



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Worldplay
Telephone Network(s)	Vodacom
Service Type	Subscription Service
Source of Complaints	Competitor
Complaint Number	#0038

Complaint

A complaint was received from a competitor of the SP concerning an advertisement for the “Babes” subscription service shown on E-TV on the weekend of 7 and 8 October 2005.

The complainant alleged the following breaches of the WASPA Code of Conduct:

- The ad is run saying SMS babes to 31109. On the last screen in fine print, you are advised that this is a subscription service (Clause 11.1.1);
- When the user requests Babe, they are automatically subscribed to the service (Clause 11.1.2); and
- The pricing is displayed within the terms and conditions on the last screen. It is not clear anywhere in the ad what the pricing is (Clause 6.2.5).

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

6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price should appear with all instances of the premium number display.

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.

Investigation

The Secretariat conducted an investigation into the service offered by the SP.

The Secretariat received a response from the SP indicating that in its opinion the complaint is “vexatious and prima facie without merit for the following reasons:

- the promotional material for this subscription service is set in bold font prominently and explicitly identifying the service as a subscription service;
- the service is an independent transaction and the subscriber must subscribe, intentionally, in order to join;
- with regards to pricing requirements, the price for subscription to the service is set in bold font, raised out of the terms and conditions thus making it clearly and easily visible to any viewer.”

Decision

The Adjudicator considered the service offered by the SP. In the opinion of the Adjudicator, the complaint in respect of Clause 11.1.2 of the WASPA Code of Conduct is without foundation as there is no specific content accessible to a consumer and only a single generic key word is used, indicating that there is only a single subscription based transaction.

Regarding the advertisement for the service, the Adjudicator found:

- the term “subscription service” is used in the advertisement. Such term appears in the terms and conditions screen at the end of the advert. The advertisement runs for approximately fifteen seconds, of which the terms and conditions screen appears for approximately four seconds. In the context of the text size used for the terms and conditions screen, the term “subscription service” appears in capital letters and bold type, making it explicit and prominent for the approximately four seconds the terms and conditions screen is shown and relative to that screen;
- the term “babe of the week” is very prominently displayed for approximately two seconds at the beginning of the advertisement;
- the voice over indicates “each week”.

The particular advertisement was flighted prior to the introduction of the WASPA Advertising Guidelines. The Advertising Guidelines set explicit and objective standards against which an advertisement can be judged and the advertisement in question would be found wanting, measured against such standards. However, without the benefit of such objective standards in place at the date when the advertisement was flighted, the Adjudicator found no contravention of Clause 11.1.1 of the WASPA Code of Conduct.

Concerning Clause 6.2.5 of the WASPA Code of Conduct, the Adjudicator was concerned over the use of the word “must” in the first sentence of such Clause while the word “should” is used in the second sentence of such Clause. On the assumption that the drafters of the WASPA Code of Conduct used the different terms “must” and “should” intentionally to convey different meanings or different nuances of meaning, the Adjudicator had to consider the difference in meaning between such terms.

The Oxford English Dictionary defines the term “should” as:

“**modal verb** (3rd sing. **should**) **1** used to indicate obligation, duty, or correctness. **2** used to indicate what is probable. **3** formal expressing the conditional mood. **4** used in a clause with ‘that’ after a main clause describing feelings. **5** used in a clause with ‘that’ expressing purpose. **6** (in the first person) expressing a polite request or acceptance. **7** (in the first person) expressing a conjecture or hope.”

The term “must” is defined as:

“**modal verb** (past **had to** or in reported speech **must**) **1** be obliged to; should. **2** expressing insistence. **3** expressing an opinion about something that is very likely.”

Having regard to Longman's Dictionary of Contemporary English, New Edition, 1991, pp 669-671, the term “should” is generally used to express desirability or probability while the term “must” is generally used to express obligation or a requirement.

The term “must” is used in indicating that it is necessary that something happens or is done, in stating formal rules and regulations, or to express strong obligation. The term “should” is generally used to state recommended or advisory procedures, a recommendation or that which is advised but not required. The term “should” does have an element of obligation, generally in the context of what is the right or correct thing to do, or the best or a good thing to do, such as the recommendations of some outside authority, to express a mild obligation or to give advice. In fact, the term “should” is regarded by some grammarians as a weak form of the term “must”.

Considering the contrast between the different modal verbs “must” and “should” and concentrating on the nuances of meaning between them, the Adjudicator was of the view that both terms indicate an obligation, however the obligatory nature of the word “must” is “stronger than that of the word “should”.

From the advertisement, it is clear that the SP did display the price information for the service, albeit for a limited duration and in a font size that is smaller than is desirable. The Adjudicator did not agree with the SP that the test of ease and clarity of visibility is purely subjective and is of the view that attempting to determine if the size and duration of such display meets the requirements of Clause 6.2.5 is a combination of objective and subjective elements. This test has been comprehensively and objectively superseded by the WASPA Advertising Guidelines, however as the advertisement in question pre-dates the introduction of the Advertising Guidelines, such exercise must be undertaken.

Clause 6.2.5 of the WASPA Code of Conduct contains three requirements:

- 1 The price for a premium rated service must be easily visible;
- 2 The price for a premium rated service must be clearly visible; and
- 3 The price should appear with all instances of the premium number display.

Requirement 1 is not capable of objective assessment and as such, a subjective test must be used. The Adjudicator regarded the advertisement as a whole and considered particularly the small font size used, the fact that the price information is

shown in bold font but in combination with other terms and conditions and the extremely brief time of display. Having regard to these factors, the Adjudicator was of the opinion that the pricing information was not easily visible in the advertisement.

The Adjudicator is of the view that requirement 2 can be objectively ascertained, however in the absence of the ability to test the advertisements on multiple screen sizes and distances from the screen, the Adjudicator made no finding in respect thereof. The Adjudicator's *prima facie* view is that there was no contravention of requirement 2.

Requirement 3 is similarly capable of objective assessment and here the Adjudicator found that the SP has, in its advertisement, failed to display pricing information "with all instances of the premium number display" as required and as such is in breach of requirement 3 of Clause 6.2.5 of the WASPA Code of Conduct.

The complaint was accordingly:

- upheld in respect of a breach of Clause 6.2.5 of the WASPA Code of Conduct; and
- rejected in respect of the alleged breach of Clauses 11.1.1 and 11.1.2 of the WASPA Code of Conduct.

In determining the sanction to be imposed in respect of the breach of Clause 6.2.5 of the WASPA Code of Conduct, the Adjudicator had regard to the fact that the:

- SP sends a consumer an SMS message confirmation of the customer's subscription to the subscription service in terms of Clause 11.1.7 of the WASPA Code of Conduct. Such message includes, inter alia, the cost of the subscription service and the frequency thereof. The transmission of this message reduces, but does not eliminate, the potential harm to a consumer;
- SP has changed its advertisements to comply with the WASPA Advertising Guidelines;
- test for ease of visibility in Clause 6.2.5, is a subjective test;
- obligation regarding pricing appearing with all instances of the premium number display in the second sentence of Clause 6.2.5 of the WASPA Code of Conduct, is a weak obligation and has a common usage of an advisory rather than peremptory nature; and
- issue has been pre-empted by the WASPA Advertising Guidelines, intended to obviate issues of this nature and in effect as at the date of this adjudication but not at the date of the complaint,

the Adjudicator imposed the following sanction, following the decision in Complaints #0014 and #0015:

- The SP is formally reprimanded for:
 - its failure to display easily visible pricing information in the advertisement for the service; and

- its failure to display pricing information relating to the service with all instances of the premium number display in the advertisement for the service; and
- The SP is ordered to pay a fine of R1 500,00 to WASPA.

Fines are payable to the WASPA within five (5) working days of notification of this sanction. Should an appeal be lodged, the fine will be suspended until the determination of the appeal. Should the fine be upheld (in whole or in part, or increased) the fine will be payable within five (5) working days of notification of the appeal finding.