



REPORT OF THE ADJUDICATOR

Complaint reference number:	20061
WASPA member(s):	SMS Portal (Pty) Limited (SP)
Membership number(s):	0139
Complainant:	Media Monitor
Type of complaint:	Non-compliant advert
Date complaint was lodged:	2013-04-02
Date of the alleged offence:	2013-04-02
Relevant version of the Code:	12.1
Clauses considered:	4.1.1; 6.2.2; 6.2.6; 6.4.1; 6.4.2
Relevant version of the Ad. Rules:	2.3
Clauses considered:	5.2.1.1; 5.2.1.2
Related cases considered:	19652, 19675, 20062 and 20129

Complaint

1. The WASPA Media Monitor lodged a formal complaint against the SP regarding a 1st For Women advertisement which flighted on television on 2 April 2013.
 2. The advertisement invites viewers to SMS the keyword "FIRST" to the advertised shortcode and they will receive a call-back from the client.
 3. The Media Monitor alleges that the price of the SMS to be sent to the shortcode is not clearly visible, nor explicit in the advertisement.
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Service provider's response

4. The SP's representatives submitted a consolidated response to this complaint and to four others involving the same SP (19652, 19675, 20062 and 20129).
5. The response states that all of the complaints relate to television advertising booked by the same IP, Telesure Upstream (Pty) Ltd.
6. In their response, the SP's representatives made certain direct submissions and also included a number of submissions made by the IP in response to the complaint.
7. The IP is not a member of WASPA but has acknowledged the need to comply with the WASPA Code of Conduct.
8. The IP states that it has used over 800 short codes in the previous 5 years and has never received any complaints during this period in respect of the advertising on any of these codes.
9. The IP goes on to state that, in particular, there have been no instances where advertising involving a short code has not specified the applicable cost for sending an SMS to such short code.
10. The IP states that it conducted some informal research on behalf of its customer in order to establish how many competitor insurers, in their advertising and where SMS "call to action" was involved, actually provided/displayed the cost of such SMSes. It found that a great many of the competitors were not displaying detail relating to the SMS cost.
11. The IP then consulted with the Advertising Standards Authority of South Africa ("ASA") to establish whether it was required to display the cost of an SMS response where standard rates were applicable.
12. ASA confirmed to the IP that it was not necessary to display the cost of standard-rated SMS responses in advertising of this nature. ASA also provided the IP with a copy of a ruling made by the ASA Directorate on this issue in a related complaint (MTN Sama Awards / T Braune (13435)) which confirmed ASA's view.
13. In this ruling, ASA ruled that where there are no value added services being charged for, and consumers are only charged standard rates that they are normally charged by their respective service providers when sending SMSes, then the omission of the applicable SMS rate did not render the advertisement misleading to consumers in their expectations as to costs.
14. The IP relied on the view expressed by ASA and found it unnecessary to display the cost of an SMS response to the advertised short codes contained in its client's advertisements where standard-rates applied.

15. The IP states that it interpreted section 6.2.6 of version 12.1 of the WASPA Code of Conduct in line with the view expressed by ASA, i.e. that it was only necessary to display the price of an SMS where a premium number was displayed.
16. The IP acknowledges that section 6.2.2 is not limited to "premium rated services" and applies to all services. However the IP argues that it interpreted this to refer to the actual services promoted as opposed to the cost of the SMS response and that the more explicit provisions of section 6.2.6 superseded 6.2.2.
17. The IP also submitted that there is no prejudice to consumers at all given that all responses are charged at the standard rate.
18. The IP argues that it is an untenable situation for an entity to be regulated by two distinct codes which impose conflicting obligations and that an interpretation of the WASPA Code should be aligned with the ASA Code.
19. Based on the submissions made by the IP, both the SP and IP deny that either of them have breached section 4.1.1 of the Code.
20. The SP submits that there is no evidence presented that it or the IP has not had "honest and fair" dealing with its customers. As set out above, the IP in this matter has explained the reasons for its conduct and there was no intention on the part of either the IP or the SP to mislead or be dishonest with consumers.
21. The SP argued further that there was no prejudice to customers or potential customers given that the shortcodes advertised utilised a standard rate and that in the absence of any prejudice, it could not be found that there had been a failure to act honestly or fairly or to clearly and accurately convey pricing information to customers and potential customers.
22. Notwithstanding the view taken by the SP and IP, the IP will review and amend its advertising where relevant on a without-prejudice basis.
23. The IP provided the SP with a timetable (contained in Annexure B to the SP's response) indicating the status of the advertisements forming the subject of the complaint.
24. The IP has stressed that it regards the time-periods indicated for remedial action as being reasonable given the nature of the media involved. The IP has also had regard to the guidelines provided by the ASA Procedural Guide relating to time periods allowed for the withdrawal of advertisements.
25. In its consideration of these time periods the adjudicator and/or WASPA monitor is requested to also consider the lack of any clear prejudice to consumers who have viewed the advertising in that a standard rate response is utilised. There is no prejudice because this is exactly what a consumer would

anticipate spending on such SMS and his or her choice to respond would therefore be on a fully-informed basis.

26. The SP has also made the following submissions in mitigation of the sanction should it be found that it has, through the IP's conduct, breached one or more clauses of the WASPA Code of Conduct and/or Advertising Rules:
- 26.1 The lack of clear prejudice to consumers and potential consumers flowing from the use of standard -rate response tariffs as opposed to premium-rate response tariffs. This offsets the fact that television advertising has a broad audience.
- 26.2 The reasonableness of the IP's actions in relying on advice received from the ASA prior to amending its advertisements and the reliance of the IP on ASA precedent read with the clear implication of clause 6.2.6 of the Code.
- 26.3 In the past three years there have been two formal complaints lodged against the SP, i.e. complaints 12662 and 16486. Both complaints related to unsolicited SMSes and therefore are not directly relevant to this complaint.
- 26.4 The SP has not previously been found to have breached section 6.2.2 and that its record as regards WASPA complaints is relatively good.
- 26.5 The Media Monitor has referred in her complaints to "repeat offences". This is patently erroneous as no adverse adjudications have been made in this matter as opposed to assertions made by the Media Monitor.
27. A copy of the SP's full response is attached to this report for ease of reference.

Sections of the Code considered

28. Section 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.

29. Section 6.2.2:

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

30. Section 6.2.6:

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. (ONLY APPLICABLE IF MORE THAN STANDARD RATED SMS)

31. Section 6.4.1:

Where a short code is used as a brand, there is no requirement to display pricing information next to the short code, provided there is no directly associated call to action.

32. Section 6.4.2:

Where a short code is used as a brand and there is an associated call to action, the standard requirements for the display of pricing information are required, as set out in the Advertising Rules.

Decision

33. I have considered the submissions made directly by the SP, as well as those submissions that have been made by the IP and included in the SP's response to the complaint.

34. *Alleged contravention of section 4.1.1 of the Code*

34.1 While I disagree with the submission made by the SP that an element of prejudice to customers or potential customers must be shown before a member can be held to have acted dishonestly or unfairly in terms of this section; I am satisfied in the circumstances of this complaint that the SP did not act dishonestly or unfairly without making any finding on the question of prejudice to customers or potential customers.

34.2 The SP responded to the initial complaint made by the Media Monitor and obtained confirmation from the IP that the advertisements in question would be changed.

34.3 Furthermore, the SP did not act dishonestly or unfairly in relying on the position taken by the IP that it did not need to publish standard SMS rates with its advertised shortcodes based on the view expressed by ASA in this regard.

34.4 The complaint in this regard is accordingly dismissed.

35. *Alleged contravention of section 6.2.2 of the Code*
- 35.1 Section 6.2 of the Code deals with the issue of pricing of “services” promoted by members.
- 35.2 While there is no express definition of the term “services” in the definition section of the Code, section 1.4 makes it clear that the scope of the Code is restricted to *wireless application services* accessed by a customer in South Africa, transmitted by a wireless application service provider and carried by a South African network operator; and does not refer to other types of services that the member may provide.
- 35.3 The Code then goes on to deal separately with various types of wireless application services, including, *inter alia*, children’s services, adult services, competitions, contact and dating services, subscription services, and notification services.
- 35.4 In the present complaint, the IP’s customer (1st For Women) has used a short code as a means by which potential customers can contact it via SMS to receive a call-back.
- 35.5 No wireless application services are being promoted in the advertisement. Instead, a shortcode is being used as a potential contact touchpoint for customers.
- 35.6 I agree with the SP’s view that, on a proper interpretation of section 6.2.2, the section does not apply to the cost of SMS responses to an advertised shortcode where no “services” which fall within the ambit of the Code are being promoted.
- 35.7 I therefore find that the SP has not contravened section 6.2.2, and the complaint is accordingly dismissed in this regard.
36. However, that is not the end of the matter. In the present circumstances, I believe that section 6.4 is the relevant section of the Code which is applicable.
37. The shortcode being used in the advertisement by the IP forms part of the client’s brand and is directly associated with a call-to-action, i.e. that potential customers are invited to send an SMS to the shortcode to receive a call-back.
38. Section 6.4.2 provides that, in such circumstances, the standard requirements for the display of pricing information are required, as set out in the Advertising Rules.
39. The omission of such pricing information would constitute a contravention of section 6.4.2 of the Code.

40. However, as the Media Monitor did not raise this issue in its complaint and in light of the undertaking that the relevant adverts will be amended to display the correct pricing information, it is not necessary for me to make any ruling in this regard.