



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP)</b>	iTouch in respect of its Jippii brand
<b>Service Type</b>	Advertising for Competition and Subscription Service
<b>Source of Complaints</b>	Competitor
<b>Complaint Number</b>	#0056

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### Complaint

A complaint was received from a competitor of the SP concerning a promotional SMS message received from the SP in respect of its Jippii brand. The promotional SMS message reads:

*"Win a fab Citroen C2! Join Jippi Super Club and we'll give U up to 7 FREE entries 2 the draw plus a FREE tone and lots more. sms SUB TONE to 31516 now 2 join!"*

The complainant further indicated that, in his view, the promotional SMS message "...is in breach of a whole bunch of competition and subscription service rules, including but not limited to: does not have price, does not tell when prize will be given and closing date, does not refer to a website or terms and conditions, combines the entering of a competition with a subscription service, does not call it a subscription service, is not an independent act to join a subscription service and is in breach of the law in that in terms of the promotional competitions regulations under the Lottery Act you are not allowed to offer a prize that requires the winner to have a license - in this case a car requires a license.

The complainant referred to Sections 9.1.1., 9.1.4., 9.1.5., 9.1.6., 9.3., 11.1.1., 11.1.2., 11.1.3. and 11.1.4. of the WASPA Code of Conduct as well Section 3.1.2. thereof.

The relevant Sections indicate:

3.1.2. Members are committed to lawful conduct at all times.

### **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.

9.1.4. 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.

9.1.5. The following additional information must also be made readily available on request, if not contained in the original promotional material:

(a) how and when prize-winners will be informed;

(b) the manner in which the prizes will be awarded;

(c) when the prizes will be awarded;

(d) how prize-winner information may be obtained;

(e) any criteria for judging entries;

(f) any alternative prize that is available;

(g) the details of any intended post-event publicity;

(h) any supplementary rules which may apply;

(i) the identity of the party running the competition and responsible for the prizes.

9.1.6. Competition services and promotional material must not:

(a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;

(b) exaggerate the chance of winning a prize;

(c) suggest that winning a prize is a certainty;

(d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.

### **9.3. General provisions**

9.3.1. Competition services must have a specific closing date, except where there are instant prizewinners. An insufficient number of entries or entries of inadequate quality are not acceptable reasons for changing the closing date of a competition or withholding prizes. Once the closing date for a competition is reached, the advertised prizes must be awarded, notwithstanding the number of entries.

9.3.2. Prizes must be awarded within 28 days of the closing date, unless a longer period is clearly stated in the promotional material.

9.3.3. All correct entries must have the same chance of winning.

## **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.

## SP Response

The SP provided an extremely detailed response, indicating:

The message sent to [the complainant] was part of an opt-in send inviting lapsed Jippii subscribers to re-join the Jippii subscription service. The selection of MSISDN's we have made includes only users who have at some stage (i.e. within the last 6 months) subscribed to one or more of our services and unsubscribed at a later stage. Hence, we were reasonably assuming that these users know (as [the complainant]'s complaint shows) what Jippii is and are reasonably aware of our terms and conditions, as all of these users were Jippii subscribers in the recent past.

We believe the communication send was not in fact deceiving or confusing in terms of any of the Code of Conduct clauses referred to by [the complainant].

*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.*

The message sent to [the complainant] will incur no additional cost to him for entering the competition. Should [the complainant] have subscribed to our service as invited in the message, he would have been given an entry at no charge over and above his subscription bill. [the complainant] was previously a subscriber to the club, so he would have been aware of the costs involved to re-subscribe. However, if he wasn't and he did respond to our invite, he would have received a message including all of the above information. The copy reads: "Welcome 2 Jippii Tones Club. U pay R5 every 2 weeks & get tones at half price. 2 unsubscribe sms STOP TONE to 31516 (50c). 4 help call 0822322328".

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

While we are aiming to be as clear in our communications as possible, it is not reasonable to expect a full list of terms and conditions for any service, be it competition, subscription or direct download, to be included in a single sms of 160 characters. Full terms and conditions for the competition are available to users on the Jippii website as well as through our call centre, for users who don't have access to Internet.

We believe that the description of the prize, in this case a Citroen C2, is the single item of information that would most significantly influence users' decision to enter or not. Hence, we have selected this information to be communicated to the users via the sms channel where we have restrictions on the number of characters to be used in a message. Print, TV and web advertising of the competition give all relevant information, as such restrictions are not applicable to those media.

*9.1.5. The following additional information must also be readily available on request, if not contained in the original promotional material....*

As mentioned above, all relevant information pertaining to the Citroen C2 competition is available on the Jippii website and through our customer care

centre. To my knowledge, [the complainant] has not contacted the call centre to enquire about additional information.

*9.1.6. Competition services and promotional material must not:*

- (a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants*
- (b) exaggerate the chance of winning a prize*
- (c) suggest that winning a prize is a certainty*
- (d) suggest that the party has already won a prize....*

We believe that the message sent to [the complainant] does not contravene any of the clauses above. We use the word 'win' to describe the prize which will be awarded to only 1 winner at the end of the competition. We have not mentioned that [the complainant] will have a higher chance of winning or that he will certainly win or that he has already won a prize. The only information communicated in the message is that he will be given up to 7 entries to the competition should he follow the instructions sent to him. (We give Jippii subscribers a free entry every time they are successfully re-billed; if [the complainant] subscribed on that date, he would have been re-billed 7 times until the competition closing date and hence would be given 7 free entries.) This is not to say that he has a better chance than someone else with 7 entries, or that there will not be users with more than 7 entries, who will logically have a better chance to win.

*9.3. Competition services must have a specific closing date,....*

The Citroen C2 competition does have a closing date, which is 31 January 2006 as indicated on our website and in print and TV ads.

*11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".*

As mentioned earlier, the message sent on 27 October 2005 was sent only to customers who have been Jippii subscribers prior to receiving the message. As we clearly ask users to join the Jippii club, which they have been part of before, we have reasonably assumed that they understand that by replying they would join the subscription service. Every user who responded to the message was sent a return message that reads: "Welcome 2 Jippii Tones Club. U pay R5 every 2 weeks & get tones at half price. 2 unsubscribe sms STOP TONE to 31516 (50c). 4 help call 0822322328". In addition to that, every user who responded to the sms was given a free entry to the C2 competition and a free tone.

We believe that we are not misleading users with the mentioned communication as immediately after responding they were given the option to unsubscribe, should they have misunderstood our offer. While they would have been billed R5 by that time, they would have received a competition entry which would have costed (sic) them R5 plus a tone, which would have costed (sic) them another R5. So, we reasonably believed that users knew they were joining a subscription service (as [the complainant] clearly understood that), but in the slight possibility that they did not - they were reasonably compensated.

*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 the service.*

In our sms, users were asked to join the subscription club and as a reward they were offered free entries in the competition. They were asked to enter the club as such, i.e. to subscribe, and would then automatically enter the competition. It is not a case of them entering a competition and automatically subscribing to the service.

*11.1. 3. Where feasible, billing for a subscription service must indicate that the service purchased is a subscription service.*

As cell phone billing is done by the network (in this case Vodacom) we can only provide them with information as to what was the reason for billing a customer. We have no control over what appears on users' invoices. However, as far as we are aware, itemized Vodacom bills specifically name whether we have billed users for subscription, for a download or for any other reason.

*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.*

As mentioned in point 11.1.2. above, users are never subscribed to Jippii by "accident". We would only subscribe a user if we have received the following instructions from him/her: SUB <PACKAGE NAME>. Hence, [the complainant's] reference to this clause is invalid.

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### **Lawfulness of Service**

The complainant referred to a possible breach of national law, which was considered to ascertain the possible contravention of Clause 3.1.2 of the WASPA Code of Conduct. The possible contravention is of the Regulations of Promotional Competitions of the Lotteries Act. Regulation 3 (d) prohibits the award of any prize:

*3. (1) A promoter may not offer or award goods, services or benefits as prizes to a participant in a promotional competition-*

*....*

*(d) in respect of which any licence, approval, endorsement, sanction, consent, agreement or any form of authorisation by-*

*(i) any organ of state;*

*(ii) a person's legal guardian; or*

*(iii) any other person,*

*is required for the lawful possession or use of those goods, services or benefits;*

The Adjudicator consulted with the National Lotteries Board regarding an interpretation of this regulation and was advised telephonically that the Board did not consider such regulation to prohibit the offer or award of a motor vehicle as a prize in a promotional competition, without any specific reason being given for such interpretation.

The Adjudicator noted that neither he nor the WASPA Secretariat is a Court of Law empowered to consider possible violations of national law. Although there may be

overlap between certain national laws and the WASPA Code of Conduct, any findings and sanctions referred to in this Adjudication are founded purely on any infringements of the WASPA Code of Conduct. As such the WASPA Adjudicator cannot make a finding that the prize awarded or to be awarded in the competition conducted by the SP contravenes the Lotteries Act or regulations made in terms of the Lotteries Act. This is amplified by the interpretation provided by the National Lotteries Board regarding the regulation in question.

As such, there was no basis for a finding of a breach of Clause 3.1.2 of the WASPA Code of Conduct.

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## Decision

The complaint was not upheld in respect of Sections 9.1.5., 9.1.6., 9.3., 11.1.2. and 11.1.3. of the WASPA Code of Conduct.

The Adjudicator upheld the complaint in respect of Section 9.1.1., 9.1.4. and 11.1.1. of the WASPA Code of Conduct, as:

- 9.1.1. The Adjudicator accepted that there is no additional cost to a consumer to enter the competition, however each competition entry is allocated to the consumer on the successful billing (or re-billing) of such consumer for the amount of the subscription. In order to comply strictly with Section 9.1.1., the promotional SMS message should have indicated that the free entry is conditional on the successful re-billing of the consumer and that one entry is allocated for each such billing (or re-billing) event;
- 9.1.4. The Adjudicator recognised the technical limitation of SMS to 160 characters, however the SP has elected to make use of this communication technology and must operate within its confines. The SP had the election of using multiple SMS messages, MMS messages or not communicating with the consumer at all. In exercising its election to restrict its communication to a single SMS message and failing to include the required information, the SP failed to comply with clause 9.1.4. It should be noted that the SP failed to include any reference to its full terms and conditions available via its Internet web site and call centre, in the promotional SMS message. The Adjudicator accepted that the terms applicable to the competition were available, however they were not specifically stated in the promotional material for the competition (in this case the promotional SMS message received by the complainant).

The Adjudicator did not consider whether the inclusion of such reference would have been sufficient to find compliance with Section 9.1.4. as no such inclusion was made. The Adjudicator nevertheless commented that Section 11(3) of the Electronic Communications and Transactions Act, Act 25 of 2002 gives a clear indication of the applicable considerations for referencing of information in electronic form, had the SP made an attempt to do so;

- 11.1.1. The Adjudicator has previously indicated his concerns regarding the marketing of a “subscription service” as a “club”. While such marketing is not prohibited in terms of the WASPA Code of Conduct, Section 11.1.1. clearly indicates that the term “subscription service” must be used in promotional material and such use must amount to a prominent and explicit identification

of the service as a subscription service. The placing of the term “subscription service” in between inverted commas in Section 11.1.1. of the WASPA Code of Conduct is in the view of the Adjudicator a clear indication that this exact term must be used. This was not done. The Adjudicator specifically found that the use of the term “club” or the phrase “join the club” or similar phrases is not a substitute for the use of the term “subscription service”.

The Adjudicator recognised that the three contraventions of the WASPA Code of Conduct identified are technical in nature and that any harm caused by such contraventions and in particular by the contravention of Section 11.1.1. of the WASPA Code of Conduct, is significantly mitigated by the fact that:

- the promotional SMS message was sent to previous customers of the SP who had utilised the subscription service of the SP in the past;
- the use of the key words “SUB TONE” (where the word “TONE” may be replaced by one of the other category of subscription services offered by the SP) gives some indication that this is a subscription service; and
- a comfort message is sent to subscribers by the SP, in terms of Section 11.1.7. of the WASPA Code of Conduct.

As such, the Adjudicator imposed the following sanction:

- The SP is reprimanded for its breaches of the WASPA Code of Conduct;
- The SP is ordered to ensure that it complies with the WASPA Code of Conduct and the WASPA Advertising Rules (introduced after this complaint was lodged) and specifically with regard to the display of competition terms and the identification of services as subscription services; and
- The SP is ordered to pay a fine of:
  - R1 500 in respect of the breach of Section 9.1.1. of the WASPA Code of Conduct;
  - R10 000 in respect of the breach of Section 9.1.1. of the WASPA Code of Conduct; and
  - R50 000 in respect of the breach of Section 11.1.1. of the WASPA Code of Conduct; provided that R45 000 of this fine is suspended in recognition of the mitigating factors outlined above and subject to no further contravention of Section 11.1.1. of the WASPA Code of Conduct being adjudicated in respect of the SP.