



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP):</b>	Buongiorno UK
<b>Information Provider (IP):</b>	Not applicable
<b>Service Type:</b>	Unsubscribe Request
<b>Complainants:</b>	Atti
<b>Complaint Number:</b>	7087
<b>Code Version:</b>	7.0
<b>Advertising Rules Version:</b>	N/A

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### Complaint

This complaint is the escalation of unsubscribe request regarding the "Movilisto R10 Club" subscription service. The Complainant was not satisfied with the SP's response and provided the following reason for escalation: Not honouring stop request on the 2009-04-22 08:03:44

After the SP had replied to the formal complaint the Complainant wrote the following:

"What is clear from the info received is that someone subscribed to these short codes on behalf of myself.  
As the phone was with me and I did not subscribed who did then.  
The only other entity having access to my personal details is italk.

This is why I log this claim initially and it does not help to take the service provider to task alone. I believe italk gets incentive payments back from the service providers and on the behalf of my selves and others they subscribe to the short codes.

I can state under oath that I did not received the info as stated below, or any music, pictures, games etc., because if I received this I would immediately have cancelled.

*Upon subscribing to the Fun club the user was sent the welcome messages and informed of the billing amount that would occur while being a member of the Fun Club. The messages sent via sms also advises the user on how to stop the service, as well as informs the user of the call centre contact number, should he have experienced any problems with the mobile content Fun Club*

*subscription service. The Wap page visited to start the Fun Club Subscription service can be viewed further below. This page is our link to the terms and conditions of the subscription service on the fun club brand.*

The only time I found out about the short codes was when I contacted italk and they advised that I have subscribed and they then advised me how to unsubscribe.

I would like you to launch an investigation into the activities of italk, when a new account is opened, how they go about securing the info from their clients to prevent employees to forward clients info to short code companies.”

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### **Service provider's response**

In its response to formal complaint the SP states the following:

“Please be advised that after investigating the matter, we discovered that the complainant had subscribed to the Movilisto R10 Club in which the user sent in the keyword #8220;FUN” to the 36060 short code. This can be seen in the Detail Options window as well as the Mobile Traffic report on the day the user sent in the FUN Keyword, as of 22<sup>nd</sup> March 2009 21:11:46. In the Reporting information window messages sent to the user informs the user of the subscription, as well as how to end the service and advising the user of our call centre contact number, should he have experienced and problems with the subscription service. The messages also inform the user of the subscription implications associated to the mobile content service he or she joined on the 22<sup>nd</sup> March 2009. The Club Movilsito subscription was started when the user sms'd in the keyword Fun from his mobile device.

In the second instance the user subscribed to the Fun Club on the 26<sup>th</sup> March 2009 21:48:40. Upon subscribing to the Fun club the user was sent the welcome messages and informed of the billing amount that would occur while being a member of the Fun Club. The messages sent via sms also advises the user on how to stop the service, as well as informs the user of the call centre contact number, should he have experienced and problems with the mobile content Fun Club subscription service. The Wap page visited to start the Fun Club Subscription service can be viewed further below. This page is our link to the terms and conditions of the subscription service on the fun club brand.”

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### **Sections of the Code considered**

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.

11.1.1. 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.

11.1.3. 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.

11.1.5. Subscription services with different billing frequencies should not have a subscription mechanism likely to cause a customer to accidentally subscribe to a more frequent service.

11.1.6. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian do to so.

11.1.7. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

- (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.

11.1.8. A monthly reminder SMS must be sent to all subscription service customers containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) The service provider's telephone number.

11.1.9. The monthly reminder SMS must adhere to the following format:

- (a) The monthly reminder must begin with either "Reminder: You are a member of NAME OF SERVICE" or "You are subscribed to NAME OF SERVICE".
- (b) Any marketing for a new service must appear after the cost and frequency of the existing service and the service provider's telephone number.

11.1.10. Once a customer has subscribed to a subscription service, neither the amount nor frequency of the charges nor the frequency of the service may be increased without the customer's explicit permission.

11.1.11. The format of the both the initial notification message and the monthly reminder should comply with the relevant section of the WASPA Advertising Rules.

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### **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.

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

The SP has provided proof of the fact that the Complainant in this matter has requested to stop its subscription services. Logs were also provided to indicate the sending of subsequent reminder messages. No other information was provided by the SP.

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 real evidence on behalf of the Complainant, the facts would under normal circumstances amount to mere speculation.

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 period 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, complainants uttering their frustrations with either the "IQ test", "Brain-age" or other fun club services, 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 most cases, as in this one, customers also unanimously and categorically stated that they did not subscribe to the services.

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 and whether there might be a case of bundling and an instance of the SP misleading its customers?

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 decisions provided in Adjudication 5921, 6039, 6112 and several others, leaves the Adjudicator with no alternative but to find the SP in breach of sections 4.1.2, 11.1.2, 11.1.4 and 11.1.5 of version 7.0 of the Code.

The Complaint is upheld.

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### **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:

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.

The WASPA Secretariat is also ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this.

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