.2.1: 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

Version 7.0	Version 7.4
11.2.2: The reminder messages specified in 11.2.1 must adhere exactly to the following format, flow, wording and spacing: U r subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code].	11.2.2: The reminder messages specified in 11.2.1 must adhere exactly to the following format, flow, wording and spacing: U r subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help, sms HELP [optional keyword] to [short code] or call [call centre number + "(VAS)" if applicable]. To unsubscribe, sms STOP [service keyword] to [short code]. or U r 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 unsubscribe, sms STOP [service keyword] to [short code].

Sections of the Advertising Rules considered

Not applicable to this complaint.

Decision

The central issue in this matter is the subscription mechanism the SP employed to subscribe the complainant to the service. A further issue is the question of a refund to the complainant of amounts deducted where the complainant did not voluntarily subscribe to the service.

The subscription mechanism the complainant reported in his comments to WASPA appears to have required the complainant to take positive action to avoid being subscribed for the service. This is regarded as a "negative option" mechanism in the Consumer Protection Act¹ and while the Act is not fully in force yet, it is indicative of

¹ Act 68 of 2008

undesirable business practices, particularly those targeting consumers, as well as business practices which are against public policy.

Going further, section 11.1.2 (reinforced by 11.1.5) of the Code requires that a subscription to a subscription service must be “*an independent transaction, with the specific intention of subscribing to a service*”. There is no evidence of this “independent transaction” or the complainant’s requisite and “specific intention” to subscribe to the SP’s subscription service. The SP’s subscription mechanism is clearly problematic and, in the absence of information from the SP suggesting an error, I find the subscription service to be a breach of the Code.

The remaining provisions of the Code which I have quoted above require WASPA members to send out certain notices and reminders to subscribers. These provisions also prescribe the format and content of those messages. Judging by Annexure “A”, I don’t see any indication that the SP has complied with these requirements.

On the assumption that the complainant was subscribed to the service involuntarily (and the evidence presented to me would seem to support that assumption), I see no reason why the complainant should not be entitled to a refund of amounts deducted from his account as a result of this involuntary subscription.

Sanctions

1. The SP is ordered to refund all amounts charged to the complainant as a result of her subscription to the SP’s subscription service in question;
2. The SP shall send an sms notification to all existing subscribers of the campaign in the format prescribed in 11.4 of the current Code;
3. The SP is fined -
 - 3.1. R25 000 for its non-compliance with 11.1.2 of the Code; and
 - 3.2. R25 000 for its non-compliance with 11.1.10 of the Code;
 - 3.3. R25 000 for its non-compliance with 11.2.1 of the Code; and
 - 3.4. R25 000 for its non-compliance with 11.2.2 of the Code.

The fines must be paid to the WASPA Secretariat within five (5) days of notification of this report’s findings.

Annexure **"A"**



Time	Origin	Destination	Message
2009-03-08	133535		Insert your password rinver and receive 3 Games and 1 Truetone every week. Please check T&C at www.za.natta.com/web/za/tac .
2009-03-08	133535		Welcome! U have joined Games Club. 3 Games + 1 Tune per week, R4,99/day.Stop? Dial *120*33535# and follow the menu(1c/sec). Helpline:(0)11 4470357. Total TIM
2009-03-08	33535		Click to get the coolest games now! www.za.natta.com
2009-03-09	33535		Download now
2009-03-10	33535		Download now
2009-03-11	33535		Download now
2009-03-12	33535		Download now
2009-03-13	33535		Download now
2009-03-14	33535		Download now
2009-03-15	33535		Get 100 Credits to download all u want! SMS COOL to 33535.Subs R4,99/day.Stop? dial *120*33535# and follow the menu(1c/sec).Helpline:(0)11 4470357!TotalTim
2009-03-15	133535		Click 2 get the coolest games now! www.za.natta.com
2009-03-16	33535		Download now
2009-03-17	33535		Download now
2009-03-18	33535		Download now
2009-03-19	33535		Download now
2009-03-20	33535		Download now
2009-03-21	33535		Download now
2009-03-22	33535		Get 100 Credits to download all u want! SMS COOL to 33535.Subs R4,99/day.Stop? dial *120*33535# and follow the menu(1c/sec).Helpline:(0)11 4470357!TotalTim
2009-03-22	133535		Click 2 get the coolest games now! www.za.natta.com
2009-03-23	33535		Download now
2009-03-24	33535		Download now

2009-03-25	33535		Download now
2009-03-26	33535		Download now
2009-03-27	33535		Download now
2009-03-28	33535		Download now
2009-03-29	33535		Get 100 Credits to download all u want! SMS COOL to 33535.Subs R4,99/day.Stop? dial *120*33535# and follow the menu(1c/sec).Helpline:(0)11 4470357!TotalTim
2009-03-29	133535		Click 2 get the coolest games now! www.za.natta.com
2009-03-30	33535		Download now
2009-03-31	33535		Download now
2009-04-01	33535		Download now
2009-04-02	33535		Download now
2009-04-03	33535		Download now
2009-04-04	33535		Download now
2009-04-05	33535		Get 100 Credits to download all u want! SMS COOL to 33535.Subs R4,99/day.Stop? dial *120*33535# and follow the menu(1c/sec).Helpline:(0)11 4470357!TotalTim
2009-04-05	133535		Click 2 get the coolest games now! www.za.natta.com
2009-04-06	33535		Download now
2009-04-07	33535		Download now
2009-04-07	133535		FreeMsg: You are subscribed to Games Club.Cost R4,99/day. To Stop Subscription, SMS STOP to 33535. Helpline: (0)11 4470357 (VAS Rates). Total Tim
2009-04-08	33535		Download now
2009-04-09	33535		Download now
2009-04-10	33535		Download now
2009-04-11	33535		Download now
2009-04-12	33535		Get 100 Credits to download all u want! SMS COOL to 33535.Subs R4,99/day.Stop? dial *120*33535# and follow the menu(1c/sec).Helpline:(0)11 4470357!TotalTim
2009-04-12	133535		Click 2 get the coolest games now! www.za.natta.com

2009-04-12	133535		Click 2 get the coolest games now! www.za.natta.com
2009-04-12	133535		Click 2 get the coolest games now! www.za.natta.com
2009-04-13	33535		Download now
2009-04-14	33535		Download now
2009-04-15	33535		Download now
2009-04-16	33535		Download now