

**WASPA appeals panel
Complaint 10245**

REPORT OF THE APPEALS PANEL

Date:

Appellant: Viamedia

Complaint Numbers: 10245

Applicable versions: 9.0

1 BACKGROUND TO THE APPEAL

1.1 This is an appeal against the finding and sanction imposed on the Appellant by the adjudicator in complaint 10245.

1.2 The Appellant is a full member of WASPA.

1.3 The complaint was made by a competitor of the Appellant, and turned on receipt of an SMS from the Appellant on the 13th of August 2010 in the following terms:

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

1.4 The Complainant alleged that the SMS in question constituted a breach of clause 11.2.1 of the Code of Conduct, in that it encouraged recipients to request a single content item (the winning numbers in a lottery) but in fact would subscribe them to a subscription service.

1.5 He also appeared to allege an infringement of clause 11.2.2 of the Code of Conduct in that "This is also an entry into a quiz." and according to that clause a request "...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."

1.6 The adjudicator quoted the Appellant's response *verbatim* in his report, and it is not necessary to repeat it. Suffice it to say that the main points raised were as follows:

1.6.1 The next version of the Code of Conduct would clarify the position regarding offering promotional competitions in conjunction with subscription services, and the matter should be put on hold until the next version of the Code is produced.

1.6.2 The Complainant as a competitor was bringing the complaint for the purpose of vexing the Appellant. The SMS should be interpreted as a whole and not by picking out extracts and analysing them in isolation as the complainant has done. The consumer must be assumed to read the whole message. Analysed this way, the message is clearly an advertisement for a subscription service and not for a single content item, and the consumer would intend to subscribe to the subscription service when responding to the SMS.

**WASPA appeals panel
Complaint 10245**

- 1.6.3 As the alleged infringement of clause 11.2.2, the Appellant submitted that the SMS did not refer to a quiz, but to a competition, and that the bundling of competitions with subscription services (and specifically advertisement thereof in promotional messages in this way) was the subject of a recent Code Committee meeting, the minutes of which the Appellant included in its response. These minutes showed a resolution by the committee that “the intention of the clause was not to prohibit promotional competitions”, and that the Code would be amended to allow for inclusion of notice of competitions in this way.
- 1.7 The Code of Conduct was indeed amended with the insertion of clause 11.2.3 in version 10.0 thereof, which became effective on the 13th of October 2010, some two months after this complaint was lodged.

2 THE APPLICATION OF THE CODE AND RULES

The Code, v9.0

- 2.1 The adjudicator correctly applied version 9.0 of the WASPA Code of Conduct to this complaint, the relevant sections of which are reproduced here for convenience:

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.

The Code, v10.0

- 2.2 Clause 11.2.3, inserted in version 10.0 of the Code of Conduct reads as follows:

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.

3 THE DECISION OF THE ADJUDICATOR

3.1 The panel notes that the heading of the adjudicator's report lists the complaint number as "9878" rather than "10245", an oversight that fortunately does not seem to have had a prejudicial effect.

3.2 The adjudicator found that the Appellant had infringed clause 11.1.1 of the Code:

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.

3.3 Unfortunately it is not clear from the above what factor swayed the adjudicator to make the decision that he did.

3.4 The adjudicator then finds that an infringement of clause 11.1.1 necessarily implies an infringement of clause 11.2.1 in these circumstances.

3.5 Finally, the adjudicator finds that the Appellant infringed clause 11.2.2 on the following basis:

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

**WASPA appeals panel
Complaint 10245**

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.

3.6 The following sanctions were imposed:

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.

4 GROUNDS OF APPEAL

4.1 In its undated appeal, the Appellant does not set out whether it is appealing the adjudicator's findings or sanction, and indeed doesn't cite any particular clause of the Code of Conduct at all. Nonetheless, the Panel will assume that the Appellant wishes to appeal all the adverse findings of the adjudicator as well as the sanctions imposed.

4.2 The grounds of appeal were similarly opaque, but appeared to be as follows:

4.3 The outcome of the adjudication is a result of taking the elements of the SMS message in isolation and applying the Code of Conduct to those isolated sections rather than interpreting the message as a whole.

**WASPA appeals panel
Complaint 10245**

- 4.4 The purpose and reason for the existence of the service that the SMS in question advertised was to notify consumers of lottery draw results.
- 4.5 The message addresses the recipient's need for this information in an appropriate manner. As the Appellant puts it:
- In another context, one could ask if the Stormers won their game last night. For the results of theirs and other Super 15 fixtures, SMS X to 3****. It's an intuitive and appropriate question (given the context), and not concerning as has been intimated.
- 4.6 The Appellant re-iterated its view that this complaint had its genesis in the complainant's wish, as a competitor of the Appellant, to cause discomfort to the Appellant.
- 4.7 Finally, the Appellant gives examples of SMSes sent by other WASPS that in its view show similar characteristics to the SMS complained of, and which are apparently accepted in practice. As the Appellant points out, none of the examples identify the service advertised as being a subscription service.

5 FINDINGS OF APPEALS PANEL

Clause 11.2.1

- 5.1 The adjudicator predicated his findings in respect of this clause on his findings on clause 11.1.1. Both the adjudicator's reasoning in respect of clause 11.1.1 and the link that he establishes between clause 11.1.1 and 11.2.1 were unfortunately too sparse to be of assistance. Consequently the Panel is unable to uphold the adjudicator's finding based on his reasoning.
- 5.2 To view the matter afresh, however, the Panel reasons as follows.
- 5.3 Clause 11.2.1 dictates that a consumer cannot be subscribed to a subscription service as a result of a "...request for any non-subscription content or service."
- 5.4 In responding to the SMS in question, what would the recipient be requesting? If the recipient's intention would be to subscribe to a subscription service, then the Appellant's conduct is acceptable. However, if the recipient's intention would likely NOT be to subscribe, then the Appellant has indeed infringed clause 11.2.1.
- 5.5 The Appellant makes much of the need to interpret the SMS as a whole and not to analyse its separate parts individually. The Panel agrees with this, but it is equally important to note that the SMS contains several distinct messages, and it is the message that is foremost in the Recipient's mind, the "call to action" that determines what the recipient would be requesting when responding to this SMS.
- 5.6 The message can be broken into four sections, each of which contains a separate "message", and they are set out here in the order in which they appear in the message:-

**WASPA appeals panel
Complaint 10245**

5.6.1 The first section of the message, the part that grabs the recipient's attention and addresses his or her need - to know if he or she has won the lottery prize TONIGHT:

REPLY P to find out if u have WON the R25 000 000 Powerball 2Nite!

5.6.2 The second section, a "sweetener" that offers a free entry into a competition.

+FREE entry 2 WIN R10 000 every week!

5.6.3 The third section, that gives more information about the frequency of the service:

Results after each draw.

5.6.4 The fourth and final section, identifying the subscription service and giving billing and unsubscribe information:

Sub service.R5/day out 2 stop

5.7 A few further points are noteworthy here:

5.7.1 The message was not phrased to describe the ongoing, repetitive nature of the service. So for example, the Appellant could have said, "Reply P to have all Powerball results sent to ur phone", but instead chose to concentrate on the recipients wish to find out TONIGHT's results.

5.7.2 The Appellant chose to put the third section, which qualifies the first by saying that results are provided after each draw, after the information regarding the free entry into a competition.

5.8 The "call to action" here was clearly to find out the lotto results for "2Nite". The subscription nature of the service, while stated, was very much ancillary to the main message.

5.9 To use the Appellant's rationale, when viewed as a whole, the message encourages the recipient to request results for a particular day. Hence it is a request for a particular content item, and the Appellant by subscribing recipients to a subscription service when they make a request, has infringed clause 11.2.1.

5.10 It is a recurring theme in WASPA adjudications that even though a member may meet all of the technical requirements set out in the Code of Conduct for advertising of services, if the manner in which services are advertised is misleading, the "boxes ticked" do not shield against members against a finding that advertising is misleading.

5.11 The appeal on clause 11.2.1 is dismissed.

**WASPA appeals panel
Complaint 10245**

Clause 11.2.2

- 5.12 Clause 11.2.2 comprises two sentences, the first of which addresses a general evil: that a request to join a subscription service must be an independent transaction with the specific intention of subscribing to that service. The second sentence addresses specific evils: that a subscription to such a service must not result from a request for a single content item or be disguised as an entry into a competition or quiz.
- 5.13 The adjudicator based his finding on this clause on the fact that the Appellant had included information on a competition in the SMS complained of. Does this amount to an infringement of this section, as the adjudicator contends?
- 5.14 Since the complaint was lodged, clause 11.2.2 has been qualified by clause 11.2.3, which was introduced in version 10.0 of the Code of Conduct. The adjudicator takes the view that taking clause 11.2.2 in isolation, unqualified by clause 11.2.3, the Appellant infringed the code simply by including reference to the competition. He goes on to interpret the clause in the light of the new clause 11.2.3, and still finds that the Appellant to have breached the code.
- 5.15 The panel takes a different view. The relevant phrase used in clause 11.2.2 is that a request to join a subscription service ...“may not **be** an entry into a competition or quiz.” (*emphasis added*) Note that the word “be” was used, not “include”, “contain” or similar. In other words, the “call to action” should not be the competition entry. The evil being addressed here is one where the recipient of an SMS enters a competition, and is subscribed to a subscription service by the way. In this case, the SMS contains notification that the response would result in entry into a competition, but it is clear to the panel that this notification is not the call to action. Consequently the Appellant did not infringe clause 11.2.2 of version 9.0 of the Code by including reference to a competition in the SMS complained of. This is true even without taking into account version 10.0’s new clause 11.2.3.
- 5.16 The Appellant is not exonerated, however. The panel is of the view that both sentences of clause 11.2.2 expand on the theme of clause 11.2.1: that customers must not be subscribed to a subscription service if they think they are requesting something else. In this case, a recipient who responded to the “call to action” to find out the lotto results for “2Nite” would be subscribed to the Appellant’s service. This amounts to subscribing the customer as a result of the customer’s request for a single content item. It follows then that by doing this the Appellant infringed clause 11.2.2.
- 5.17 The appeal on clause 11.2.2 is dismissed.

Clause 11.1.1

- 5.18 The appellant also lodged an appeal in complaint 9817, which involved a message sent by the Appellant that was very similar in substance to the one complained of in this matter. In complaint 9817 the panel found that the message when viewed as a whole did not adequately identify the service as a subscription service because the “call to action” was not to join the subscription service but to obtain a single content item and found that it had infringed clause 11.1.1. The same is true in this case.

**WASPA appeals panel
Complaint 10245**

- 5.19 Once again, if a message's content is misleading, adhering to the technical requirements of the Code will not be a defence.
- 5.20 The appeal on clause 11.1.1 is dismissed.

Sanction

- 5.21 The Appellant does not advance any grounds of appeal against the sanctions imposed upon it; the panel has nonetheless considered the suitability thereof.
- 5.22 Clause 11.2.2 qualifies clause 11.2.1, and it would hence not be proper to sanction the Appellant for infringements of both of them. The adjudicator did not set out how he arrived at the quantum of the fine for infringements of these two clauses, so the panel does not know if he appreciated that a sanction in respect of each would be an injustice.
- 5.23 The Appellant was sanctioned under complaint 8917 for an infringement of clause 11.1.1 that was very similar to that found in this complaint. The infringement in this matter took place on 13 August 2010, and the report in complaint 8917 was published on 22 June 2011. As the Appellant had not received notice of the adjudicator's report in complaint 9817 at the time, and as the infringement arose from the same practice, it would be unjust to sanction the Appellant again here.
- 5.24 The Appellant was evidently attempting to obtain clarity on the subject matter of this complaint from the WASPA Code Committee during the period when this complaint was lodged. The submission made was in respect of the "bundling" of competitions with SMSes advertising subscription services. While at it turns out this is not entirely relevant to the complaint, the Appellant was in the panel's view acting in good faith throughout, and there is no evidence that it intended to mislead consumers.
- 5.25 Further, the panel considers that, the fine imposed on the Appellant was too onerous in the light of sanctions imposed for similar infringements.
- 5.26 Consequently, the adjudicator's sanction is to be replaced with the following:
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. In particular the SP shall ensure that the "call to action" of all SMSes advertising subscription services describes the subscription service, and not a single content item.

**WASPA appeals panel
Complaint 10245**

6. The SP is fined R50 000 for its non-compliance with clauses 11.2.1 and 11.2.2, of which R 40 000 is suspended for one year, payable to the WASPA Secretariat within 5 (five) working days of notice.

5.27 The WASPA Secretariat is requested to point out the error identified by the panel in paragraph 3.1 above to the adjudicator and suggest an amendment in terms of clause 14.3.18 of the Code of Conduct.

5.28 The Appellant's appeal fee is forfeited.