

REPORT OF THE ADJUDICATOR

WASPA Member (SP):	VIAMEDIA
Information Provider (IP):	Not applicable
Service Type:	Subscription service
Complainants:	Anonymous
Complaint Number:	9878
Code Version:	9.0 & 10.0
Advertising Rules Version:	2.3

Complaint

The Complainant wrote:

"This SMS was sent to XXXXXXXX. One item - \'find out if you have won 2night\' - no less, is being used to enter a subscriber into a subscription service. This is also an entry into a quiz. The SMS is not transparent. The words subscription service must be used not sub."

The Complainant also provided the following:

"REPLY P to find out if u have WON the R25 000 000 Powerball 2Nite! +FREE entry 2 WIN R10 000 every week! Results after each draw. Sub service.R5/day out 2 stop"

The Complainant was not satisfied with the SP's response and wrote the following:

"The current version of the code applies. Please proceed with adjudication.

The intention of the code is and will always be transparency, clarity and to protect consumers. This SMS is deceptive. This cannot be compared to the 'subscribe and win principle' which would have been in line with the intentions of the code. 'Reply to find out if you have won tonight' - is a larger concern than the bundling with the competition. The user will be subscribed and will be billed every day - this is NOT clear and unacceptable in my opinion. An adjudication should clarify.

REPLY P to find out if u have WON the R25 000 000 Powerball 2Nite! +FREE entry 2 WIN R10 000 every week! Results after each draw. Sub service. R5/day out 2 stop Sent"

Service provider's response

In its response the SP wrote:

"The complainant is a competitor and has clearly vexatious intentions. He is only reading the first sentence of the SMS and applying the code to that, without regard to the rest of the message (advert). If one took a single sentence from any conforming TV ad in isolation, one could find it in contravention of the code too. You cannot take a component of an advert in isolation.

The message received was:

Reply P to find out if u have won the R25 000 000 Powerball 2Nite! +free entry 2 win R10 000 every week! Results after each draw. Sub Service. R5/day out 2 stop

By replying P a user would find out that evening's Powerball results and hence if they had won the R25 000 000. They would also get results after every draw on an ongoing basis. This is clear. The Complainant claims the message is not transparent, we disagree, anyone reading this message would understand that while we are headlining tonight's draw (a normal marketing approach), that you will get results after every draw.

The complainant indicates a contravention of 11.2.1 and 11.2.2, suggesting that the first sentence of the message "find out if u have WON the R25 000 000 Powerball 2Nite!" is selling only one item. Taken in isolation, this could be true, however, in the rest of the message ... a few characters further, it says "+FREE entry 2 WIN R10 000 every week! ", "Results after each draw" and "Sub service" and "R5/day". The message thus communicates the ongoing nature of the service 4 times. 4 times! It also communicates that there will be results after every draw. Multiple content items.

A television advert would be completely acceptable if the voice over said "Find out if you've won the lotto tonight, SMS LOTTO to xxxxx. Get results after every draw." How is this SMS different? A single component of the commercial message cannot be taken in isolation for the application of the code. That would be illogical, wrong. A typical customer reading this message cannot have any other impression but that it is an ongoing service for results after every draw.

You have to assume that a customer is going to read the whole message.

- After reading the message a typical customer would not be automatically subscribing to a non-subscription service. The message is clearly promoting an ongoing service.
- They would be specifically opting in to that ongoing service.
- They would not be making a request for a specific content item as the message clearly states "results after every draw" and "every week".

How then can this be a contravention of either 11.2.1 or 11.2.2?

The complaint suggests that the message is an entry into a quiz. There is absolutely no mention or suggestion of a quiz here. Perhaps the complainant is on a fishing expedition and is looking for any possible basis to stifle a competitor and is seeing things that don't exist.

Finally, we'd like the Adjudicator to know that there has been some concern about 11.2.2. It is possible to interpret this clause as prohibiting promotional competitions run in conjunction with subscription services. However, such an interpretation would be contrary to the intention of the clause as was unanimously agreed in the recent Code Committee meeting. This is documented in the minutes (attached) and furthermore the code is being changed currently to ensure the 11.2.2 will not be interpreted as such. The intention was to block specific internet competitions and NOT associated promotional competitions like this.

The relevant extract from these minutes:

"11.2.2

ViaMedia alerted Code Com that recent adjudications have found against a promotional competition offered in conjunction with a subscription service, citing contravention of 11.2.2.

For example a lotto results service with a competition element. "Reply to Join and win!"

It was agreed that the intention of the clause was not to prohibit promotional competitions. It was raised that SMS was particularly vulnerable to being considered a contravention due to the limited space in an SMS, but that all promotional competitions could be viewed as a contravention under the current wording of the clause.

It was unanimously agreed that such an interpretation was not the intention of the rule and that such promotional competitions should be allowed."

The code is currently being amended to ensure only the correct interpretation.

We hope we have communicated clearly. If you have any questions, or wish further clarification please don't hesitate to ask."

Sections of the Code considered

4.1.1. Members must have 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.

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

11.2.2. 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 a request for a specific content item and may not be an entry into a competition or quiz.

Version 10 of the Code (Consideration)

11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent response as well as the recent MANCOM meeting as referred to and the amendment of section 11.2.3 in the latest version of the Code.

In evaluating the specific service the Adjudicator is not convinced that the SP has made it clear that the service is a subscription service. When determining

the application of sections 11.2.1 and 11.2.2 one cannot view them in isolation without taking section 11.1.1 and the Advertising Rules into consideration.

Section 11.1.1 states that promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

The SP in this instance, read together with the Advertising Rules did not refer to the services as "subscription services" but only made use of the term "sub". It further refrained from providing clear guidelines on how to unsubscribe.

The placement of the "subscription service" right towards the end of the message might also lean towards confusion, where a customer might be thinking that he applies for non-subscription content. That however said, the message does contain certain elements that might indicate that the service offered does indeed offer a continuous service.

Whether a prospective customer therefore realises that he enters a subscription service in this instance is a subjective debate. The Adjudicator is however not of the opinion that the SP has complied with section 11.1.1 and from that draws inference that a prospective customer might think he / she requested non-subscription content.

This would in this instance therefore result in a breach of section 11.2.1 and the Adjudicator concomitantly rules a breach of section 11.2.1.

With reference to section 11.2.2 the Adjudicator has given the SP the benefit of taking the amended section 11.2.3 of version 10 of the Code and the recent Mancom meeting into consideration. It has to be stated however that this was merely done for interpretation purposes.

Section 11.2.2 states that a request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

This section was clearly breached should one view it in terms of version 9 of the Code: "REPLY P to find out if u have WON the R25 000 000 Powerball 2Nite! +**FREE entry 2 WIN** R10 000 every week!

Taken section 11.2.3 of version 10 of the Code into consideration, it would however not seem to be a breach: "...it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer..."

BUT, section 11.2.3 states further that in **such a case**, it must be **clear** to the customer that the promotional draw or competition is **ancillary** to the subscription service, and the **process of joining the subscription service may not be disguised as an entry into a competition**.

The Adjudicator is not of the opinion that the SP has conformed to these obligations and therefore finds that the SP has committed a breach of section 11.2.2.

The Complaint is upheld.

Sanctions

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SPs with regard to breaches of the relevant sections of the Code of Conduct; and
- The SPs' subsequent response
 - 1. The SP is required to suspend the service until such time as it complies with the orders set out below.
 - 2. The SP may not initiate any new or existing billing transactions for the service during such period of suspension; however it may process any unsubscription requests;
 - 3. The SP shall send an sms notification, detailing such suspension, to all existing subscribers of the service (the SP shall furnish the WASPA Secretariat with confirmation that it has notified its subscribers);
 - 4. The SP shall clearly indicate at the first point of contact with the service and all subsequent services (irrespective of medium) that the service is a subscription service and further precisely what the subscription entails. These indications must be clearly visible and unambiguous.
 - 5. The SP is fined R100 000 for its non-compliance with sections 11.2.1 and 11.2.2 of which R 80 000 is suspended for one year, payable to the WASPA Secretariat within 5 (five) working days of notice.

The WASPA Secretariat is also ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this.