



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe request
Complainants:	Chris Neumann
Complaint Number:	7907
Code Version:	6.2
Advertising Rules Version:	2.3

Complaint

The Complainant stated the following:

“I was tricked into paying iTouch a registration fee without registering for their service. This was billed on my VODACOM account and VODACOM could not help me resolve the query for months on end. I ended up paying approx R3000 for this service and now I want my money back as I never registered in the first place. Apparently I clicked a link that said IQ test and it registered my VODACOM Internet sim card for this service automatically.”

The Complainant was not satisfied with the SP's response and provided the following reason for escalation:

1. I did not enter the cellular number into the mobile number block of their brain game block that they were billing me on 079 xxxxx97 VODACO.
2. I did enter 2 x cellular numbers that my wife and I use and this is on the CellC network. Namely 08xxxxxx9 mine 0xxxxxx3 my wife's.
3. I didn't think anything worked as I had to register with a pin and this was not sent to the CellC numbers.
4. I didn't receive this pin on my VODACOM cell data contract either and DEFINITELY DID NOT ENTER THIS INTO THEIR WEBSITE AS THEY SAYING I DID.
5. How can they pick up my VODACOM number if that is not what I entered?
6. How can they charge me for something I am not made aware of?
7. The email they sent me that I will forward to you has terms and conditions and says it is R10/day, quite clearly. THIS WAS DEFINITELY

MISSING WHEN I READ THIS POPUP ON GOOGLE ADS! And I would never even enter my Cell C number if this was there.

8. As far as I am concerned this is GROSS FRAUD on the behalf of iTouch and they cannot charge a number that I have not entered into the Website. And even more I did not register at all by entering a pin into their website!!
9. They should be taken to task for this as I'm sure millions of people have been scammed by this and i have been scammed for near R3000.

SEE WEBSITE for others that have been SCAMMED:

<http://www.moneyweb.co.za/mw/view/mw/en/page91?oid=274986&sn=Detail>

10. They must be making a fortune off innocent people.
11. PLEASE CAN YOU HELP ME WITH THIS URGENTLY?"

The Complainant provided the following response to the SP's reply:

"I'm so sick and tired of iTouch lying about this matter. They are busy with a huge fraud scam and have scammed many people like this. First of all I didn't EVER ENTER THE NUMBER THEY ARE BILLING ME ON. The number they are billing me on is my VODACOM my data contract. And yes the only mobile traffic they would have ever picked up is after continual complaints from my side to VODACOM. I realised what was happening and had to insert this VODACOM sim card into my cell phone to sms stop to their number, think it was 34911 or something. The number I entered was my two CellC phone and it did not ask me for a cellular provider as stated below. This is a BLATANT LIE BY ITOUCH AND MOST OF THE PICTURES BELOW ARE NEVER EVER SEEN. EVEN THE RATES ARE NOT ON THE WEBSITE. I thought the whole process did not work as I got NO SMS' from them on the numbers I entered. SO IT IS IMPOSSIBLE THAT I COULD HAVE ENTERED A PIN AS THEY LIED AGAIN BELOW!!

They are definitely lying to you and if they did pick up my VODACOM number from the Internet somehow. THIS IS STILL A FRAUD CASE and goes against EVERY SINGLE RIGHT OF THE CONSUMER AS STATED IN THE WASPA POLICY.

I'M ABSOLUTELY LIVERED THAT SCAMMS LIKE THIS CAN GO ON. And why is it that now this scam has ended and that you cannot see them advertising this anymore? This goes to prove that they are hiding their original scam.

Please could you take this further with them as I don't believe a word they are saying and this is a continues scam as has been reported before:
<http://www.moneyweb.co.za/mw/view/mw/en/page91?oid=274986&sn=Detail>”

Service provider's response

In its initial response to the informal complaint the SP wrote:

“We'll investigate to determine if a refund is due. Thanks.”

The SP provided the following response to the formal complaint:

“We thank you for making this complaint known to us.

Please see below for subscription start and end dates as per the reporting information section.

In the Detail options window you will see the media key fca_tek521_3762, which is our website tracking code for the Fun Club. Via the code, we are able to see what website advertisement the user had interacted with and subscribe to the Fun Club Service.

Please find attached messages sent to the user on the day the subscription was initiated by the user. In the messages sent to the user it informs the user of the stop command to end the Fun Club service, as well as the our 24x7 call centre contact details, should the user have experienced any problems with the service.

Further below is the user process the user had followed in order to have been subscribed to the Fun Club service.

Vodacom 3G devices do allow for sms notifications, hence all messages sent to the user shows delivered and not the undelivered as per the user specified.

User wrote: *I did enter 2 x cellular numbers that my wife and I use and this is on the Cell C network. Namely 08xxxxxx9 mine 0xxxxxx3 my wife's.*

The user had not interacted with the fun club service with the CellC numbers, as these numbers where never registered on our systems. There is nothing in the logs to suggest the user had subscribed to the fun club service with the CellC mobile numbers. The only number visible in the system is the enquired number, which is +2xxxxxxx7 and no other mobile number the user had supplied.

In this regard, we do not deem a refund justified as the user had in fact received the sms notifications as the network operator supplied confirmations back to our systems of the delivered messages:

The messages sent to the user from the Fun Club can be verified by the users service provider i.e. Vodacom SA.

Below is the stop command the user sent in to stop the service, hence the user did in fact receive sms's sent to him or her from the fun club service, as the stop command is in the messages sent to the user. This can also be seen in the message log attachment.

The entire processes the user would have had to follow to start the Fun Club Service in 27th December 2008:

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.

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 web splash page.

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.

a) After the user has entered in his phone number he is sent a pin number to his phone. Still on screen are 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.

b) 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 web site.

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 web site 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 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 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.”

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.

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.

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 "Fun Club" 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 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.

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.