



Wireless Application Service Provider Association

REPORT OF THE ADJUDICATOR

WASPA Member (SP)	BuongiornoUK
Information Provider (IP) (if any)	N/A
Service Type	Subscription
Source of Complaints	Competitor
Complaint Number	#0610 & #0611
Date received	26 October 2006
Code of Conduct version	4.6

Complaint

The two Complaints relate to the same advertisement placed by the SP in the Huisgenoot published for the week commencing 26 October 2006 and were submitted to WASPA by the same Complainant. A copy of the advertisement forms Annexure A to this Adjudication.

The Complainant undertook the following investigation: "I sent an SMS with the code AB23212 to 31199. I was billed 50c. I then got an SMS back saying "Blinko Club: Please confirm ur download request NOW by sending YES to 31199. I sent an SMS with the word YES to 31199. I was billed an additional R5.50. I then received an SMS saying "Welcome! We are currently processing your order. Notification via SMS will be sent to you. I received a bookmark to download the item.

I then sent another SMS with another content code to 31199. I was billed 50c. I received a bookmark to download the content."

Under Complaint #0610 the Complainant comes to the conclusion that the above indicates that he had "been subscribed to this service by requesting a single content item".

The Complaint alleges further that:

- That the actual billing differed from the advertised billing in that the “ad says that you get 10 items each week for R5.00. I have been billed R6.50 and have only received 2 items”.
- That the Complainant did not receive any notification about the subscription and how to unsubscribe.

Under Complaint #0611 the Complainant alleges a breach of section 11.3.1 of the WASPA Code of Conduct which states that “[I]nstructions on terminating a subscription service must be clear, easy to understand, and readily available”. The alleged breach exists in the SP’s failure to state in the advert the manner and cost of unsubscribing.

The Complaint also raises a possible breach of section 11.1.7 of the Code insofar as he states that he was “not sent a SMS which tells you that you are subscribed and how to unsubscribe”. This is a duplication of one of the elements of Complaint #0610.

SP Response

The SP in its Response sets out that the Complainant is making two allegations against it, viz. that it was “subscribing a client to a service by allowing them to request a single content item” and that it was “charging an additional R0,50 per request”.

Complaint #0610

As regards the first allegation the SP points out that the Complainant “clearly stated that he tried to request a piece of content and was asked does he want to subscribe to the service”.

The SP continues:

“We’ve configured the service to either subscribe one if they send in a START / GO / CLUB command automatically. Alternatively, if they request a piece of content we notify them of the subscription and ask them to opt in (i.e. confirm that they want to subscribe).

The rationale of the above is that one can download a single piece of content at R5 or if one wants to subscribe to a club one would pay a lower rate (i.e. R5 per week and bearer rated SMS to request content).

We clearly state the procedures for one off downloads and the costs involved thereto.”

In respect of the pricing allegation as identified the SP states that its advertisements clearly state “that one would pay bearer rated (or R0,50) to request any piece of content”.

Complaint #0611

The SP admitted the breach of section 11.3.1 of the Code, attributing the error to an honest oversight:

“The advert was booked last minute as part of a trade exchange with You / Huisgenoet. Whilst compiling the advert our agency overlooked the STOP command requirements in the T&C's. This was the first Blinko All you can eat subscription club advert in print. As such the omission was an honest oversight on our behalf.”

The SP continues by stating that its system ‘is configured to send an SMS with our customer care number and unsubscribe details’. The SP requests that the Complainant supply it with the MSISDN used to test the service so as to investigate the matter further. This element of the SP’s Response under Complaint #0611 is treated in this Adjudication as being a response to the alleged breach of section 11.1.7 of the Code as raised under Complaint #0610.

Investigation

An examination of Annexure A reveals the following:

1. The text at the top of the page reads as follows:

“BLINKO is ‘n wonderlike nuwe subskripsie diens

KRY 10 ITEMS ELKE WEEK VIR R5!

Teken nou in by die BLINKO CLUB en kry 10 items van jou keuse elke week. Daar is vele om te kies: muurpapiere, luitone, animasies en speletjies – alles vir 'n spot-goedkoop 50c per item. Net items wat se kode met A begin is geldig vir die Blinko Club.”

“SMS CLUB TO 31199”

2. The TnC at the foot of the page include the following conditions:

“WAP mag koste van jou network laat oloop.”

“SMS'se kos 50c extra”.

3. There is further text relating to ordering single pieces of content as opposed to subscribing to the Club:

“WIL JY NET HIERDIE ITEMS AFLAAI? As jy net een van die boonste items wil aflaai sonder om aan die Blinko Klub te behoort, verander dan asseblief die AB voor die kode met 'n BB en stuur an die kode aan 31199 R5 per item.”

The Adjudicator repeated the process followed by the Complainant on 11 December 2006 with the following results:

1. Sent SMS “AB23212” to 31199.
2. Received SMS “BLINKO: U r joining the BLINKO CLUB where you can download p to 10 great items every week for just R5 p/w. To join send YES to 31199”.
3. Sent SMS “YES” to 31199.
4. Received SMS “BLINKO CLUB: Welcome! We are currently processing your order. Notification via SMS will be sent to you ****end****”
5. Sent SMS “STOP CLUB” to 31199.
6. Received SMS “Your request has been processed and you have be unsubscribed. Thank You.”.

Sections of the Code considered

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.

6. Advertising and pricing

6.2. Pricing of services

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. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.

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 must 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.

Advertising Rules Version 1.6

Section 5.3.13 Subscription Services

“(ii) Must Indicate Charge/s:

The advertisement must indicate in the font size, position and type as indicated:

(a) The TOTAL charge that 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) & (b) above, there are any additional charges applicable to obtaining any particular service, Content or class of Content on the advertisement. [See (iii) below]

This indication must include the potential and cost of any (additional) bearer charges.”

Subscription services

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. A request from a subscriber to join a subscription service may not be bundled with a request for a specific content item.

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.

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.

11.3. Termination of a service

11.3.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

Decision

The steps taken by the Complainant to arrive at the allegations of breaches can be set out as follows:

1. Sent SMS "AB23212" to 31199. This was in effect a request to subscribe to the Blinko Club (an SMS containing "BB23212" would have constituted a request for a single piece of content). Cost 50c.
2. Received SMS "Blinko Club: Please confirm ur download request NOW by sending YES to 31199".
3. Sent SMS "YES" to 31119. Cost R5,50.
4. Received SMS "Welcome! We are currently processing your order. Notification via SMS will be sent to you"
5. Received SMS with bookmark.
6. Sent SMS "AB?????", Cost 50c.
7. Received bookmark.

It is the Adjudicator's view that the allegations raised are not as set out by the SP in its Response but can rather be stated as follows:

- Has the SP breached section 11.1.2 of the Code by bundling a request from a subscriber to join a subscription service with a request for a specific content item?
- Has the SP complied with section 11.1.7 of the Code through the provision of a proper subscription confirmation notice?
- Has the SP breached section 4.1.1 and/or section 6.2.4 of the Code through the manner in which it has presented pricing information?

Has the SP breached section 11.1.2 of the Code by bundling a request from a subscriber to join a subscription service with a request for a specific content item?

At the outset it should be noted that section 11.1.2 of the WASPA Code of Conduct has been amended with effect from 25 August 2006 by the addition of the underlined portion:

"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 may not be bundled with a request for a specific content item."

The addition has, it is submitted, the effect of clarifying what has, to date, been a somewhat controversial area of the Code.

In the WASPA Appeal Panel Findings for Complaint no #0002 #0011 #0026 #0037 #0058¹ the Appeal Panel had cause to consider the meaning of section 11.2 (as it then existed without the underlined portion) of the Code. After noting that the clause did admit to some ambiguity, the Appeal Panel stated:

“The meaning of clause 11.1.2 becomes apparent if it is read in context with the rest of clause 11.1, especially the heading of clause 11.1 (*Manner of subscription*) and clause 11.1.4. Clause 11.1.4 provides that customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. It becomes clear that clause 11.1.2 prohibits the subscription service from being dependent on the ordering of content and that the customer must be specifically intent on subscribing to a subscription service and not the ordering of content.

The second part of clause 11.1.2 also makes it clear that an offer to customers to sign up for a subscription service should not mislead customers to believe that they are subscribing to anything other than a subscription service. We are therefore of the view that clause 11.1.2 prohibits requests for subscription services from being dependent on requests for specific items of content.”

(my emphasis)

In the Adjudicator’s Report in respect of Complaint #0022² the Independent Adjudicator laid out the approach to be taken and some of the factors to be taken into account in determining whether any particular advert breaches section 11 of the Code.

“It is reasonable and appropriate for providers of subscription services to give customers and potential customers of their subscription service an indication of the type of content or service to be delivered. However, use of one or more specific items of content as an indication or example of content to be provided in terms of a subscription service, has the possibility of confusing a customer or potential customer so that they believe they are acquiring a specific content item or service rather than subscribing to a subscription service. This is prohibited in Clause 4.1.1 of the WASPA Code of Conduct requiring honest and fair dealings with customers and Clause 4.1.2 of the WASPA Code of Conduct requiring members to “not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission”. Advertising of this nature is also likely to be in breach of Clause 11.1 of the WASPA Code of Conduct.

However, the WASPA Code of Conduct does not specifically prohibit the use of a content item or items in advertising for a subscription service; provided that the content item or items is clearly and only being used as an indication or example of the type of content to be provided in terms of the subscription service. This is of course subject to the further proviso that such use does not breach Clauses 4.1.1, 4.1.2 and 11.1.1 of the WASPA Code of Conduct and that the business processes involved do not breach Clauses 11.1.2 and 11.1.4 of the WASPA Code of Conduct (as these Clauses or other Clauses of the WASPA Code of Conduct may be amplified or further explained by advisories issued by WASPA from time to time, in this case the WASPA Advisory on Subscription Services).

¹ See http://www.waspa.org.za/code/download/0002_11_26_37_58_appeal.pdf

² See <http://www.waspa.org.za/code/download/0022.pdf>

Assessing whether a content item or items is clearly and only being used as an indication or example, or whether it is likely to mislead (intentionally or unintentionally) can only be done in the context of the specific advertisement. There are a number of factors to be considered, both individually and in relation to each other inter alia and by way of example only, including:

- The use of keywords. Specific content is more likely to be an example only if a single, generic keyword used for the subscription request, while the use of one or more content specific or content related keywords is likely to cause confusion.
- The indication that the service being advertised is a subscription service and the prominence and clarity of such indication (visual, auditory or otherwise); particularly in comparison with the indication (visual, auditory or otherwise) of the content example/s.
- The indication that there will be a continual billing process and the billing frequency as well as an indication of the amount to be billed and the prominence and clarity of such indication.
- The indication that there will be ongoing, continual and regular delivery of content and the frequency of such delivery, having regard to the prominence and clarity of such indication.
- Whether there is a mix of content items and a subscription service being advertised or only a subscription service.
- Whether the same short code or access number is used for both content items and a subscription service.
- Whether similar key words are used for content items and a subscription service.
- The clear differentiation between the content examples or indicators and the subscription service itself.”

(my emphasis)

It is clear from the above that so-called “hybrid” adverts – adverts that combine the promotion of a subscription service with specific content – are neither expressly prohibited nor permitted by the Code. SPs who use such adverts should, however, be aware of the clear risk of heightened confusion in the minds of consumers and the accompanying possibility of other breaches of the Code and/or Advertising Rules.

On a review of the steps taken by the Complainant to establish its Complaint and the SP Response it is the Adjudicator’s inescapable finding that the SP’s conduct constitutes a serious breach of section 11.1.2 of the Code.

Simply put: if the only mechanism for subscribing to the Blinko Club was by SMS’ing “CLUB” there would be no problem. The advertisement is however structured in a manner that each item code also constitutes a manner in which to subscribe. This is a clear bundling of a request to join a subscription service with a request for a specific content item.

According to the SP the Complainant “clearly stated that he tried to request a piece of content and was asked does he want to subscribe to the service”. The underlined

portion is simply not true. The Complainant, under step 2 set out above, was asked to confirm his download request, not his subscription.

The SP further raises its configuration of the service noting that it has configured the relevant service to subscribe a consumer automatically if they send in a START / GO / CLUB command automatically. Alternatively, according to the SP, where the consumer requests a piece of content “we notify them of the subscription and ask them to opt in (i.e. confirm that they want to subscribe)”. As shown above the quoted portion is simply not true.

In summary:

- Subscription is dependent on a request for a specific item of content;
- the use of one or more content specific or content related keywords is likely to cause confusion;
- the same short code or access number is used for both content items and a subscription service;
- the SP has not employed a technical solution such as a double opt-in system to ensure the independence of any subscription transaction vis-à-vis any request for specific content.

Has the SP complied with section 11.1.7 of the Code through the provision of a proper subscription confirmation notice?

The SP’s response to this alleged breach is taken from the Response to Complaint #0611. The SP stated that its systems were configured to send the required confirmatory SMS and requested that the Complainant provide it with the relevant MSISDN use to test the service.

The Adjudicator repeated this request through the offices of the Secretariat during December 2006. At the date of finalisation of this Report no reply had been received.

While the *bona fides* of the Complainant in raising this allegation are accepted it would not be fair to the SP to make any finding in the absence of the provision of the requested MSISDN.

No finding is made with regard to this element of the Complaint.

Has the SP breached section 4.1.1 and/or section 6.2.4 of the Code through the manner in which it has presented pricing information?

The Complaint alleges a breach of this provision insofar as the he received only two items of content at a total cost of R6.50 as opposed to 10 items at a cost of R5.

Section 6.2.4 of the Code requires that “[P]ricing contained in an advertisement must not be misleading”. Section 4.1 further requires that “...pricing information for services must be clearly and accurately conveyed to customers and potential customers”.

It is the finding of the Adjudicator that the pricing and the manner in which it is presented has a high probability of being misleading to consumers and is not clearly and accurately conveyed to customers.

The outline upper cap text at the top of the page clearly states that a subscriber will obtain 10 items every week for R5. The actual cost of obtaining the content is R10, being the R5 subscription and the 10 50c SMS messages sent to specify content. Further text states that each item is available for 50c but, particularly given that 10 items would then cost R5, this does not clarify or counter a belief that R5 per week is the total cost of the service.

The SP’s view is that the advertisement clearly states “that one would pay bearer rated (or R0,50) to request any piece of content”. With respect this view is not supported by an examination of the advertisement itself. The 50c charge per SMS is raised as the last term and condition at the foot of the page. Its prominence and position do little to counter the reasonable belief already formed on the part of a viewer that they will be entitled to 10 pieces of content for R5.

The adverse finding is reinforced by an examination of the relevant provisions of Chapter 5 of the WASPA Advertising Rules which relates to print advertisements placed in the body or classified portions of published magazines where Access Channels are displayed. It should be noted that no findings can be made with regard to any possible breach of such provisions.

Sections 5.3.13 (ii) and (iii) read as follows:

“(ii) Must Indicate Charge/s:

The advertisement must indicate in the font size, position and type as indicated:

(a) The TOTAL charge that 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) & (b) above, there are any additional charges applicable to obtaining any particular service, Content or class of Content on the advertisement. [See (iii) below]

This indication must include the potential and cost of any (additional) bearer charges.”

(my emphasis)

(iii) Must Indicate Cost Of Any (Additional) Per-Content Access

If in addition to a periodic subscription charge the consumer could additionally be charged on a per-access basis for access to any particular service, Content or class of Content on the advertisement within the subscription period and terms, then the advertiser must make it clear to the consumer that access this Content or service will, over and above the periodic subscription cost, incur additional charges per Content or service access.

The periodic subscription cost, the frequency of the periodic charge, and where applicable, the additional access cost must all be displayed clearly and TOGETHER, in a position immediately above, below, or to the side of the Content, service, or class of Content. There must in particular be an indication whether bearer charges are included or not in the access cost.

(my emphasis)

The above extract makes it clear that a single indication must be given of the subscription charge and frequency as also additional charges, i.e. this information must be set out together and not in separate places in the advertisement. The SP has failed to do this.

In the circumstances the following finding is made in respect of Complaint #0610:

- the SP has breached section 11.1.2 of the Code;
- the SP has breached section 11.1.7 of the Code; and
- the SP has breached section 4.1.1 and/or section 6.2.4 of the Code.

Has the SP breached section 11.3.1 of the Code by not providing instructions on terminating a subscription service in a clear, easily understandable and readily available manner?

The Response of the SP in this regard is accepted.

In the circumstances the following finding is made in respect of Complaint #0611:

- the SP has breached section 11.3.1 of the Code;

It should be noted that numerous other potential breaches of the Code and Advertising Rules were present in the advertisement in question but these were not raised by the Complainant and were accordingly not taken into account. The SP is urged to undertake as a matter of urgency a review of its advertising and advertising procedures with particular regard to subscription services.

Sanction

1. Breach of section 11.1.2

The Adjudicator, mindful of the steps taken by WASPA to eradicate dubious subscription service practises and the number of subscription-related matters referred to the WASPA Independent Adjudicators, regards the breach as being of a particularly flagrant and serious nature.

The Adjudicator had reference to the Adjudicator's Report in respect of Complaints #0192, #0196, #0198, #0201, #0222, #0260, #0263, #0265 and #0266³. In this matter the same SP was fined the sum of R200 000, of which R100 000 was suspended for a period of twelve months. The fine was imposed in respect of breaches of the following clauses of the WASPA Code:

- 4.1.1
- 4.1.3
- 5.2.1
- 5.3.1

³ See <http://www.waspa.org.za/code/download/0192.pdf> , subsequently substantially confirmed on appeal

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- 11.1.2, 11.1.4 and 11.1.7
 - 11.2.

The following sanction is imposed:

- The SP is reprimanded for its disregard for the WASPA Code of Conduct;
- The SP is fined the sum of R75 000.00 payable to the WASPA Secretariat within five (5) days of the date of issue of this Report;
- The SP is required to ensure that all advertising in respect of the Blinks Club is immediately amended so as to comply with section 11.1.2 (as amended) and to provide a report of its progress in doing so, together with samples, to the Secretariat within 15 days of date hereof. The taking effect of this sanction will not be suspended by the lodging of an appeal by the SP⁴; and
- The SP is required to ensure that its business processes with regard to subscribing consumers comply with section 11.1.2 and to provide a report of its progress in doing so, including an outline of such processes, to the Secretariat within 15 days of date hereof. The taking effect of this sanction will not be suspended by the lodging of an appeal by the SP.

2. Breach of section 4.1.1 of the Code read with section 6.2.4 of the Code and Section 5.3.13 of the Advertising Rules

The Adjudicator, mindful of the steps taken by WASPA to eradicate dubious subscription service practises and the number of subscription-related matters referred to the WASPA Independent Adjudicators, regards the breach as being of a particularly flagrant and serious nature.

The Adjudicator again had reference to the Adjudicator's Report in respect of Complaints #0192, #0196, #0198, #0201, #0222, #0260, #0263, #0265 and #0266⁵.

The following sanction is imposed:

- The SP is reprimanded for its disregard for the WASPA Code of Conduct;
- The SP is fined the sum of R50 000.00 payable to the WASPA Secretariat within five (5) days of the date of issue of this Report; and

⁴ see section 13.3.15 & 13.4.2 of Version 4.6 of the WASPA Code of Conduct

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- The SP is required to ensure that all advertising in respect of the Blinko Club is immediately amended so as to comply with section 4.1.1 of the Code read with section 6.2.4 of the Code and Section 5.3.13 of the Advertising Rules and to provide a report of its progress in doing so to the Secretariat within 15 days of date hereof. The taking effect of this sanction will not be suspended by the lodging of an appeal by the SP⁶.

Breach of section 11.3.1 of the Code

Having accepted the version of the SP this is regarded by the Adjudicator as a mitigating circumstance.

The SP is fined the sum of R15 000.00 payment of which fine is suspended for a period of one year from date of the delivery of this Report. The application of the suspended sanction shall come into operation in the event that the SP is found to have breached section 11.3.1 during the term of the suspension.

⁵ See <http://www.waspa.org.za/code/download/0192.pdf> , subsequently substantially confirmed on appeal

⁶ see section 13.3.15 & 13.4.2 of Version 4.6 of the WASPA Code of Conduct