



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	iTouch
Service Type:	Subscription Service
Source of Complaints:	Public
Complaint Number:	9632
Code Version (CoC):	Code of Conduct 8.0 and 9.0
Advertising Rules (AR):	Advertising Rules 2.3
Date of Adjudication:	27 July 2010

Complaint

1. On the 4th May 2010 the complainant lodged a complaint that he had not subscribed to the "Fun Club" provided by the IP. The complainant asked to be unsubscribed from a subscription service (and was duly unsubscribed) but did not consider this action to be sufficient in the circumstances and persisted with the complaint.

SP Response

2. The SP alleged that the complainant first entered its web site (See Annexure A) whereupon the complainant requested that a code be sent to the complainant's cell phone.
3. From the message logs (See Annexure B) the SP contended that it was apparent that a message as indicated in Annexure B was sent to the complainant's cell phone on the 14th March 2010 at 15:30:40 where a four digit code (0899) was provided to the complainant. The message read as follows:

3.1. >>Your CODE is 0899 << You'll be subscribed to Fun Club from Buongiorno UK
@ R6/day Subscription Service. Enjoy the fun.

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4. The SP was at pains to indicate that at this point the complainant was not subscribed to the service and that it was only after entering the code on the web site that the subscription service would be activated.
 5. This code was then inserted (see Annexure C) pursuant to SMS being provided to the complainant. Confirmation that the complainant was subscribed was then provided to the complainant in the form of another SMS which read:

5.1. Welcome 2 Fun Club. Go to wap.funfone.co.za on your mobile 4 Unlimited Games,Mp3's,Apps and more! Help: 0214178001 sms STOP FUN to 31194. Subscription R6/day.
 6. The SP then went on to indicate that the fact that this was a subscription service was repeated several times throughout both the SMS' as well as on the web site at both the top and the bottom of the web site. In addition the terms and conditions of use were also available to the complainant which included the way in which the subscription service could be cancelled.
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Complainant Response

7. In response to the above email the complainant indicated that she would consider the SP response and revert which she duly did on the 09th June 2010. In her response the complainant indicated that neither she nor her husband had any knowledge of the programs and would not be interested in this type of activity.
 8. She further indicated that the SP "clearly obtained my no through some irregular means" in order to "manipulate us into subscribing to a service".
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Portions of the Code of Conduct (version 9.0) considered:

Firstly it should be noted that portions of the conduct complained about occurred between the various release dates of the different code versions in that code 8.0 was replaced by code 9.0 on the 31 March 2010. However after considering the differences between the two code versions it is clear that neither the Complainant nor the SP would suffer any prejudice or have any unfair advantage if WASPA Code of Conduct version 9.0 was used.

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- 4.1.1. Members must have 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.
 - 4.1.4. Members must make the terms and conditions of any of their services available to customers and potential customers, on request.
 - 11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.
 - 11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.
 - 11.2.2. 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.
 - 11.2.4. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must be sent to the customer's mobile handset in order to prove that the number entered matches the customer's mobile handset number. This message may either:
 - (a) contain a PIN number which is then confirmed or validated on the web page, or
 - (b) contain a URL with a unique identifier, which, when clicked, validates the handset number.

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- 11.2.5. 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]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].
 - 11.4.1. 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.
 - 11.5.1. 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.
 - 11.5.2. The reminder messages specified in 11.5.1 must adhere exactly to the following format, flow, wording and spacing:
 - You are 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

- You are 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].
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Decision

9. While there are a number of different clauses in the WASPA Code of Conduct Version 9.0 that apply to this service, the only one that is really in contention by the complainant is clause 11.2.1 which indicates that a customer must not be subscribed to a subscription service without specifically opting in to that service. In this case the complainant does not allege that the messages were in some way deceptive, or not provided when necessary, but rather that the request for the subscription services on the web site was not performed by the complainant and, further to that, the complainant did not use this code in the web site (see Annexure C). In support of this contention the complainant alleges that neither she nor her husband have any knowledge of the service and that she would not have subscribed to this type of service as she has no interest therein.
10. In response to this the SP provided its message logs indicating precisely when a person requested the code (0899) and thereafter when that code was entered into the web site in order to activate the subscription services.
11. In all cases of subscription services the onus is on the SP to provide proof that the complainant in question did in fact subscribe and after doing so was sent the correct messages as mandated by clause 11 of the WASPA Code of Conduct. By providing the message logs as well as the actual date that the complainant was subscribed the SP has discharged the onus placed on it to indicate that a person using or having access to the cell phone subscribed to this service.
12. Moreover a monthly reminder message of this subscription was provided to the complainant and notwithstanding this the complainant chose to wait until May 2010 to cancel her subscription even when she would have been informed at least twice prior to this of her subscription. For example an immediate message of “STOP” sent to the IP and SP in question after receiving the initial welcoming message would have been an

appropriate response if the service had not been requested.

13. In addition the complainant does not deny receiving the messages, but only that she did not subscribe by putting the relevant code into the web site as alleged.
14. Indeed the complainant makes no attempt to provide any proof of any kind that the subscription service was not activated using the code sent to her cell phone. Examples of proof that could have assisted include:
 - 14.1. That the complainant was not able to access web sites using her computer at the particular time that the code is alleged to have been inserted;
 - 14.2. That the complainant requested the message logs from her service provider (Vodacom, MTN or Cell C) to verify the accuracy of the allegations by the SP and see if there were SMS' recorded at this time; and
 - 14.3. The complainant's ISP (Internet Service Provider) confirmed that she did not use the Internet on that day or at that time, or (if possible) accessing that particular URL.
15. In the circumstances while it is possible that there could have been a fraudulent transaction relating to the complainant's cell phone, no evidence has been placed before me that would lead me to conclude - on the balance of probabilities - that the subscription service was not entered into. Indeed all the available evidence in this matter supports the position of the SP.
16. In her submission the complainant also refers to the need for "continued assistance". While assistance may well be needed, it is not entirely clear who precisely she believes should be performing this function. Unlike an ombud, the WASPA secretariat has been tasked with administering complaints and the WASPA adjudicators have been tasked with providing decisions based on the claims as submitted. As a result any investigative function would need to come from the complainant herself. While the WASPA secretariat should certainly assist with this process insofar as it is able without compromising its neutrality, no-one is in a better position than the complainant herself to provide the necessary evidence to support her case, and the failure to do so in this matter is fatal.
17. As a result there can be no finding that the SP has contravened the WASPA Code of

Conduct Version 8.0 or Version 9.0.

18. Should the complainant be able to provide any evidence in the future relating to this incident the complainant is welcome to re-initiate the complaint with the new evidence.

Mitigation/Aggravation

AGGRAVATION/MITIGATION

1. Not applicable.

Sanction Imposed

2. None.

Appeal

Please note that should the SP wish to appeal this decision it must inform the secretariat of this within five working days of this decision in terms of section 14.6 of the Code of Conduct version 9.0.

Annexure A

PLEASE NOTE THAT SOME IDENTIFYING PERSONAL INFORMATION HAS BEEN REMOVED BY THE ADJUDICATOR DUE TO THE FACT THAT THIS ADJUDICATION WILL BE PUBLICLY AVAILABLE.

GENERAL SETTING									
Email or Sms:		Removed by adjudicator				☒ Select all lists ☒ Select all channels			
BLACKLIST			Test		Insert		Delete		

REPORTING INFORMATION									
This user isn't member of control panel									
History subscriptions									
nr.	sub/ unsub	list	channel	date	source	options	failures	tracking	code
1	sub	fun_club_site		2010-03-14 14:30:40	za_funclub_web	club.pin=.%2528	0	0	1332128
2	sub	fun_club_fretrial		2010-03-14 14:32:36	za_funclub_web	code=JG00000259	0	0	143329
3	sub	fun_club_standard		2010-03-14 14:32:36	za_funclub_web	code=JG00000259	0	0	720936
4	sub	fun_club_stim		2010-04-13 09:51:55	JMAILER_LOAD	operator=mtn&h9	0	0	268817
5	sub	36060_error		2010-04-13 21:36:09	PREMIUM		0	0	79281
6	unsub	36060_error		2010-05-05 14:29:25	SUB_HISTORY	n.a.	n.a.	n.a.	n.a.
7	unsub	fun_club_fretrial		2010-05-05 14:29:25	SUB_HISTORY	n.a.	n.a.	n.a.	n.a.
8	unsub	fun_club_site		2010-05-05 14:29:25	SUB_HISTORY	n.a.	n.a.	n.a.	n.a.
9	unsub	fun_club_standard		2010-05-05 14:29:25	SUB_HISTORY	n.a.	n.a.	n.a.	n.a.
10	unsub	fun_club_stim		2010-05-05 14:29:25	SUB_HISTORY	n.a.	n.a.	n.a.	n.a.

Get history subscriptions		Get current subscriptions	
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MOBILE TRAFFIC REPORT						
CREATED	MO/MT	RESPONSE	FROM	TO	TEXT	MORE
2010-03-14 15:30:40 +0200	MT	2010-03-14 15:30:40 +0200 acked	+27832875519	>> Your CODE is 0899 << You'll be subscribed to Fu....		
	TransID	2010-03-14 15:30:48 +0200 delivered				
2010-03-14 15:32:36 +0200	MT	2010-03-14 15:32:38 +0200 acked	+27832875519	Click here to download your content		object
	TransID	2010-03-14 15:32:47 +0200 delivered				
2010-03-14 15:32:36 +0200	MT	2010-03-14 15:32:37 +0200 acked	+27832875519	Welcome 2 FUN CLUB. Go to Wap.funfone.co.za on ur		
	TransID	2010-03-14 15:32:44 +0200 delivered				

Download file XLS

Welcome 2 FUN CLUB. Go to Wap.funfone.co.za on ur mobile 4 Unlimited games,Mp3's & more! Help: 0214178001 Sms STOP FUN to 36060 2 unsub (R6/day subscription)

Annexure B

FUN CLUB SUBSCRIPTION SERVICE R6/DAY YOU WILL GET THE THE DEATH CLOCK , MUSIC GAMES AND TONS MORE

**DISCOVER HOW MUCH LONGER YOU HAVE LEFT
WITH THE DEATH CLOCK ON YOUR MOBILE NOW**

CHOOSE YOUR FAVOURITE ITEM

20??

FIND OUT FOR YOUR DESTINY

Your mobile number Your carrier

☐ I agree to the Terms and Conditions. Join Fun Club, get music, games and tons more.

FUN CLUB. R6 / day **Subscription Service**. Networks charge extra. All the above content is available in the subscription service. Sms Stop Fun to 36060 to unsubscribe or call 0214178001 (std rates apply). T&C's available at wap.funfone.co.za

Annexure C

FUN CLUB SUBSCRIPTION SERVICE R6/DAY YOU WILL GET THE THE DEATH CLOCK , MUSIC GAMES AND TONS MORE

YOUR LIFE WILL BE LONG AND POSITIVE

**ARE YOU SURE THAT YOU WANT TO KNOW
YOUR DESTINY?**

Insert the code received by sms:

YOUR CODE

FUN CLUB. R6 / day **Subscription Service**. Networks charge extra. All the above content is available in the subscription service. Sms Stop Fun to 36060 to unsubscribe or call 0214178001 (std rates apply). T&C's available at wap.funfone.co.za