



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	iTouch
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe Request
Complainants:	Johan Cilliers
Complaint Number:	6039
Code Version:	6.2 / 7.4
Advertising Rules Version:	2.3

Complaint

In the initial complaint The Complainant stated the following:

“An amount of R131 was charged to my March Vodacom account as "content services". According to Vodacom this charge was received from Itouch and Vodacom gave me the above email addresses to complain about this matter. To the best of my knowledge I did not subscribed to anything lately and I do not even know what Itouch mean, do or offer, never heard of them until today. I request you to immediately credit my Vodacom account with R131.”

The Complainant has provided the following reason for escalation: Complainant insists that he never received a pin, never entered a pin, was not on the internet on Friday, 13 Feb 2009 at 22:30 and does not have any recollection of entering any such a service.

The Complainant wrote:

“Graag bevestig ek die volgende aangaande die koste van R131 gehef deur Itouch t.o.v. n sogenaamde "Caculate your Brain Age game".

1. Ek kan geensins onthou dat ek op 13 Februarie 2009 of op enige ander stadium aan die spel op die internet aangeteken het.
2. Ek het ook op geen stadium n pincode ingevul nie. Wat pincodes betref het ek 20 pincodes op n lys vir bankrekenings, aandelerekenings tot mediesefonds rekenings. Ek is baie sensitief wanneer dit by die gebruik van pincodes kom en sal nooit n pincode gebruik wat nie op my lys verskyn nie of die rede daarvoor nie aan my bekend is nie. Sodra ek n

nuwe pincode gebruik of geskep word kom dit op my lys. Ek doen my internet deur my selfoon weens die laer koste as die van Telkom omdat my gebruik van die internet is slegs vir persoonlike sake soos bv. bank, aandele transaksies, ens. By uitsondering sal ek vakansie akkomodasie en vliegtuie deur internet bespreek. 4. Normaalweg sal ek selde so laat in die aand nog op my rekenaar werk en op n Vrydagaand sal dit werklik n noodgeval wees.

Lorrain ek maak n nota dat julle voor of om en by 8 Junie 2009 na my sal terug kom. Ek glo die is n geval van "diefstal" weens die feit dat daar ander gebruikers is met dieselfde klagte.

Ek kan nie verstaan dat Itouch nie die R131 wil of kan terug betaal nie, want hulle het geen diens of produk aan my gelewer nie. Sedert ek sogenaamd ingeteken het kon hulle nie bevestig dat ek enige iets van hulle program gebruik het nie. Ek het hulle gevra om te bevestig watter ouderdom ek in die spel ingevoer het en hoeveel ure ek in n nag slaap. Veral laasgenoemde sal my baie interesseer. Ek bevestig ook dat ek sopas telefonies die saak met my prokureur bespreek het.”

Service provider's response

In its initial response the SP states the following:

“The number has been unsubscribed from the FUN CLUB, a confirmation sms has been sent. There will be no refund as all notification was delivered to the MSISDN (attached). The customer has been contacted.”

In the final response the SP wrote:

“We thank you for bring to our attention this customer complaint.

Please see the Mobile Traffic Report below for sms's sent to the user. The 4 digit pin number sent to the user was 2279, as can be seen in the January 2009 section of the Mobile Traffic report.

Attached you will find confirmation that the user inserted the pin on the website, which only once the pin is inserted correctly, could the subscription be initiated. Further below you will find the process outlined indicating that only once the 4 digit pin number is inserted does the subscription begin.

The user has also indicated that he or she was not on the internet on Friday, 13 Feb 2009. As seen in the reporting information below, you will find information stating that the subscription was started via Website, as per the source column in the Reporting Information Window.

Once again, please be advised that the user is no longer subscribed to the Fun Club Subscription Service.”

Sections of the Code considered

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.

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.

11.1.2. 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. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.2.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

11.2.2. Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'.

11.2.3. The 'STOP' request described above must be charged at the lowest tariffed rate available (with the exception of reverse billed rates).

11.2.4. Members must ensure that the termination mechanism is functional and accessible at all times.

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.

At some stage it became evident that the Complainant was indeed not happy with events and he conveyed the same in a text message sent to the SP on the 13th of March 2009.

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 evidence on behalf of the Complainant proving otherwise as to what was logged by the SP, it is difficult for the Adjudicator to make a finding, based on the words of the Complainant alone.

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 month 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, uttering their frustrations with the "brain-age" 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?

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 decision provided in Adjudication 5921, leaves the Adjudicator with no alternative but to find the SP in breach of sections 4.1.2, 11.1.2, 11.1.4 of version 6.2 of the Code and 11.1.5 of version 7.4 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:

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.
