



REPORT OF THE ADJUDICATOR

WASPA Member (SP) Integrat (Pty) Ltd

Information Provider (IP)
(if applicable) Gozomo

Service Type Subscription for various content items and Competition

Source of Complaints Competitor

Complaint Numbers #0002, #0011, #0026, #0037, #0058

Complaint

Complaints were received in respect of the service offered by the IP through the SP. In particular the complaints concerned the bundling of content items and a subscription service, as evidenced by various advertisements for the service as placed by the IP in various publications. As the five complaints concern essentially the same issue, were submitted by the same complainant and in respect of the same service, provided by the same IP through the same SP, these five complaints have been consolidated into a single report.

The question of the competition contained in the advertisements forming the basis of complaints #0002 and #0011 have also been raised and have also been considered in this report.

The basis of the various complaints is set out below:

Complaint Number	Section of WASPA Code of Conduct	Detailed Description	Publication	Date of Publication
#0002	11.1.2	This clause clearly states that the service may not be bundled with content. In the ad the subscription is bundled with content and is therefore illegal. The user has to download a content item and is then subscribed to the service.	People magazine	2 September 2005
#0011	11.1.2	A request to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. The advertising offers you content and	People magazine	8 September 2005

	9	<p>if you download the content you are automatically subscribed to the service. The code disallows this process.</p> <p>The ad must state the closing date and further information on how the prizes will be awarded. They refer you to the web site where there is no information</p>		
#0026	11.2.1 (an incorrect reference to 11.1.2)	<p>This company continues to place ads which are in direct contravention of the code of conduct. The code is very clear and very specific and therefore no interpretation is necessary:</p> <p>Section 11.1.2 clearly states that to join a subscription service must not be bundled with a request for specific content. This ad advertises content and by purchasing the content, you are subscribed to the service.</p>	People magazine	23 September 2005
#0037	11.1.2	<p>A request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.</p> <p>In the advertisement, content is offered and when you purchase that content, you are subscribed the service. The code clearly states that the subscription must be an independent transaction. Therefore no content can be offered as part of the subscription.</p> <p>In the top left, where they advertise the pricing of the subscription service, this is where the subscription should take place.</p>	Huisgenoot magazine	8 October 2005
#0058	11.1.2	<p>Any request from a customer to a subscription service must be an independent transaction, with the specific intention of subscribing to a service.</p> <p>Section 11.1.2 clearly states that a request to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. It further states that to join a subscription service may not be bundled with a request for specific content</p>	People magazine	28 October 2005

The following clauses of the WASPA Code of Conduct were considered:

2.8. A “**competition service**” is any competition or game with prizes or entry mechanism into a draw.

2.11. An “**information provider**” is any person on whose behalf a wireless application service provider may provide a service, and includes message originators.

2.20. A “**subscription service**” is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

3.9. Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

9. Competitions

9.1. Provision of information

9.1.1. Any promotional material for a competition service must clearly display the full cost to enter the competition and any cost to the user to obtain the prize.

9.1.2. Any promotional material for a competition service must include details of how the competition operates.

9.1.3. Interactive competition services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.

9.1.4. Promotional material must clearly state any information which is likely to affect a decision to participate, including:

- (a) the closing date;
- (b) any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;
- (c) an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;
- (d) any significant age, geographic or other eligibility restrictions;
- (e) any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item.

11. Subscription services

11.1. Manner of subscription

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.

11.1.3. Where feasible, 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 to do so.

11.1.7. Once a customer has subscribed to subscription service, a notification message must be sent to the customer containing the following information:

- (a) The cost of the subscription service and the frequency of the charges;
- (b) Clear and concise instructions for unsubscribing from the service;
- (c) The member's contact information.

11.2. Customer support

11.2.1. Assistance, such as 'help' information, for subscription services must be easily available to customers, and must not be limited to a medium that the customer is unlikely to have access to.

11.3. Termination of a service

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

11.3.2. All subscription services must have an unsubscribe facility available at no more than one rand.

11.3.3. Where feasible, customers should be able to unsubscribe from any subscription service using no more than two words, one of which must be 'STOP'.

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

13.3.7. The adjudicator must carefully review:

- (a) the complaint;
- (b) any response the member has made to the complaint;
- (c) the WASPA Code of Conduct;
- (d) any other material relevant to the complaint, as supplied by WASPA.

13.3.8. On the basis of the evidence presented, the adjudicator will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits.

13.3.9. If the adjudicator determines that there has been a breach of the Code, then the adjudicator must determine appropriate sanctions.

13.3.10. In determining any appropriate sanctions, the adjudicator must take into consideration:

- (a) any previous successful complaints made against the member;
- (b) any previous successful complaints of a similar nature.

SP response

The Secretariat received several responses from the SP in its own regard as well as from the IP.

These responses are set out comprehensively (with minor editing) below:

Complaint Number	IP Response	SP Response
#0002	<p>We refer to the above mentioned formal complaint made by Gavin Penkin of Exact Mobile on September 1, 2005.</p> <p>We do not believe that the complaint is reasonable or valid for the following reasons:</p> <ul style="list-style-type: none"> • The magazine, although dated September 2, 2005 was distributed on August 29, 2005, which was prior to September 1, 2005, the effective date of the new code. • The advertisement in People magazine, clearly states the price and the frequency, i.e. R5 per weekly message and sms the red keyword to receive a weekly ringtone, thereby clearly stating that the request to purchase is a subscription request and not a one off sale. We understand that this may not be identical to the requirements as set forth by the code and therefore, we have already rectified this going forward. • We only received the Advisory updated Section 11 of the code on August 22, 2005. We made every effort to enforce the code with immediate effect, even though the notice period was extremely short. However, there were advertisements that had already been submitted to the magazines for print and thus may not have been 100% compliant with the new code. This People Magazine is an example of one of them. It is not possible at all to expect or even request that a magazine reprints an issue. • Gavin Penkin, the CEO of Exact Mobile, we believe, regularly initiates frivolous complaints and legal action against his competitors presumably in an endeavor to stifle competition. We believe that again he is doing so in regards to this complaint. <p>We do not believe an organization such as WASPA should or would allow itself to be used as an instrument of such an unfair business practice.</p> <p>We understand that the code of conduct is</p>	<p>1) We agree with the client (Gozomo) response.</p> <p>2) We have received the WASPA advisory on Subscription Services on the 8th of August 2005. After review, this information was forwarded to our customers on the 22nd of August, which they immediately implemented. This however was too late for the issue of People Magazine already in print, and therefore they missed the deadline.</p> <p>3) The customers always adhere to good practice, and you will note that the ad Gavin Penkin is complaining about, very clearly indicates to subscribers that the service being requested, is a subscription service. This is indicated on the top of the page, above each content category, below the price, below content types as well as in the terms and conditions section. Although this does not comply fully with the WASPA interpretation of the CODE due to (2) above, the intent to adhere to the guidelines is indicated. The Client has also always committed to support the WASPA practices, although they are not currently allowed</p>

	<p>designed to protect the consumer and we are very serious about adhering to the code.</p> <ul style="list-style-type: none"> To the best of our knowledge, we have taken all necessary steps to ensure that every single advertisement that is submitted to print going forward will be compliant with the new code. Please see attached example. <p>We pride ourselves in our exceptional systems, content and have a management team with commitment and integrity. We are extremely grateful for the work WASPA is doing to protect our customer. We are aware of the code and have studied it in great detail and we have made and will continue to make every attempt to abide by the code in future.</p> <p>Since inception, we have not received a single complaint from WASPA or Vodacom for our subscription services. We employ a very responsible team that is very committed to our product and service and have shown much respect for the industry.</p> <p>We hereby confirm that, to the best of our knowledge and interpretation of the code, we are compliant with the code going forward and we believe that it is unreasonable to penalize us in any way, whatsoever, for print material that was printed prior to receipt of the new code. We have taken all necessary steps to ensure that our print advertisements are fully compliant with the code.</p>	<p>to become a member.</p> <p>4) This we believe should change in the near future. All companies providing Mobile Services should be allowed to become members, even though they use an Aggregator like Integrat. This will allow for the information to be communicated to them, directly and in time, and to not be dependant on the Aggregator to communicate the information to them. As an aggregator, and a member of WASPA we don't want to bombard our customers with all communications from WASPA. Much of it is irrelevant.</p> <p>5) Gozomo's new Ad to be published has been changed to adhere to the WASPA interpretation of the CODE. Please see the attached document.</p>
<p>#0011</p>	<p>Response to Section 11.1.2:</p> <p>Please refer to our response dated September 5, 2005, which was forwarded to you by Norman Parkin of Integrat Pty Ltd.</p> <p>In addition, we believe, that Gavin Penkin should know that deadlines for YOU magazine are well in excess of 3 weeks and therefore, we believe that he is once again attempting to utilize WASPA as an instrument to make frivolous complaints against us as an attempt to stifle competition.</p> <p>Response to Section 9:</p> <p>We dispute the complaint made by Gavin Penkin. Please visit www.gozomo.co.za/info -</p>	<p>No response.</p>

	<p>you will notice that the terms and conditions are clearly laid out and extremely legible. At the time of the writing, Gavin Penkin's attempts to access the website may have failed for numerous reasons beyond our control.</p> <p>We trust that you will over rule this frivolous complaint.</p> <p>We had previously submitted our updated advert to the Secretariat, who responded with suggested changes. As to the seriousness of our commitment to the WASPA Code and the adherence to this code, we have taken all these suggestions and made the appropriate changes as per the suggestions.</p> <p>Please see our latest advert attached, which we submit for your review.</p>	
#0026	<p>This is an official response to the complaint that was forwarded by WASPA to Integrat (Pty) Ltd on 22 September 2005 for an advertisement that was placed in People Magazine's 23 September issue by Gozomo.</p> <p>Although this complaint is targeted at Integrat this response is sent with the Integrat response by Gozomo. Please note that all the information in this document have been formulated by Gozomo who placed the Advertisement that has been complained against. We believe WASPA would regard Gozomo as an "Information Provider". As will appear Gozomo has a material interest in the consideration of this complaint and any potential sanction imposed by the adjudicator.</p> <p>Background Gozomo and Integrat – the WASPA member concerned in this complaint have a commercial relationship in terms of which Integrat acts as an Aggregator for Gozomo and delivers Content for Gozomo. This content is obtained and licensed in the main by Gozomo and the advertising and promotion of the mobile content services "offered" by Gozomo are handled by Gozomo. In effect and summary, you could say that the service is provided by Gozomo and delivered through Integrat's aggregation services.</p> <p>In this instance the advertisement featured in the complaint was designed and placed by Gozomo. Gozomo is one of the largest</p>	<p>We have received the ruling on this same issue on the 23rd of October 2005, WRT the complaint Number 001 lodged against Peach Mobile. We have been working with our customers to ensure the problem is rectified. Our customer has taken the following actions:</p> <ol style="list-style-type: none"> 1) Disabled all their websites until compliant 2) Appointed a champion on the team to ensure compliance 3) Will send all advertising to Integrat to review, and make recommendations (Pease see sample of the ad attached) 4) Ensure that a double opt in will be used for all current bundled services, requiring the user to reply with a "Yes" to continue, after the terms were explained. If the user replies with "No", only a single item will be

	<p>information service providers in the country (certainly if measured by visible advertising presence). It should be stressed that there is no cross-shareholding or other interrelationship between Gozomo and Integrat and the two are not affiliated companies. While Integrat is a member of WASPA, Gozomo is not and in fact has been advised that it is not able to become a member due to the fact that it does not have a direct connection with a Network Operator.</p> <p>Gozomo has a major concern that WASPA seems to have created “by implication” a requirement that WASPA member aggregators, assume responsibility for policing advertisements placed by Information Provider which often are as in this instance, independent companies. This current position will shortly be complicated by the anticipated approval and coming into effect of the draft Advertising guidelines.</p> <p>Membership and relationship with WASPA At the outset it should be stated that Gozomo support WASPA and the principles behind WASPA and recognise the need for industry self-regulation. The concerns and objections stated in this response should be seen not as a challenge to WASPA but in the context that they are made – as constructive identification of problem areas within the regulation of a growing and changing industry – and specifically the potential of well intentioned procedures to be used as a tool to gain competitive advantage. We do not believe that it is in the interests of WASPA to allow itself to be used in this fashion.</p> <p>As confirmation of its approach to WASPA, Gozomo would like to become a member of WASPA and to assist in the development and promotion of the industry. Gozomo is involved in content provision over mobile networks in South Africa, Australia and the United States. In our view the provisions of the constitution of WASPA as it stands permit a company like Gozomo to become a member of WASPA. Accordingly we question the restrictive interpretation that seems to have been applied in interpreting the membership criteria. We would certainly trust that WASPA will not be used in order to maintain some form of “first mover” advantage in the regulation or control of the industry. Certainly we do not understand</p>	<p>delivered. This will then form part of the advertisement and will be seen as a extension of such an advertisement.</p> <p>Integrat is still awaiting final feedback from WASPA WRT item 4 above, if acceptable.</p> <p>Further more Integrat has sent out the following email to all its WASPS:</p> <p>*****</p> <p>Dear Business Partner</p> <p>Due to the WASPA code as well as the code provided by the mobile networks, Integrat must review all advertisements before they are published, whether it is SMS, Print, TV, or Radio, until such time that you are allowed to join WASPA.</p> <p>Integrat will review the advertisements to attempt to ensure compliance with the WASPA and Mobile Networks Codes. Integrat will only recommend changes to be made, but the onus will still be on you to ensure compliance. Any fines, or rulings by WASPA will be carried over directly to you.</p> <p>Any Business Partner placing advertising without it being reviewed and approved by Integrat, could result in immediate termination of your service(s). Email all advertising to be reviewed to</p>
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	<p>why the industry would not welcome the involvement and direct participation of the larger "Information Providers" and will be addressing this issue with WASPA directly.</p> <p>Jurisdiction At the outset we should raise a concern over the ability of a WASPA adjudicator to make a finding applicable to an advertisement placed by a company which is not a WASPA member.</p> <p>It is to be presumed that the WASPA secretariat believe that section 3.9.1. of the code of conduct gives the secretariat jurisdiction over the complaint however this is not mentioned or dealt with in the complaint. We mention this because section 3.9.1 is the only section of the Code dealing with the relationship between WASPA members and Information providers. The relevant section reads as follows:</p> <p>3.9.1 Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.</p> <p>3.9.2. The member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.</p> <p>You will note that in no section of the Code does it state that a member of WASPA is liable in any other way for any actions of an information provider or that advertisements placed by an information provider can be imputed to an aggregator. In this regard a recent adjudication that fined a WASPA member (albeit suspended) for an advertisement placed by an unrelated company is to be questioned strongly.</p> <p>Identity of Complainant It should be noted that the Complainant in this case is a major stakeholder in one of Gozomo's largest competitors. [To date all of the complaints lodged against Gozomo have been placed by the same complainant.] We regard this as a clear instance of anti-competitive behaviour and a misuse of the complaints procedure of WASPA. In expansion of this</p>	<p>ad@integrat.co.za. We will ensure a 24 Hr review time.</p> <p>All business partners providing Content services and Bulk Services who have not yet signed the attached document (Terms and conditions) and sent it back by 1 October 05, services shall also be suspended until such time a signed copy was received. This document was set to you on Fri 02/09/2005 17:13.</p> <p>Customers that has (sic) joined after 1 September 2005, do not need to sign the updated Terms and Conditions. *****</p> <p>As an Aggregator, we have to manage many companies connected to us. We are trying our utmost best to ensure that the companies are compliant, and ensure that the advertising material is reviewed. We would however need to have a meeting with the WASPA adjudicator, to ensure our own interpretation of the code is correct.</p> <p>We hereby request an urgent meeting between WASPA and Integrat to review some of the sample advertising as to ensure we understand the requirements, in order to ensure compliance.</p> <p>A meeting for the same purpose was requested</p>
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	<p>point we note that Gozomo was one of the first in the market to build a large base of subscription based consumers for premium content on MT billing. The Complainant has made it clear in the industry that his company lost market share due to his inability to offer subscription services until recently and has attempted to limit and restrict Gozomo's operations where possible.</p> <p>It should be stressed that the complainant is making a technical complaint regarding the breach of a code that his company was involved in drafting and adopting (two of Exact Mobile's representative sit on the sub-committee for the code of conduct) and in regard to which the "Information provider" was not consulted. This code purports to bind one of the complainant's major competitors and the consequence of a finding of a breach of the code could compel Integrat to suspend or terminate the service of Gozomo, thus gaining the complainant a direct competitive advantage. As may appear merely from the face of it this runs contrary to the principle of free and fair competition and natural justice enshrined within our legal system. We are quite prepared to raise our concerns relating to the legal implications of the complainants anti-competitive behaviour in the appropriate forum. We do however believe that WASPA should urgently attend to this issue as legal issues relating to stifling of competition are certainly raised by such behaviour and could have broader implications for WASPA.</p> <p>Timing of Complaint and Behaviour of Gozomo</p> <p>The Code of Conduct was approved as recently as 30 June 2005. Once again it should be stressed that Gozomo, unlike the complainant's company, was not involved or consulted in the formulation of the Code – (still less the Advisory on Subscription services) despite Gozomo being a large subscription service provider in South Africa at the time of adoption of the code. The submission date of the copy for the advertisement was on or about 9 September 2005. It follows therefore that this was less than 6 weeks after the coming into power of the code. Outside of the WASPA complaint procedure at no time - either prior to / or subsequent to this date did any of the secretariat or any other WASPA members</p>	<p>more than 2 weeks ago. Integat has not yet received an invite there to, although this request was sent to the WASPA Management Committee on Thu 08/09/2005 11:12, by the Secretariat.</p> <p>The SP then provided a further submission which it indicated was applicable to complaints #0026, #0037 and #0058. This submission provided:</p> <ol style="list-style-type: none"> 1. The Information Provider has effected significant changes to their advertising and has indicated their willingness to attempt to understand the WASPA code and adhere to the reasonable requirements within the code, even though they are not allowed to become WASAP members themselves. There is confusion as whether the process of double opt in will be viewed as a good enough provider to notify users of the fact that a service requested is a subscription service, and no clarity WRT this was received to date. 2. The Information Provider is a company in it's own right and although it is bound by an agreement with the Respondent it still has a free hand in it's advertisements. 3. The Respondent acted as the Service Provider, and did not advertise the material and information
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	<p>contact Gozomo or Integrat in order to express concerns relating to the manner in which subscription services were being promoted. On the contrary - in order to gain clarity over the interpretation of the code – Gozomo attempted to obtain WASPA’s approval of its advertisements in advance – but was informed that this was not a responsibility assumed by WASPA.</p> <p>We should stress that Gozomo can demonstrate ongoing good faith attempts by it to comply with what it perceives as WASPA’s requirements as they are developed and refined. [In fact this specific advertisement was submitted prior to publication to the WASPA secretariat in an attempt to gain formal approval for it.]</p> <p>Validity of the Complaint Notwithstanding the other reservations expressed elsewhere in this response – Gozomo regard the basis of the complaint to be without foundation and spurious.</p> <p>Turning to the specific content of the complaint:- Mr Penkins (sic) states that “this company continues to place ads which are in direct contravention of the code of conduct.” Firstly as stated above the adverts were not placed by Integrat at all but by Gozomo an entirely separate company. Then the use of the word “continues” attempts to make some sort of emotive link to other previous unnamed actions – despite the code making it clear in section 13.3.8 that each and every complaint will be treated on its own merits. In addition to the date of the complaint no finding of any breach of the code had been made against either Integrat or Gozomo.</p> <p>As will follow from an analysis of the actual allegation the complaint very much depends on an interpretation of how the advertisement is graphically presented with text descriptions, pictures and codes although the complainant continues with his emotive language saying “the code is very clear and very specific and no interpretation is necessary.”</p> <p>Mr Penkins continues on to allege that the alleged breach was of provision 11.1.2 of the code. As may be seen from the code – this provision reads as follows: -</p>	<p>provided, nor did we initiate the transaction, select the addressee, or modify the data, and the process is completely automatic, without selection of the data. According to the ECT Act the Service Provider can not be held liable for the data provided. The WASPA code is thus in contradiction with the ECT Act.</p> <p>Chapter 11, sections (1) a-d and section (2) a-c of the ECT Act "73. (1) A service provider is not liable for providing access to or for operating facilities for information systems or transmitting, routing or storage of data messages via an information system under its control, as long as the service provider-</p> <ul style="list-style-type: none"> (a) does not initiate the transmission; (b) does not select the addressee; (c) performs the functions in an automatic, technical manner without selection of the data; and (d) does not modify the data contained in the transmission. <p>(2) The acts of transmission, routing and of provision of access referred to in subsection (1) include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place-</p> <ul style="list-style-type: none"> (a) for the sole purpose of carrying out the transmission in the information system; (b) in a manner that makes it ordinarily inaccessible to anyone other than anticipated recipients; and (c) for a period no longer than is reasonably necessary for the transmission. <p>(3) Notwithstanding this section, a competent court may order a service provider to terminate or prevent unlawful activity in terms of any other law."</p>
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	<p>“Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.”</p> <p>This is somewhat different from Mr Penkin’s somewhat inaccurate précis that the provision provides that “to join a subscription service must not be bundled with a request for specific content.”</p> <p>In fact Mr Penkins is quoting from the advisory on subscription services and not from the code at all. It is not clear from the Constitution, the Code of Conduct or any other source what form of binding authority an “advisory” has. In the preamble to this document it is expressed to be a “guide” to interpreting the code. We are interested to find out who was responsible for drawing up and issuing the Advisory and also what form of authority WASPA believes the advisory has.</p> <p>Apart from his broad assertion that “This ad advertises content and by purchasing the content, you are subscribed to the service”, Mr Penkins does not give further information regarding how he alleges this ad breaches provision 11.1.2 and so it is difficult to respond precisely to this complaint at all. Once again this is concerning in the light of the broad powers of sanction given to an adjudicator in the event that a breach of the code were to be established</p> <p>It is however our view that the advertisement clearly provides in respect of each category of content that a subscription service is being offered. As may appear from the ad in no instance is any specific keyword linked to only one specific item of content although examples of applicable content are provided.</p> <p>Summary In summary we have serious concerns relating to many aspects of this complaint and the procedures followed including – the nature of the complaint, the identity of the complainant (and his pattern of behaviour in this regard), and the jurisdiction of the Adjudicator in such a case. We trust that these will gain the serious attention of WASPA and look forward to further discussion of these issues. Thank you for the opportunity to respond.</p>	<p>4. The distinction between Information Providers who are connected directly to the Networks and Information Providers who do not connect directly to the Networks result in unfair and unequal treatment and constitutes an unfair business practice as the first mentioned are allowed to become WASPA members and has the benefit of the WASPA process, whereas the second mentioned are not allowed to become WASPA members, and according to the WASPA Code the aggregator connecting them must terminate services to any Information Provider that provides a service in contravention of the WASPA code.</p> <p>WASPA Code Section 3.9.2: The member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.</p> <p>5. Responses from our Customers (The Information Providers) for the above complaints will be forwarded to WASPA. The statements or opinions of Our Customers (The Information Provides) sent to WASPA directly or indirectly, do not necessarily reflect our views.</p>
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#0037	No response received	
#0058	<p>We refer to the complaint number #58 referring the Gozomo ad placed in People Magazine dated 28 October 2005 and respond as follows on behalf of Gozomo:</p> <p>We have as yet not had any response to our comments in relation to Complaint Number 26 lodged against Integrat by Exactmobile in reference to another advertisement placed by our company. In our response to that complaint we raised serious concerns relating to general issues including the jurisdiction of WASPA over advertisements placed by Information Providers and potential anti-competitive practises. These issues remain pertinent to the current complaint and we ask that they be taken into account once more.</p> <p>We are somewhat hampered dealing with these issues by our failure to receive any response from WASPA in regard to the concerns that we raised.</p> <p>We turn now to the Complaint under discussion. We do not believe that our advertisement constitutes a breach of the Code of Conduct and the consumers (end-users) are fully informed of the nature of the subscription service or bundled offering being advertised and as such would have the specific intention of subscribing to the relevant service.</p> <p>In examining the details of the Complaint it appears that it is alleged that there has been a breach of Section 1.1.2 (sic.) We presume that the Complainant is referring to Section 11.1.2.</p> <p>The relevant section of the Code reads as follows ""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."</p> <p>The Complainant proceeds to add that "It [Section 11.1.2] further states that to join a subscription service may not be bundled with a request for specific content.</p> <p>Section 11.1.2 has no such addition or prescription. The Complainant is presumably referring to the Advisory on Subscription Services. This Advisory is dated 8 August 2005 and is said in its introduction to "provide a</p>	As above

	<p>step-by-step explanation of section 11 of the WASPA Code of Conduct. The intention of the advisory is to provide a guide for WASPs who wish to offer subscription services in a manner that is consistent with the requirements of the Code of Conduct."</p> <p>Be that as it may nothing in the Constitution of WASPA or the Code itself gives any binding authority to such an Advisory and as such we believe it to be of illustrative force and effect only. Certainly nothing in WASPA's Code of Conduct provides for any sanction for a breach of an "advisory."</p> <p>Insofar as the Advisory does deal with Section 11.1.2 of the Code it states the following "A request from a subscriber to join a subscription service may not be bundled with a request for specific content. It must be an independent transaction. For example, "This picture is an example funny picture. To subscribe to the daily funny picture, SMS FUNPICS to 12345," does not bundle any particular content with a subscription service. However, "To get this picture, SMS FUNPICS to 12345. You will also be subscribed to the daily funny picture," is an offer bundling a subscription service with a specific item of content (the picture in the advert), and is thus not allowed.</p> <p>We categorically reject this expansion of the Code of Conduct in what purports to be a "guide" to the Code of Conduct and which has not been approved by WASPA members in the same manner as the Code of Conduct. The proposed interpretation is unprecedented in our experience and unnecessarily restrictive on our business practice and commercial offering.</p> <p>Our problem with the advisory arises not from the example given above but from the general "new requirement" that a request to join a subscription service may not be bundled with a request for specific content.</p> <p>Rather than serve as a protection to the end user this provision would actually prevent us offering the consumer a choice of content to start the subscription cycle. By way of analogy this is like asking a publisher not to sell a years subscription to a monthly magazine "starting with this month's edition."</p> <p>As one of the leading providers of subscription</p>	
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services we were not consulted with regard to either the code or the so-called advisory. We have not come across any similar regulation in any of our international Operations. We do not believe that our response to this Complaint is the proper forum to address fully these deficiencies in the Advisory nor does the simple nature of the Complaints procedure adequately provide for a full airing of views when an interpretive issue of the Code is in question.

We have once more in addition been hampered in our efforts to adequately respond to the Complaint by the Complainants lack of detail in the Complaint. In the circumstances we can only state generally that we believe that our advertisement provides full and adequate information which will enable the end user to ascertain the nature of the service being offered.

Due to our rejection of the general prohibition against "bundling" we believe that the only real question which arises from Section 11.1.2 of the Code in relation to our advertisement is "Is there an independent transaction in order to subscribe?" The answer to this question is clear and unequivocal - there is only one transaction that a subscription customer can order through our advertisement, and that is a subscription service. There are no non-subscription services offered to subscription network customers and as such no other transactions are possible.

Even were the example of the advisory quoted above to be followed one will notice an important distinction in our advertising. Using the language of the advisory by way of analogy instead of saying "To get this picture, SMS FUNPICS to 12345. You will also be subscribed to the daily funny picture" our advertising in effect says Subscribe to FUNPICS - to start your subscription with pic1 SMS X to 12345, to start with pic2 sms y to 12345 etc.

Finally and perhaps most importantly the Complainant relies for its complaint upon the print advertisement alone which does not provide a full picture of the transaction between us and the end user. In each and every case where an end user is able to request a specific

	<p><i>item of content as the commencement of the subscription a double opt in procedure is used to give end users further opportunity to confirm the nature of the transaction. In other words end users are required to send a further confirmation sms after the initiation sms to confirm their order before they are charged at any premium rate for the service. We believe that our adoption of this method (in many cases where it is not prescribed to us by the networks) shows our commitment to providing the end user with a fully informed choice regarding the ordering of our service.*</i></p> <p><small>*This italicised paragraph was included in the IP's response forwarded by Philip Smuts, a director of the SP on 7 November 2005 but not in the IP response forwarded by Norman Parkin, another director of the SP, on 8 November 2005</small></p> <p>We trust that our concerns and submissions noted above will be given the necessary consideration and that no further action will be required in respect of this complaint.</p>	
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Investigation

The Secretariat investigated the various complaints.

In respect of the complaint concerning the competition service previously provided by the IP through the SP (forming part of complaint #0011). The secretariat unsuccessfully attempted to access the relevant URL <www.gozomo.co.za/info> at 15:05 on 7 September 2005, shortly after the complaint was submitted. The Internet web site was inaccessible at the time the complaint was submitted.

The secretariat reviewed the advertisements submitted by the complainant as well as the IP's Internet web site (which no longer contains reference to the competition rules – possibly as the competition service does not appear to be offered any longer and certainly does not appear in any of the IP's more recent print advertising) and more recent print advertising (tvplus magazine 28 December 2005, people magazine 25 November 2005, people magazine 6 January 2006).

In addition, the secretariat accessed the IP's services on both the Vodacom and MTN networks in order to test the service. At the outset it must be noted that only the service available over the Vodacom network falls within the definition of a "subscription service" contained in the WASPA Code of Conduct, namely "any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction." As Vodacom is currently the only network with event based billing allowing for repeated regular billing as stipulated in such definition, only the service accessed over the Vodacom network can be considered a subscription service.

As all the print advertisements forming the subject of the various complaints offer services to users of all three mobile cellular networks, only the component of the advertisements that relate to customers of Vodacom can be subject to the various complaints (excluding the competition service related complaint).

In respect of the print advertisements submitted and forming the basis of complaints, as well as those considered, the advertisement contains numerous content items organised by category, such as “games”, “wallpapers” and “ring tones” with various sub-divisions within such categories. Wall papers, info services and animations have a single code per sub-category (such as “animals45 to receive a weekly animal wallpaper”) with two or three example pictures of the type of content to be received or a brief description in the case of info services. Games and ring tones (polyphonic, true sounds and true sounds) are itemised by content item (for example garfield45 relates to the Garfield candles game or row45 relates to the 5 laughs in a row true sound). While the content of the advertisements has changed over time and various inconsistent and confusing elements have been eliminated, the basics structure of the advertisement remains the same.

On subscribing to the IP’s service using a Vodacom account, the Secretariat received a SMS message response indicating:

“Hello and welcome. U nearly there. Simply reply YES to this sms and we will send you your [content type] right away. The cost is only R[content type cost]/week. Have fun!”

Thereafter a further message was received indicating:

“Welcome to Gozomo’s subscription service. U will get 1 [content type]/week. To unsubscribe sms [code used for subscription] STOP to 31996. Cost R[content cost]/msg rec. Cust Supp. 082 903 4994”

A WAP link was provided for successful content download and an unsubscribe request generated the following response:

“You have been successfully unsubscribed. We hope you had fun. 2 receive a Weekly Wallpaper sms FUNNYS65 to 31996. Cost R3/msg rec.”

Decision

Competition service:

A relatively simple issue is the complaint regarding the competition service offered by the IP through the SP. At the outset it is noted that the cost of entry (9.1.1 of the WASPA Code of Conduct) and the closing date (9.1.4(a) of the WASPA Code of Conduct) are included in the advertisement. From the statement of the complainant and the investigation of the Secretariat, it is clear that at the time access to the IP’s Internet web site to view the remaining terms and conditions relevant to the competition was generally not available. The IP’s suggestion that this access problem was the issue of the complainant alone is not correct, as the Secretariat experienced the same problem when attempting to access the relevant URL and as such the IP’s submission is rejected.

The WASPA Code of Conduct does not provide for “hyper linking” or otherwise referring to information contained elsewhere (as has been done by the IP in placing an Internet web site URL in its print advertisement), so the only authority allowing for such a situation would be national law. The only national law allowing such a

practice is the Electronic Communications and Transactions Act, 25 of 2002 (the “ECT Act”) Section 11(3) of which provides:

“Information incorporated into an agreement and that is not in the public domain is regarded as having been incorporated into a data message if such information is –

- (a) referred to in a way in which a reasonable person would have noticed the reference thereto and incorporation thereof; and
- (b) accessible in a form in which it may be read, stored and retrieved by the other party, whether electronically or as a computer printout as long as such information is reasonably capable of being reduced to electronic form by the party incorporating it.”

However, the print advertisement is not a “data message” as defined in the ECT Act (being “data generated, sent, received or stored by electronic means”) and as such Section 11(3) of the ECT Act would not apply. As Clause 9.1 of the WASPA Code of Conduct requires information to be provided in the “promotional material”, the IP has not complied with clause 9.1 of the WASPA Code of Conduct, save in respect of Clauses 9.1.1 and 9.1.4(a) thereof as noted above. The Adjudicator recognises that with the convergence of technologies and the premium payable in respect of advertising space, ancillary information, such as that set out in Clause 9.1.5 of the WASPA Code of Conduct, could be referenced by way of a referral to another easily accessible source, such as an Internet web site.

Even if the Adjudicator is not correct in finding that the provision of the URL of an Internet web site does not meet the requirements of Clause 9.1 of the WASPA Code of Conduct (which is not conceded), such Internet web site must be accessible in order to meet the test of accessibility stipulated in Section 11(3) of the ECT Act. The Adjudicator recognises that access to Internet based resources, such as the IP’s Internet web site (or a portion thereof), is subject to a multitude of factors and that the ECT Act does not specify what standard is to be used in determining accessibility and as such it is the view of the Adjudicator that a test of reasonableness must be applied. It is the view of the Adjudicator that where two independent persons, on two independent networks and on at least two separate occasions have attempted to access the IP’s Internet web site (or the relevant portion thereof) and such attempts failed, such Internet web site cannot be said to be “accessible”.

Save in respect of Clauses 9.1.1 and 9.1.4(a) of the WASPA Code of Conduct, the complaint in respect of the balance of Clause 9.1 of the WASPA Code of Conduct is upheld.

Independent Transaction:

The Adjudicator has previously held that placing examples of content items in an advertisement for a subscription service does not contravene the WASPA Code of Conduct, if these are clearly examples of the type of content that can be received and not an advertisement for the specific content item itself. The use of a generic key word is one factor to be considered in this regard. As such, the Adjudicator held that there was no contravention of Clause 11.1.2 or 11.1.4 of the WASPA Code of Conduct in respect of the wall papers, animations and info services contained in the print advertisements. As such the decision is restricted to the games and ring tone downloads advertised in the print advertisements.

The Adjudicator noted that the IP's Internet web site does not refer to specific content items, even with regard to ring tone and game downloads. Instead it refers to various examples of music types and then refers the prospective consumer to a generic key word relating to the music genre and not the specific content item. This seems to indicate that the IP has implemented the Advisory in regard to its Internet web site but not its print advertising.

The Adjudicator noted further that the IP has elected to advertise subscription services (available only to Vodacom customers) and content items (MTN and Cell C customers, albeit content where the exact content item is only known only in the case of games and ring tones and even then, only the first of a series of items is known) in a single advertisement. The WASPA Code of Conduct does not in any way restrict such combined advertising, however a combination of advertising for content items and subscriptions services has an increased possibility of confusion and perceived or real contravention of Clauses 11.1.2 and 11.1.4 of the WASPA Code of Conduct. This is a voluntary assumption of risk by the IP and accordingly the SP.

In three of the five complaints, the complainant refers to "bundling" of content and a subscription service. The term bundling is not referred to in the WASPA Code of Conduct and seems to derive from the WASPA Advisory on Subscription Services (dated 8 August 2005) (hereinafter referred to as the "Advisory"). At the outset the Adjudicator held that the Advisory does not have the status of the WASPA Code of Conduct and is an attempt to explain and interpret the Code of Conduct. As such, it has a guidance role and the Adjudicator considered same, however is not bound to follow the interpretation of the Code of Conduct contained therein. More particularly, no finding can be made of a contravention of the Advisory and certainly no sanction can be imposed for a failure to adhere to the Advisory. Where the Advisory has particular relevance is in considering the arguments advanced by the SP and the IP regarding its state of mind.

The complainant refers to a contravention of clause 11.1.2 of the WASPA Code of Conduct, however Clause 11.1.4 of the Code of Conduct is also applicable. The Adjudicator had regard to the decision of the Appeal Panel in respect of Complaint #0001 and held that Clause 11.1.4 of the WASPA Code of Conduct is clearly referenced in all of the complaints (specifically in complaints #0002, #0011, #0026 and #0037 and by implication in complaint #0058).

Having regard to the interpretation of Clause 11.1.2 of the WASPA Code of Conduct, the key issue is the definition of the term "independent transaction". As this term is not defined in the WASPA Code of Conduct, regard must be had to the common usage of such term. The word "independent" is defined, inter alia, as:

- not dependent on or conditioned by or relative to anything else; not contingent [WordNet 2.1 <<http://wordnet.princeton.edu/>>];
- 1 free from outside control or influence. 2 (of a country) self governing. 3 not depending on another for livelihood or subsistence. 4 not connected with another; separate [Oxford English Dictionary].

The word "transaction" is defined, inter alia, as:

- the act of transacting within or between groups [WordNet 2.1 <<http://wordnet.princeton.edu/>>];

- 1 an instance of buying or selling. 2 the action of conducting business. 3 an exchange or interaction between people [Oxford English Dictionary].

This indicates that one transaction is completely unrelated to another transaction and not dependent on a previous or subsequent transaction. Having regard to a potential consumer's request to be subscribed to a game or ring tone subscription service from the IP's print advertisement, the consumer must select a specific content item and use the content specific key word to initiate the subscription service. While information is clearly provided indicating that this is a subscription service, confusion is created and by the combination of subscription services and content items in the same advertisement as well as the use of content specific key words to initiate the subscription service.

As such, the Adjudicator is of the view that a Vodacom customer joining a game or ring tone download subscription service advertised by the IP in its print advertisements, enters a single transaction for the specific content and is then subscribed. This is a contravention of Clause 11.1.2, alternatively Clause 11.1.4, further alternatively both Clauses 11.1.2 and 11.1.4 of the WASPA Code of Conduct.

With regard to various of the submissions of the SP:

- the failure of the SP to timeously notify the IP of its obligations in terms of the WASPA Code of Conduct, does not excuse non-compliance and the Adjudicator is of the view that sufficient time was given to the SP to ensure its information providers became compliant with the WASPA Code of Conduct;
- the identity of the complainant is of little relevance in complaints generally and the fact that the complainant is a competitor of the SP, alternatively the IP, further alternatively both the SP and the IP is not relevant in the instant complaints;
- information providers are now entitled to become associate members of WASPA and the fact that they were not so entitled at the time that the WASPA Code of Conduct was passed or the advertisements published and the complaints submitted is of no relevance. The Adjudicator is bound to uphold the WASPA Code of Conduct and will do so, unless this contravenes the national law and particularly the Constitution of the Republic of South Africa. No such contravention has been argued or proven;
- the changes to the IP's advertising were not sufficient to show compliance with clauses 11.1.2 and 11.1.4 of the WASPA Code of Conduct;
- no "double opt-in" system is used, as submitted by the SP. The initial SMS message transmitted by the SP on behalf of the IP is extremely vague and does not create an independent transaction, but is rather a conflated part of the initial transaction. The IP is applauded for providing further information to a consumer, in an attempt to avoid confusion, however the introduction of an additional step in the transaction process does not transform the initial transaction into a separate independent transaction;
- While the independence of the IP from the SP is noted, that the SP has taken Section 73 of the Electronic Communications and Transactions Act 25

of 2003 (the "ECT Act") out of context. The preceding sections of Chapter XI of the ECT Act (of which Section 73 is the third section) provide:

CHAPTER XI

LIMITATION OF LIABILITY OF SERVICE PROVIDERS

Definition

70. In this Chapter, "service provider" means any person providing information system services.

Recognition of representative body

71. (1) The Minister may, on application by an industry representative body for service providers by notice in the *Gazette*, recognise such body for purposes of section 72.
- (2) The Minister may only recognise a representative body referred to in subsection (1) if the Minister is satisfied that—
- (a) its members are subject to a code of conduct;
 - (b) membership is subject to adequate criteria;
 - (c) the code of conduct requires continued adherence to adequate standards of conduct; and
 - (d) the representative body is capable of monitoring and enforcing its code of conduct adequately.

Conditions for eligibility

72. The limitations on liability established by this Chapter apply to a service provider only if—
- (a) the service provider is a member of the representative body referred to in section 71; and
 - (b) the service provider has adopted and implemented the official code of conduct of that representative body.

In this regard it should be noted that the Minister of Communications has not recognised ANY industry representative bodies as required in Section 71. As such the WASPA is not yet an industry representative body as contemplated in Section 71. Accordingly, the SP cannot be "a member of the representative body referred to in section 71" as is required by Section 72(a), as no bodies have been recognised in terms of Section 71.

In addition, it must be questioned if the SP has "implemented the official code of conduct of that representative body" as contemplated in Section 72(b) if there is a breach of the code by the SP or an IP for whom the SP is vicariously liable?

It should further be noted that the conditions stipulated in Sections 72(a) and (b) must both exist for the SP to enjoy the limitation of liability contemplated in Section 73 and the balance of Chapter XI of the ECT Act.

Even when these conditions are met, the limitation of liability is restricted to those circumstances contemplated in Sections 73 to 76 of the ECT Act. In this regard the SP is unlikely to qualify as a “mere conduit” owing to the fact that it shares transactional revenue with the IP.

This view is based on the finding of the Appeal Panel in respect of Complaint #0001.

- The vicarious liability of the SP for the actions of the IP has been upheld by the Appeals Panel in respect of Complaint #0001, based on the SP having voluntarily and contractually assumed liability of risk for the actions of the IP. The SP’s submissions regarding unequal treatment and unfair business practice were likewise rejected by the Appeals Panel in respect of Complaint #0001 and the Adjudicator has followed such ruling.

With regard to various of the submissions of the IP (which do not repeat those of the SP dealt with above):

- Issues of membership of WASPA and the adoption of the WASPA Code of Conduct are beyond the jurisdiction of the Adjudicator;
- The IP’s submission that no specific keyword is linked to only one specific item of content is correct in respect of wall papers, info services and animations, however is incorrect with respect to games and ring tones. Here the keyword relates directly to the content item concerned. This cannot objectively be regarded as merely providing an example of content, but rather relates to the provision of the content item itself;
- As indicated above, the Advisory was considered by the Adjudicator but has no binding effect. The Adjudicator is accordingly reluctant to enter the detailed debate regarding the examples given in the Advisory and the counter examples provided by the IP. The Adjudicator nevertheless has noted the attempt by the IP to equate the subscription services offered by the IP through the SP with magazine or newspaper subscriptions. It is the view of the Adjudicator that magazine or newspaper subscription are most closely related to the content transactions to MTN and Cell C customers that the IP facilitates through the SP and not the subscription service offered by it. A magazine or newspaper subscription allows a subscriber to purchase a defined type of content for a defined period of time at a fixed price, payable in advance, which is what a MTN or Cell C customer is able to obtain from the IP. What is defined as a subscription service in the WASPA Code of Conduct bears little relationship to this model as the subscription can be cancelled at any time, however persists indefinitely until so cancelled;
- The Adjudicator noted that South African conditions are different from those that apply in the other markets in which the IP operates and as such, the more onerous requirements of the WASPA are both reasonable and justified;
- The IP’s contention that a “double opt-in” is used is rejected. The process used by the IP amounts to a double confirmation of a single transaction, not an independent transaction as required by the WASPA Code of Conduct.

As such the complaints in respect of clause 11.1.2 and 11.1.4 is upheld.

Sanction

In considering the sanction to be imposed arising from the breaches of the WASPA Code of Conduct raised in the complaints under consideration:

- The Adjudicator took note of the decision of the Appeals Panel in respect of Complaint #0001;
- The Adjudicator noted that the competition service no longer appears to be offered by the IP through the SP.
- The Adjudicator considered Clause 3.9 of the WASPA Code of Conduct, which provides:

3.9. Information providers

3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct.

3.9.2. The member must suspend or terminate the services of any information provider that provides a service in contravention of this Code of Conduct.

- The Adjudicator had regard to the fact that subscription services remain an extremely contentious issue within WASPA.
- The Adjudicator noted that if sanctions are imposed in respect of the complaints under review, rather than in respect of the service provided by the IP through the SP as a whole, further complaints regarding the same service but different advertisements may be submitted. Such complaints may be entertained by the WASPA and additional sanctions could be imposed, should this be found to be necessary and appropriate in the circumstances. In contrast to this, consideration of the service as a whole and not the instant complaints, could be unfairly prejudicial to the SP (and through it the IP), as it has only been asked to respond to the complaints under consideration.

The Adjudicator accordingly imposed the following sanction:

- The SP is reprimanded for allowing the IP to breach the WASPA Code of Conduct.
- The SP is required to remedy the breach of Clauses 11.1.2 and 11.1.4 of the WASPA Code of Conduct. In order to do so, the SP is ordered to ensure that the IP separate its content advertising, where specific items of content are advertised and its advertising for subscription services, where only content examples may be given and no specific content may be advertised and no content specific keywords may be used. Where content advertising and subscription advertising appears on the same page of a publication, clear physical and logical separation of the two types of service is required. Having regard to advertising lead times for various publications, a grace period of 45 days from the date of receipt of this report is afforded to allow compliance with this sanction. Should the IP fail to comply, the SP is ordered to terminate the service of the IP forthwith on expiry of such grace period.

- The SP is ordered to pay a fine of:
 - R10 000,00 in respect of the breach of Clause 11.1.2 and 11.1.4 of the WASPA Code of Conduct in respect of each of the complaints under consideration, being a total of R50 000,00; and
 - R2 500,00 in respect of the breach of Clause 9.1 of the WASPA Code of Conduct in respect of Complaint #0011,

being a grand total of R52 500,00.

While the amount of the fine has been determined with respect to the specific complaints under consideration, such sanction shall apply in respect of all advertisements placed and transactions conducted by the IP through the SP from 1 September 2005 until the expiry of the grace period referred to above, but only in respect of alleged contraventions of Clauses 11.1.2 and/or 11.1.4 of the WASPA Code of Conduct.

Clause 13.3.13 of the WASPA Code of Conduct indicates that the SP “must, within five working days, comply with any sanction imposed, or notify the secretariat that it wishes to appeal against the decision of the adjudicator”.