



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe Request
Complainants:	Mrs Jennifer Mary Coote
Complaint Number:	7260
Code Version:	6.2
Advertising Rules Version:	N/A

Complaint

This complaint is the escalation of unsubscribe request.

The Complainant wrote:

“I had noticed a big increase in my Vodacom account this year and I decided to study my latest account in detail. I noticed an amount for R245.56 was being deducted for Content Services. I immediately phoned Vodacom Customer Care and was told it was for iTouch--something I have never heard of. The lady gave me a number to phone which I did. It was a voice giving several options to opt out of various clubs. I gathered from this that I have been paying nearly R10.00 a day for the Fun Club!! I have never joined the Fun Club and I was not ever aware that such a thing existed. I am 61 years old and things like that would not interest me. What I would like to know is who confirmed this "service" and who gave them permission to deduct the money from my account. I have paid R1664.55 for something I have never joined. I would like a full investigation done on this and I intend to take this matter further if it is not resolved to my satisfaction. I would like a full refund of the money that has been fraudulently deducted from my account.”

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

“Thank you for your email and for the effort you have gone to resolve my problem.

However although I am pleased to hear that I have now been unsubscribed to the "Fun club" it still doesn't resolve the fact that I never subscribed to it in the first place. I have received no written proof that I was ever a subscriber or

as to how or when I subscribed to such a club. Secondly it doesn't resolve the fact that I have had a total amount of R1394.43 added to my Vodacom accounts for the last 6 months which I feel should be refunded to me.

I would appreciate it if you could provide me with the proof of my "subscription" and secondly try to get a refund of the amount that has been illegally charged to my account."

Service provider's response

The SP states the following:

"Please be advised that the user of mobile number***** was subscribed to the Buongiorno Fun Club via Web Advertisement.

The media Key fca_tek521_3762 is merely one of our companies internal references to tracking both website and website advertisements. This is our way of verifying the user's subscription via a particular advertisement. This can be verified in the detail options window below.

The user was subscribed via the Fun club Advertisement on the 20 January 2009 @ 22:49:38. The pin number 1562 was sent to the user via sms and he or she did in fact enter the pin 1562 on the webpage advert on the day he or she interacted with our Fun Club Service, as can be viewed in the attached file.

The subscription was initiated by the users own initiative. From the Mobile traffic reports you will find messages sent to the user during the life span of the fun Club Subscription.

In this regard we do not deem the users complainant justified of a refund as the user did interact with the Fun Club Service @ R10/pday and did activate the service when he or she entered the pin number that was sent to him or her on the day the subscription was started. It is indicated in the Terms and Conditions that the user has to obtain the bill payers permission before continuing with subscribing to the Fun Club.

The pin number 1562 was generated and linked to the mobile number29245573 on the day the subscription was started and only if the user had entered the pin 1562, as is the case correctly would the subscription be started.

In light of this we do not deem a refund forthcoming, as the user had received all monthly reminder messages as well as was informed of the Fun Club Subscription via sms on the day he or she activated the mobile content subscription to the fun club.

We have included the entire breakdown of the Fun Club Website advertisement further below for the use's perusal and yours, which is an indication to the type of service he or she was interacting with, as the pages

as well as the T&C are shown in the advertisement and price associated to the mobile content service.

Please be advised that as of 2009-07-14 09:21:01 the user sent in the keyword "Stop Fun" ending the fun club service indicating that he | she had received sms notifications on how to cancel the service. The user is currently not subscribed to any of the mobile content service of Buongiorno ZA.

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 website 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 insures 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.

This welcome message is as below:

"Welcome to the Fun Club! U get unlimited game, tones, vids & more! Start downloading now! Help: 0214178001 (R10/day subscription service. Sms STOP FUN to 31191 to end)."

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 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 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 of version 6.2 of the Code 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.

The SP is further instructed to pay the Complainant R 1000 for financial expenses incurred and emotional distress.

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.