



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Clickatell
	Cell C
Telephone Network(s)	MTN
	Vodacom
Information Provider (IP) (if applicable)	Promo D.o.o trading as Mob1
Service Type	SMS Competition
Source of Complaints	Public
Complaint Number	#0069

Complaint

A complaint was received from a member of the public regarding an unsolicited SMS message offering the conversion of "Mob1 bucks". There have been multiple complaints made in respect of the service that is the subject of this complaint, inter alia against the SP (#0050) and other members of the WASPA (inter alia #0057, #0066 and #0067). The SMS messages submitted by the complainant indicate that the complainant responded to the initial SMS message received and provided a transcript of four of these SMS messages, however did not provide a copy of the initial SMS message received nor did the complainant respond to the Secretariat's request for confirmation of the number on which the initial message was received and which was then used for the subsequent responses.

The complainant raised the issues of "false advertising/theft". As these are not issues covered by the WASPA Code of Conduct, the Secretariat conducted an investigation into the service offered by the SP, on behalf of the IP and noted the possible breaches of the WASPA Code of Conduct, based on previous complaints regarding this service.

The following breaches of the WASPA Code of Conduct were raised:

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

4.1. Provision of information to customers

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

4.1.5. Members must have a complaints procedure allowing their customers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.

4.1.6. Members undertake to inform their wireless application service customers that they are bound by this Code of Conduct. Members also undertake to make these customers aware of the WASPA complaints procedure and the mechanism for making a complaint, should any customer wish to do so.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

5.2. Identification of spam

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.3. Prevention of spam

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

6.2.2. All advertisements for services must include the full retail price of that service.

6.2.3. Pricing must not contain any hidden costs.

6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.

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.

6.2.6. Unless otherwise specified in the advertising guidelines, the name of the WASP or the information provider providing the service must appear in all advertisements for premium rated services.

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.

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.

SP Response

The Secretariat incorporated the SP's response in respect of complaint #0050 in this complaint, specifically concerning:

- The amendment to the SP's business practices to prevent receipt of premium rated SMS messages, where it is not responsible for the transmission of the initial SMS message or responses;

- Active investigation of complaints regarding the service;
- Suspension of the IP's service; and
- Suspension of the short code 39006 with the three mobile network operators.

In addition, the SP submitted a response to this complaint indicating:

- The service on short code 39006 was suspended on 28th October 2005. The SP is holding onto all revenue while we wait for the IP to provide opt-in details of all numbers for which we received complaints.
- The MT (initial) SMS delivered to these numbers did not go over the SP's gateway; therefore the SP had absolutely no control over it. The IP makes use of the SP for the MO PRS SMS incoming leg only, for which the service was suspended.
- It seems to the SP that the IP is sending out both prizes, the free SMS as well as the holiday vouchers. The SP is aware of people who opted in who have received these vouchers and free SMS accounts. The SP's concern lies with the manner in which the numbers were opted-in, in the first place.
- The SP has already informed the IP that the SP will not allow this campaign to run again. At this time the SP is trying to resolve all outstanding matters as best as it can.
- The IP has assured the SP that they sent another batch of the free holiday vouchers on 2 November 2005.
- The SP requested the mobile number(s) from which the complainant opted into the competition. The SP undertook to confirm with the IP if the holiday vouchers have been sent to the complainant. The SP undertook that if the complainant does not receive the holiday vouchers, the SP would ask the complainant's operator to refund the PRS charges to the complainant, or pass a credit to the complainant's service provider.

The SP undertook, in summary, to will provide best effort to make sure that either the complainant receives the holiday vouchers or a refund on the PRS charges. The SP indicated that it has asked both MTN and Vodacom to refund a few clients, and in each case the operator did pass credit to the service provider with which the contract was held.

Investigation

While the complainant had not submitted a copy of the initial SMS message received, the Secretariat has received a number of complaints concerning the conversion of "Mob1 bucks" as well as several SMS messages directly. The content of such SMS messages varies slightly, however the consistent features are:

- The recipient's account shows an alleged number of "mob1 bucks" the number is often the same on SMS messages sent to different recipients;

- These can allegedly be converted into a reward valued at R2000;
- A “secure code” is given, even though this code is often the same on SMS messages sent to different recipients;
- The recipient is required to send a keyword to a premium rated number. In most cases the cost of the initial SMS message response is given (usually R15);
- Further SMS messages are then sent to the recipient, each requiring a reply to a premium rated number. Some SMS messages indicate the total number of responses required from the recipient.

Lawfulness of Service

The key element of the complaint is a possible breach of Clause 9.1.6(d) of the WASPA Code of Conduct, which specifically prohibits competition services and the promotional material for competitions from suggesting “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.” Clause 9.1.6(d) of the WASPA Code of Conduct was drafted having regard to the provisions of the Lotteries Act, Act 57 of 1997 (the “Lotteries Act”), as amended and the Consumer Affairs (Unfair Business Practices) Act, Act 71 of 1988 (the “Consumer Affairs Act”). While the key determination of this report concerns Clause 9.1.6(d) of the WASPA Code of Conduct, national law was also considered to ascertain the possible contravention of Clause 3.1.2 of the WASPA Code of Conduct as well as any extenuating or exacerbating circumstances regarding a possible breach of Clause 9.1.6(d) of the WASPA Code of Conduct.

The provisions of the Lotteries Act, Act 57 of 1997 (the “Lotteries Act”), as amended and the Consumer Affairs (Unfair Business Practices) Act, Act 71 of 1988 (the “Consumer Affairs Act”) were considered. These issues have been exhaustively canvassed in previous complaints and as such, only the findings are repeated here. From a review of the competition conducted by the IP using services provided by the SP and the IP’s Internet web site and the Lotteries Act (particularly those clauses indicated above) it appears that:

- The competition conducted by the IP is a lottery for the purposes of the Lotteries Act (see the IP’s web site where the statement is made “Our computer randomly matches mobile numbers stored on our database with a reward” and in the SP’s interaction with the IP it indicated that this is a “competition”);
- Lotteries may only be conducted in South Africa in terms of a licence granted by the National Lottery Board or if they are Lotteries Incidental to Exempt Entertainment, Private Lotteries, Society Lotteries and Promotional Competitions, conducted in accordance with the Lotteries Act and the Regulations promulgated in terms of the Lotteries Act);
- The competition conducted by the IP does not fall within the definitions of Lotteries Incidental to Exempt Entertainment, Private Lotteries or Society Lotteries;

- The competition conducted by the IP may possibly be regarded as a Promotional Competition and the IP on its Internet web site attempts to create this impression, however it does not appear to comply with the requirements in respect of Promotional Competitions as outlined in the Lotteries Act and the relevant Regulations (Regulation 672 of 2003 published in Government Gazette Number 24874) *inter alia* in the following respects:
 - the promotional competition or any conduct under it is substantially comparable to a business practice which has been declared unlawful in terms of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988) [in respect of which see below];
 - there is no discernable promotion of goods or services, despite numerous references to undisclosed “services” on the IP’s web site;
 - consideration is payable for the opportunity to enter the competition.
- There is accordingly a very strong *prima facie* indication that the competition conducted by the IP is being conducted in contravention of the Lotteries Act and particularly the prohibition in Section 56 (b) of the Lotteries Act.

Competitions of a similar nature to that conducted by the IP have been the subject of an extensive investigation in terms of the Consumer Affairs Act. Pursuant to such investigation, General Notice 303 of 2005 was published in Government Gazette 27311 on 21 February 2005, in terms of section 12(6) of the Consumer Affairs Act. Such notice proclaims as an “unfair business practice” the business practice “whereby mail-order entities, inform consumers or potential consumers, by any means whatsoever, that they have won a sum of money or any other prize,

- (a) where the consumers have not won the money or prize mentioned in the headline; and/or
- (b) where such money or prize is subject to suspensive conditions prior to entitlement, and the suspensive conditions are not printed, immediately after the announcement of the prize, in the same letter type and size as the announcement of the prize; and
- (c) where consumers are required to send any sum of money in order to claim the prize, except such sum of money which is the purchase price for identified goods bona fide offered for purchase by the company and ordered by the consumer.”

The relevance of General Notice 303 of 2005 to the instant case is that the term “mail-order entities” is defined very broadly as “manufacturers, wholesalers or retailers who contact buyers through direct mail, catalogs, television, radio, magazines, and newspapers and deliver the goods ordered by their clients to a post office or a physical address nominated by the clients. **It also includes entities who do not necessarily offer goods but require of consumers to forward any type of fee on order to receive a prize**” (emphasis inserted). Additionally the term “prize” includes, but is not restricted to, “awards, donations, bonuses, gifts, grants, presents and rewards.”

In the instant case:

- the “reward valued R2000” referred to in the initial SMS message received by the complainant appears to fall within the definition of a prize in terms of General Notice 303 of 2005;
- the SMS message delivered to the complainant appears to have informed the complainant that he was entitled to the reward, namely “Your account shows 12450 mob1 bucks! Convert them into a reward valued R2000”. It could be argued that the wording of the initial SMS message does not indicate the winning of the prize, rather the conversion of some notional currency into a reward. This is a semantic distinction and it appears that the effect of the SMS message is to inform the complainant (a consumer or potential consumer) that has won a prize. The conversion process appears to be a procedural step in claiming such prize;
- the initial SMS message seems to fall within the meaning of informing the complainant “by any means whatsoever”;
- the return SMS message to the SP’s short code at a cost of R15, plus at least eight additional SMS messages required (a total cost of R135 or greater) appears to amount to a payment of a fee to the IP, collected on its behalf by the SP;
- while the IP may not be a manufacturer, wholesaler or retailer and while it may not “contact buyers through direct mail, catalogs, television, radio, magazines, and newspapers and deliver the goods ordered by their clients to a post office or a physical address nominated by the clients”, the IP appears to fall within the last sentence of the definition of mail-order entity in that it does “not necessarily offer goods but require[s] of consumers to forward any type of fee on [sic] order to receive a prize”.

General Notice 303 of 2005 goes further and provides that with effect from 1 May 2005, the unfair business practice (defined above) is “declared unlawful and persons are hereby directed to:

- (a) refrain from applying and/or perpetuating the unfair business practice; and
- (b) refrain at any time from applying and/or perpetuating the unfair business practice”.

There is accordingly a very strong *prima facie* indication that the competition conducted by the IP is being conducted in contravention of General Notice 303 of 2005.

Decision

The Adjudicator upheld the complaint in regard to the unsolicited SMS message and the competition promoted therein.

The Adjudicator determined that the IP had contravened the provisions of the following Clauses of the WASPA Code of Conduct:

- 4.1.1 as pricing is unclear. The initial SMS message refers to a maximum of 9 messages, while the Internet web site refers to a “minimum 5 SMS” in the

terms & conditions section while the FAQ section refers to “at least 9 text messages”;

- 4.1.2 particularly concerning the value of the rewards. Having regard to the previous investigations of the Secretariat, the statements concerning the value of the rewards are at best likely to mislead by inaccuracy, ambiguity, exaggeration or omission (and the statement as to value appears to contain elements of one or more or all of inaccuracy, ambiguity, exaggeration and omission). At worst the statements regarding the value of the rewards are false and/or deceptive.
- 5.3.1 as the SMS message constitutes spam as determined in terms of clause 5.2.1. The IP’s justification in the FAQ section of the Internet web site to the effect that registration “may have been done through: a) Participation in a game of chance, subsequent to ordering a logo/ring tone, b) Sending a free SMS and consent of the sender’s terms & conditions” is at best disingenuous and at worst blatantly dishonest. The Adjudicator found no indication that the complainant had “a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator”.

Furthermore, the IP’s answer as to the question of how the “Mob1 Client Bucks” have been earned, namely “By participating in one or more of our services over the last years” is not accepted, as the majority of SMS messages distributed by the IP reflect the same number of “Mob1 Client Bucks”, when the complainant has not made use of any of the IP’s services. It appears again that the IP’s answer is at best disingenuous and at worst blatantly dishonest.

- 6.2.2 in that initial SMS message is an advertisement and does not include the full retail price. The IP has gone some way to complying in indicating the cost of the reply SMS message and the maximum number of SMS messages required, however the IP’s Internet web site indicates that this is not factually correct.
- 6.2.4 again, the IP has gone some way to complying in indicating the cost of the reply SMS message and the maximum number of SMS messages required, however the IP’s Internet web site indicates that this is not factually correct.
- 6.2.6; and
- 9.1 (9.1.1 – 9.1.6) and specifically:
 - Clause 9.1.6(a) of the WASPA Code of Conduct in that the word “reward” is used to describe an item, which is intended to be provided to each and every participant;
 - Clause 9.1.6(d) of the WASPA Code of Conduct, which specifically prohibits competition services and the promotional material for competitions from suggesting “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.” The initial SMS message from

the IP to the complainant and transmitted by the SP falls squarely within this prohibition.

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 competition conducted by the IP is being conducted in contravention of the Lotteries Act or in contravention of the Consumer Affairs Act (in respect of General Notice 303 of 2005). As contraventions of the Lotteries Act and the Consumer Affairs Act are criminal offences, making a finding of contravention of such legislation will require a trial to be held in accordance with South African criminal law. Clause 9.1.6(d) of the WASPA Code of Conduct overlaps to some extent the national law referred to above and the Adjudicator is empowered by the WASPA Code of Conduct to find breaches thereof and to impose sanctions in respect of breaches found.

Clause 3.1.2 of the WASPA Code of Conduct commits a member of WASPA, such as the SP, to lawful conduct. It is an affirmative statement requiring a positive effort on the part of the WASPA member. It is not stated in the negative (for example, "Members are committed not to participate in conduct which has been found by a court of competent jurisdiction to be unlawful and which is not the subject of an appeal"), which would obviate the need for positive effort on the part of a WASPA member.

Due to the affirmative nature of the SP's obligation in terms of Clause 3.1.2 of the WASPA Code of Conduct and the compelling *prima facie* indication of a breach of the Lotteries Act and the Consumer Affairs Act, the Adjudicator held that there was a breach of Clause 3.1.2 of the WASPA Code of Conduct.

Sanction

In considering the sanction to be imposed arising from the numerous and egregious breaches of the WASPA Code of Conduct raised in the instant complaint:

- The Adjudicator took note of the SP's submission concerning the origination of outgoing SMS messages and its role being limited to the receipt of incoming SMS messages.
- 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 prevalence of this and similar practices and the fact that there are a number of Information Providers using WASPA

members to provide services of the same or similar nature to that described in the instant complaint and General Notice 303 of 2005. Generally, when one member takes action to terminate the service, the Information Provider will move to a different WASPA member and obtain services from that member. While certain WASPA member's have been more proactive in dealing with practices of this type, no single WASPA member stands out as promoting services of this nature.

- The Adjudicator had regard to the fact that the SP had done more than simply submit a response to the complaint. It had suspended the service (as contemplated in Clause 3.9.2 of the WASPA Code of Conduct), suspended the short code used with the mobile cellular network operators, identified the provider sending the MT messages on behalf of the IP and communicated with it and changed its business rules so as not to allow receipt of MO messages unless the SP was also responsible for the provision of the MT messaging service.

The Adjudicator ordered the SP to refund the complainant with the value of the premium rated SMS messages dispatched, being a "reasonable and valid claim[s] for compensation" in terms of Clause 13.4.1(d) of the WASPA Code of Conduct. The Adjudicator further confirmed the correctness of the SP's action in terminating the service of the IP and the continuance of such suspension. Having regard to the SP's proactive and indeed exemplary conduct in this matter, the Adjudicator was of the view that no further sanction was required.