



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP)</b>	Worldplay
<b>Telephone Network(s)</b>	All
<b>Service Type</b>	Games downloads
<b>Source of Complaints</b>	Competitor
<b>Complaint Number</b>	#0039

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### Complaint

A complaint was received from a competitor of the SP concerning an advertisement for certain game downloads shown on E-TV on the weekend of 7 and 8 October 2005.

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

- “The price scrolls at the beginning of the ad and never reappears. The Premium Rate Short code is kept visible for the duration of the ad, yet the price is only visible for a few seconds scrolling. As the games are R30.00, the pricing should be very clear” (Clause 6.2.5).

The following Clause of the WASPA Code of Conduct was 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.

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### Investigation

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

The Secretariat received a response from the SP indicating that:

- “the ... advertisement has been revised since 7/8 October 2005, not as a result of this complaint, but in light of the WASPA advertising guidelines which are to be implemented imminently.
- Notwithstanding the above, it is our opinion that the complaint lodged ... is vexatious and prima facie without merit for the following reason:
  - with regards to pricing requirements, as set out in section 6.2.5 of the WASPA Code of Conduct, as these are not media specific, the

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requirement that "the price for a Premium Rated Service must be clearly and easily visible in all advertisements" is purely subjective, and it is our view that such prices, were easily and clearly visible on the ... advertisement."

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## Decision

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 (approximately three seconds of an advertisement approximately fifteen seconds in length), in a font size that is smaller than is desirable and scrolling across the screen. 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 scrolls across the screen 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.

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 has changed its advertisements to comply with the WASPA Advertising Guidelines;
- test for easy 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 accordingly 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.