

REPORT OF THE ALTERNATIVE APPEALS PANEL

Date: 11 December 2007
Service Provider Mira Networks
Information Provider: 2waytraffic
Complaint Numbers: 0568
Version of the Code: **4.6**

1. INTRODUCTION TO THIS APPEAL

- 1.1 This appeal concerns the adjudication of a complaint received from a competitor of the Service Provider Mira Networks (SP), a member of WASPA. The SP's response to the complaint included a response from the Information Provider (IP), 2waytraffic. The IP is the appellant in this matter, as the SP confirmed that it did not wish to supplement the IP's appeal with a submission of its own.
- 1.2 The Report of the Adjudicator is dated 23 November 2006. The subject of the complaint relates to a possible breach of a number of the sections of the WASPA Code of Conduct (the Code), more specifically Section 6.1 which states that all WASPA members are bound by the WASPA Advertising Rules, Section 6.2 which deals with pricing of services, section 11.1 which deals with the manner of subscription, section 11.2 which deals with customer support and section 11.3 which deals with the termination of a service. The complaint also relates to possible breaches of the WASPA Advertising Rules concerning three advertising media used by the IP, namely television, the Internet and SMS messages. The relevant sections of the WASPA Advertising Rules are referred to in detail below. The applicable version of the Code is Version 4.6 which was valid from 25 August 2006 to 10 November 2006 . The applicable version of the Advertising Rules is Version 1.6.
- 1.3 The Appeals Panel have adopted an informal structure and the findings made are set out below as follows:
Part 2: Summary of the complaint and the response;
Part 3: Summary of the relevant sections of the Code and Advertising Rules;
Part 4: Summary of the Adjudicator's decision;
Part 5: Summary of the IP's grounds of appeal; and
Part 6: Findings of the appeals panel.
- 1.4 The Appeals Panel record that there is no right for a review of the appeals panel decision
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2. SUMMARY OF THE COMPLAINT AND THE RESPONSE

- 2.1 The Complaint

- 2.1.1 The complaint was submitted to the WASPA Secretariat via the WASPA website on 03 October 2006.
- 2.1.2 The complaint was made against “MiraNetworks and Other ID: 31303” being the SP, Mira Networks.
- 2.1.3 The complaint concerns, according to the complainant, a number of breaches of both the Code and the WASPA Advertising Rules in relation to three advertising media, namely a television advertisement, internet web site advertising and SMS advertising. The complainant makes reference to a number of clauses in the Code and the Advertising Rules and provides as follows:

“Detailed_Description_Complaint: TV Adverts -

The adverts violate 6.1.1. as they don't at all adhere to the advertising guidelines at all e.g.

1) They don't have any pricing visible except in the small T&Cs as required.

2) They don't have any indication of the word “subscription” other than in the T&Cs

3) They do not indicate a billing frequency (they only say R7.50 per sms) – they do say “get a daily reading” but this relation to billing frequency is not clear.

The adverts violates 6.2.5 as they don't clearly advertise the price (as defined by the ad rules and reasonableness).

The adverts violate 11.1.1. as the advertised material doesn't prominently display that it's a subscription service (as defined by the ad rules and reasonableness).

The advert violates 11.1.2. as the advert utilises bundling to promote their product. The user is sent their content simultaneously with subscription action, and the product is sold as content and a subscription. It is not an independent transaction.

The service violates 11.1.7. as there is no contact number in the notification message as required, neither is there a frequency of the subscription i.e. daily. They say only per SMS.

e.g. they sent the SMS: “Find personal fulfilment daily! Reply with the 1st 3 letters of your sign (e.g. SAG) R 7,5/sms. Jokes? Reply JOKE, Latest hits? RING, Unsub: stop astro” as a notification sms. Followed by: Congratulations VIRGO! You will receive your first daily horoscope shortly. Like Jokes? Reply JOKE. Like ringtones? Reply TONE. unsb: astro stop.

ALSO From this notification SMS, it NOT clear to users that sending JOKE or RING will generate another daily subscription of R7.50 each i.e. there is no pricing for these services or an indication that they are subscription services.

Web adverts

The Web pages violates 6.2.5 as they don't clearly advertise the price (as defined by the ad rules and reasonableness) with the access number.”

2.2 The Response

- 2.2.1 In the response provided by the SP, the SP did not reply to the complaint itself in any detail. Apart from stating the name of the IP to be 2waytraffic, the SP's response merely included the statement that "*The Company has corrected the advert to reflect the correct WASPA guidelines*" and a reference to a response provided by the IP.
 - 2.2.2 In its response to the complaint, included in the response from the SP, the IP addresses the possible breach of the Code and the Advertising Rules in reference to each of the three media media as stated in the complaint. The IP's response, however (apart from the reference to clause 6.2.5 of the Code in section 2 of its response) does not include specific references to the clauses of the Code or Advertising Rules relevant to the complaint.
 - 2.2.3 In the IP's response to the complaint regarding the first medium namely, the television advertisement, the IP indicates that amendments were made to the television advertisement in order to ensure compliance.
 - 2.2.4 In the IP's response to the complaint regarding the second medium namely, the internet web site, the IP indicates that it disagrees with the complainant that it is not in compliance with clause 6.2.5 of the Code. The IP then refers to the paragraphs that can be found on its web site"
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3. SUMMARY OF THE RELEVANT SECTIONS OF THE CODE

- 3.1 The relevant sections of the Code are: Section 6.1.1 which is a general provision dealing with the Advertising Rules; Section 6.2 which deals with advertising and pricing, and Section 11.1 which deals with subscription services:
- 3.2 Section 6.1.1 which deals with the Advertising Rules provides that:
 - 3.2.2 6.1.1 *In addition to the provisions listed below all members are bound by the WASPA Advertising Rules, published as a separate document.*
- 3.3 The relevant subsections of Section 6.2 which deals with pricing and advertising are subsections 6.2.2 and 6.2.4 and provide that:
 - 3.3.1 6.2.2 *All advertisements for services must include the full retail price of that service.*
 - 3.3.2 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.*
- 3.4 The relevant subsections of section 11.1 which deals with subscription services are subsections 11.1.1; 11.1.2 and 11.1.7 and provide that:

- 3.4.1 11.1.1 *Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”.*
- 3.4.2 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. A request from a subscriber to join a subscription service should not be bundled with a request for a specific content item.*
- 3.4.3 11.1.7 *Once a customer has subscribed to a subscription service, a notification message must be sent to the customer containing the following information:*
- (a) The name of the subscription service;*
 - (b) The cost of the subscription service and the frequency of the charges;*
 - (c) Clear and concise instructions for unsubscribing from the service;*
 - (d) The service provider’s contact information.*
- 3.5 The relevant sections of the WASPA Advertising Rules, which are relevant to the three media, namely the television advertisement, the internet web site and sms messages as contained in the complaint will not be quoted here in detail. Reference will however be made to the relevant sections of the Advertising Rules in context of each individual medium in our findings in part 6, below.
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4 SUMMARY OF THE ADJUDICATOR’S DECISION

4.1 Adjudicator’s Decision

4.1.1 After an enquiry the adjudicator decided that a contravention of both the WASPA Code of Conduct and the WASPA Advertising Rules should be considered. The adjudicator was of the view that a possible breach of the Advertising Rules was sufficiently clear as specific reference was made to the Advertising Rules in the complaint. Clause 6.1 of the Code as referred to in the complaint also makes specific reference to the Advertising Rules. The adjudicator was further of the view that the IP, through the SP, had the opportunity to respond to a possible breach of the Advertising Rules. This as the adjudicator states ‘is borne out by the fact that the IP stated in its response that *“I have read the advertising rules”*.

4.1.2 Independent Transaction

4.1.2.1 A possible breach of clause 11.1.2 of the WASPA Code of Conduct was included in the complaint. In reaching his decision regarding the question of whether the advertisement which forms the basis of the complaint utilises bundling to promote the IP’s service the adjudicator, firstly, considered the wording of the advertisement. The adjudicator was of the view that the wording of the advertisement is *“at the least confusing and at worst a contravention of clause 11.1.2 of WASPA Code of Conduct”*.

- 4.1.2.2 The adjudicator further quoted from the “ADDITIONAL BACKGROUND NOTES TO SUBSCRIPTION SERVICES” (at the end of clause 2.3.13) and stated that the notes are also applicable to situations, where a subscription only service (with no non-subscription content) is confusingly portrayed as a non-subscription item.
- 4.1.2.3 The adjudicator then stated that it would be expected that the confusing nature of the IP’s advertisement to be clarified in the “comfort message” sent by the IP in terms of Clause 11.1.7 of the Code, but that the fact that the comfort message is delivered almost simultaneously with the first content item gives credence to the allegation in the complaint.
- 4.1.2.4 Although finding that the IP’s advertising and comfort messages are confusing in the extreme, which is in the words of the adjudicator, “*either due to blatant disregard for the WASPA Code of Conduct and Advertising Rules or due to a deliberate attempt to confuse consumer*”, the adjudicator found that this is insufficient to find a breach of clause 11.1.2 of the Code and decided not to uphold the complaint in this regard.
- 4.1.3 Adherence to the WASPA Advertising Rules
- 4.1.3.1 The adjudicator reviewed in turn the IP’s television advertisement, its Internet website and SMS advertising and found breaches of the Advertising Rules and a consequent breach of Clause 6.1.1 of the Code.
- 4.1.3.2 Television Advertising
- 4.1.3.2.1 The adjudicator found that the IP breached Clause 2.2.2 of the Advertising Rules because no visible block was placed in the top corner of the screen, indicating both access costs and the fact that it is was subscription service.
- 4.1.3.2.2 The adjudicator also found that Clause 2.3.11 of the Advertising Rules was breached because no indication of network compatibility was given (although the panel note that this was not part of the original complaint).
- 4.1.3.2.3 After reviewing the pricing of the IP’s service as contained in the advertisement and quoting Clause 2.3.12 of the Advertising Rules, which deals with the requirements for pricing information the adjudicator found that the IP’s display should have stated “*2xR7.50 for registration and R7.50 per message received. Total cost R22.50 and thereafter R7.50 per daily message received*”. The adjudicator further indicated that the pricing also needed to be displayed in the title block at the top of the screen and not just in the terms and conditions.
- 4.1.3.3 Internet web site advertising
- 4.1.3.3.1 The adjudicator found that IP’s web site breached the Advertising Rules, in particular Clause 9.2.15, which the adjudicator quoted, in that the total cost involved for obtaining the full service, the number of SMSs or access times, and their individual cost, required for full access were not indicated in the display.

- 4.1.3.3.2 The adjudicator further found that there was no indication of network compatibility. Our comment at 4.1.3.2.2 is applicable here too.
- 4.1.3.4 SMS Advertising
- 4.1.3.4.1 The adjudicator found that in advertising its other subscription services in messages sent to subscribers, that the messages contravene the Advertising Rules in respect of the following clauses:
- Clause 11.2.1 - Text clearly showing access cost and T&C for each service or content type offered.
- Clause 11.3.1 – Display text with full pricing information must be displayed on the SMS/MMS.
- Clause 11.14 – There must be a clear indication in the advertisement detailing which mobile networks the user must have access to, to fully access any content and/or participate in the service offered.
- Clause 11.15 – The display text must show the full or potential cost of access for fully obtaining the advertised content and/or service.
- Clause 11.16 – If the content provider is providing a continuous, subscription-like or subscription based service, then the words “Subscription Service” must be prominently displayed at the top section of the advertisement as well as at each content or service section in the advertisement where various subscription types are displayed. Must also indicate charge/s, including:
- (a) The TOTAL charge the consumer will incur for the subscription component of their access to that subscription service
 - (b) The frequency (and the minimum frequency, if applicable) at which they will be charged for the subscription component of access to that subscription service.
 - (c) Whether in addition to the periodic subscription charges in (a) and (b) above, there any additional charges applicable to obtaining any particular service, content or class of content on the advertisement
 - (d) Must differentiate clearly between multiple subscription types. If in any advertisement there may exist the possibility to subscribe to a number of individual subscription services which would ordinarily each carry a separate but additional subscription charge and associated charging frequency or additional per-content access charge, then this possibility of the consumer being charged at multiple prices and charging frequency must be clearly indicated.
- 4.1.3.4.2 The adjudicator found that the subscription service costs associated with the IP’s “Jokes” and “Ringtones” subscription services differ, as well as the fact that no indication of handset compatibility was given for the IP’s “Ringtone” subscription service.
- 4.1.3.5 Pricing of service
- 4.1.3.5.1 The adjudicator stated unwillingness to make a finding of a breach of clause 6.2.5 of the Code, which relies on a subjective test of

clarity of visibility, because a finding with regards to a contravention of clause 6.1.1 of the Code had already been made.

- 4.1.3.5.2 The adjudicator found that possible breaches of Clauses 6.2.2, 6.2.3 and 6.2.4 of the Code could be considered although the complaint only specified Clause 6.2 of Code under the heading “Section of the Code of Conduct Breached.”
- 4.1.3.5.3 In considering the possible breaches of the sub-clauses of Clause 6.2 the adjudicator noted and discussed the two common billing models in use in South Africa. The adjudicator found that IP used a different billing system that did not contravene the Code, but which was potentially confusing. The adjudicator, therefore, did not find a breach of clause 6.2.3 of the Code as there was no basis to indicate that the additional costs were “hidden”.
- 4.1.3.5.4 The adjudicator, however, found breaches of clauses 6.2.2 and 6.2.4 of the Code as the IP’s advertisements did not contain the full retail price of the service. The IP’s advertised costs were also according to the adjudicator misleading. The adjudicator found, in particular, that multiple communications were required to obtain content, although the advertised price did not clearly indicate or include the cost for all communications required for that transaction. This was therefore in breach of the Code.
- 4.1.3.6 Comfort Message (clause 11.1.7 of the Code)
- 4.1.3.6.1 The adjudicator found that the message sent to the consumer on subscribing to the IP’s service did not contain the name of the subscription service or the IP’s or SP’s contact information which constituted a breach of the Code.
- 4.1.3.6.2 The adjudicator further found that although the message contained the cost of the subscription service and the frequency of the charges, these were separated from each other in a manner that was less than ideal, but did not breach the Code.
- 4.1.3.6.3 Similarly, the adjudicator found that the instructions for unsubscribing from the service were cryptic yet not sufficiently so to find a breach of the Code in this respect.

4.2 Sanctions

- 4.2.1 The adjudicator imposed the following sanctions:
 - 4.2.1.1 The adjudicator ordered the SP not to provide a service to the IP, until such time as the IP’s advertising, pricing and comfort message accorded with the Code and the Advertising Rules. In so doing the SP could not initiate any new or existing billing transactions for any of the IP’s subscription services during such period of suspension although it could process requests to unsubscribe.
 - 4.2.1.2 The adjudicator ordered that the IP, and failing the IP, the SP, should send an SMS notification to all existing subscribers notifying them of the suspension of the IP’s service until such time as it complied with the Code and the Advertising Rules.

- 4.2.1.3 The adjudicator instructed the WASPA secretariat to notify all other WASPA members of the suspension of the IP's service in terms of the sanction in 4.2.1.1 above and that providing a service to the IP during such period may constitute a breach of the Code and render a member doing so liable to sanctions themselves.
- 4.2.1.4 The adjudicator ordered the SP to pay a fine in the amount of:
- 4.2.1.4.1 R 30 000 in respect of the IP's failure to include the required title block in its television advertisements;
- 4.2.1.4.2 R 5000 for the remaining breaches of the Advertising Rules relating to television;
- 4.2.1.4.3 R 5000 for the breaches of the Advertising Rules relating to Internet web sites;
- 4.2.1.4.4 R 10 000 for the breaches of the Advertising Rules relating to SMS messages. The adjudicator stated that this amount was higher than the fines in 4.2.1.4.2 and 4.2.1.4.3 above due to the IP's failure to include both identification of the service as a subscription service, as well as pricing information, in its SMS advertisements, while the television and Internet web site advertising included these elements, albeit in a manner in breach of the Advertising Rules and clause 6.1.1 of the Code.
- 4.2.1.4.5 R 10 000 in respect of the IP's breach of clauses 6.2.2 and 6.2.4 of the Code, which are penalised in a single amount as they were aspects of the same breach, which amount was set by the adjudicator with regard to the potential harm to consumers; and
- 4.2.1.4.6 R 5 000 in respect of the IP's contravention of clause 11.1.7 of the Code.

5. GROUNDS OF APPEAL

- 5.1.1 On 23 January 2007 the IP lodged an appeal against the adjudicator's decision. The SP confirmed that it did not wish to supplement the IP's appeal with a submission of its own.
- 5.1.2 The IP, in the covering letter to the appeal, states that the complaint refers to the IP's horoscope service, which according to the IP was not advertised in South Africa. The IP states that its production company made a mistake in sending the "wrong commercials to the broadcasters" and that the "old commercials" were replaced after one week of advertising. The IP further states that after the first week of advertising it only advertised with its joke and ring tone services "which are compliant with the Code of Conduct."
- 5.1.3 In support of its appeal the IP included a number of emails to the SP, an email to the WASPA Secretariat as well as the adjudicator's report of complaint number 0591. Reference will be made to these documents where necessary in section 6, below, and will not be quoted here in detail.

5.1.4 Before listing its grounds of appeal, the IP also makes reference to actions that were taken by the IP after it received notice of the complaint from the SP, which included changes made to the IP's advertisements, Internet site and templates. Reference will again be made to these actions taken by the IP where necessary in 6, below, and will not be quoted here in detail.

5.2 Independent Transaction

5.2.1 The IP states in its first ground of appeal that its services are not in breach of clause 11.1.2 of the Code. The IP also provides detailed reasons why it is of the opinion that their service is not in breach of clause 11.1.2 of the Code.

5.2.2 Although the adjudicator made comments regarding the IP's advertisement that reflected negatively on the IP, the adjudicator did not uphold the complaint with regards to clause 11.1.2. This ground of appeal will therefore not be discussed here in detail.

5.3 Adherence to the WASPA Advertising Rules

5.3.1 Television Advertising – Visible Block

5.3.1.1 The IP states that "all advertisements" have a visible block, which is placed in the top left / right hand side of the commercial, indicating both access cost and the fact that it is a subscription service.

5.3.1.2 The IP also notes in this regard:

"For the adjudicators information, who handled this complaint. We only advertised with our horoscope service for one week (test week). After this week we only advertised with our joke and ring tone services in South Africa, which are fully compliant with the WASPA code of conduct".

5.3.2 Television Advertising – Network Compatibility

5.3.2.1 In this ground of appeal the IP states:

"We are applicable for all mobile operators in South Africa. MTN and Vodacom on a "Mobile Terminated" base, which means on a subscription base. Cell C does not offer subscription services, so users of Cell C will only receive a content item, if they specifically request this.

- Pre-paid users and post paid users have access to our services."

5.3.2.2 The IP further argues that it is not misleading "people" in any way, because "everybody" has access to its services.

5.3.3 Television Advertising - Pricing

5.3.3.1 In support of its statement that they are not in breach with the Code as regards the pricing of their services the IP provided logs for the messages sent to the adjudicator's mobile phone.

5.3.3.2 The IP specifically refers to the fact that four messages were sent to the adjudicator's mobile number, but that only two messages were billed. The IP provides that the reason for this fact is that a subscriber to its horoscope service will firstly receive a general horoscope content message, where-after a subscriber needs to specify his or her

star sign in order to continue the service. A subscriber will then receive a specific star sign content message.

- 5.3.3.3 The IP continues by stating that the only service where it is possible to receive two content messages is their horoscope service. This according to the IP is only the case if a subscriber specifically requests the second content message. The IP again makes reference to the fact that it does not promote its horoscope service in South Africa.
 - 5.3.3.4 The IP argues that the findings of the adjudicator concerning clause 6.1.1 of the Code are incorrect, because of the fact that MO messages and the welcome message is not charged but only MT are charged.
 - 5.3.4 Internet Web Site Advertising
 - 5.3.4.1 The IP states that the full and final cost is displayed at the bottom in the legal statement as well as in the top left/ right hand corner in a font size and a font type that is easily readable. According to the IP the SP confirmed that a subscriber to the service only pays R7,50 for the content message.
 - 5.3.5 SMS Advertising
 - 5.3.5.1 In this ground of appeal the IP agrees with the adjudicator that it cross sells other services by sending SMS messages to subscribers. The IP claims that it was not aware of the fact that SMS messages are defined as advertisements and that it had a different interpretation of the Code in this regard
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- 5.4 Pricing of the Service
 - 5.4.1 Concerning the breach of clause 2.2.2 of the Advertising Rules the IP states that its has a visible block, which is placed in the top left / right hand corner of the advertisement indicating both access cost and the fact that it is a subscription service.
 - 5.4.2 The IP also provides a screen shot of their “JOKE” advertisement which indicates the visible block in the top left hand corner.
 - 5.4.3 The IP further states that it is compliant with clauses 6.1.1 and 6.2.5 of the Code and that only MT message are charged.
 - 5.4.4 With regards to the breach of clauses 6.2.2, 6.2.3 and 6.2.4 the IP states that it was not aware of the fact that SMS messages are defined as advertisements. In support of this statement the IP notes that it has changed their “templates” with immediate effect.
- 5.5 Comfort Message (Clause 11.7 of the Code)
 - 5.5.1 The IP quotes its welcome template and states that the template contains frequency, pricing and contact information.

- 5.5.2 The IP further indicates that it can in future include the name of the service as well as the fact that the service is a subscription service in its comfort message if so required by WASPA.
- 5.6 Summary
- 5.6.1 In summary the IP states that it does not agree with the sanctions imposed by the adjudicator and that it has done everything in its power to be compliant with the Code. (In support of this statement the IP refers to a number of emails and the adjudicator's report in complaint 591 which it included as part of the appeal.)
- 5.6.2 The IP concludes its appeal by stating with specific reference to each individual sanction whether it agrees with the sanction imposed by the adjudicator or not.
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6. FINDINGS OF THE APPEALS PANEL

- 6.1 The panel wishes to state from the outset that it is not the role of the panel to applaud good behaviour – members of WASPA are expected to comply with the Code. To the extent that the members note a potential problem or breach and take steps to remedy this, we do not consider this behaviour to deserve any special consideration at the appeal stage, except in relation to the sanction where it might be taken into account in mitigation. Even so, the panel is reluctant to approve a practise which for all intents and purposes permits contraventions then applies lesser sanctions if the defaulter has taken a particular number or type of actions to fix the situation so as to be compliant, which is the starting position required under the Code in any event. Each case should be evaluated strictly on its own merits. In general the panel's view is that contraventions are contraventions. (See in this regard the comments made in 6.1.1.1 and 6.1.1.2 below.)
- 6.1.1 The IP, in the covering letter to the appeal (see 5.1.2 above), makes the statement that its horoscope service is not advertised in South Africa. The IP states that its production company made a mistake in sending the "wrong commercials to the broadcasters" and that the "old commercials" were replaced after one week of advertising. The IP further states that after the first week of advertising it only advertised its joke and ring tone services "which are compliant with the Code of Conduct." The panel wishes to point out that the IP did in fact advertise its "horoscope service". Whether it was by "mistake" or only for a period of "one week" is not relevant to the question of whether the advertisement that was indeed flighted on television was compliant with the Code and the Rules.
- 6.1.2 The IP, also in the covering letter to the appeal (see 5.1.3 above), makes reference to a number of emails in order to "emphasize" that the IP is "compliant with the Code of Conduct" and refers to the "review of the adjudicator of complaint 0591, which contradicted many sanctions of complaint 0568". The panel wishes to point out that the emails referred to above, and the review of complaint 0591, are all dated after the complaint to which this appeal relates and that these documents are therefore not relevant. In addition, we point out that each matter must be weighed on its own merits.

- 6.1.3 Before listing its grounds of appeal, the IP also makes reference to actions that were taken by the IP after it received notice of the complaint from the SP, which include changes made to the IP's advertisements, Internet site and templates (see 5.1.4 above). The panel again wishes to point out that these actions were all taken after the complaint which forms the basis of this appeal was lodged, and that these actions are therefore not relevant to the question of whether the advertisement that was indeed flighted on television was compliant with the Code and the Rules.
- 6.1.4 The panel has considered each ground of appeal set out by the IP above and we state our decision next to it below:
- 6.2 *Independent Transactions.* Although the adjudicator found that the IP's advertising and comfort messages are "confusing in the extreme, either due to blatant disregard for the WASPA Code of Conduct and Advertising Rules or due to a deliberate attempt to confuse consumers and potential consumers" the adjudicator did not regard this as sufficient to find that the IP breached Clause 11.1.2 of the Code. The adjudicator consequently did not uphold the complaint with regards to the breach of clause 11.1.2 of the Code. Because the adjudicator did not find a breach of the Code in this regard, no sanction was imposed. Even though the adjudicator did not find a breach of clause 11.1.2 the IP chose to include this as its first ground of appeal.
- 6.2.1 The panel records that the WASPA complaints procedure is a combination of review and appeal procedures. While it is not the role of the appeals panel to start the enquiry anew it is within the panel's powers to review the facts which are brought before it by the WASPA Secretariat. The panel on the facts before it, agrees with the adjudicator's decision, in that there are not sufficient grounds to find a clear breach of clause 11.1.2. of the Code. Because no breach of the Code was found with regards to clause 11.1.2 the panel does not find it necessary to discuss in detail the merits of the IP's submission in this ground of appeal.
- 6.3 *Adherence to the WASPA Advertising Rules* The panel wishes to place on record for the purposes of this appeal specifically and future complaints generally that the Advertising Rules form an integral part of WASPA's regulatory framework and that breaches of the Advertising Rules are as serious and as eligible to incur sanction as breaches of the Code of Conduct. The panel further agrees with the adjudicator that a possible breach of the Advertising Rules was sufficiently clear from the complaint and that the IP had been given an opportunity to respond to the possible breach of the Advertising Rules. The IP, further, at no stage in this appeal, made any submission to the contrary. The IP also had sufficient opportunity to respond in this appeal to the breaches of the Advertising Rules as found by the adjudicator.
- 6.3.1 *Television Advertising: Visible Block*
The panel finds the IP's ground of appeal with regards to the omission of the visible block as required by Clause 2.2.2 of the Advertising Rules without merit. The "horoscope" advertisement which forms the basis of this appeal clearly has no visible block in the in the top corner of the screen, indicating both access costs and the fact that it is a subscription service. The fact that all the IP's other advertisements ("Joke" and "Ringtones") are compliant in this regard is irrelevant. The fact remains that the IP's "horoscope" advertisement which forms the basis of this appeal, even if only advertised for one week, is in clear contravention of

clause 2.2.2 of the Advertising Rules. This ground of appeal is therefore not upheld.

6.3.2 *Television advertising: Network Compatibility*

Clause 2.3.11 of the Advertising Rules is clear in that advertisements must clearly indicate which mobile networks users must have access to in order to have full access to any content and/or participate in the service offered. The service advertised in the “horoscope” advertisement which forms the basis of this appeal is a subscription service. By the IP’s own admission Cell C users would not have been able to access the “horoscope” subscription service as advertised, but would have needed to specifically request content items. This in turn would definitely have led to the pricing of the service as advertised not being a true reflection of the costs Cell C users would have incurred in accessing the advertised content. This ground of appeal is not upheld.

6.3.3 *Television advertising: Pricing*

The “horoscope service” as advertised, which forms the basis of this appeal, is a subscription service, the implication of which is that a subscriber will receive content daily, more specifically “your personal horoscope daily” as mentioned in the voice over in the advertisement. After receiving a general horoscope content message for which a subscriber is billed the subscriber is billed for a second message in order to obtain the specific content for which the subscriber actually wants to subscribe (The IP itself states this in its grounds of appeal). It is therefore clear that a subscriber to the “horoscope service” will be required to send two messages, each of which the subscriber is billed for, in order to access and use the full service as advertised. This is not reflected clearly in the pricing of the advertisement. The IP again distinguishes between its “horoscope service” and its other services by stating that “The only service where it is possible to get 2 content messages on one day, is our horoscope service.....” The panel again wishes to stress the fact that the IP’s other services, and whether these services comply with the Code or the Rules have absolutely no bearing on this appeal. The IP itself admits that it is indeed possible for a subscriber to receive two content messages per day for which a subscriber to its “horoscope service” will be billed. The panel is of the view that the pricing information as provided in the advertisement is indeed in contravention of clause 2.3.12 of the WASPA Advertising Rules in that the advertisement is not sufficiently clear on the number of messages that are required before full access and use of the advertised service becomes available to the subscriber. This ground of appeal is not upheld.

6.3.4 *Internet web site advertising*

As is the case with the IP’s television advertising (see 6.3.3 above), the panel is of the opinion that the internet website advertising, as pertaining specifically to the advertising of the IP’s “horoscope service”, does not clearly reflect the total cost (cumulative number of billed messages) involved in accessing the full service. This ground of appeal is not upheld.

6.3.5 *SMS advertising*

The panel wishes to reiterate (see 6.1.1 above) that it is not the role of the panel to applaud good behaviour and compliance subsequent to non-compliance may be relevant only to the sanction where it might be taken into account in mitigation. The panel takes note of the fact that the IP

effected immediate changes and would like to commend the IP for admitting to an incorrect interpretation of the Code and the Rules and thereby not contributing to the complexity of this appeal. With regards to clause 11.14 of the Advertising Rules, the only clause regarding SMS advertising to which the IP itself did not admit to an incorrect interpretation, the panel refers to the comments made in 6.3.2 above. This ground of appeal is not upheld.

6.4. *Pricing of service*

All the individual aspects regarding this ground of appeal have been dealt with in the previous grounds of appeal. The IP's "horoscope service" advertisement which forms the basis of this appeal did not have the required visible block. The fact that the IP's "joke" advertisement, an image of which was included in this ground for appeal, does have the visible block as required is absolutely irrelevant to this appeal (see 6.3.1 above). The fact is that the IP's "horoscope service" requires a subscriber to send more than one message in order to access the full subscription service is in contravention of clauses 6.2.2. and 6.2.4 of the Code. (see 6.3.3 and 6.3.4 above). This ground of appeal is not upheld.

6.5 *Comfort Message*

The IP's "comfort message" received by subscribers to its "horoscope service" did not comply fully with the requirements of a notification message as stated in clause 11.1.7 of the Code. Although it is possible that the notification messages for the IP's other services may now contain the required information the fact remains that the notification message for the subscription service which forms the basis of this appeal did not contain the required information in that it did not contain the name of the subscription service nor the IP's contact information. The IP itself admits in its grounds of appeal the fact that it is not fully compliant due to an incorrect interpretation of the Code. In this regard the IP states "We have interrelated these sms clauses differently and therefore are willing to make the changes suggested in this report a.s.a.p." This ground of appeal is not upheld.

6.6 *Summary*

In the summary to its grounds of appeal the IP refers to three emails as well as the "review" of the adjudicator of complaint number 0591 in order to, as the IP states "emphasize that we are compliant to the WASPA Code of Conduct". In this regard the panel wishes to again state clearly that the emails as well as the adjudication of complaint number # 0591 are dated after the date of the complaint which forms the basis of this appeal. Apart from showing that the IP did take certain measures to amend their advertisements in order to be compliant to the Code the three emails referred to in the IP's grounds of appeal have no bearing on the facts of the complaint which forms the basis of this appeal. The adjudication of complaint number 0591 similarly has no bearing on this appeal considering that the facts of the two complaints are substantially different and that in any event, each complaint and each adjudication for appeal purposes must be considered on its own merits and its own facts. Complaint number 0591 was lodged on 16 October 2006, in relation to an advertisement flighted on the weekend of 13/14 October 2006, therefore well after the IP became aware of the fact that they were in breach of a number of clauses of the Code and the Rules and had consequently amended its advertisements (as is clear from the email to Mira Networks sent on 6 October 2006), one of which formed the basis of complaint number 0591. This ground of appeal is not upheld.

6.7 *Sanctions*

6.7.1 Considering the fact that the IP has amended its advertisements in order to be compliant with the Code as well as the fact that sanctions 1 – 3 have been suspended for the period pending this appeal, the panel further suspends sanctions 1 – 3 for a period of six (6) months from the date of this appeal. Should the IP be found to be in breach of the Code and/or the Advertising Rules in terms of any other complaint lodged with the WASPA Secretariat, these sanctions would become effective from the date of a decision in which the IP is found to be in breach of the Code and/or the Advertising Rules.

6.7.2 Sanctions 4.1 – 4.4 are upheld.

6.7.3 It was entirely within the powers of the adjudicator to sanction the breaches of clauses 6.2.2 and 6.2.4 of the Code as the adjudicator did in sanction 4.5. Sanction 4.5 is upheld.

6.7.4 Sanction 4.6 is upheld.

6.8 The appeal fee of R10 000 is not to be refunded to the IP.