



REPORT OF THE ADJUDICATOR

WASPA Member:	US Cellcom
Service Type:	Subscription
Complainant:	Public and WASPA Secretariat
Complaint Number:	22466 and 22635
Code Version:	12.4
Advertising Rules Version:	Not applicable

Supplementary Adjudication

In the above matters, certain issues were held over for consideration pending the filing of certain requested papers.

The relevant portions of the ruling are:

5.1.12. Direct marketing messages may not be sent on Sundays, public holidays, on Saturdays before 09:00 or after 13:00, or on all other days between 20:00 and 08:00, unless expressly agreed to in writing by the recipient.

In matter 22466 messages appear to have been received, at, inter alia 00h19, 20h01 and 02h37. The complainant's logs confirm the 02h37 message. The logs also confirm two messages at 00h19.

The timing of the messages does not appear to have been an issue in matter 22635.

Putting aside the question of whether the subscription was valid, I have to ask myself whether the messages sent out of acceptable hours amount to "direct marketing".

The messages sent at 00h18 on 14 August 2013 are:

Congrats, Ur Mobile Voucher Reward is Ready! Keep your Account active and visit www.mob-voucher.com, your username is [] password [].

At 00h19 the following was sent:

Welcome: Your Mob Voucher subscription has been activated. R7/day. . . .

The message sent at 02h37 was a reminder message.

I refer the parties to the discussion under clause 11.2, and similarly reserve judgement on Clause 5.1.12.

6.2.11. During any calendar month, if the total cost of any service exceeds R200 for that month:

(a) Where the WASP is in control of the billing (e.g. an OBS), a notification must be sent to

the customer that they have reached this limit and a communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs

being billed.

(b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), the member must send a notification to the customer once they

have reached this limit.

On the complainant's version it appears that the cost of this subscription is R7 a day. It appears from the logs that in September 2013, the complainant in matter 22466 was billed 34 times. This is R238. No notification was sent, according to what is before me.

On the WASP's version, the subscription period was too short for this issue to be relevant.

I refer the parties to the discussion under clause 11.2, and similarly reserve judgement on Clause 6.2.11.

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.*

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, all marketing and promotional material must make it reasonably 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.*

There are two versions before me – the complainant in matter 22466 and the WASPA Secretariat in matter 22635 both submit that the subscription in this matter was an auto subscription.

The WASP alleges that the subscription is a double opt in process. It provided logs in support thereof.

I am tempted – given that the clause is in any event breached – to ignore the question of auto-subscription. This is a “he said/ she said” situation and it is hard to make a call. However, auto subscription is a far more serious infringement than a misleading call to subscription.

I therefore looked carefully at the sms logs provided by the complainant relating to his number in matter 22466. The records appear ex facie to emanate from MIRA. It is clear that he received a number of similar solicitations from this WASP in the time leading up to the subscription, all of which he ignored.

According to his records, he received two calls to action at around 8pm on 13 August 2013. He then received a “Welcome” message at 00h19 on 14 August 2013. His records show no record of the sms’s necessary for a double opt in process.

According to the WASP, the subscription only happened on the 21st of October, and the double opt in messages were recorded. The complainant's records show no activity on 21 October, but there is a reminder message sent on 20 October.

This matter has been the subject of a court application and an emergency hearing, yet the WASP has failed to provide solid evidence other than an extract from its logs that could easily be fabricated that its version is correct.

I am also disturbed by the fact that the complainant appears ex facie to work for or be the CEO of a competitor of the WASP and this could give rise to a reason for misrepresenting what occurred.

Here is what is clear:

If the complainant is telling the truth, an amount of R7 a day was deducted from his account from 14 August 2013. If the WASP is telling the truth, an amount of R7 was only deducted from 21 October 2013.

It appears that he was unsubscribed on 9 November 2013.

I therefore request the following:

- [The complainant to provide a certified copy of his cell phone bill for the relevant dates, and a certified copy of his bank statement reflecting the relevant deductions (other payments may be covered over for privacy).***
- [The WASP to provide certified or audited statements reflecting the deductions for this number, and confirming the absence of deductions for this number for the relevant dates.***

I caution the WASP that they are facing a serious breach in this regard, and that a continued failure to respond will be interpreted by me as an admission. The parties have two weeks to supply WASPA with the requested records, whereafter I shall rule on the question of auto subscription based on what is before me. No extensions may be granted by WASPA.

11.2.5. If a subscription service is initiated by a customer sending an SMS to the service provider, then a separate confirmation message must then be sent to the customer's mobile

handset. Only once the customer has followed the activation instructions in the confirmation message can they be subscribed to the subscription service.

This issue can similarly only be resolved by determining which party has furnished a truthful version of what occurred, and I reserve judgement on this issue.

Reserved Judgement

I have called for:

- [***The complainant to provide a certified copy of his cell phone bill for the relevant dates, and a certified copy of his bank statement reflecting the relevant deductions (other payments may be covered over for privacy).***
- [***The WASP to provide certified or audited statements reflecting the deductions for this number, and confirming the absence of deductions for this number for the relevant dates.***

The parties have 2 weeks to provide this information whereafter I shall rule, and apply sanctions accordingly.

The suspension of services ordered by the Emergency Panel remains in force until the reserved ruling referred to above is issued. The status of the suspension will be fully considered in that ruling.

The WASP is advised that procedurally it should address the issues raised whereafter it can appeal the content of both this and the reserved judgement should it so wish.

What is clear from these extracts is that I am torn as to who is telling the truth. Both parties unfortunately have a motivation to lie in this matter. I therefore had to find a mechanism to verify the truth, which was summarised in this statement:

Here is what is clear:

If the complainant is telling the truth, an amount of R7 a day was deducted from his account from 14 August 2013. If the WASP is telling the truth, an amount of R7 was only deducted from 21 October 2013.

Unfortunately, it seems that I was misled by the WASP's confusion. There are two complaints in this matter:

#22466 lodged by a member of the public for number [redacted]

22635 lodged by the WASPA Secretariat for number [redacted]

The WASP stated:

By the quotation of Mr. Garth Mackintosh ("Again, my main complaint is that I was AUTOSUBSCRIBED!") we are pointing out and providing a proof of subscription which was made on 21.10.2013. and this was not auto subscription. Mr. Garth Mackintosh was referring to the free promotion message he received in August (29.08.2013.) but he WAS NOT SUBSCRIBED THEN.

Subscription was completed on 21.10.2013. via sending sms LUX to 43450 and OK to 43450 (double opt in procedure). Welcome message was sent accordingly after subscribing and it is following the WASPA code of conduct

The WASP attached proof of this October subscription.

However, looking at the records provided by both parties now, I realise that the October subscription was on matter #22635 and unrelated to Mr Mackintosh. The WASP had managed to confuse the two matters, and use the wrong phone number in formulating its response. My chain of logic was therefore faulty, leaving me back at the proverbial drawing board on this question.

The WASP has now provided records for both numbers. For the relevant number, being matter #22466, the logs show:

13.08.2013					
out	11:44:18 AM	43450	MTN	[free]	Congrats [redacted], U are THE WINNER! Cl
in	07:15:09 PM	43450	MTN		LINK2
out	07:15:09 PM	43450	MTN	[free]	Click to open http:mte.meEXy your Voucher R
out	07:58:08 PM	43450	MTN	[free]	Click to open http:mte.meEXy your Voucher R
out	08:01:26 PM	43450	MTN	[free]	Click http:mte.meEXy to open your Voucher R
14.08.2013					
out	12:19:18 AM	43450	MTN		LINK2 OK
out	12:19:21 AM	43450	MTN		Congrats, Ur Mobile Voucher Reward is ready!
out	12:19:21 AM	43450	MTN	[free]	Welcome: Your Mob Voucher subscription has
out	10:10:00 AM	43450	MTN		

Now, according to the WASP there is a double opt in process. The consumer must "sending sms LUX to 43450 and OK to 43450 (double opt in procedure)".

According to the above records, at best ONE SMS came “in” before the subscription was activated.

I compared this to the similar records for the number in matter 22635, in respect of which we have already seen the WASP's summary as quoted above. The records show:

21.10.2013					
	01:52:03				
in	PM	43450	MTN		LUX
	01:52:04				
out	PM	43450	MTN	[free]	Send OK to 43450 to receive your Voucher
	01:53:15				
in	PM	43450	MTN		LUX OK
	01:53:16				
out	PM	43450	MTN		Congrats, Ur Mobile Voucher Reward is rea
	01:53:18				Welcome: Your Mob Voucher subscription h
out	PM	43450	MTN	[free]	43450.

Of course, the logs for 13 and 14 August in matter 22466 could be wrong. However, they are provided BY the WASP, and the WASP has stated that they received them from MIRA, as prima facie evidence and I must accept them as correct.

What makes the situation even more worrying is that the August logs for matter 22466 go on to show:

15.08.2013					
	10:10:38				
out	AM	43450	MTN		
16.08.2013					
	10:11:42				
out	AM	43450	MTN		
17.08.2013					
	10:11:04				
out	AM	43450	MTN		
18.08.2013					
	10:05:31				
out	AM	43450	MTN		
	02:54:05				
in	PM	43450	MTN		LINK2
	02:54:07				
out	PM	43450	MTN	[free]	Click to open http://mte.meHBW your Voucher F

In other words, four days after the subscription was activated, another activation request was received. Again, while the sms sent in return calls for completion step (“ . . .and complete your activation”) but no further sms is received.

I am left with no choice but to conclude that something untoward has occurred with the subscription process in this matter.

Therefore, on the WASP's own evidence, the complainant in matter 22466 was autosubscribed in that there was no second confirmation. **There is therefore a breach of Clause 11.2.1. and 11.2.5.**

I now return to the clause by clause consideration of the remaining issues:

5.1.12. Direct marketing messages may not be sent on Sundays, public holidays, on Saturdays before 09:00 or after 13:00, or on all other days between 20:00 and 08:00, unless expressly agreed to in writing by the recipient.

The logs provided by the WASP show action on 14 August 2013 at 12.19am. Given that this is not prima facie in response to any stimulus from the consumer, **these messages amount to direct marketing and are in breach of Clause 5.1.12.**

Clause 6.2.11 relates to notification if charges in any month amount to more than R200.

It now appears to be common cause that the subscription ran from August, and it therefore appears this clause was breached.

Sanctions

In respect of the above breaches, I impose a **fine of R125 000,00 for immediate payment, and a further fine of R250 000 suspended for 12 months, which I hope will act as a motivation to the WASP to address the apparent errors in their system.**

The suspension of the service will be lifted on payment of the fine, or on filing of appeal papers.



REPORT OF THE ADJUDICATOR

WASPA Member:	US Cellcom
Service Type:	Subscription
Complainant:	Public and WASPA Secretariat
Complaint Number:	22466 and 22635
Code Version:	12.4
Advertising Rules Version:	Not applicable

Complaint

In matter 22466, the complainant – a member of the public who is employed by a WASP – essentially submitted that he was auto subscribed to the service in question.

He provided detailed accounts of his interactions, including the wording of the sms's he received.

An emergency hearing of this matter was heard on 2 December 2013. At that hearing, the Panel identified, in addition to the issue of auto subscription, Code, sections 5.1.1, 5.1.3, 5.1.12, 5.2, 6.2.11, 9.1.7 and 11.6.1.

In matter 22635, the complainant was the WASPA Secretariat who raised the following sections of the Code – 5.2.1, 5.3.1.6.2.10, 6.3.3, 11.2.1, 11.2.2 and 11.2.3.

Member's response

In the initial matters, the members only responded to matter 22635, but appeared to be responding to both matters in that reply, as the issues are substantially similar.

This matter was ruled on urgently and was subsequently the subject of a court application, whereafter WASPA granted a generous extension to the WASP to respond.

WASPA received a response on Friday, 31 January 2014.

This response provides a detailed description of the business. Parts of the response are copied from the Court papers and are therefore irrelevant to the question before me. Other parts are copied from the original response. The relevant aspects will be referred to in the ruling below.

Sections of the Code considered

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

5.1.3. For commercial messages, a recipient should be able to stop receiving messages from any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply 'STOP' procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

5.1.12. Direct marketing messages may not be sent on Sundays, public holidays, on Saturdays before 09:00 or after 13:00, or on all other days between 20:00 and 08:00, unless expressly agreed to in writing by the recipient.

5.2. Identification of spam

5.2.1. Any direct marketing message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;*
- (b) the message recipient has a prior commercial relationship with the message originator and has been given a reasonable opportunity to object to direct marketing communications*
 - (i) at the time when the information was collected; and*
 - (ii) on the occasion of each communication with the recipient; or*

(c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.3.1. *Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.*

6.2.10. *Pricing on any promotional material must use one of the following generally accepted formats for prices in Rands: "Rx" or "Rx.xx".*

6.2.11. *During any calendar month, if the total cost of any service exceeds R200 for that month:*

(a) Where the WASP is in control of the billing (e.g. an OBS), a notification must be sent to the customer that they have reached this limit and a communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.

(b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), the member must send a notification to the customer once they have reached this limit.

6.3.3. *Promotional material must not be of a nature that unduly encourages unauthorised calls or use of services.*

9.1.7. *Competition services and promotional material must not:*

(a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;

(b) exaggerate the chance of winning a prize;

(c) suggest that winning a prize is a certainty;

(d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.

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.*

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, all marketing and promotional material must make it reasonably 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.*

11.2.5. *If a subscription service is initiated by a customer sending an SMS to the service provider, then a separate confirmation message must then be sent to the customer's mobile handset. Only once the customer has followed the activation instructions in the confirmation message can they be subscribed to the subscription service.*

11.6.1. *A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter. The customer may not be charged for these reminder messages.*

Decision

I have chosen to consider these matters together as it essentially relates to the same service and the same problem. Where a particular issue only applies to a particular matter, I will indicate accordingly.

This matter is complex, and my approach will be to consider each clause, together with the relevant communication and argument (if any).

Initial broad comments

I note that the WASP has provided detailed defence about the layout of the landing pages and the activation of the points / vouchers. The complaints before me relate to the sms campaign and it is this that will be considered. My failure to consider the landing pages and voucher activation should not be read as an approval thereof. In addition, the WASP should understand that a failure to comply with the sms format and requirements cannot be remedied by the landing pages.

The WASP has also quoted large tracts of what appears to be the Court application, addressing the issue of bias and urgency, and implying a calculated attempt to delay this matter. Having been on standby to issue an urgent ruling in December, and having been instructed by WASPA not to do so because the WASP itself had requested an opportunity to respond (which it only did almost two months later), I do not find this argument either germane to the questions before me, or supported by fact.

Finally, I note that despite the extensions granted, the response of the 31 January 2014 continues to fail to address many of the issues raised by the complaints and the clauses cited.

I will now consider each issue raised.

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

In matter 22466 the first message is:

\\"Congrats
083[REDACTED], U are THE WINNER! Claim your R1 200 Voucher Reward Today.
Click
[www.m2u.me/w/d/.php?m=83\[REDACTED\]mvou.me/subscription@r7/day/optout?txtstop](http://www.m2u.me/w/d/.php?m=83[REDACTED]mvou.me/subscription@r7/day/optout?txtstop).

In matter 22635 the initial message is:

Congrats 083[REDACTED], U are THE WINNER! Claim Your R1,200 Voucher Reward Today,
send LUX to 43450 mvou.net/subscription@r7/day/optout?txtstop

Both of these messages contain valid website addresses which in turn provide information about the message sending, including contact details.

While I find Clause 5.1.1 to be somewhat vague in reach, I believe that these initial messages satisfy the requirements in that they contain "the identifier" of the message originator. In addition, the other messages in matter 22466, in relation to which this clause was raised, all appear to contain the website, or a direct reference to the service name.

There is therefore no breach of Clause 5.1.1.

5.1.3. For commercial messages, a recipient should be able to stop receiving messages from

any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply 'STOP' procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

In both the matters, the initial message has the following "STOP" message:

mvou.net/subscription@r7/day/optout?txtstop

It is significant that it took me a number of reads to see that it was there at all. The word "stop" is lower case, in a run on text that appears on first glance to actually be part of the URL. In the WASP's version of events, the word "stop" is better separated from the URL but is lower case. The Code is absolutely clear that "STOP" should be upper case.

I therefore do not believe that this is compliant with the Code.

In both matters the next "STOP" message only appears once the subscription is confirmed, and the word "stop" is in lower case, making it less legible than intended by the Code.

The first fully compliant message was only received as a reminder message in matter 22466:

Free SMS: You are subscribed to Mobile Voucher. HELP: 0119668141. Cost R7/day. To unsub, sms STOP to 43450.

The requirement of the Code is that "The reply 'STOP' procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent".

In this matter, the formatting of the message does not make the stop procedure clear to the recipient.

There is therefore a breach of Clause 5.1.3.

5.1.12. Direct marketing messages may not be sent on Sundays, public holidays, on Saturdays before 09:00 or after 13:00, or on all other days between 20:00 and 08:00, unless expressly agreed to in writing by the recipient.

In matter 22466 messages appear to have been received, at, *inter alia* 00h19, 20h01 and 02h37. The complainant's logs confirm the 02h37 message. The logs also confirm two messages at 00h19.

The timing of the messages does not appear to have been an issue in matter 22635.

Putting aside the question of whether the subscription was valid, I have to ask myself whether the messages sent out of acceptable hours amount to “direct marketing”.

The messages sent at 00h18 on 14 August 2013 are:

Congrats, Ur Mobile Voucher Reward is Ready! Keep your Account active and visit www.mob-voucher.com, your username is [] password [].

At 00h19 the following was sent:

Welcome: Your Mob Voucher subscription has been activated. R7/day. . . .

The message sent at 02h37 was a reminder message.

I refer the parties to the discussion under clause 11.2, and similarly reserve judgement on Clause 5.1.12.

5.2. Identification of spam

5.2.1. Any direct marketing message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;*
- (b) the message recipient has a prior commercial relationship with the message originator and has been given a reasonable opportunity to object to direct marketing communications*
 - (i) at the time when the information was collected; and*
 - (ii) on the occasion of each communication with the recipient; or*
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.*

5.3.1. *Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.*

I can find nothing before me that indicates that the users in either matter in any way consented to the direct marketing in any way, or had a previous relationship with the originator.

The marketing messages therefore appear to be spam and are in breach of Clauses 5.2 and 5.3.1.

6.2.10. *Pricing on any promotional material must use one of the following generally accepted formats for prices in Rands: “Rx” or “Rx.xx”.*

As is apparent from what I have quoted above, many of the messages in this matter utilise a small “r” instead of a capital “R”. While this may appear at first glance to be a nit-picking requirement, it in fact goes to the core of the question of whether or not the recipient understood the communication correctly. The use of the “r” prevents the recipient from easily identifying that there is a charge related to the service.

There is therefore a breach of Clause 6.2.10.

6.2.11. During any calendar month, if the total cost of any service exceeds R200 for that month:

(a) Where the WASP is in control of the billing (e.g. an OBS), a notification must be sent to the customer that they have reached this limit and a communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.

(b) Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), the member must send a notification to the customer once they have reached this limit.

On the complainant's version it appears that the cost of this subscription is R7 a day. It appears from the logs that in September 2013, the complainant in matter 22466 was billed 34 times. This is R238. No notification was sent, according to what is before me.

On the WASP's version, the subscription period was too short for this issue to be relevant.

I refer the parties to the discussion under clause 11.2, and similarly reserve judgement on Clause 6.2.11.

6.3.3. *Promotional material must not be of a nature that unduly encourages unauthorised calls or use of services.*

This clause was raised in relation to matter 22635.

It is unclear to me why this clause was cited and no explanation was provided. I therefore find myself unable to consider it.

I find no breach of Clause 6.3.3.

9.1.7. Competition services and promotional material must not:

(a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;

- (b) exaggerate the chance of winning a prize;*
- (c) suggest that winning a prize is a certainty;*
- (d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.*

The initial message that “hooks” the consumer in this matter is along the lines of:

!\"Congrats

083[REDACTED], U are THE WINNER! Claim your R1 200 Voucher Reward Today.

Click

[www.m2u.me/w/d/.php?m=83\[REDACTED\]mvou.me/subscription@r7/day/optout?txtstop](http://www.m2u.me/w/d/.php?m=83[REDACTED]mvou.me/subscription@r7/day/optout?txtstop).

The response from the WASP explained that any user receives the reward immediately and that this is not a quiz or competition.

Clause 9.1.7 (a) above clearly states that you cannot use words such as “win” to describe an item offered to all the participants.

The use of the word “winner” is therefore in breach of Clause 9.1.7 (a).

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.

This clause is one of those that go to the core of this issue. The question that the adjudicator must always ask is whether the consumer would have been aware that by responding to the material, they would be subscribed to a service.

I have quoted the relevant sms above.

It is my opinion that the sms does not clearly and explicitly identify the service as a subscription service because:

- There is a run on of text and the words “subscription service” therefore do not stand out;
- The words appear to be part of the URL and not the main message of the SMS;
- It is unclear what the subscription service actually offers. Indeed this is only clear from the detailed response submitted by the WASP. A compliant campaign would give a better idea of what the consumer might possibly be subscribing TO before requesting a subscription response.

The material is therefore in breach of Clause 11.1.1.

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.*

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, all marketing and promotional material must make it reasonably 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.*

There are two versions before me – the complainant in matter 22466 and the WASPA Secretariat in matter 22635 both submit that the subscription in this matter was an auto subscription.

The WASP alleges that the subscription is a double opt in process. It provided logs in support thereof.

I am tempted – given that the clause is in any event breached – to ignore the question of auto-subscription. This is a “he said/ she said” situation and it is hard to make a call. However, auto subscription is a far more serious infringement than a misleading call to subscription.

I therefore looked carefully at the sms logs provided by the complainant relating to his number in matter 22466. The records appear *ex facie* to emanate from MIRA. It is clear that he received a number of similar solicitations from this WASP in the time leading up to the subscription, all of which he ignored.

According to his records, he received two calls to action at around 8pm on 13 August 2013. He then received a “Welcome” message at 00h19 on 14 August 2013. His records show no record of the sms’s necessary for a double opt in process.

According to the WASP, the subscription only happened on the 21st of October, and the double opt in messages were recorded. The complainant's records show no activity on 21 October, but there is a reminder message sent on 20 October.

This matter has been the subject of a court application and an emergency hearing, yet the WASP has failed to provide solid evidence other than an extract from its logs that could easily be fabricated that its version is correct.

I am also disturbed by the fact that the complainant appears ex facie to work for or be the CEO of a competitor of the WASP and this could give rise to a reason for misrepresenting what occurred.

Here is what is clear:

If the complainant is telling the truth, an amount of R7 a day was deducted from his account from 14 August 2013. If the WASP is telling the truth, an amount of R7 was only deducted from 21 October 2013.

It appears that he was unsubscribed on 9 November 2013.

I therefore request the following:

- **The complainant to provide a certified copy of his cell phone bill for the relevant dates, and a certified copy of his bank statement reflecting the relevant deductions (other payments may be covered over for privacy).**
- **The WASP to provide certified or audited statements reflecting the deductions for this number, and confirming the absence of deductions for this number for the relevant dates.**

I caution the WASP that they are facing a serious breach in this regard, and that a continued failure to respond will be interpreted by me as an admission. The parties have two weeks to supply WASPA with the requested records, whereafter I shall rule on the question of auto subscription based on what is before me. No extensions may be granted by WASPA.

Putting aside the question of auto-subscription, the message itself is misleading. The primary communication is that the recipient has won a voucher (and it is unclear what the voucher is for). The "subscription" information is added as a hard to read after thought. It is unclear WHAT the recipient would be subscribing to. On reading the sms, it appears that by clicking the link, you will receive the voucher.

This breaches clause 11.2.1 and 11.2.2. In relation to 11.2.3, the subscription is ancillary to the draw, rather than the other way round. There is therefore also a breach of clause 11.2.3.

11.2.5. If a subscription service is initiated by a customer sending an SMS to the service provider, then a separate confirmation message must then be sent to the customer's mobile handset. Only once the customer has followed the activation instructions in the confirmation message can they be subscribed to the subscription service.

This issue can similarly only be resolved by determining which party has furnished a truthful version of what occurred, and I reserve judgement on this issue.

11.6.1. A monthly reminder SMS must be sent to all subscription service customers. This reminder must be sent within 30 days of the initial notification message, and once per calendar month thereafter. The customer may not be charged for these reminder messages.

This was not raised as an issue in matter 22635.

In matter 22466, on the complainant's version, he was subscribed on 14 August 2013. Reminder messages were sent on 15 September and 20 October. While this is indicative of a slightly disorganised approach to reminder messages, there are indeed monthly reminders, even on the complainant's version of events.

There is therefore no breach of Clause 11.6.1.

In summary:

The following clauses were breached:

- **5.1.3 ("STOP")**
- **5.2 and 5.3.1 (Spam)**
- **6.2.10 ("Rand")**
- **9.1.7 ("Winner")**
- **11.1.1 (Subscription services)**
- **11.2 (Subscription ancillary to reward)**

The following clauses were not breached:

- **5.1.1. (Message identifier)**
- **6.3.3 (Unauthorised calls)**
- **11.6.1 (Reminder messages)**

Judgement is reserved on the following clauses:

- **5.1.12 (Time of messages)**
 - **11.2.1, 11.2.2 and 11.2.3 (Auto subscription)**
 - **6.2.11 (Billing)**
 - **11.2.5 (Confirmation message)**
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Sanctions

In relation to the clauses that were breached, I order the following sanctions, based on the severity of the breach, and the harm that the breach does to the consumer in each case:

- **5.1.3 ("STOP") – A fine of R25 000**
- **5.2 and 5.3.1 (Spam) – A fine of R100 000**
- **6.2.10 ("Rand") – A fine of R5000**
- **9.1.7 ("Winner") – A fine of R10 000**
- **11.1.1 (Subscription services) – A fine of R200 000**
- **11.2 (Subscription ancillary to reward) – A fine of R50 000**

Reserved Judgement

I have called for:

- **The complainant to provide a certified copy of his cell phone bill for the relevant dates, and a certified copy of his bank statement reflecting the relevant deductions (other payments may be covered over for privacy).**
- **The WASP to provide certified or audited statements reflecting the deductions for this number, and confirming the absence of deductions for this number for the relevant dates.**

The parties have 2 weeks to provide this information whereafter I shall rule, and apply sanctions accordingly.

The suspension of services ordered by the Emergency Panel remains in force until the reserved ruling referred to above is issued. The status of the suspension will be fully considered in that ruling.

The WASP is advised that procedurally it should address the issues raised whereafter it can appeal the content of both this and the reserved judgement should it so wish.